

Community Punishments

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The case for use of community punishments in a rational society is a no-brainer. Compared with confinement in a jail or prison, they are less expensive to administer, less likely to lead to future offending, and more humane. They do less collateral damage to the lives and futures of offenders and their loved ones. They can be scaled to the seriousness of crimes for which they are imposed. When well-managed, well-targeted, and adequately funded, they result in lower reoffending rates. Those are among the reasons why most Western countries use community punishments much more, and imprisonment much less, than do American jurisdictions.

INTRODUCTION

In 2010, the most recent year for which standardized national European data are available, 9.6% of convicted offenders in Sweden were sentenced to confinement.¹ In Germany, 5.4% of convicted offenders. In Finland, 3.1%.² By contrast, in the United States in 2009, also the most recent year for which national data are available, 73% of people convicted of felonies were sentenced to jail or prison, including 83% of violent, 75% of property, and 71% of drug offenders.³ In the federal courts in 2015, 92.8% of convicted people were sentenced to confinement.⁴

Stop for a minute and think about the contrast between the extreme cases. Ninety-three percent of convicted U.S. federal offenders received prison sentences; 97% of convicted Finnish offenders did not. The explanation for

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1. No other country operates parallel local and state confinement systems. European prison data accordingly are equivalent to combined American jail and prison data. European sentencing data do not include traffic or administrative offenses. The offenses covered are equivalent to American felonies and misdemeanors combined.

2. EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS (5th ed. 2014), http://www.heuni.fi/material/attachments/heuni/reports/qrMwOcvTF/HEUNI_report_80_European_Sourcebook.pdf.

3. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

4. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. D (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureD.pdf>.

that stunning difference is neither that most federal offenders have committed substantially more serious crimes than most Finnish offenders nor that Finland is an extraordinarily pacific, Eden-like place. Well under 5% of sentenced federal offenders in 2015 were convicted of violent crimes; nearly a third were convicted of immigration offenses (mostly minor), a fifth of drug offenses, and a fifth of property offenses. Both Finland and the United States have crime patterns and rates that fall in the middle among developed countries.⁵ After the United States, Finland has and long has had the highest homicide rate among Western developed countries. The Finnish rate is typically two to three times as high as those of other Western European countries.

The difference in punishment patterns between the United States and all other Western developed countries results from differences in the salience of crime and punishment as a political issue and in cultural attitudes toward the severity of punishment. These differences can be seen in the American retention and all other Western countries' abandonment of capital punishment,⁶ in the presence of three-strikes, truth in sentencing, life without parole, and mandatory minimum sentence laws in the United States, and their absence from other countries' sentencing laws,⁷ and in four decades of largely failed efforts to encourage the use of community punishments in the United States. The single most common finding of evaluations of community punishment programs meant to be used by judges in place of imprisonment has long been that they are more often imposed on people who otherwise would have received lesser punishments than on people who would have been locked up.⁸

The United States cannot avoid continued mass incarceration unless use of community punishments increases enormously for people who otherwise would be (and now are) sentenced to confinement.⁹ Shorter prison terms and repeal of mandatory minimum sentence and similar laws also are necessary, but those things by themselves will not do the job. A wide range of community punishments could be adopted that are commonly used in other Western countries. These include resolution by mediation; diversion from prosecution conditioned on payment of fines, making restitution, or performance of

5. JAN VAN DIJK ET AL., *CRIMINAL VICTIMISATION IN INTERNATIONAL PERSPECTIVE: KEY FINDINGS FROM THE 2004–2005 ICVS AND EU ICS* (2007).

6. See generally Carol S. Steiker & Jordan M. Steiker, "Capital Punishment," in the present Volume.

7. See, e.g., Erik Luna, "Mandatory Minimums," in the present Volume.

8. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990).

9. For a discussion of mass incarceration, see Todd R. Clear & James Austin, "Mass Incarceration," in the present Volume.

community service; much greater use of fines for non-trivial crimes; suspended prison sentences; community service; and diverse forms of supervision and community-based treatment.

A complete package will also include substantially increased use of unconditional discharges following conviction and sentences to unsupervised probation. In neither instance do convicted offenders thereby escape punishment. Anyone convicted of crime has endured fear and anxiety. All experience demeaning assembly-line processing. Many spend overnight in jail awaiting a preliminary hearing. Many remain in jail until they are convicted. All will understand, as a classic study of criminal courts long ago showed, that “the process is the punishment.”¹⁰ For such cases, unconditional discharges should be the norm, unsupervised probation the exception. Otherwise, probation agencies will have to allocate resources to lowest-risk offenders, and probationers who judges believe do not warrant further state intrusion in their lives will be at risk of revocations and imprisonments for violation of technical conditions. New crimes, when they occur, should be handled as new crimes.

If policymakers want to adopt policies based on evidence, doing so is rational, cost-effective, and easy. Community programs that are well-conceived, well-managed, well-targeted, and adequately financed have repeatedly been shown to reduce reoffending.¹¹ Many hundreds of evaluations have shown that participants in community punishments achieve reoffending rates no worse than those of comparable people sentenced to confinement. That last finding means that, except concerning a small percentage of unusually dangerous people, vast sums spent on imprisonment are—from a crime-prevention perspective—wasted. Historian James M. McPherson said, of the pre-Civil War Southern response to abolitionism, “The South closed its mind.”¹² American policymakers of the past three decades likewise closed their minds to meaningful use of community punishments in place of imprisonment. Not much will happen until that attitude changes.

A steadily accumulating literature confirms the observation two centuries ago by John Howard, the first prominent English prison reformer, that prisons are “schools for crime.”¹³ All else being equal, people sentenced to imprisonment

10. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

11. E.g., DORIS LAYTON MACKENZIE, *WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS* (2006).

12. James M. McPherson, *America's Greatest Movement*, N.Y. REV. BOOKS, Oct. 26, 2016, at 64 (reviewing MANISHA SINHA, *THE SLAVE'S CAUSE: A HISTORY OF ABOLITIONISM* (2016)).

13. See generally JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES* (1777).

are more, not less, likely to reoffend than are comparable people sentenced to community punishments.¹⁴ There is nothing surprising about this. Prisoners are immersed in inmate subcultures and intensively exposed to the deviant values of chronic offenders. Many prisons are brutal and brutalizing places to which prisoners must accommodate for self-protection.¹⁵ Almost all prisons are resource-poor and unable to provide adequate drug, mental-health, and other treatment, training, and educational programs to meet prisoners' needs.¹⁶

Being sentenced to imprisonment undermines and often impoverishes prisoners' families and children. The resulting stigma and collateral legal consequences foreclose opportunities and access to resources that make released prisoners' later lives more difficult and their employment prospects worse.¹⁷

Nothing I've written here is new, controversial, or likely to surprise knowledgeable corrections professionals or other well-informed people. Most of it has been well known for decades, some of it for centuries. Nonetheless, it has largely been ignored since imprisonment rates began their 35-year increase in 1973. Despite the alternatives-to-corrections movement in the 1970s, the intermediate-punishments movement of the 1980s, and the community-corrections initiatives that began in the 1990s, most community punishments programs are under-funded, poorly managed, and lack adequate access to services and treatment programs.

Creating effective community punishments will require much more than new programs, increased funding, and better management. It will require a change of heart by policymakers. Despite much ballyhoo, however, bipartisan support for change shows few signs of happening. One compelling sign is the failure of most "justice reinvestment" efforts to reduce prison populations substantially and reallocate enormous foreseeable savings in prison expenditure to community-corrections programs. Most have not produced substantial declines in actual as opposed to projected prison populations. Where prisoner numbers have fallen significantly, the savings have seldom been reallocated

14. Daniel S. Nagin et al., *Imprisonment and Re-offending*, 38 CRIME & JUST. 115 (2009); Francis Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011).

15. See Sharon Dolovich, "Prison Conditions," in the present Volume.

16. Cf. Margo Schlanger, "Prisoners with Disabilities," in the present Volume.

17. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCE* (2014). For a discussion of collateral consequences see Gabriel J. Chin, "Collateral Consequences," in the present Volume.

to community corrections.¹⁸ If and when the change of heart occurs, the knowledge exists to create and run effective programs.

The indications are not yet especially good. Despite the work of conservative organizations such as Justice Fellowship and the Texas Public Policy Foundation, and the Right on Crime initiative both organizations support, no bipartisan consensus has yet emerged that massive policy changes are required because mass incarceration is unjust, unwise, and ineffective. A handful of liberal reform advocates have long said this. Some spokesmen for Right on Crime say it. In 2014, former Republican House Speaker Newt Gingrich and former Democratic White House staffer Van Jones wrote, “It would be hard to overstate the scale of this tragedy. For a nation that loves freedom and cherishes our rights to life, liberty and the pursuit of happiness, the situation should be intolerable. It is destroying lives and communities.”¹⁹ Many conservative critics of the status quo, however, make no such admission. Instead they propose new policies for first and nonviolent offenders, say that current policies cost too much, and promote policies aimed primarily at saving money and reducing recidivism.²⁰ But tinkering to save a few dollars will not accomplish much. Meaningful, lasting reform will occur only when it becomes widely accepted that mass incarceration is morally wrong, not merely fiscally foolish.

In this article, I offer an overview of the past four decades of experience and accumulated knowledge concerning community punishments. That is followed by a short set of proposals of what policymakers should do if they want to reduce the use of imprisonment and the harms it causes. One, not otherwise discussed, is that use of community punishments for minor and low-risk offenders should be drastically reduced. Relative to other developed countries, overuse of community supervision in the United States is as extreme as overuse of imprisonment.

18. JAMES AUSTIN ET AL., *ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT* (2013); NANCY LAVIGNE ET AL., *URBAN INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT* (2014).

19. Newt Gingrich & Van Jones, *Prison System Is Failing America*, CNN (May 22, 2014), <http://www.cnn.com/2014/05/21/opinion/gingrich-jonesprison-system-fails-america/index.html>.

20. See MICHAEL H. TONRY, *SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025*, at 206 (2016).

I. COMMUNITY PUNISHMENTS SINCE THE 1970s

Community punishments in the United States are imposed following criminal convictions, or as conditions following release from prison.²¹ Usually they do not involve confinement. They include nominally and intensively supervised probation; fines and restitution; community service; and participation in community-based treatment programs of various sorts. Sometimes, but comparatively rarely, they involve intermittent confinement—for example, in programs in which participants leave prisons, jails, or halfway houses to work or attend school. Sometimes, but again comparatively rarely, they are imposed as the back component of “split” sentences that include a short period of confinement.

Use of community punishments expanded substantially in most Western countries during the 1970s, 1980s, and 1990s when crime rates, including homicide rates, increased almost everywhere by three to four times before peaking and dropping precipitously.²² Legislation in many countries authorized new community punishments and new or expanded programs that allowed prosecutors or judges to divert cases on the condition that fines or restitution be paid or community service be performed. The policy aims were almost always the same: to reduce the flow of people into to imprisonment and find less damaging but proportionate ways to punish wrongdoers. The new initiatives mostly achieved their goals. Despite harsher public attitudes toward violent and sexual offending, in most countries imprisonment rates remained stable or increased only slightly during the period of rising crime rates, and have since declined. There have been three distinct phases of attempted but largely unsuccessful efforts to establish community punishments as prison alternatives in the United States: “alternatives to incarceration” in the 1970s, “intermediate punishments” in the 1980s, and an array of initiatives since the early 1990s. Most were meant to replace sentences to imprisonment. Few did.

21. By contrast, laws in many European countries authorize prosecutors to resolve cases without convictions if suspects agree to pay fines or restitution or perform community service. See, e.g., Thomas Weigend, *No News Is Good News: Sentencing in Germany Since 2000*, 45 *CRIME & JUST.* 83 (2016) (discussing conditional dismissals in Germany); Henk van de Bunt & Jean-Louis van Gelder, *The Dutch Prosecution Service*, 41 *CRIME & JUST.* 117 (2012) (discussing transactions in the Netherlands).

22. Michael Tonry, *Why Crime Rates Are Falling Throughout the Western World*, 43 *CRIME & JUST.* 1 (2014).

A. ALTERNATIVES TO IMPRISONMENT IN THE 1970s

The several-decade rise in crime rates in the United States that began in the 1960s, and was followed by sharp declines beginning in the early 1990s, paralleled patterns in other countries. However, the policy responses were radically different. Rather than attempt to restrain growth in use of imprisonment by creating new and expanded community-punishment programs, legislators enacted laws intended to send more people to prison and to make many of them stay there longer.

Legislators in some states, and corrections officials in many, also created new community corrections programs that sought to reduce prison use by diverting convicted offenders from imprisonment. In practice, the new initiatives were comparatively seldom used for otherwise prison-bound offenders and, as I explain below, often produced net increases in prison populations and corrections budgets.²³

During the heyday of the Law Enforcement Assistance Administration in the 1970s, enormous numbers of pilot and demonstration projects were established and evaluated.²⁴ They included victim-offender mediation, restitution, and community-service programs meant explicitly to serve as “alternatives to incarceration.” Evaluations typically were methodologically weak, but their three main findings were consistent with findings of later, stronger evaluations. First, judges seldom used the new programs as substitutes for imprisonment. Second, participation in them was seldom shown significantly to reduce reoffending. Third, though, participants’ reoffending rates were seldom higher than those of comparable people in control groups.

It is ironic that community service, mediation, and restitution failed; all were pioneered in the United States.²⁵ In a wide range of other Western countries, perhaps most extensively in Scandinavia, all three were widely adopted and have been extensively used to divert people from imprisonment.²⁶

By the 1980s in the United States, however, it became evident that the alternatives movement was bucking an emerging law-and-order political culture. Officials became tougher. Judges and prosecutors sent more people to prison for longer times, and parole boards held them there longer before

23. MORRIS & TONRY, *supra* note 8.

24. See, e.g., MARGUERITE WARREN ET AL., *RESTITUTION IN LAW AND PRACTICE: THE EXPERIENCE OF TEN PROGRAMS* (1983) (discussing restitution); DOUGLAS C. McDONALD, *PUNISHMENT WITHOUT WALLS: COMMUNITY SERVICE SENTENCES IN NEW YORK CITY* (1986) (discussing community service).

25. MORRIS & TONRY, *supra* note 8.

26. Michael Tonry, *Differences in National Sentencing Systems and the Differences They Make*, 45 *CRIME & JUST.* 1 (2016); Tapio Lappi-Seppälä, *Nordic Sentencing*, 45 *CRIME & JUST.* 17 (2016).

release.²⁷ Judges and prosecutors were not especially interested in diverting prison-bound offenders to “softer” punishments. This had a number of results. Most mediation, community service, and restitution programs disappeared when federal funding ceased; few legislators supported their goals and were willing to spend money on them.

Proponents of prison-diversion initiatives tried to match the angrier temper of the times. They dropped the politically and symbolically inexpedient term “alternatives to incarceration” and replaced it with the tougher-sounding “intermediate punishments.” With the change in nomenclature, however, came a fundamental change in many community-penalty programs: Originally conceived as reformatory efforts meant to keep offenders out of prison and help them live law-abiding mainstream lives, they were reconceived as intrusive, closely supervised programs aimed primarily at recidivism reduction.

B. INTERMEDIATE PUNISHMENTS IN THE 1980s

Norval Morris and I acknowledged the changed ethos by using intermediate “punishments” rather than “sanctions” in the title of a 1990 book on community penalties.²⁸ The most prominent 1970s initiatives sought to redress crimes in positive ways and help victims and offenders get on with their lives. The major intermediate punishments of the 1980s—intensive supervision, electronic monitoring, home detention, frequent drug testing—instead emphasized surveillance to identify breaches of conditions and new crimes. They often included frequent random drug tests and unannounced home visits by probation officers, increasingly armed and often accompanied by police officers. A new conception of probation officers as law enforcement officials replaced an earlier, traditional conception as social workers.

Numerous intermediate punishment programs were established in the 1980s. They were conceived as falling between prison and routine probation but in their promoters’ minds generally had the same ultimate purpose as the 1970s “alternatives”—to divert convicted offenders from prison. The logic was that “alternatives to imprisonment” failed because judges considered them insufficiently punitive; the solution was to make community punishments look more punitive, intrusive, and stigmatizing. That happened. The new programs were more intrusive and controlling, they were often strictly enforced, and majorities of participants wound up in prison for breaches of conditions. The perverse result was that programs meant to divert people from prison

27. Alfred Blumstein & Allen Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 *CRIME & JUST.* 17 (1999).

28. MORRIS & TONRY, *supra* note 8.

and save money instead sent more people to prison and increased costs. In retrospect, proponents of intermediate punishments made a huge mistake in not anticipating that the new programs would be used to toughen sentencing rather than, as they hoped, to reduce the use of imprisonment.

Examples illustrate the toughening dynamic. The National Institute of Justice (NIJ) provided funding for several states to establish and evaluate day-fine systems for use as prison alternatives. Day fines are common in Germany and Scandinavia as penalties for low- and moderate-severity offenses. The seriousness of the crime determines the number of day-fine units (for example, 30). The individual's daily income (adjusted for wealth) determines the amount of a single unit. A low-income offender might be required to pay 20 euros per day and an affluent one 300. The NIJ evaluation design called for randomized allocation of eligible offenders to day fines or to whatever sentence the judge ordinarily would order. The projects failed. In most, despite the federal grants that paid for the pilot projects, practitioners refused to implement day fines at all. In none did practitioners agree to random allocation.²⁹

Intensive supervision programs offer a second example. NIJ funded a multi-jurisdiction experiment to determine the programs' effects on recidivism. Eligible offenders were to be randomly allocated by judges or corrections officials to intensive supervision or the default disposition. Researchers would track the experiences of program participants and control group members to learn what happened. There was, however, an insuperable obstacle. Judges in all participating jurisdictions refused to follow the experimental research design and insisted on being able to sentence eligible offenders to imprisonment on a case-by-case basis. Follow-ups of programs in which parole or probation officials randomly allocated cases showed that intensive supervision had no effects on recidivism rates but increased revocation rates. This was no surprise because, evaluators found, the closer supervision disclosed more breaches of conditions and the program operators seldom had adequate access to treatment programs and other services.³⁰

Changes in the ethos of parole and probation revocation practice illustrate a third obstacle. Throughout the 1980s, probation and parole revocations and their shares of prison admissions steadily increased as judges' and parole boards' attitudes toward offenders became more unforgiving. Officials responded more harshly to breaches of conditions than in earlier periods, especially for

29. Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49 (1990); Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517 (2015).

30. Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 CRIME & JUST. 281 (1993).

technical violations such as failing drug tests or not appearing for scheduled appointments.³¹ In some states, revocations came to constitute a large fraction, often more than half, of all prison admissions.

The new intermediate punishments often had the perverse effect that more, not fewer, offenders wound up in prison.³² Their rationale was that diversion of prison-bound offenders would reduce prison crowding and save substantial money because the per capita costs of intermediate-punishment programs—typically \$1,000 to \$10,000—are a small fraction of the per capita cost of imprisonment (\$30,000 to \$75,000, depending on the state). The experience was otherwise.

The new programs typically resulted in extensive “net-widening.” Evaluations consistently showed that judges used new tougher community sanctions mostly to impose harsher punishments on people who previously were sentenced to ordinary probation. They were comparatively seldom ordered for people who previously would have been imprisoned. Because the more intensive new programs were strictly enforced, half to two-thirds of participants were commonly imprisoned following revocations for breaches of conditions. People who previously received ordinary probation were bumped up to intermediate punishments and, when they breached conditions, were bumped up again to imprisonment. More, not fewer, people wound up in prisons, and corrections costs went up, not down.

C. COMMUNITY PUNISHMENTS SINCE THE EARLY 1990s

From one perspective, a lot has happened since the early 1990s. From another, little.

1. A lot has happened

There has been substantial program development, most conspicuously under the banners “drug and other problem-solving courts”³³ and “prisoner reentry.” Research on the effectiveness of treatment programs has burgeoned; more is known, and known more confidently, about the effects and operation

31. Michael Tonry, *Stated and Latent Functions of ISP*, 36 *CRIME & DELINQUENCY* 174 (1990).

32. MORRIS & TONRY, *supra* note 8.

33. See Richard C. Boldt, “Problem-Solving Courts,” in Volume 3 of the present Report.

of a wide variety of programs and services. Under the right circumstances, many kinds of programs can enhance participants' human capital and reduce their reoffending.³⁴

Many judges want to impose sentences that do something more constructive, and more humane, than simply send troubled people to jail or prison. Drug courts, mental-health courts, and other specialized problem-solving courts for domestic violence, gun crimes, drunk driving, and military veterans have proliferated. The first drug court was established in Miami in the early 1990s. By 2017, there were thousands and many hundreds of other problem-solving courts. Well-regarded evaluations and research reviews conclude that well-run and targeted specialty courts produce better results than business as usual.³⁵ The vast majority were established before credible evidence of effectiveness was available, because judges and others believed them to be the right thing to do. Despite the large numbers of programs, caseloads are typically small, however, and can deal with only a tiny fraction of offenders who could benefit.

The reentry movement took off early in this century, heralded by writings of Jeremy Travis³⁶ and Joan Petersilia.³⁷ They observed that hundreds of thousands of people are released from prison each year and it is in everyone's interest that as many as possible achieve satisfying, law-abiding lives. Those arguments were widely accepted. Within a few years, federal funding became available to support state programs. Programs were established in most, probably all, states. Reentry targets people being released from jail or prison, ideally providing continuity of treatments and services provided inside the institution and assistance in meeting the challenges of reentering mainstream life.

In practice, little or nothing about reentry is new except the term and the enthusiasm. Programs and service for people released from prison are indistinguishable from those traditionally provided parolees and probationers in community settings. Evaluations of reentry programs produce the same kind

34. MacKENZIE, *supra* note 11; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION* (2008). For a discussion of rehabilitation, see Francis T. Cullen, "Correctional Rehabilitation," in the present Volume.

35. Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-traditional Drug Courts*, 40 J. CRIM. JUST. 60 (2012).

36. Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, SENT'G & CORRECTIONS (May 2000), <http://www.ncjrs.gov/pdffilesi/nij/181413.pdf>; JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005).

37. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003).

of mixed findings as do evaluations of community-corrections programs more generally. Well-run, adequately funded programs can achieve good results; poorly run and funded programs do not.³⁸

The big change in the past quarter-century is that many more people believe that correctional treatment programs can, under the right circumstances, reduce reoffending. In 1990, “nothing works” remained the predominant and much more influential view. Landmarks that underlay the change include the “Drug treatment works!” conclusion of the President’s Commission on Model State Drug Laws in 1993,³⁹ work by Canadian scholars beginning in the 1980s that demonstrated the effectiveness of cognitive-skills training and proposed best-implementation practices, and a long list of meta-analyses and systematic reviews of evaluations of community-corrections programs that showed positive results.⁴⁰

2. Little has happened

Nothing fundamental has changed. The prison population has declined only modestly since its 2011 peak, almost none of the harshest sentencing laws enacted in the 1980s and 1990s have been repealed, and the risk-averse politics of crime control of the 1990s remain predominant. Law reforms focus on nonviolent first offenders. The massive investment in community-corrections programs needed to capitalize on new knowledge has not happened.

Like flies in amber, policies and programs that emerged from ways of thinking consistent with the crime-control politics of the 1980s continue to win support. Here is a popular example.⁴¹ More than 150 corrections programs have emulated

38. Jonson & Cullen, *supra* note 29.

39. THE PRESIDENT’S COMMISSION ON MODEL STATE DRUG LAWS (1993), <http://www.namsdl.org/final-report-the-presidents-commission-on-model-state-drug-laws.cfm>.

40. Francis Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299 (2013) [hereinafter Cullen, *Rehabilitation*]; Francis T. Cullen et al., *Reinventing Community Corrections*, 46 CRIME & JUST. 1 (2017) [hereinafter Cullen et al., *Reinventing Community Corrections*].

41. A second is contemporary preoccupation with use of predictions of reoffending in sentencing and parole decision making. Enormous ethical and technical issues stand in the way. *E.g.*, BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2014); Sonja B. Starr, *Evidence-based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G REP. 167 (2014). Ethical issues include use of predictive variables such as age, sex, and social status characteristics correlated with race and ethnicity. Technical issues include high false positive rates (people predicted to reoffend who will not but are treated more severely), routine failure to validate instruments on populations to which they are applied, and failure to restrict the reoffending outcome measure to serious sexual and violent offending.

Hawaii's Project HOPE, a probation initiative based on "swift, fair, and certain" sanctions.⁴² Probationers are told that any breach of conditions will result in immediate sanctions, initially modest but progressing in severity with each subsequent breach, eventually resulting in revocation and a trip to prison for a period of years. An initial evaluation purported to show that probationers subjected to the program reoffended less often than others and were less likely to be imprisoned.⁴³ NIJ funded a series of replications that were evaluated using randomized assignments of eligible offenders to treatment and control groups. The new evaluations concluded that the programs were ineffective.⁴⁴

Project HOPE was misconceived from the outset. "Swift, fair, and certain" is much more apt for conditioning dogs or horses than for dealing with disadvantaged low-level offenders, many drug-dependent or mentally ill, and most living socially disorganized lives. What they as a group need is structured access to diverse services and forms of support to help them address human-capital deficiencies and establish pro-social patterns of living. Operation HOPE treated compliance with probation conditions as an end in itself.

HOPE is inconsistent with ways of thinking that are necessary if successful use of community punishments is to be greatly increased. HOPE is fundamentally punitive and indifferent to the complexities of the lives of the people it affects. A disadvantaged, socially inadequate person subjected to HOPE will remain a disadvantaged, socially inadequate person even if he or she successfully completes a probation term.

II. INVIGORATING COMMUNITY PUNISHMENTS

There were two overriding causes of the failures of the alternatives-to-incarceration and intermediate-punishments movements. Policymakers were committed to a regime of harsh punishments and unwilling to invest substantial resources in community programs. Judges and prosecutors were

42. MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LOW CRIME AND LOW PUNISHMENT* (2009).

43. ANGELA HAWKEN & MARK KLEIMAN, *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS. EVALUATING HAWAII'S HOPE* (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

44. Pamela K. Lattimore et al., *Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?*, 15 *CRIMINOLOGY & PUB. POL'Y* 1103 (2016); Daniel J. O'Connell et al., *Decide Your Time: A Randomized Trial of a Drug Testing and Graduated Sanctions Program for Probationers*, 15 *CRIMINOLOGY & PUB. POL'Y* 1073 (2016).

unwilling to divert offenders whom they believed deserved to be sent to prison. Community punishments were seldom seen as appropriate for other than the most minor crimes.

American sentencing norms are incomparably more severe than those in other Western countries. Normal sentences for thefts, burglaries, assaults, and auto thefts in Scandinavia, Germany, the Netherlands, and most of Europe are community punishments or prison sentences measured in weeks or months; a decision instead to impose day fines or community service does not create stark differences. Those offenses typically result in lengthy jail terms or multi-year prison terms in the United States. Diversion to community punishments creates stark differences. If a community penalty must be seen as being as burdensome as a multi-year prison sentence, little room is available for vast expansion in their use.

Assuming that politicians and practitioners wanted people convicted of non-trivial offenses to be sentenced to community punishments, the way forward is clear. A large literature offers advice on effective targeting and management of community corrections and treatment programs.⁴⁵ I make no effort to summarize it here. Instead I offer an action list of community penalty programs that would be established if sentencing were to be made rational, evidence-based, and humane, and if mass incarceration is to be reduced.

RECOMMENDATIONS

1. **Reduce use of community punishments for minor and low-risk offenders.** American judges and parole boards much too often use community punishments for people convicted of minor crimes and for people who present little risk of reoffending. In 2015, American prisons and jails held 2.17 million people. Another 4.65 million were under community supervision. Calculated as population rates, both of those numbers are vastly higher than in any other Western country.⁴⁶ Current use of community supervision is enormously wasteful; the vast majority of people being supervised present little risk to public safety. One of the most robust findings of the last two decades' research on correctional programs is that resources should target high-risk offenders. The current failure to do that makes little sense from cost-effectiveness or public-safety

45. Cullen, *Rehabilitation*, *supra* note 40; Cullen et al., *Reinventing Community Corrections*, *supra* note 40.

46. DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

perspectives. The following proposals call for increased use of a wide range of community punishments, but assume that they will be deployed in ways that are cost-effective and sensibly targeted.

2. **Prosecutorial diversion and community punishments.** One way to avoid judicial reluctance to divert convicted offenders from imprisonment is to keep cases out of judges' hands. Most European countries use one or both of two approaches. German conditional dismissals and Dutch transactions offer suspects, usually on a take-it-or-leave-it basis, without negotiation, the opportunity to accept the fine, restitution, or community service that would be imposed if they were formally charged and convicted. If they accept, the charge is conditionally dismissed. The Scandinavians, the Dutch, and several other countries offer parallel programs, usually referred to as penal orders, that involve a conviction and a community penalty. Large percentages of all resolved cases result from these kinds of diversionary programs.⁴⁷ For the obvious reason of collateral consequences, programs that do not involve convictions are preferable for the United States.
3. **Mediation, restitution, and restorative justice.** Some European countries handle diversion by means of pre-charge mediation, restitution, and restorative justice programs.⁴⁸ If victims and offenders agree on a resolution of the offense, or if the defendant pays restitution, the charge is dismissed. In Norway and Finland, a large fraction of resolved cases are disposed of via mediation. In concept, such programs should be congenial to American attitudes because they involve victim agreement or restitution of victim losses.
4. **Fines and community service.** Both fines and community service are in principle ideal community punishments to be used in lieu of imprisonment. Both can easily be scaled in proportion to the seriousness of the crimes for which they are imposed. Day fines are frequently used in Germany and Scandinavia for minor and moderately serious, including violent, crimes. In the United States, however, the absence of income supports for poor people means that most criminal defendants lack sufficient money to pay fines.⁴⁹

That problem need not, however, obstruct much wider use of community service. Ironically, the first publicized modern community-service programs were pioneered in the United States for use in lieu of

47. Petter Asp, *The Prosecutor in Swedish Law*, 41 CRIME & JUST. 141 (1993); Bunk & Gelder, *supra* note 21; Weigend, *supra* note 21.

48. Lappi-Seppälä, *supra* note 26.

49. See Beth A. Colgan, "Fines, Fees, and Forfeitures," in the present Volume.

imprisonment for women convicted of welfare fraud. The idea was quickly and successfully emulated in England and Wales, Scotland, and The Netherlands and later spread throughout Europe. By the 1990s, however, American use of community service as a freestanding punishment had largely ended. When it was used, it was as one among many conditions of probation.⁵⁰ This is the federal court practice. No freestanding community punishments other than probation are authorized in the federal sentencing guidelines: All are available only as probation conditions.

Community service ought to be an obviously appropriate community penalty in the United States. It is essentially a fine on time, paid in work installments, and scaled to the seriousness of crime.

5. **Probation with treatment conditions.** The evaluation literature on correctional treatment shows that a wide range of programs when adequately funded, managed, and targeted, can change people's lives. Many including drug treatment, cognitive skills training, vocational training, educational programs, and mental-health treatment are self-evidently appropriate conditions for probation sentences in fitting cases. Sometimes they may involve intensive supervision or intermittent confinement in treatment facilities.

Whether such sentences are effective, however, fundamentally depends on the availability, adequate funding, and professional operation of treatment facilities. Simply imposing treatment conditions or intensive supervision, without assuring that necessary services can be provided and that necessary programs are available, invites failure. Failure is also likely if supervision is rigid and unforgiving. Many conditions that affect offenders, including especially alcohol and drug dependence and mental illness, almost inevitably result in relapses. Like overeating or nicotine addiction, alcohol and drug dependence are chronic, relapsing problems. Failures are foreseeable. The realistic goal is not immediate abstinence (as in Project HOPE), but fewer relapses, and longer intervals between them, as part of efforts to help offenders establish satisfying, law-abiding lives.

CONCLUSION

Community punishments should be used much less for people whose characteristics and lives do not warrant them, and much more for people who would otherwise receive jail or prison sentences. Diverting a large percentage of people now sentenced to jail or prison into well-run, adequately funded,

50. MORRIS & TONRY, *supra* note 8.

professionally operated community punishments could save huge amounts of money, substantially reduce imprisonment rates, and be more crime-preventive than the current regime. Crime prevention would result from the reduced reoffending rates that good community programs can deliver and from reduction of the effects of the criminogenic conditions to which people are exposed in prison. Community punishments would do much less harm to offenders and their families than prison and jail sentences now do.

Whether large-scale diversion from imprisonment to community punishments will happen will depend on political will. So far, little is evident. Sentencing and parole initiatives have focused on minor and first offenders.⁵¹ Federal efforts to stimulate development of specialty courts and reentry programs have been modest, far less than is needed. States so far have not been prepared to make the substantial investments required. Justice-reinvestment initiatives have targeted low-hanging fruit but more importantly have offered a free lunch: Legislators need not appropriate substantial new sums but simply tweak sentencing laws or revocation policies in order to reduce prison spending and reallocate all or part of any savings. Even then, justice reinvestment has seldom resulted in major funding increases for community punishments.

Community punishments could accomplish much that is good. For that to happen on a large scale, policymakers must be prepared in the short term to reduce prison populations substantially, and recycle much of the savings, or appropriate new funds for community punishments on a scale that so far seems unimaginable. Adoption of either or both of those approaches will depend on determination to reduce the scale of American imprisonment and the lengths of current prison sentences. Substituting 100 or 240 hours of community service, or probation with drug treatment, for a multi-year prison term will always be a hard sell.

51. Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238 (2016); TONRY, SENTENCING FRAGMENTS, *supra* note 20.