

Mass Incarceration

Todd R. Clear* and James Austin†

This chapter addresses a fundamental challenge for criminal justice reform in America: mass incarceration. Using the framework of the “Iron Law of Prison Populations,” we show that the most commonly proposed strategies have limited capacity to make major reductions in the number of people in prison. Diversion strategies are unlikely to target people who would have served much prison time, anyway. Early release for people convicted of less serious crimes likewise misses those who use the greatest number of prison cells. Strategies designed to reduce recidivism rates do not have the proven power to reduce numbers on a large scale. In short, meaningful reductions in prison populations cannot happen without substantial reductions in prison time served for people convicted of violent crimes. Evidence suggests that a prison-population reduction program that includes shorter prison stays for people convicted of violent crimes can be done without endangering public safety.

INTRODUCTION

Beginning in the 1970s, the United States embarked on a three-decade-long shift in its penal policies. In these years, state and federal governments tripled the percentage of convicted felons sentenced to confinement and doubled the length of their sentences. From 1972 to 2009, the U.S. prison population grew by 700%, reaching a peak of 1.6 million inmates.¹ Since 2009, due to reforms enacted by state legislatures, the prison population has declined a few percentage points. This is a welcome but modest trend, as Inimai Chettiar has noted: “At this pace, it would take nearly 75 years to return to the 1985 incarceration rate of 200 per 100,000.”²

* University Professor of Criminal Justice, Rutgers University.

† President, JFA Institute.

1. JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 11 (2016), http://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated.pdf [<http://perma.cc/3YR5-Q8PN>]; see also Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307 (2009).

2. Inimai Chettiar, *Preface*, in AUSTIN ET AL., *supra* note 1, at 3.

Like other failed social experiments, mass incarceration was not a spasm without a cause. The expansion was driven largely by overly punitive policies enacted beginning in the 1970s and continuing through the 1990s, such as higher new mandatory minimum sentencing laws, “truth in sentencing” laws, and “three strike” laws that imposed automatic life terms on repeat offenders, and an expansion of criminal codes.³ As a consequence of these policies, U.S. prison populations have become exceptionally high, not only as a historical matter but also by international standards—many times higher than comparable democratic nations, thus placing us in the company of repressive autocracies. Indeed, the United States has an incarceration rate nearly four times greater than Poland, the developed democracy with the second-highest rate.⁴

In this chapter, we take as given that: (a) from a cost-benefit perspective, whatever marginal gains there are in public safety are far outweighed by the devastating impact on social, economic, and political justice; and (b) the situation calls for rapid, meaningful reductions in the number of people in prison. In particular, we use the framework of the *Iron Law of Prison Populations* to think about what is required, in policy and practice, to achieve rapid, meaningful reductions in the number of people incarcerated in U.S. prisons. By “rapid,” we mean within a constricted political window—one or maybe two electoral cycles. By “meaningful,” we mean reductions of a magnitude of 50% or thereabouts—enough to make the U.S. rate of imprisoning its citizens no longer shockingly abnormal, by world standards.

The *Iron Law of Prison Populations* is a straightforward way to say that the size of a prison population is created by two factors. The number of prisoners (usually measured as “average daily population” or ADP, but will be referred to here as *prison population*) is fully determined by the number of people sent to prison (*admissions*) and how long they stay in prison (*length of stay*). That is:

$$\text{Prison Population} = \text{Admissions} \times \text{Length of Stay}$$

This simple idea conceals considerable complexity, as we show below. But its simplicity has the advantage of making explicit what should be obvious. Prison populations do not occur as a normal consequence of irresistible societal forces. They are, instead, created by purposeful decisions. Those decisions may themselves be wrapped up in complicated and sometimes confounding dynamics, be they political, economic, or social in nature. But in the end, a

3. See generally Erik Luna, “Mandatory Minimums,” in the present Volume; Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report; Stephen F. Smith, “Overfederalization,” in Volume 1 of the present Report.

4. AUSTIN ET AL., *supra* note 1, at 15.

series of discrete allocation decisions create a given prison population; these decisions, taken together, may be thought of as prison-space allocation practices. Hence, if a different prison population is desired, a replacement allocation practice is needed. These new allocation practices must be designed intentionally, with the desired size and attributes (e.g., gender, race, etc.) of a prison population in mind.

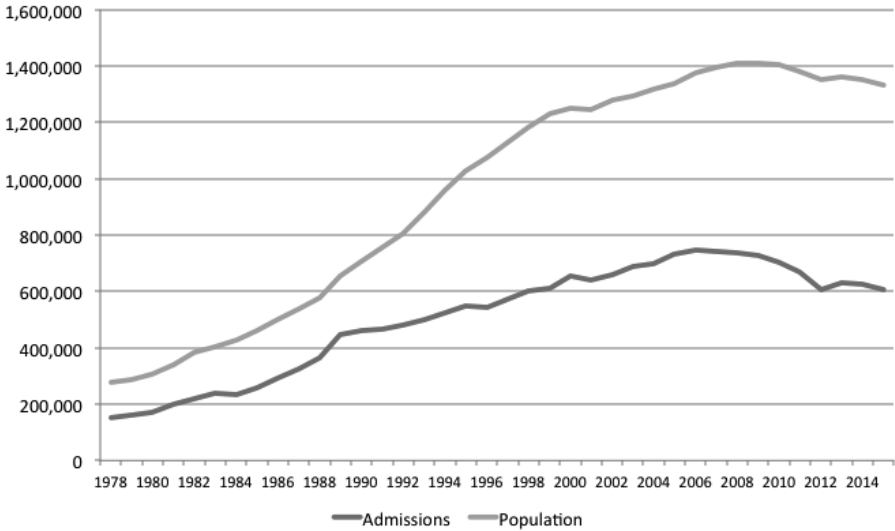
I. FOUR FEATURES OF THE U.S. SYSTEM OF PRISON USE

Four features of the U.S. system of allocating punishments provide the crucial context for designing allocation strategies that can reduce prison populations in the United States:

1. Approximately 90% of the U.S. prison population is housed in state prison systems. Meaningful reductions in the nation's overall incarceration rate are, in actuality, the aggregation of meaningful reductions taking place in various state prison populations.
2. The 50 states and the District of Columbia have each used different allocation strategies to create their prison populations. These strategies have changed in varying ways in each state, over time. The population outcome in each state, thus, is the product of more or less unique sentencing structures and policies that impact prison admissions and length of stay. It follows that changes necessary to reduce prison population will be state-specific, rather than national.
3. Declining crime rates nationally have resulted, in most places, in a corresponding drop in arrests and prison admission numbers. But, in most places, there has not been a corresponding drop in prison population (see Figure 1, below). Consistent with the *Iron Law*, an entrenched prison population in the face of declining crime rates, arrests, and prison admissions can only have occurred by increasing length of stay.
4. There is an equivalence in the exchange rate between prison admissions and length of stay. The net, long-term impact of eliminating one prison admission with a length of stay of 10 years is equivalent to a one-time reduction of 10 prison admissions with a length of stay of one year. The effect of the latter change is a large, immediate reduction in prison population that disappears quickly; whereas the former approach produces a small change that takes a while to disappear. Policy changes thus can have differential impacts on prison population over time through the way they alter admissions and/or length of stay.

Figure 1

**State Prison Population and Admissions
1978-2015**



Source: Bureau of Justice Statistics, National Corrections Reporting Program

The complexity of these four special features by which prison populations are created in the U.S. can be better understood through discussion of the dynamics of admissions and length of stay. In the next two sections, we illustrate population-relevant dynamics of these two drivers of prison populations.

II. DYNAMICS REGARDING ADMISSIONS

There are two major streams of admissions into prison. People are sentenced to prison from the court, or they are returned to prison by correctional authorities due to problems that occur while they are under community supervision. Each of these streams is targeted as a way to reduce the number of people in prison. Yet there are limits on the amount of prison-population reduction that can be accomplished by “diverting” people to non-custodial options instead of prison.

A. DIVERTING PEOPLE FROM SENTENCES TO PRISON

Problems faced in targeting direct sentences to prison can be illustrated by looking at the issues in a hypothetical prison allocation system whose dynamics are more or less typical of the 50 states and District of Columbia, shown in Table 1. This is not meant to be a complete sentencing system; since

in a fully articulated system, there would be much more complexity. But this hypothetical case follows general patterns of any realistic sentencing system, and we use it to illustrate constraints that arise when reformers try to reduce prison populations by reducing sentences to prison.

Under this hypothetical situation, every 1,000 felony convictions would generate 450 prison sentences. Because almost half the cases go to prison, it would seem at first blush that reducing prison admissions would offer a promising target for reducing overall prison numbers. The strategy would be to develop “front-end” sentencing options that attract what would have been prison-bound cases away from that outcome.

The problems with this strategy become obvious by looking deeper into the allocation system. More than one-fourth of the prison-bound cases come from “extremely” and “very” serious categories. They are often thought to be off-limits for non-custodial sentences; in many jurisdictions, these cases are subject to mandatory prison terms. Among the remaining cases, almost two-fifths of the sentences are for crimes in the “serious” category. For the most part, in cases where there is harm to the victim, policymakers have been reluctant to target them because they are “violent” crimes.⁵

Table 1: Hypothetical State Sentencing for 1,000 Felony Convictions

Level of offense, by seriousness	Felony sentences	Percentage of felony sentences	Percentage non-prison	Prison admissions	Percentage of prison admissions
Extremely serious (death)	50	5%	0%	50	10%
Very serious (harm to victim)	100	10%	10%	90	18%
Serious (less harm victim)	200	20%	30%	140	28%
Less than serious (property)	500	50%	60%	200	40%
Not serious (public order)	150	15%	90%	15	3%
Total	1,000	100%	50%	495	100%

The remaining target group for diverting from prison is the “less than” and “not” serious group. They are two-thirds of the felony sentences and most reformers would agree that it makes sense to target them for an overall prison population reduction strategy. While this group could be approached by a type of reverse “mandatory sentencing” policy, requiring a non-custodial sentence for all of them, in fact nobody has proposed such a restriction on the use of prison. The general strategy for targeting this group is to create a “front-end sentencing alternative” that will be attractive to judges, often also creating various incentives for judges to use those alternatives.

5. The size of this target group makes them attractive, and we return to them below.

The problems with “sentencing alternatives” are well known. In our example, for the people being sentenced within the two least-serious categories, the current odds of going to prison, absent any new programs or policies, are about one in three (and specifically for public-order crimes, the odds are much smaller: one in ten). That means that the base odds that a person sentenced to the new “alternative” would have gotten a non-custodial sentence anyway are about 2 to 1.

In fact, a new front-end alternative could be both sizeable and widely used by judges, and still end up mostly with people who would not have gone to prison in the first place. This kind of net-widening happens with many “alternatives” to incarceration.⁶ It is not easy to ensure that a front-end program is used only (or even primarily) for people who would otherwise be prison-bound. So, the actual diversion numbers are generally significantly less than the program participation rate, and may approach zero. When the number of people who fail these “strict alternative” programs is included,⁷ the net impact can actually be negative. If the target group is non-serious cases that have little risk of prison to begin with, then the net impact is almost always zero.

A more promising category turns out to be the “serious” cases, even though there is usually harm to a victim in these cases. They are attractive because fewer than one-third get non-custodial sentences. For these sorts of cases involving non-fatal, less severe harm to the victim, some reformers have suggested restorative justice (“RJ”) style programs to substitute for prison.⁸ In general, RJ has not demonstrated the ability to capture a large number of cases from this group—they tend to be selective, and they do not process a large volume of cases. Well-tailored RJ-style programs targeting moderately violent crimes can attract some cases away from prison, but the number will likely be small, even under optimistic assumptions.

These problems combine to make front-end strategies a reach. To illustrate, consider a scenario in which a state facing the pre-existing allocation practices

6. See Michael Tonry, “Community Punishments,” in the present Volume; Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST 99 (1996).

7. See Susan Turner, Joan Petersilia & Elizabeth Piper Deschenes, *Evaluating Intensive Supervision Probation/Parole (ISP) for Drug Offenders*, 38 CRIME & DELINQ. 539 (1992); Todd Clear & Patricia L. Hardyman, *The New Intensive Supervision Movement*, 36 CRIME & DELINQ. 42 (1990); JOAN PETERSILIA & SUSAN TURNER, RAND, INTENSIVE SUPERVISION OF HIGH-RISK PROBATIONERS: FINDINGS FROM THREE CALIFORNIA EXPERIMENTS (Dec. 1990).

8. DANIELLE SERED, ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/accounting-for-violence/legacy_downloads/accounting-for-violence.pdf.

laid out in Table 1 implemented several new front-end options. One might be an Intensive Supervision Program (“ISP”) that targets “less” and “not” serious felonies. With an operating capacity of 100 cases, the ISP would be designed to divert one-fifth of the entire admissions stream. Let’s say, to be generous, that this particular ISP is more successful than most at getting true diversions, and half the cases would have gone to prison without it. Assume, finally, that the state set up an RJ program targeting “serious” cases with a capacity of 24, two-thirds of whom would have gone to prison. The net impact of these two reforms is about a 15% reduction in the admissions flow. But would there be a corresponding 15% decline in the prison population? Probably not.

One reason is that under ISP programs, many people fail and end up in back in prison. In our example, if half the ISP cases fail, either by being rearrested or failing to abide by the rules, and one-third of the RJ cases drop out, then the net reduction in prison admissions is more like 6%. Even more important, as we note below, the types of cases targeted by such front-end diversion programs tend to have a very short prison stay so diverting them has less of an impact on prison population than the numbers of cases would imply.

In sum, attempting to alter admissions in ways that would achieve substantial reductions in the number of people in prison is problematic. The logical place to start—less serious crimes—does not easily lead to true diversions. The kinds of serious crimes that would translate into true diversions would not easily yield large enough numbers to make a meaningful impact.

B. REDUCING FAILURES ON COMMUNITY SUPERVISION

People who are admitted to prison because they fail under community supervision are thought to be an attractive target for prison-population reduction for two reasons. As a key stream of prison admissions, reductions in the number of community-supervision failures directly translate into reduced admissions.⁹ The numbers available to be targeted can be quite substantial. In 2015, there were 561,406 state prison admissions, of which 160,288 (about 30%) were for parole supervision violations;¹⁰ add the number who go to prison as probation violators and the full scale of the community-supervision stream emerges. Nationally, perhaps a majority of people admitted to prison are headed there because they failed community supervision.

9. If they can succeed under supervision, they also represent a net gain in social value for the community.

10. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

These failures are of three types. Some people are arrested and convicted of a new crime, and go to prison on a new sentence. Some are rearrested and returned to prison in lieu of conviction. Still others fail to meet a supervision requirement (e.g., “dirty” drug test, absconding, etc.) and are sent to prison, even though they are not charged with a new crime. Estimates of the rates of community-supervision failure vary widely, and depend on the definition of failure. For 2015, approximately 60% of state and local probationers were classified as “successful” when their supervision was terminated.¹¹ The same applies to state parolees, and these rates have been basically unchanged since 2005.¹² About half of the state prisoners who are released onto parole are returned to prison within three years, and these rates have remained essentially unchanged since 1983.¹³ In other words, decades of work to improve the success of community-supervision efforts have proven largely fruitless, as measured by national trends.

Notwithstanding these national numbers, state-level community-supervision policies and outcomes vary dramatically, so generalizations are problematic. For a few states, community-supervision failures without new convictions, called “technical revocations,” can be half or more of all prison admissions. This makes technical revocation an attractive target for prison-population reduction initiatives. In other states where technical revocation is used more sparingly, community-supervision failures can still be one-fifth to one-third of admissions—again suggesting that this is a promising target.

There are two types of strategies to reduce the number of people who go back to prison for community-supervision failures: policy alternatives to interrupt the pattern of technical revocation such as “graduated sanctions,” and treatment programs designed to reduce reoffending rates.

Policy strategies seek to put intervening steps between the decision by a probation or parole officer to charge a client with a rules violation and the decision of a sentencing authority to return that client to prison. Each step siphons off cases from the stream into prison, and the result is fewer admissions. Because these systems are administrative, requiring little or no legislative authority, they can be quickly implemented and can have rapid and sizeable

11. *Probation and Parole FAQs*, AM. PROB. & PAROLE ASS’N, https://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=VB_FAQ.

12. DANIELLE KAEBLE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2015 (2016), <https://www.bjs.gov/content/pub/pdf/ppus15.pdf>.

13. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

effects on the number of people admitted to prison.¹⁴ Treatment programs attempt to reduce the frequency and/or seriousness of rules violations in the first place. Often combined with policy strategies (treatment is one of the required “steps”), these approaches operate in order to change behavior. Common approaches include anger-management training, community-service work, increased reporting, shock incarceration, and the like.

Revocation reduction, as a target, has obvious attractions, but it faces major structural limitations on its capacity to deliver meaningful reductions in the number of people in prison. For one thing, even though there can be a large number of people flowing into prison on this stream, they may not account for much of the daily prison population. Many violators return to prison for much less than a year, and diverting them into some policy or treatment “step” may produce a great deal of action at that step without translating into much aggregate reduction in the prison number.

Say, for example, that 30% of a given state’s prison admissions are currently technical revocations of probation or parole, either with no new arrest or in lieu of an arrest. These are cases where correctional policy could change the decision to go to prison, because there is no new conviction by a court. Let’s say, as well, that the average technical revocation of this type results in four months in prison—not an unusual number. Finally, let’s assume that everyone in that 30% technical revocation rate is covered by a new policy that requires some sort of treatment intervention instead of revocation. How much would it reduce the prison population?

The temptation is to say that 30% of the flow into prison has been stopped. That may be true, but the related impact on the average daily population, depends on two more statistics: the average length of stay for the other 70% and the proportion out of the 30% who succeed in the new program.

Let’s say that the length of stay for the remaining 70% of admissions (excluding life sentences) is 28 months—a reasonable figure. Let’s further assume that the new intervention is wildly successful, such that 75% of the technical revocation cases finish the program without incident for the remainder of their sentence. Under these assumptions, a revocation program that accepts 30% of the prison intake would result in just over a 3% reduction in the population. But that is an optimistic number, based on strong assumptions of program success getting and keeping cases. If the new intervention captures only half the eligible revocations, and if it succeeds with them half the time—a profile

14. Michelle Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 *LAW & POL’Y* 51 (2013).

more characteristic of these kinds of policy interventions—the reduction in prison population is about 1%. If the proportion of technical revocations in the admissions stream is less than 30%, the impact shrinks even more.

In other words, even under friendly assumptions, a strategy that focuses on technical revocations holds limited promise for meaningfully reducing the number of people in prison. Indeed, that has been the experience of these strategies as they have been rolled out. A more effective way to target this stream would be to entirely prohibit prison returns for mere rules violations. This is almost never proposed, but it, too, would face obstacles. As Joan Petersilia has pointed out, many, if not most, technical revocations have an arrest as the underlying problem leading to the revocation.¹⁵ For these cases, a prohibition on technical revocations might only lead to a prosecution.

III. DYNAMICS REGARDING LENGTH OF STAY

Length-of-stay increases have been at the core of the size of the prison population for the last 30 years. Since it has often been observed that 95% or so of those who are imprisoned will eventually be released, adjustments in length of stay are an obvious target. Obviously, if some of them are released earlier, then the number of people in prison will go down. Here again, however, the eventual reduction in the number of people in prison is not always commensurate with the number who are released early.

A. REDUCING SENTENCES FOR THOSE ADMITTED TO PRISON

To illustrate, we again turn to the hypothetical state jurisdiction shown in Table 1, to which we add a column with the average (mean) length of stay. In Table 2, the statewide mean length of stay is 43 months, with a median length of stay of 30 months (with a high of 180 months for 5% of the entry cohort to a low of 6 months). The cohort will produce a “steady state” prison population of 1,758 inmates. A small across-the-board reduction in length of stay of three months would reduce the hypothetical prison population by only 124 inmates (495 admissions x 3 months/12 = 124 inmate population). The impact on the length of stay for “extremely,” “very,” and “serious” crimes would be small, with time-served reductions ranging from a high of 10% to a low of less than 2%. For the other types of crimes, the impact is much more substantial, reducing the length of stay by one-fourth to one-half.

15. Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 *CRIME & JUST.* 207 (2008).

**Table 2: Hypothetical State Lengths of Stay for an Admissions Cohort
(Based on 1,000 felony cases from Table 1)**

Level of offense, by seriousness	Percentage of the total felony sentences	Prison admissions	Mean length of stay (months)	Prison population (based on total years served)	Percentage of prison population (based on total years served)
Extremely serious (death)	5%	50	180	750	43%
Very serious (harm to victim)	10%	90	60	450	26%
Serious (less harm victim)	20%	140	30	350	20%
Less than serious (property)	50%	200	12	200	11%
Not serious (public order)	15%	15	6	8	0%
Total	100%	495	43	1,758	100%

But across-the-board reduction has not been seriously proposed anywhere (although we would point out that across-the-board *increases* have quite frequently been on the table). Instead, the common plan is to do something about “drug” and “low-risk property” offenders. In Table 2, these would be “less than” and “not” serious cases. The three-month reduction for them is a large overall cut in their individual prison time, puts 215 people out earlier than before, and has less than half the overall impact of an equivalent across-the-board reduction—about a 3% reduction in total months for the cohort.

These illustrations are for an admission cohort. The impact will not be rapid. Prison-population reductions for this cohort will take effect gradually, as the number of people behind bars steadily decreases. That is an “all things being equal” long-term reduction, of course. If, for example, it takes a decade for these changes in admission sentences to produce a “meaningful” reduction in the number of people in prison, it is reliable only if, in the intervening years, legislatures do nothing to add to the number of people in prison. That assumption is a stretch.

B. RELEASING PEOPLE WHO ARE CURRENTLY INCARCERATED EARLIER

Because the impact of changes in length of stay for new admission cohorts is so gradual, reformers tend to think about reductions in sentence length for the current population in prison. This is a more fruitful way to think about the problem, for two reasons. First, the connection between the length of the sentence imposed by the judge and the time served on that sentence is not as close as we might think. That means that adjustments in sentencing designed to affect length of stay may be ineffectual. Second, a change in length of stay for the current population has an immediate effect on the population, and if the changes are permanent, the effect is lasting.

In fact, a variety of mechanisms operate at the release-from-prison stage to adjust downward the sentence imposed by the court. About one-third of the states have parole release; every state has one or more forms of “good time”; and states have different patterns of credit for time served while awaiting trial. In direct opposition to these sentence-reduction mechanisms, almost every state has some form of “truth in sentencing,” requiring a minimum percentage of the judicial sentence to be served for certain types of crimes. The net effect of the downward options on the one hand and the “truth” requirements on the other is that sentencing patterns are not as important as they once were for *Iron Law* mathematics. In fact, the sentences that judges are imposing today seem to be a bit shorter than they were a decade ago,¹⁶ even though the amount of time people serve before being released from prison is considerably longer.¹⁷ A major reason for the seemingly anomalous disconnect between sentencing and length of stay is that post-sentencing mechanisms such as parole and good time play out differently than before. Nationally, the number of people released on parole has been cut in half, while the number of people subject to “truth in sentencing” statutes has skyrocketed following the 1994 Violent Crime Control and Law Enforcement Act.

The resulting longer sentences for more-serious crimes have led to a stacking up of those cases in the prison system. While people convicted of drug-related crimes may be a large portion of the admissions to prisons, they do not stay there very long. People convicted of very serious crimes are comparatively less frequent in the entering cohort, but they stay in prison longer, becoming a larger portion of the daily population.

Table 3 shows the results of this “stacking” effect for the U.S. daily prison population. The more-serious cases end up occupying an increasing proportion of prison space, while the less-serious cases come in and go out, taking up less space overall. The powerful effect of sentence length is shown in the way people convicted of violent crimes end up comprising the majority of the prison population. The relative difference between these more-serious cases and less-serious crimes means that it is difficult to get a significant impact on the average daily prison population without a sizeable reduction in the sentence length of the more-serious cases, for they have more impact on the total prison capacity used than the less-serious cases.

16. JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017).

17. James Austin, *Reducing America's Correctional Populations: A Strategic Plan*, 12 *JUST. RES. & POL'Y* 1 (2010).

Table 3. State Prison Admissions, Population, and Length of Stay, by Offense

Offense	Prison Population	Prison Admissions	Prison Length of Stay (months)
Violent	53%	28%	50
Murder	12%	2%	172
Manslaughter	2%	2%	110
Rape	5%	1%	92
Other sex	7%	4%	51
Robbery	14%	8%	53
Assault	11%	10%	30
Other violent	3%	2%	24
Property	18%	29%	20
Burglary	10%	11%	25
Larceny/theft	3%	7%	17
MV theft	1%	3%	18
Fraud	2%	4%	17
Other property	2%	1%	15
Drug	17%	28%	20
Public order	10%	15%	21
Other	1%	1%	30

Source: Bureau of Justice Statistics, National Corrections Reporting Program.

It is important to emphasize that Table 3 should not be read in the same way as Tables 1 and 2. The daily population count (Table 3) is very different from a cohort. The effects of changes in sentencing for the latter can be estimated “going forward,” in the way we interpreted the first two figures. Table 3 is instead a “snapshot” of the current prison population, and it includes people who are just beginning their terms as well as others who are nearing release. The total cell months associated with people convicted of the violent crimes should not be read as the amount of time this group will do, starting now. It is rather what will have happened with this prison population group by the time it has finished the term in prison. No doubt some of those who have been convicted of murder are now in month 170, on the threshold of release, while others are in month two, staring at a long stretch in prison. Likewise, the 50 cell months associated with people convicted of violent crimes is not what all admissions in

the group account for, but rather reflects what the group in prison at the time of the snapshot will collectively cost in terms of prison cells at the conclusion of their terms.

Table 3 does aptly show an important implication of the *Iron Law*, however. When the objective is to reduce the number of people in prison, changing length of stay for the current population is the most promising target for immediate impact. The effect of changing sentence length for people who are serving time for serious crimes will be immediate because they are a large portion of the population. It will also be lasting, because they will not be replaced in the prison population very rapidly, and the effect of reduction in their sentences will reduce demand for cell space longer into the future. If changes in length of stay for the current population continue to apply to future admissions cohorts, the impact will be permanent.

IV. COMBINING THE FOUR FEATURES OF PRISON USE AND THE *IRON LAW*

We have illustrated a strategy of analysis that uses the *Iron Law* to identify which aspects of prison admissions and length of stay provide more-attractive targets for reducing prison counts rapidly and meaningfully. The *Iron Law* states that prison demand is created by a combination of two forces—how many people go to prison and how long they stay. In a real sense, the demand for prison space is allocated across a population of people convicted of crimes, and the question the *Iron Law* poses is: What different strategies of admissions and length of stay would create substantially lower levels of demand for prison space?

We identified the streams that make up the flow of admissions to prison, and disaggregated the streams into levels of crime seriousness. We then estimated how various adjustments in those streams might ultimately change the number of people in prison. From this, we concluded that admissions, generally speaking, are a weak target for achieving rapid and meaningful reductions in the number of people in prison. We then turned to length of stay, and showed that disaggregated rates of aggregate prison time mean that, even though less-serious crimes are far more numerous in the justice system, it is the more-serious crimes that make up the more attractive target for reducing prison populations, because their collective impact in prison counts is so much larger, per case.

We used a hypothetical prison allocation system to illustrate how it works. Our hypothetical numbers were more or less reasonable, but since jurisdictional differences are an overriding feature of the U.S. justice system, actual numbers

could turn out differently when going from one state to another. Thus, what we present here is a way of looking at the problem rather than an answer to the problem. Our experience in places where we have done this analysis on actual state data suggests that our conclusions about admissions and length of stay are not wildly out of sync with reality. But we are not advocating a set of policies; rather, we are suggesting a strategy for establishing and modeling those policies.

V. FURTHER IMPLICATIONS OF THE *IRON LAW*

This approach is equally important for what it suggests is *not* promising. Three of these are considered truisms in the mass-incarceration reduction business: “first-time nonviolent offenders”; “the drug war”; and “recidivism-reduction programs.”

The “first-time/nonviolent offender” population is simply not enough of a factor in the prison population to provide a sufficient pool of candidates. It is true that there are plenty of these cases in the justice system, but by far most do not go to prison. When they do, they do not stay long. The prison-reduction payoff of focusing on this group is mediocre at best. The potential for backfire with this group is not insubstantial, either, through net-widening or the collateral consequences of criminal labeling. To the extent that this is a young group, recidivism rates may be higher than anticipated. To the extent that this is a poor and underprivileged group, programmatic needs may be extensive. That is, while there may be good reasons to impose less correctional coercion on first-timers and people convicted of nonviolent crimes, ending mass incarceration is not one of them.

A similar analysis applies to “drug offenders,” with two caveats. First, people caught up in the drug trade are a much larger portion of the federal prison population than they are in the states. For the federal jurisdiction, a significant reduction in sentence length for people convicted of drug crimes will likely have a very meaningful, potentially immediate impact (not only on the number of people in the federal system, but on the quality of justice dispensed).¹⁸ Second, many of those convicted of drug crimes have a high likelihood of recidivism. They may, over the course of their lives, have numerous interactions with the justice system, and so the cost savings at any one stage of their interaction with the system may not carry over to their lifetime of involvement.

18. For discussions of drug criminalization and legalization, see Jeffrey A. Miron, “Drug Prohibition and Violence,” in Volume 1 of the present Report; and Alex Kreit, “Marijuana Legalization,” in Volume 1 of the present Report.

“Recidivism-reduction programs” are also quite popular. Who can dispute the value of helping people who have broken the law turn their lives around? Programs that have demonstrated track records of success should be made widely available.¹⁹ But the *Iron Law* suggests that the ceiling of their impact on prison populations is lower than most people would expect.

There is a vast literature now on the effectiveness of correctional programs.²⁰ Most of them do not work. Those that do work tend to be tailored to specific problems that cause the risk, and they focus on high-risk cases. Generic treatments do not make much of a difference. Neither do programs that are applied to lower-risk individuals. So we begin with the proposition that proven recidivism-reduction programs will be applicable to only a subset of those who go through the system.

With that caveat, what can be expected of these programs? The very best of them—a substantial minority of those on current offer—reduce recidivism rates by about 20%. This explains why recidivism reduction is such a weak target when it comes to reducing the prison populations meaningfully and rapidly. These programs will be relevant only for, perhaps at best, a third of the correctional population. Not all of those suited for treatment will be in prison or prison-bound. For this group, recidivism-reduction programs, if they run well, will reduce the expected rate of new arrests from, say, 40% to about 32%. This would doubtless be an achievement and would be worth doing. But having one-third of the people in the corrections system return to prison 32% of the time instead of 40% of the time, after some years in treatment, will not change the number of people in prison at any given time very rapidly. Indeed, meaningful reductions will take many years. And even this depends upon extremely optimistic (and mostly untenable) assumptions about program availability and overall program effectiveness. More-reasonable assumptions would lead to even more feeble impacts in the number of people in prison.

Finally, the *Iron Law* takes external factors affecting the prison population as a given. These are well-established factors, such as the number of at-risk males aged 16-40; the number of violent crimes; and the number of felony arrests.²¹ To the extent these forces translate into admissions to prison, the *Iron Law* accounts for them. That said, the impact of crimes and arrests on the number of people in prison is weaker than logic would suggest. Both have been dropping nationally for years, at the same time prison populations have been

19. See generally Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume.

20. See, for example, the Campbell Collaboration’s Systematic Reviews on Crime and Justice, available at <https://www.campbellcollaboration.org/library.html>.

21. See generally John Monahan, “Risk Assessment in Sentencing,” in the present Volume.

rising or stable. The same is true for the at-risk male population, which has been declining steadily for decades. As it turns out, factors operating inside the justice system are far more influential in the number of people in prison than factors external to the system.²²

VI. PEOPLE CONVICTED OF VIOLENT CRIMES AS A POLICY TARGET

The popular conception of prison reform holds that those incarcerated for violent crime cannot have their sentences reduced without endangering public safety. There is a sense that people who have been convicted of violent acts are violent people, prone to recurring violent behavior, and that they cannot be safely allowed in society. Equally, it is thought that when individuals who have been convicted of a violent crime are removed from the community and put in prison, the community becomes safer for their removal. While that may be the case for a fraction of those convicted of violent crime, it is certainly not the case for the majority.

Five well-established empirical realities serve as orienting assumptions about public safety regarding people convicted of violent crime. They are:

1. A very high proportion of violent crimes are subject to “replacement.”

Most crimes are committed by young men in groups, a phenomenon referred to as co-offending.²³ When one of those young men is incarcerated, the group may remain, on average, as criminally active as it was before. It may also recruit new group members who themselves replace the missing person (until he returns from prison). In short, a person who is locked up may be prevented from committing crimes while in prison, but the crimes themselves may occur anyway. *This helps explain why, in many impoverished communities, large numbers of young men can be locked up, many of them regularly cycling into and out of prison, while crime rates remain stubbornly high. Under any reasonable policy scenario, a concentration of criminally active people remain in the community, notwithstanding the number of people from that community who are behind bars at any given time.*

22. PEAFF, *supra* note 16.

23. MARCUS FELSON & MARY ECKERT, CRIME AND EVERYDAY LIFE (2016). See generally Shawn D. Bushway, “Incapacitation,” in the present Volume.

2. **Time served in prison does not reduce the chance of recidivism.** People are neither rehabilitated nor deterred by longer stays in prison.²⁴ Longer time served delays the re-entry process but does not affect the likelihood of success in terms of preventing recidivism. The vast majority of people who go to prison are eventually released, and the likelihood of any individual returning to prison would not increase if he were released a few months sooner. *This means that, all things being equal, longer prison sentences do not tend to prevent criminal activity through deterring recidivism; the effect instead is to delay the new criminal event.*
3. **Recidivism rates for people convicted of violent crimes are, on average, lower than those for people with nonviolent criminal histories, and the rates of repeat violent crime are not high.** People who are in prison for violent crimes actually have a slightly lower recidivism rate than those who are in prison for property or drug crimes. When a person convicted of a violent crime recidivates, the rate of the new crime turning out to be violent is not markedly different (and for some categories of crime, smaller) than the rate for those convicted of nonviolent crimes.²⁵ *This suggests that the effects on public safety of prison reduction policies will be no worse (and potentially marginally better) by a prison reduction of individuals convicted of violent crimes as they would be by a reduction of people convicted of nonviolent crimes.*
4. **People exhibit a strong tendency to age out of criminal careers, and this is equally true for those with violent criminal histories as it is for others.** It is often said that “there is no re-entry program more powerful than having a 35th birthday.” While individual criminal careers vary dramatically, on average, this effect of “aging out” applies. Holding people in prison past the age of 40 has demonstrably limited impact on the likelihood of crime.²⁶ *This means that prison sentences for violent crime that result in imprisonment into old age have little or no public-safety value.*²⁷

24. See Daniel S. Nagin, “Deterrence,” in the present Volume; Cullen, *supra* note 19; Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48 (2011).

25. DUROSE, COOPER & SNYDER, *supra* note 13.

26. Shadd Maruna, *Reentry as a Rite of Passage*, 13 PUNISHMENT & SOC’Y 3 (2011).

27. See, e.g., Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, “Releasing Older Prisoners,” in the present Volume.

Taking these four orienting ideas into account, it follows that delaying the release of a person because the crime of conviction involved violence does not alter the likelihood that either the person will commit a new crime or that the new crimes committed by people released from prison will involve greater levels of violence. In other words, longer time served for people convicted of violent crimes does not make the community safer from violent crime.

VII. OBTAINING MEANINGFUL REDUCTIONS IN PRISON COUNTS

In a recent report released by the Brennan Center for Justice,²⁸ a team of scholars concluded that almost 40% of people incarcerated in the United States are behind bars without a compelling public-safety rationale. This type of number may seem shocking, but achieving a reduction in the number of people in prison at that scale is not a radical proposal. For one thing, a 40% reduction in today's U.S. prison numbers would result in an incarceration rate of 282 per 100,000,²⁹ leaving the U.S. higher than every other democratic nation in the world and more than double the rate of any other Western European democracy.

More to the point, this level of reduction is already demonstrably within reach in the United States. New Jersey and New York have both reduced the number of people in their prison systems by more than one-third since the peak year of 1999, with a drop in their incarceration rates that already approaches that 40% national target (the U.S. population has dropped 2.9% since the peak in 2009).³⁰ California, whose prison population peaked in 2006, had since dropped by more than one-fourth.

How did these sizable drops occur? The California story is well known and equally well documented.³¹ The California Public Safety Realignment policy agenda, combined with a reinvigorated Probation Subsidy program and the impact of voter-approved Proposition 47 (downgrading several previous felonies to be misdemeanors), have resulted in over 45,000 people being removed from state prison and placed on probation, in local jails, or in other community alternatives. As depicted in the following table, the entire correctional population has declined by about 185,000 people even as the crime rate has declined.

28. AUSTIN ET AL., *supra* note 1.

29. CARSON & ANDERSON, *supra* note 10.

30. *Fact Sheet: US Prison Population Trends 1999-2014*, THE SENTENCING PROJECT (Feb. 2016), <http://www.sentencingproject.org/wp-content/uploads/2016/02/US-Prison-Population-Trends-1999-2014.pdf>.

31. Chris Kubrin & Carroll Seron, *The Great Experiment: Realigning Criminal Justice in California and Beyond*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (2016).

Table 4: California Correctional Population, 2007-2015

Year	State prison	Local jail	Parole	Felony probation	Totals	Crime rate
2007	173,312	83,184	126,330	269,384	652,210	3,556
2008	171,085	82,397	125,097	269,023	647,602	3,461
2009	168,830	80,866	111,202	266,249	627,147	3,204
2010	162,821	73,445	105,117	255,006	596,389	3,074
2011	160,774	71,293	102,332	247,770	582,169	2,995
2012	133,768	80,136	69,453	249,173	532,530	3,235
2013	132,911	82,019	46,742	254,106	515,778	3,082
2014	134,433	82,527	44,792	244,122	505,874	2,852
2015	127,421	73,891	44,526	221,243	467,081	3,046
Change						
Since 2007	-45,891	-9,293	-81,804	-48,141	-185,129	-510
Since 2014	-7,012	-8,636	-266	-22,879	-38,793	194

Source: Bureau of Justice Statistics Correctional Statistics Series; Federal Bureau of Investigation Uniform Crime Reports

The story in New Jersey and New York is less dramatic but more important. There have been several reform efforts in each location—for example, a statewide drug-court movement in New Jersey and the roll-back of the so-called Rockefeller Drug Laws in New York—but the effect of these legislative efforts has been limited.³² Instead, in New Jersey, where prison reductions lead the nation, a series of reforms of drug-law enforcement, combined with significant changes in parole release and revocation policies, created a sizable impact that added up over almost two decades.³³ In New York, a law-enforcement policy that downgraded many drug-related and other kinds of minor arrests from felonies to misdemeanors is at the heart of major reductions in the number of people going from New York City to state prisons.³⁴ Uncelebrated, but at

32. JIM PARSONS ET AL., VERA INST. OF JUST., END OF AN ERA? THE IMPACT OF DRUG LAW REFORM IN NEW YORK CITY (2015), available at <https://www.vera.org/publications/end-of-an-era-the-impact-of-drug-law-reform-in-new-york-city>. For a discussion of the drug court movement, see Richard C. Boldt, “Problem-Solving Courts,” in Volume 3 of the present Report.

33. THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES (2014), <http://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf>.

34. JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. FOR JUST., HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? (2013), http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf. For a discussion of misdemeanors, see Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

the heart of the situation in both states, has been a relative (and unofficial) moratorium on new sentencing laws, allowing the state's prison system to decline as a consequence of major decreases in serious crime and felony arrests.

RECOMMENDATIONS

These three stories underline the central thesis of this chapter and support the following points:

1. **Large—meaningful—reductions in the number of people in prison can be accomplished without endangering the public.** Overall crime rates have declined and continue to do so in all three states.
2. **No single strategy exists that will apply equally to all the states in the country. Rather, significant reductions can be accomplished in any state by focusing on productive targets.** These may include front end strategies that divert people convicted of low-level crimes from prison, but we would especially emphasize front-end strategies that reduce sentences for all types of crime, across the board. In many places, front end strategies that eliminate or vastly reduce returns to prison for non-criminal and non-serious misconduct on probation or parole can be important, as well. Back-end strategies that reduce length-of-stay, especially for people serving long sentences, may have the most significant impact of all the policy options.
3. **An agenda that can achieve meaningful reductions in the number of people in prison must focus on legal policies and practices rather than social programs and services.** A clear-eyed focus on changing the laws and policies that produce too many people in prison will pay off directly and immediately. That is the main implication of the *Iron Law*, and it is the core challenge before us.