

**RIGHT ON CRIME: A RETURN TO FIRST PRINCIPLES FOR  
AMERICAN CONSERVATIVES**

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## I. INTRODUCTION

On March 14, 2013, Ken Cuccinelli, the Attorney General of Virginia, took the stage at the Conservative Political Action Conference (CPAC) in Maryland. This was perhaps the most conservative attorney general in the country addressing the most conservative audience in the country. Over the course of a nearly twenty-minute speech, the attorney general lambasted the size of the national debt, reasserted his conviction that President Barack Obama's signature health care legislation was unconstitutional, and referred to the Environmental Protection Agency (EPA) as the "Employment Prevention Agency."<sup>1</sup> The audience applauded every one of these "red meat" lines. The crowd also broke into applause when Cuccinelli asked:

[H]ow many times have I seen my fellow tough-on-crime conservatives be not merely willing, but excited, to lock up every convict and throw away the key? If we really believe that no one is beyond redemption, we need to stop throwing away that key! Conservatives should lead in changing the culture of corrections in America.<sup>2</sup>

In these remarks at CPAC, Cuccinelli's support for corrections reform appeared to arise from a socially conservative impulse. Then, seven months later, Cuccinelli added a stark note of fiscal conservatism when he told the *Washington Post*, "[t]here is an expectation that the generic Republican position is tough on crime . . . [b]ut even that has budget limits . . ."<sup>3</sup> In both instances, Cuccinelli's comments were made in the thick of a closely contested and nationally prominent gubernatorial campaign.<sup>4</sup> This suggests that he did not think he would pay a significant political price for his views.

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1. Kenneth T. Cuccinelli, Va. Attorney Gen., Remarks at the 40th Conservative Political Action Conference 2 (Mar. 14, 2013), available at <http://bearingdrift.com/wp-content/uploads/CuccinelliCPACSpeech.pdf> [<http://perma.cc/D8TL-76RJ>]).

2. *Id.* at 4.

3. Jerry Markon & Fredrick Kunkle, *Cuccinelli Says Sentencing Policy Should Be Judged, in Part, on Cost*, WASH. POST, Aug. 18, 2013, [http://www.washingtonpost.com/politics/cuccinelli-says-sentencing-policy-should-be-judged-in-part-on-cost/2013/08/18/b6496e38-068e-11e3-88d6-d5795fab4637\\_story.html](http://www.washingtonpost.com/politics/cuccinelli-says-sentencing-policy-should-be-judged-in-part-on-cost/2013/08/18/b6496e38-068e-11e3-88d6-d5795fab4637_story.html) [<http://perma.cc/8AGC-6BT7>].

4. See *The Passion of Ken Cuccinelli*, NEWSMAX MAG., Feb. 2012, [http://www.newsmax.com/ken\\_cuccinelli\\_biography](http://www.newsmax.com/ken_cuccinelli_biography) [<http://perma.cc/KN2M-TB9C>]; see generally Laura Vozzella & Fredrick Kunkle, *McAuliffe, Cuccinelli Take Their Bitter Battle to the Airwaves*, WASH. POST, Sept. 25, 2013, [http://www.washingtonpost.com/local/virginia-politics/mcauliffe-cuccinelli-take-their-bitter-battle-to-the-airwaves/2013/09/25/08983784-23af-11e3-b75d-5b7f66349852\\_story.html](http://www.washingtonpost.com/local/virginia-politics/mcauliffe-cuccinelli-take-their-bitter-battle-to-the-airwaves/2013/09/25/08983784-23af-11e3-b75d-5b7f66349852_story.html) [<http://perma.cc/U96T-GNCT>].

Cuccinelli's avid support for prison reform surprised some political observers,<sup>5</sup> but his views are hardly unique among prominent right-leaning lawyers. Edwin Meese, the U.S. Attorney General under President Ronald Reagan, has advocated similar views.<sup>6</sup> So too have Asa Hutchinson, former U.S. Attorney and Administrator of the Drug Enforcement Administration; Bill Bennett, former Director of the Office of National Drug Control Policy; Larry Thompson, former U.S. Deputy Attorney General; and Viet Dinh, the Bush Administration lawyer who was the primary architect of the U.S.A. Patriot Act.<sup>7</sup> All five are signatories to the Right on Crime Statement of Principles, a document that the Texas Public Policy Foundation developed in 2010 to articulate the position on criminal justice policy that is most consistent with the philosophical roots of conservative political and legal thought.<sup>8</sup>

All of these individuals have been major figures in American law enforcement over the last three decades. None could plausibly be called "soft on crime." Nor could any of the non-lawyer signatories—for example, Jeb Bush, Newt Gingrich, Grover Norquist, and J.C. Watts<sup>9</sup>—be called "soft on crime."

The idea that conservatives are ideologically committed to mass incarceration is—and always was—a caricature. American incarceration rates increased significantly in recent decades, and many on the right supported this increase, but conservative support for increased incarceration was linked to unique historical circumstances, not to any philosophical commitment.<sup>10</sup> Moreover, while conservatives were correct in the early 1970s that some increase in incarceration was necessary to ensure that violent and dangerous offenders served significant prison terms,

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5. *The Passion of Ken Cuccinelli*, *supra* note 4.

6. See RIGHT ON CRIME, STATEMENT OF PRINCIPLES 1, <http://www.rightoncrime.com/wp-content/uploads/2010/11/ROC-Statement-of-Principles9.pdf> [<http://perma.cc/9GYJ-WMYG>].

7. See *id.*

8. *Id.* at 1–2.

9. *Id.* at 1.

10. See David Dagan & Steven M. Teles, *The Conservative War on Prisons*, WASH. MONTHLY, Nov.–Dec. 2012, [http://www.washingtonmonthly.com/magazine/novemberdecember\\_2012/features/the\\_conservative\\_war\\_on\\_prison041104.php?page=all](http://www.washingtonmonthly.com/magazine/novemberdecember_2012/features/the_conservative_war_on_prison041104.php?page=all) [<http://perma.cc/TA8Q-E9XZ>] ("Republican's rhetorical campaign against lawlessness took off in earnest during the 1960s, when Richard Nixon artfully conflated black rioting, student protest, and common crime to warn that the 'criminal forces' were gaining the upper hand in America. As an electoral strategy, it was a brilliant success. But as an ideological claim, the argument that America needed more police and prisons was in deep tension with the conservative cause of rolling back state power.").

the sixfold increase in incarceration from the early 1970s to the mid-2000s reached many nonviolent, low-risk offenders.<sup>11</sup> Now, as crime rates are declining, conservatives are increasingly focused on developing policies that prioritize using limited prison space to house violent offenders while looking for alternative sanctions to hold nonviolent offenders accountable, restore victims, and protect public safety.<sup>12</sup> In generating and advocating these policies, conservatives are returning to first principles: skepticism of state power, insistence on government accountability, and concern for how public policy affects social norms.

In this article, we discuss the conservative return to first principles in criminal justice. In Part II, we explain the modern problem of mass incarceration. Then, in Part III, we note the historical reasons behind the push to increase incarceration in the 1980s and 1990s. In Part IV, we detail legislative reforms to remedy the incarceration problem that are consistent with conservative ideological principles.

## II. THE INCARCERATION PROBLEM

According to the International Centre for Prison Studies, the United States has the highest incarceration rate in the democratic world.<sup>13</sup> About 2.2 million Americans, or 716 out of every 100,000, are serving time behind bars.<sup>14</sup> This figure is striking when compared to figures from other nations of the Anglo-American common law tradition. In England and Wales,

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11. ROGER K. WARREN, CRIME & JUSTICE INST., NAT'L INST. OF CORR. & NAT'L CTR. FOR STATE COURTS, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES 6 (2007), available at <http://www.wicourts.gov/courts/programs/docs/cjjudicialpaperfinal.pdf> [<http://perma.cc/EG42-CBKY>] (reporting a sixfold increase); *Throwing Away the Key*, THE ECONOMIST, Nov. 16, 2013, <http://www.economist.com/news/united-states/21589868-shocking-number-non-violent-americans-will-die-prison-throwing-away-key> [<http://perma.cc/ZSM5-Y95P>] (discussing the incarceration of nonviolent offenders).

12. See, e.g., *Criminal Justice Issues*, C-SPAN (Mar. 7, 2014), <http://www.c-span.org/video/?318175-5/criminal-justice-issues> [<http://perma.cc/A47L-LMXM>] (providing a video recording in which panelists at the 2014 Conservative Political Action Conference discuss the potential benefits of reducing prison populations).

13. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (10th ed.), available at [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf) [<http://perma.cc/7QFR-9SGZ>]. The International Centre for Prison Studies reports that the United States has the highest prison population rate in the world. *Id.* We use the limiting language, "in the democratic world," because we are concerned that undemocratic nations may underreport their prison statistics.

14. *Id.* at 3.

only 148 out of every 100,000 persons are incarcerated.<sup>15</sup> Australia was founded as a prison colony, yet it incarcerates only 130 out of every 100,000 persons.<sup>16</sup> Canada incarcerates 118 out of every 100,000.<sup>17</sup> This is to say nothing of democratic nations outside the Anglo-American common law tradition. France incarcerates 98 out of every 100,000 persons<sup>18</sup> and Japan incarcerates 51 out of every 100,000 persons.<sup>19</sup>

In an important book on incarceration, *The Collapse of American Criminal Justice*, Professor William Stuntz noted that, with the important exception of homicide, American crime rates are fairly comparable to crime rates in Western democracies such as Great Britain and France.<sup>20</sup> Therefore, he wrote, “[i]f Western nations’ crime rates determine the size of their prison populations, the United States should imprison roughly the same share of its citizenry as do the British or the French . . . not four to seven times as many.”<sup>21</sup>

Americans pay dearly for these extremely high rates of incarceration. In 2012, states spent \$52.4 billion on incarceration,<sup>22</sup> and the federal government spent approximately \$6.6 billion.<sup>23</sup> Depending on the state, the per-year cost of maintaining a single prison inmate can range from approximately \$14,600 to more than \$60,000.<sup>24</sup> Over the last thirty years, prisons have been the second-fastest growing component of state budgets, trailing only Medicaid.<sup>25</sup> Roughly

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15. *Id.* at 5.

16. *Id.* at 6.

17. *Id.* at 3.

18. *Id.* at 5.

19. *Id.* at 4.

20. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 50 (2011). For international homicide figures, see UNITED NATIONS OFFICE ON DRUGS AND CRIME, *GLOBAL STUDY ON HOMICIDE* (2011), available at [http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa\\_study\\_on\\_homicide\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf) [<http://perma.cc/SML9-8NLN>].

21. STUNTZ, *supra* note 20, at 50.

22. NAT’L ASS’N OF STATE BUDGET OFFICERS, *STATE SPENDING FOR CORRECTIONS: LONG-TERM TRENDS AND RECENT CRIMINAL JUSTICE POLICY REFORMS 1* (2013), available at <http://www.nasbo.org/sites/default/files/pdf/State%20Spending%20for%20Correction%20s.pdf> [<http://perma.cc/NCX9-AAQY>].

23. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-743, *BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 1* (2012), available at <http://www.gao.gov/assets/650/648123.pdf> [<http://perma.cc/7F83-MJE4>].

24. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10* (2012), available at [http://www.vera.org/sites/default/files/resources/downloads/Price\\_of\\_Prisons\\_update\\_d\\_version\\_072512.pdf](http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_update_d_version_072512.pdf) [<http://perma.cc/5BYF-V3LZ>].

25. CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, *THE FISCAL CRISIS IN*

one in every fourteen dollars in state budgets is now spent on corrections.<sup>26</sup>

Those are just the financial costs. Yet another cost is the risk to public safety that potentially results from a vitiated deterrence effect. This is a somewhat counterintuitive thought, but Professor Stuntz explained it well by drawing an analogy to the “Laffer Curve,” an important idea in supply-side economics:

Conservative economist Arthur Laffer argued that high marginal tax rates generated less tax revenue than lower marginal rates. Higher marginal rates increased the *percentage* of income the IRS takes, but lowered the *amount* of income earned by reducing the financial rewards for work. According to Laffer’s theory, the second effect often overwhelms the first. . . . [A] Laffer-like phenomenon plainly operates in the sphere of crime and punishment. Putting more offenders in prison cells increases the tangible price criminals pay for their crimes—but if done too often, it diminishes the intangible price by making a stay in the nearby house of corrections an ordinary life experience. The second effect can easily overwhelm the first: meaning, more punishment may yield less deterrence.<sup>27</sup>

There are social and cultural costs, not just fiscal and victimization costs, that result from extremely high incarceration rates. In 2007, fifty-two percent of state prisoners and sixty-three percent of federal prisoners reported having minor children.<sup>28</sup> Mountains of research and common sense confirm that children with incarcerated parents underperform in virtually every important social indicator.<sup>29</sup> They suffer from lower high school

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CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), *available at* [http://www.vera.org/files/The-fiscal-crisis-in-corrections\\_July-2009.pdf](http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf) [<http://perma.cc/ULE9-FH32>].

26. See NAT’L ASS’N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2011–2013 STATE SPENDING 56, *available at* <http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202011-2013%20Data%29.pdf> [<http://perma.cc/LLM7-A6E6>].

27. STUNTZ, *supra* note 20, at 53.

28. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010), *available at* <http://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<http://perma.cc/3FCJ-BSPK>].

29. See, e.g., Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 477–79 (2006), *available at* [http://coursewebs.law.columbia.edu/coursewebs/cw\\_13F\\_LAW\\_L6656\\_001.nsf/0f66a77852c3921f852571c100169cb9/B43ECA7DE60A5BFA85257BD3006DE220/\\$FILE/Miller,+Keva+Impact+of+Parental+Incarceration+on+Children.pdf?OpenElement](http://coursewebs.law.columbia.edu/coursewebs/cw_13F_LAW_L6656_001.nsf/0f66a77852c3921f852571c100169cb9/B43ECA7DE60A5BFA85257BD3006DE220/$FILE/Miller,+Keva+Impact+of+Parental+Incarceration+on+Children.pdf?OpenElement) [<http://perma.cc/QV4B-UMAB>].

graduation rates, higher teen pregnancy rates, and higher incarceration rates.<sup>30</sup>

Finally, the high cost of incarceration supports a system that often does not work. Rather than emerge rehabilitated, plenty of offenders leave prison in a worsened social condition.<sup>31</sup> It is sometimes ruefully joked that prisons are finishing schools for criminality.<sup>32</sup> Even offenders who emerge from incarceration relatively stable find it difficult to reenter society because a criminal record is a significant barrier to employment.<sup>33</sup> There are a number of states in which recidivism rates hover above fifty percent.<sup>34</sup> Reflecting on this figure, former Speaker of the House Newt Gingrich and former Virginia Attorney General Mark Earley have asked whether Americans would accept other government programs with such a high failure rate: “If two-thirds of public school students dropped out, or two-thirds of all bridges built collapsed within three years, would citizens tolerate it?”<sup>35</sup>

These high rates of incarceration and associated high costs would perhaps be justified if the evidence demonstrated that more incarceration resulted in less crime. As the comparison to international incarceration rates makes clear, however, it is difficult to establish such a causal relationship.

Moreover, consider that from 2008 through 2013, the states in which crime rates increased saw a four percent decline in

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30. *See id.* at 477–78.

31. JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001), available at [http://www.urban.org/pdfs/from\\_prison\\_to\\_home.pdf](http://www.urban.org/pdfs/from_prison_to_home.pdf) [<http://perma.cc/F8B6-NARJ>].

32. E.g., Shankar Vedantam, *When Crime Pays: Prison Can Teach Some to Be Better Criminals*, NAT’L PUB. RADIO (Feb. 1, 2013), <http://www.npr.org/2013/02/01/169732840/when-crime-pays-prison-can-teach-some-to-be-better-criminals> [<http://perma.cc/58GA-B9B7>] (providing audio recording in which Shankar Vedantam and Donald Hutcherson discuss Hutcherson’s research on the impact of prison on criminality).

33. *See* HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 58 (1996) (reporting that a survey of employers in four major metropolitan cities revealed that two-thirds of employers would not hire someone with a criminal record).

34. PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 10–11 (2011), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolutioning\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolutioning_Door_America_Prisons%20.pdf) [<http://perma.cc/E8HQ-2WKJ>].

35. Newt Gingrich & Mark Earley, *Cutting Recidivism Saves Money and Lives*, ATLANTA J.-CONST., Mar. 23, 2010, <http://www.ajc.com/news/news/opinion/cutting-recidivism-saves-money-and-lives/nQdbX/> [<http://perma.cc/6994-3LP2>].

imprisonment.<sup>36</sup> At the same time, the states in which the crime rate decreased saw a five percent decline in imprisonment.<sup>37</sup> As these figures indicate, crime rates declined regardless of whether imprisonment rates increased or decreased.

Many criminologists believe that America's costly increase in incarceration over the last several decades is responsible for about twenty to thirty-five percent of the corresponding drop in the national crime rate.<sup>38</sup> The rest of the decline may be attributed to a variety of factors, the relative merits of which are hotly debated among social scientists. These factors include but are not limited to: demographic changes such as the aging of the baby boomers; the end of the U.S. crack epidemic; and improvements in law enforcement strategies such as the implementation of CompStat and the use of "broken windows" policing.<sup>39</sup> Some suggest that reduced levels of lead in household products have played a role in falling crime rates.<sup>40</sup> It has even been argued that the rise of entertainment technologies, such as video games and the Internet, have kept young men indoors and off the streets.<sup>41</sup> It may be that all of these arguments are partly

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36. *States Cut Both Crime and Imprisonment*, PEW CHARITABLE TRUSTS (Dec. 19, 2013), <http://www.pewstates.org/research/data-visualizations/states-cut-both-crime-and-imprisonment-85899528171> [<http://perma.cc/49VD-7LH4>].

37. *Id.*

38. See, e.g., Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 185–86 (2004), available at <http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf> [<http://perma.cc/5FCG-68T6>] ("In summary, the factors I examine cumulatively predict crime declines between 1973 and 1991 of between 20 and 35 percent. Essentially all of this predicted reduction is attributable to increased incarceration . . ."); William Spelman, *The Limited Importance of Prison Expansion*, in THE CRIME DROP IN AMERICA 97, 123 (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006) ("In short, the prison buildup was responsible for about one-fourth of the crime drop.").

39. See, e.g., Levitt, *supra* note 38, at 171–73, 179–81 (arguing that, unlike the receding crack epidemic, changing demographics and improvements in law enforcement strategies played little or no role in the crime decline in the 1990s); see generally George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1, 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<http://perma.cc/EN4R-R9NK>] (discussing "broken windows" policing); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, POLICE EXEC. RESEARCH FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES (2013), available at [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Compstat/compstat%20-%20its%20origins%20evolution%20and%20future%20in%20law%20enforcement%20agencies%202013.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Compstat/compstat%20-%20its%20origins%20evolution%20and%20future%20in%20law%20enforcement%20agencies%202013.pdf) [<http://perma.cc/V248-6MW9>] (discussing CompStat—a performance management system used by police to reduce crime, among other things).

40. Cf. John Paul Wright et al., *Blood Lead Levels in Early Childhood Predict Adult Psychopathy*, 7 YOUTH VIOLENCE & JUV. JUST. 208, 214–16 (2009) (arguing that lead ingestion during childhood may cause deficits in the limbic system that result in antisocial behavior).

41. A. Scott Cunningham et al., *Understanding the Effects of Violent Video Games on*



valid. Whatever the real reason or reasons may be, it seems likely that something other than increased incarceration is contributing to the crime drop because crime has been falling across the globe, not just in the United States.<sup>42</sup>

Incarceration is a sensible public safety strategy. Nevertheless, once incarceration reaches a level that is necessary to incapacitate dangerous and violent offenders, it is hard to posit a clear correlation between increases in incarceration and reductions in crime. Incarceration can reach a point of diminishing returns at which money is better spent on improved law enforcement strategies, substance abuse treatment, or community supervision monitoring.

### III. HISTORY

The extraordinarily high rate of imprisonment in the United States is a recent phenomenon. Before 1980, the highest imprisonment rate in U.S. history was recorded in 1939, when 137 out of every 100,000 Americans were behind bars.<sup>43</sup> The dramatic rise in the U.S. incarceration rate is particularly observable in the federal prison system. In the thirty-year period from 1950 to 1980, federal prisons gained about 6,600 inmates.<sup>44</sup> In the thirty-year period from 1980 to 2010, they gained over

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*Violent Crime* 4 (ZEW Centre for European Economic Research, Discussion Paper No. 11-042, 2014), available at <http://ftp.zew.de/pub/zew-docs/dp/dp11042.pdf> [<http://perma.cc/S8FC-H5H4>].

42. *The Curious Case of the Fall in Crime*, THE ECONOMIST, July 20, 2013, <http://www.economist.com/news/leaders/21582004-crime-plunging-rich-world-keep-it-down-governments-should-focus-prevention-not> [<http://perma.cc/35AT-NEBD>].

43. STUNTZ, *supra* note 20, at 46.

44. See MARK A. LEVIN & VIKRANT P. REDDY, TEX. PUB. POLICY FOUND., THE VERDICT ON FEDERAL PRISON REFORM: STATE SUCCESSES OFFER KEYS TO REDUCING CRIME AND COSTS 1 (2013), <http://www.texaspolicy.com/sites/default/files/documents/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf> [<http://perma.cc/D992-MMU7>] [hereinafter THE VERDICT]. Moreover, in the last few years, while some state prison populations have begun to decline, the federal prison population has continued to grow. Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, [http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?pagewanted=all&_r=0) [<http://perma.cc/UDP5-VHUN>]. In 2012, one year after the Texas Legislature authorized the closure of a prison in the city of Sugar Land, the federal government purchased a new prison facility in northwestern Illinois. Brandi Grissom, *Prison Closing Pleases City and Helps State Budget*, N.Y. TIMES, Aug. 19, 2011, <http://www.nytimes.com/2011/08/19/us/19tprison.html> [<http://perma.cc/YF36-VPZ6>] (discussing the closing of the Sugar Land prison); Rick Pearson, *U.S. Buys Thomson Prison From State for \$165 Million*, CHI. TRIB., Oct. 3, 2012, [http://articles.chicagotribune.com/2012-10-03/news/ct-met-durbin-quinn-thomson-prison-1003-20121003\\_1\\_thomson-prison-guantanamo-bay-wolf](http://articles.chicagotribune.com/2012-10-03/news/ct-met-durbin-quinn-thomson-prison-1003-20121003_1_thomson-prison-guantanamo-bay-wolf) [<http://perma.cc/5YCR-YPDN>] (discussing the new prison facility in northwestern Illinois).

185,500 inmates.<sup>45</sup> In the 1980s and 1990s, America became far more punitive; more individuals were prosecuted and sentence lengths grew longer.<sup>46</sup>

Policies focused on incarceration emerged as a response to skyrocketing crime rates in the 1960s.<sup>47</sup> Urban crime had become an epidemic, and nowhere was this truer than in New York City.<sup>48</sup> In fact, in 1963, New York City was known as the “murder capital of the nation.”<sup>49</sup> A *Time* magazine cover with the caption “The Rotting of The Big Apple” portrayed the muggings, robberies, and murders for which New York—and Times Square in particular—had become notorious.<sup>50</sup> Small business owner Bernie Goetz became a vigilante icon when he shot four teenage subway muggers in 1985.<sup>51</sup> Movies like *Serpico*, *Taxi Driver*, and *Dirty Harry* depicted crime-ridden urban environments in which chaos ruled.<sup>52</sup>

Just as it is unclear what caused the crime decline of recent years, it is unclear what caused the crime spike that began in the 1960s. Sociologist James Q. Wilson, however, suggested that abrupt changes in cultural norms may have been responsible for the spike:

At the deepest level, many . . . shifts, taken together, suggest that crime in the United States is falling [in the

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45. THE VERDICT, *supra* note 44, at 1.

46. TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE 33 (2014) (“Scholars have demonstrated that virtually all growth in prison populations over several decades could be attributed to the two sanctioning phases of the system: commitments to prison once convicted and length of stay once admitted. Eighty-eight percent of the growth in prison populations between 1980 and 1996 has been attributed to increasing commitments to prison and increasing lengths of stay.”); *see also* STUNTZ, *supra* note 20, at 247 (showing that the imprisonment rate per 100,000 population increased from 96 in 1973 to 179 in 1983 to 359 in 1993 and prison-years per murder conviction increased from 10 in 1973 to 21 in 1983 to 38 in 1993).

47. MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 8–15 (2009).

48. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 107 (2011).

49. Thomas J. Lueck, *Low Murder Rate Brings New York Back to '63*, N.Y. TIMES, Dec. 31, 2007, [http://www.nytimes.com/2007/12/31/nyregion/31murder.html?\\_r=0](http://www.nytimes.com/2007/12/31/nyregion/31murder.html?_r=0) [<http://perma.cc/XWW8-BV7A>].

50. *New York City*, TIME, Sept. 17, 1990, <http://content.time.com/time/covers/0,16641,19900917,00.html> [<http://perma.cc/BHB7-QNDS>] (last visited May 24, 2014). For the accompanying article, see Joelle Attinger, *The Decline of New York*, TIME, Sept. 17, 1990, at 36.

51. *See generally* Suzanne Daley, *Man Tells Police He Shot Youths in Subway Train*, N.Y. TIMES, Jan. 1, 1985, <http://www.nytimes.com/1985/01/01/nyregion/man-tells-police-he-shot-youths-in-subway-train.html> [<http://perma.cc/4JK2-25R2>].

52. SERPICO (Paramount Pictures 1973); TAXI DRIVER (Columbia Pictures 1976); DIRTY HARRY (Warner Bros. 1971).

early 2000s]—even through the greatest economic downturn since the Great Depression—because of a big improvement in the culture. The cultural argument may strike some as vague, but writers have relied on it in the past to explain both the Great Depression’s fall in crime and the explosion of crime during the sixties. In the first period, on this view, people took self-control seriously; in the second, self-expression—at society’s cost—became more prevalent. It is a plausible case.<sup>53</sup>

Psychologist Steven Pinker made a similar argument in his book, *The Better Angels of Our Nature*.

The leveling of hierarchies and the harsh scrutiny of the power structure [in the 1960s] were unstoppable and in many ways desirable. But one of the side effects was to undermine the prestige of aristocratic and bourgeois lifestyles that had, over the course of several centuries, become less violent than those of the working class and underclass. Instead of values trickling down from the court, they bubbled up from the street, a process that was later called “proletarianization” and “defining deviancy down.”<sup>54</sup>

From the 1960s through the early 1990s, crime arguably became the most important domestic issue in American politics. Liberal politicians and thinkers, however, were widely viewed as disengaged from the issue.<sup>55</sup> Many liberals of the period argued that because crime resulted from social pathologies, such as poverty and racism, crime would continue until the social pathologies were eradicated; in other words, public policy directed at reducing crime would have no effect.<sup>56</sup> In some

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53. James Q. Wilson, *Hard Times, Fewer Crimes*, WALL ST. J., May 28, 2011, <http://online.wsj.com/news/articles/SB10001424052702304066504576345553135009870> [<http://perma.cc/TJ5J-FUN2>].

54. PINKER, *supra* note 48, at 110.

55. Dagan & Teles, *supra* note 10 (“[Conservative policies on crime during this period] worked political magic by tapping into a key liberal weakness. Urban violent crime was rising sharply during the 1960s and liberals had no persuasive response beyond vague promises that economic uplift and social programs would curb delinquency.”); *see also* MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 2* (2005) (“In the face of the rise in crime (the murder rate alone almost doubled between 1963 and 1968), [liberals] initially maintained that the statistics were faulty—a response that if not incorrect was insensitive to the victims of crime as well as their friends and family, co-workers and neighbors. They also tended to dismiss those who pleaded for law and order as racists, ignoring blacks who were victimized more often than any other group and insulting Jews who had steadfastly supported the civil rights movement.”).

56. FLAMM, *supra* note 55, at 2.

extreme cases, liberals appeared not only to ignore crime, but explicitly to approve of it. Novelist Norman Mailer, for example, suggested that graffiti was not vandalism; it was artistic commentary on architecture.<sup>57</sup>

In response, conservatives insisted on incapacitation through more incarceration.<sup>58</sup> Conservative policy prescriptions of this period emphasized the importance of building new prison beds, increasing sentence lengths, and enacting truth-in-sentencing laws that limited parole.<sup>59</sup> Richard Nixon made the fight against crime one of the cornerstones of his 1968 and 1972 presidential election victories.<sup>60</sup> George H.W. Bush capitalized on the issue in his 1988 U.S. presidential campaign by launching *Willie Horton*, a campaign commercial criticizing Governor Michael Dukakis's support for weekend passes for convicted felons.<sup>61</sup> The commercial featured Willie Horton, a Massachusetts felon sentenced to life in prison who committed armed robbery and rape while on a weekend furlough.<sup>62</sup> In the minds of many Americans, Governor Dukakis's hapless response to the advertisement became emblematic of the liberal attitude towards crime in this chaotic era.<sup>63</sup>

As the conservative position became increasingly attractive to a

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57. NORMAN MAILER, *THE FAITH OF GRAFFITI* (1974) ("There was always art in a criminal act—no crime could ever be as automatic as a production process—but graffiti writers were somewhat opposite to criminals since they were living through the stages of the crime in order to commit an artistic act—what a doubling of the intensity of the artist's choice when you steal not only the cans but try for the colors you want, not only the marker and the color but the width of the tip or the spout, and steal them in double amounts so you don't run out in the middle of a masterpiece.").

58. KLEIMAN, *supra* note 47, at 13–14.

59. See generally Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, in *SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES* 43, 43–64 (Cyrus Tata & Neil Hutton eds., 2002).

60. Dagan & Teles, *supra* note 10; see also *Crime*, MUSEUM OF THE MOVING IMAGE, THE LIVING ROOM CANDIDATE: PRESIDENTIAL CAMPAIGN COMMERCIALS 1952–2012 (1968), <http://www.livingroomcandidate.org/commercials/1968> [<http://perma.cc/L6KG-LQSG>] (providing a video recording of Nixon's 1968 campaign commercial, *Crime*).

61. See *Willie Horton*, MUSEUM OF THE MOVING IMAGE, THE LIVING ROOM CANDIDATE: PRESIDENTIAL CAMPAIGN COMMERCIALS 1952–2012 (1988), <http://www.livingroomcandidate.org/commercials/1988> [<http://perma.cc/72UE-R7CG>] (providing a video recording of Bush's 1988 campaign commercial, *Willie Horton*).

62. *Id.*

63. See Eric Benson, *Dukakis's Regret: What the Onetime Democratic Nominee Learned From the Willie Horton Ad.*, N.Y. MAG., June 17, 2012, <http://nymag.com/news/frank-rich/michael-dukakis-2012-6/> [<http://perma.cc/CPR5-VNK6>] (providing an interview of Dukakis in which he describes the decision not to respond to the Willie Horton campaign commercial "the biggest mistake of my political career").

population that felt terrorized by crime, liberal political candidates began to adopt it.<sup>64</sup> Soon, increasing incarceration became a bipartisan cause.<sup>65</sup> In Texas, the liberal icon Ann Richards showed as much enthusiasm for prison building as did the Republican governor who served before her, Bill Clements, and the Republican governor who served after her, George W. Bush.<sup>66</sup> It is also worth noting that the first person to attempt to use the Willie Horton story against Michael Dukakis was not George H.W. Bush in the 1988 presidential election but, rather, Al Gore in the 1988 Democratic primary.<sup>67</sup> James Q. Wilson sardonically joked that “there are no more liberals on the crime and law-and-order issue . . . because they’ve all been mugged.”<sup>68</sup>

Next, as any public-choice theorist could have predicted, labor unions interested in maximizing the number of jobs for corrections officers joined in the cause.<sup>69</sup> The most notorious mandatory sentencing law in the country, California’s “three strikes” law, was supported by California’s powerful prison guard unions.<sup>70</sup> A federal “three strikes” law was also supported by President Bill Clinton.<sup>71</sup> Unsurprisingly, California’s prisons were

64. See FLAMM, *supra* note 55, at 183 (“The Dukakis debacle and the return of law and order to national politics convinced many Democrats that they would have to find a candidate with the record and rhetoric to challenge the Republicans on the issue. In 1992 he appeared and his name was Bill Clinton. . . . On the campaign trail against President Bush, Clinton made it clear that he was a ‘New Democrat’ who would not coddle criminals.”).

65. See *id.* at 184 (“In 1991, the Republicans had a 37–16 percent advantage on law and order according to a Time/CNN poll; by 1994, the Democrats had a 42–34 percent edge according to a CNN/USA Today Poll.”).

66. See Ann Richards, THE ECONOMIST, Sept. 28, 2006, <http://www.economist.com/node/7963556> [<http://perma.cc/A539-6ZYJ>] (noting that Richards “oversaw the biggest prison-building programme in American history”).

67. Richard L. Berke, *The 1992 Campaign: Political Week; In 1992, Willie Horton is Democrats’ Weapon*, N.Y. TIMES, Aug. 25, 1992, <http://www.nytimes.com/1992/08/25/us/the-1992-campaign-political-week-in-1992-willie-horton-is-democrats-weapon.html> [<http://perma.cc/X9VJ-6QPP>].

68. John Leo & Jack E. White, *Low Profile for a Legend: Bernhard Goetz, the Subway Gunman, Spurns Aid and Celebrity*, TIME, Jan. 21, 1985, at 54.

69. See Daniel DiSalvo, *The Trouble With Public Sector Unions*, NAT’L AFFAIRS 11–12 (Fall 2010), [http://www.nationalaffairs.com/doclib/20100918\\_DiSalvo\\_pdf\[1\].pdf](http://www.nationalaffairs.com/doclib/20100918_DiSalvo_pdf[1].pdf) [<http://perma.cc/DHW6-E53D>]; see generally JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA 44–80 (2011) (discussing the California Correctional Peace Officers Association and its political activities generally).

70. DiSalvo, *supra* note 69, at 12; see generally PAGE, *supra* note 69, at 117–33 (discussing the efforts of the California Correctional Peace Officers Association to enact and defend California’s “three strikes” law).

71. Gwen Ifill, *White House Offers Version of Three-Strikes Crime Bill*, N.Y. TIMES, Mar. 2, 1994, <http://www.nytimes.com/1994/03/02/us/white-house-offers-version-of-three-strikes-crime-bill.html> [<http://perma.cc/56W-7VNU>].

filled to almost double design capacity in 2011 when, in *Brown v. Plata*, the U.S. Supreme Court upheld a federal district court's order that California release prisoners to alleviate unconstitutional overcrowding.<sup>72</sup> Some analysts suggest that private prison companies, which benefitted financially from increased incarceration, played a role in the dramatic expansion of U.S. prisons.<sup>73</sup> However, there is no evidence that the popularity of private prison companies reflected their political influence rather than their affordability. On the other hand, it is clear that unionized labor forces in state facilities contributed to the popularity of the private companies.<sup>74</sup>

The most important thing to realize about this unique period is that historical exigencies—not ideological principles—were the driving force behind public policy decisions on criminal justice. There is nothing inherent in traditional conservative thinking that favors incarceration over other methods of handling offenders. In fact, because incarceration is expensive and restricts individual liberty, conservative ideology would favor incarceration only in the most extreme circumstances involving violent and habitual offenders. Moreover, personal responsibility is at the heart of conservative ideology, and prisoners receiving “three hots and a cot” while not paying restitution, child support, and other obligations hardly maximizes personal responsibility.

As we have seen, we have likely reached a point where the pendulum has swung too far on this issue. Traditional fiscal conservatives are concerned about escalating costs and long-term sustainability.<sup>75</sup> Libertarians are uncomfortable with the scope of punitive government and its intrusion into the lives of citizens.<sup>76</sup> Social conservatives see a link between the mass incarceration of

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72. *Brown v. Plata*, 131 S. Ct. 1910, 1923, 1947 (2011).

73. See, e.g., CHRISTOPHER HARTNEY & CAROLINE GLESMANN, NAT'L COUNCIL ON CRIME & DELINQUENCY, PRISON BED PROFITTEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. 12–14 (2012), available at [http://nccdglobal.org/sites/default/files/publication\\_pdf/prison-bed-profitteers.pdf](http://nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profitteers.pdf) [<http://perma.cc/RW42-RAT4>].

74. See Antje Deckert & William R. Wood, *Prison Privatization and Contract Facilities*, in CORRECTIONS 219, 224 (William J. Chambliss ed., 2011), available at [http://www.academia.edu/2911049/Prison\\_Privatization\\_and\\_Contract\\_Facilities](http://www.academia.edu/2911049/Prison_Privatization_and_Contract_Facilities) [<http://perma.cc/YH4D-MQMX>].

75. See Neil King Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL ST. J., June 21, 2013, <http://online.wsj.com/news/articles/SB10001424127887323836504578551902602217018> [<http://perma.cc/S59D-H94B>].

76. See, e.g., Radley Balko, *More Democracy, More Incarceration*, REASON, Oct. 25, 2010, <http://reason.com/archives/2010/10/25/more-democracy-more-incarcerat> [<http://perma.cc/MPT4-A3BE>].

young men and the breakdown of American families, especially lower-income families.<sup>77</sup>

The modern American politician who best combined fiscal conservatism, libertarianism, and social conservatism in an effective political platform was Ronald Reagan. As a politician, Reagan took pride in the reductions in incarceration that occurred on his watch. In his second gubernatorial inaugural address in California, for example, he boasted that California's "rehabilitation policies and improved parole system are attracting nationwide attention. Fewer parolees are being returned to prison than at any time in our history and our prison population is lower than at any time since 1963."<sup>78</sup> In 1971, he even attempted, albeit unsuccessfully, to close the infamous San Quentin Prison located north of San Francisco.<sup>79</sup>

#### IV. NEW SOLUTIONS BASED ON OLD WISDOM

As concern about incarceration has grown in conservative circles, so too have solutions to the problem grown in conservative states. In many ways, Texas, despite its international reputation as the premier "tough on crime" state, serves as a model for corrections reform.<sup>80</sup>

The transformation in Texas began in 2007 when the Legislative Budget Board estimated that it would cost taxpayers

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77. See, e.g., Mitch Pearlstein, *Crime, Punishment, and Rehabilitation*, NAT'L REV., Oct. 3, 2011, <http://www.nationalreview.com/nrd/articles/296415/crime-punishment-and-rehabilitation> [<http://perma.cc/B5ED-AXYW>]. Mike Pearlstein, a social conservative and Founder and President of Center of the American Experiment, points out that incarcerated men "are less attractive marriage partners, not just because they may be incarcerated, but because rap sheets are not conducive to good-paying, family-supporting jobs." *Id.* It is common sense that neighborhoods suffering from high incarceration rates also suffer a plague of single-parent homes and troubled children. This, in turn, leads to dysfunctional communities that are mistrustful of law enforcement. Most American children are taught they may always ask the police for help. In some American neighborhoods, however, children are taught never to engage with the police. See generally Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180 (2009), <http://www.sciencedirect.com/science/article/pii/S0047235209000208> [<http://perma.cc/HSU-4AGY>].

78. Governor Ronald Reagan, Second Inaugural Address (Jan. 4, 1971), available at <http://governors.library.ca.gov/addresses/33-Reagan02.html> [<http://perma.cc/EDX4-34EM>].

79. Bobby White, *San Quentin Seen as a Hot Property*, WALL ST. J., Mar. 18, 2009, <http://online.wsj.com/news/articles/SB123732681929562101> [<http://perma.cc/4K93-GKD3>].

80. For an interesting comparison of the successful sentencing model in Texas and the failing sentencing model in Texas, see Ashley Stebbins, *A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better (and Model) Position*, 62 BAYLOR L. REV. 873 (2010).

\$2 billion to build 17,000 prison beds to accommodate the expected increase in Texas's prison population by 2012.<sup>81</sup> Although Texas had a budget surplus that year, its legislators refused to spend the money; instead, they allocated a much smaller amount, approximately \$241 million, to expanding community-based supervision options such as probation, problem-solving courts, and evidence-based drug treatment.<sup>82</sup>

In the Texas Senate, Democrat John Whitmire, a Houston lawyer, rallied support for community-based supervision.<sup>83</sup> In the House of Representatives, Republican Jerry Madden, a West Point alumnus and Dallas businessman, led the charge.<sup>84</sup> Madden believed, and Whitmire agreed, that costly prison space ought to be reserved for the people "we're afraid of, not the ones we're mad at."<sup>85</sup> The Republican-majority legislature followed Madden's and Whitmire's lead, as did Republican Governor Rick Perry, who signed the reform legislation into law.<sup>86</sup> Indeed, at the beginning of the 2007 legislative session, Governor Perry had explicitly announced his support for corrections reform in his State-of-the-State Address: "[T]here are thousands of non-violent offenders in the system whose future we cannot ignore. Let's focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again."<sup>87</sup>

Texas's efforts to expand its community-based supervision options produced tangible—and exceptional—results. In 2011, for the first time in modern history, Texas closed a state prison.<sup>88</sup> Then, in 2013, it closed two more.<sup>89</sup> Most importantly, crime in

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81. COUNCIL OF STATE GOV'TS, JUSTICE CTR., JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE 3 (2009), *available at* <http://www.ncsl.org/portals/1/Documents/cj/texas.pdf> [<http://perma.cc/UC8J-6U47>].

82. John Buntin, *The Correctionists*, GOVERNING, <http://www.governing.com/poy/jerry-madden-john-whitmire.html> [<http://perma.cc/7CGQ-9ENS>] (last visited May 24, 2014).

83. *Id.*

84. *Id.*

85. See Vikrant P. Reddy & Marc A. Levin, *The Conservative Case Against More Prisons*, THE AM. CONSERVATIVE, Mar. 6, 2013, <http://www.theamericanconservative.com/articles/the-conservative-case-against-more-prisons/> [<http://perma.cc/EN24-32WU>]; see also Marc A. Levin, *Whitmire, Madden Lay Out Viable Alternative to More Prisons*, TEX. PUB. POLICY FOUND. (Jan. 30, 2007), <http://www.texaspolicy.com/press/levin-whitmire-madden-lay-out-viable-alternative-more-prisons> [<http://perma.cc/A2JW-RVSD>].

86. Dagan & Teles, *supra* note 10.

87. Governor Rick Perry, State-of-the-State Address (Feb. 7, 2007), *available at* <http://governor.state.tx.us/news/speech/29/> [<http://perma.cc/KNA6-M6TW>].

88. Grissom, *supra* note 44.

89. Elizabeth Koh, *TDCJ to Close Two Privately Run Jails in August*, TEX. TRIB., June 11,



Texas has continued to decline. As of this writing, crime rates in Texas are lower than they have been since 1968.<sup>90</sup> Moreover, crime rates in Texas are falling faster than crime rates in virtually every other large state in America.<sup>91</sup>

Texas's success is just the tip of the iceberg. Several other "red states" have passed comparable reform packages proposed by conservative legislators and signed into law by conservative governors. For example, Georgia, under Republican Governor Nathan Deal, passed a sweeping corrections reform bill in 2012.<sup>92</sup> Like Governor Perry, Governor Deal showed a particular interest in rehabilitating drug offenders and framed his arguments in terms of taxpayer resources: "If we fail to treat the addict's drug addiction, we haven't taken the first step in breaking the cycle of crime . . . a cycle that destroys lives and wastes taxpayer resources."<sup>93</sup>

Other states that have enacted major reforms led by conservative governors include Ohio,<sup>94</sup> Pennsylvania,<sup>95</sup> and South Dakota.<sup>96</sup> This year alone, important reform packages were passed and signed into law in Alaska,<sup>97</sup> Idaho,<sup>98</sup> and Mississippi.<sup>99</sup> In all cases, conservative politicians have led the

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2013, <http://www.texastribune.org/2013/06/11/tdcj-shutters-private-jails/> [<http://perma.cc/6ZDF-QDC7>].

90. *Public Safety in Texas*, PEW CHARITABLE TRUSTS (Jan. 14, 2013), <http://www.pewstates.org/research/state-fact-sheets/public-safety-in-texas-85899432273> [<http://perma.cc/UR2D-FG3Z>].

91. See Vikrant P. Reddy, *Texas Crime Rate Falling Faster Than the National Crime Rate*, RIGHT ON CRIME (Sept. 24, 2012), <http://www.rightoncrime.com/2012/09/post-needs-editing-department-of-justice-focuses-on-victims/> [<http://perma.cc/Y73M-7KJ5>].

92. H.B. 1176, 151st Gen. Assemb., Reg. Sess. (Ga. 2012). For a brief summary of the reforms, see PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, 2012 GEORGIA PUBLIC SAFETY REFORM: LEGISLATION TO REDUCE RECIDIVISM AND CUT CORRECTIONS COSTS 6–9 (2012), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_Georgia\\_Safety\\_Reform.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Georgia_Safety_Reform.pdf) [<http://perma.cc/H6GV-CDFU>].

93. Governor Nathan Deal, State-of-the-State Address: Charting the Course to Prosperity (Jan. 10, 2012), available at <http://gov.georgia.gov/press-releases/2012-01-10/gov-deals-state-state-address-charting-course-prosperity> [<http://perma.cc/4A4R-3Y62>].

94. H.B. 86, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

95. S.B. 100, 2011–2012 Gen. Assemb., Reg. Sess. (Pa. 2012); H.B. 135, 2011–2012 Gen. Assemb., Reg. Sess. (Pa. 2012).

96. S.B. 70, 2013 Legis. Assemb., 88th Sess. (S.D. 2013). For a brief summary of the reforms, see PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, SOUTH DAKOTA'S 2013 CRIMINAL JUSTICE INITIATIVE 7–9 (2013), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2013/PSPP\\_SD\\_2013\\_Criminal\\_Justice\\_Initiative\\_.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_SD_2013_Criminal_Justice_Initiative_.pdf) [<http://perma.cc/VG7F-NLVZ>].

97. S.B. 64, 28th Leg. (Alaska 2013).

98. S. 1357, 63rd Leg., 1st Reg. Sess. (Idaho 2014).

99. H.B. 585, 2014 Reg. Sess. (Miss. 2014).

reform efforts.<sup>100</sup> Each state is different, but three major policy ideas have been adopted in every state: performance-incentive funding for corrections institutions, swift and certain sanctions for criminal offenders, and the introduction of problem-solving courts that are distinct from traditional adversarial courts.

#### A. Performance-Incentive Funding

Perhaps the most significant criminal justice reform idea to receive conservative backing is performance-incentive funding. This idea is based on the conservative insight that prison funding should be based partly on performance, not just population numbers. Performance can be measured in several ways including whether treatment is obtained, whether education is received, and whether restitution is paid to victims. Above all, though, performance should be measured in terms of recidivism. A prison that can boast a low recidivism rate among its inmates is doing something right by helping to preserve public safety and is the kind of facility towards which we ought to direct public resources.

Arizona presents a good example of how performance-incentive funding works in practice. In 2008, Arizona instituted a policy that allows a portion of state savings from reduced incarceration to be redirected to counties that pursue policies that divert offenders from prison, reduce recidivism, and ensure victim restitution.<sup>101</sup> The policy helps recipient counties implement proven strategies for better supervising probationers.<sup>102</sup> Between 2008 and 2010, the number of Arizona probationers revoked to prison fell twenty-eight percent and the number of new felony convictions among Arizona probationers fell thirty-one percent.<sup>103</sup>

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100. See, e.g., *SB 64 Alaska Senate Bill*, OPENSTATES.ORG, <http://www.openstates.org/ak/bills/28/SB64/> [<http://perma.cc/3WGW-2HZQ>] (last visited May 24, 2014) (showing sponsor as Senate Judiciary Committee); *S. 1357 Idaho Senate Bill*, OPENSTATES.ORG, <http://www.openstates.org/id/bills/2014/S1357/> [<http://perma.cc/7X5C-CP3W>] (last visited May 24, 2014) (showing sponsor as Senate Judiciary and Rules Committee); *H.B. 585 Mississippi House Bill*, OPENSTATES.ORG, <http://www.openstates.org/ms/bills/2014/HB585/> [<http://perma.cc/S7AW-SMNS>] (last visited May 24, 2014) (showing Republican sponsors).

101. S.B. 1476, 48th Leg., 2nd Gen. Assemb. (Ariz. 2008).

102. PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, *THE IMPACT OF ARIZONA'S PROBATION REFORMS 2* (Mar. 2011), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2011/PSPP\\_Arizona\\_probation\\_brief\\_web.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/PSPP_Arizona_probation_brief_web.pdf) [<http://perma.cc/849G-DKPY>].

103. *Id.* at 1.

In Ohio, a similar program, Reasonable and Equitable Community and Local Alternatives to the Incarceration of Minors (RECLAIM), has also been tremendously successful.<sup>104</sup> The recidivism rate for moderate-risk youth in Ohio state lockups fell from fifty-four percent to twenty-two percent under RECLAIM.<sup>105</sup> For conservatives who have long emphasized that incentives affect the behavior of both individuals and systems, the success of these policies is unsurprising.

### *B. Swift and Certain Sanctions*

Another especially promising practice consistent with traditional conservative insight is HOPE, a probation program that is organized around the principles that swiftness and certainty are more important for effective punishment than is severity. HOPE, which stands for Hawaii's Opportunity Probation with Enforcement, began in Honolulu under the leadership of Justice Steven Alm, a former federal prosecutor, and it is beginning to spread across the mainland.<sup>106</sup>

HOPE is partly rooted in the thinking of the eighteenth-century Italian jurist Cesare Beccaria, who is widely regarded as the first criminologist in Western Civilization.<sup>107</sup> Beccaria's 1764 treatise, *On Crimes and Punishments*, was known to and read by many of the founding fathers of the United States.<sup>108</sup> Beccaria made several arguments in the treatise that many of the founding fathers made and that many modern conservatives continue to make, such as the importance of a right to bear arms.<sup>109</sup>

One of Beccaria's most important arguments was that criminal offenders respond better to immediate and certain punishments

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104. PEW CHARITABLE TRUSTS, STATE-LOCAL PARTNERSHIP IN OHIO CUTS JUVENILE RECIDIVISM, COSTS (2013), *available at* [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2013/PSPP-State-Local-Partnership-in-Ohio-Cuts-Juvenile-Recidivism-Costs.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP-State-Local-Partnership-in-Ohio-Cuts-Juvenile-Recidivism-Costs.pdf) [<http://perma.cc/WQ4H-4J43>].

105. CHRISTOPHER T. LOWENKAMP & EDWARD J. LATESSA, EVALUATION OF OHIO'S RECLAIM FUNDED PROGRAMS, COMMUNITY CORRECTIONS FACILITIES, AND DYS FACILITIES 25 tbl.10 (Aug. 17, 2005), *available at* [http://www.uc.edu/content/dam/uc/ccjr/docs/reports/project\\_reports/Final\\_DYS\\_RECLAIM\\_Report\\_2005.pdf](http://www.uc.edu/content/dam/uc/ccjr/docs/reports/project_reports/Final_DYS_RECLAIM_Report_2005.pdf) [<http://perma.cc/7AC2-J5PJ>].

106. KLEIMAN, *supra* note 47, at 34–48.

107. ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT 39–44 (2014).

108. *Id.* at 39.

109. *See id.*

than they do to tenuous but severe punishments.<sup>110</sup> Using this insight, the HOPE Court applies swift, sure, and commensurate sanctions to promote compliance with drug tests and probation terms. For example, a judge might inform a drug offender that, rather than be prosecuted, the offender will be assigned a color.<sup>111</sup> The offender will have to call the court daily to learn whether his color has been randomly selected.<sup>112</sup> If his color has been selected, the offender will have to report to the court and pass a drug test.<sup>113</sup> If he fails to pass the drug test, he will have to spend an immediate stint in jail.<sup>114</sup> At first, the stint will be short—often just a weekend. However, if the offender continues to test positive for drugs, his sanctions will become more onerous.<sup>115</sup> In this way, lengthy and protracted trials are virtually eliminated in favor of immediate sanctions.<sup>116</sup>

HOPE has decreased substance abuse and probation failures in Hawaii by more than two-thirds.<sup>117</sup> Moreover, HOPE has helped Hawaii identify which of its drug offenders most desperately require treatment. The twenty to thirty percent of HOPE probationers who cannot pass the random drug tests suffer from serious chemical addictions.<sup>118</sup> Hawaii can prioritize using its limited treatment resources to help these offenders.

HOPE works because swift and certain sanctions are more effective responses to criminal behavior than are severe sanctions applied only after multiple probation violations. An eighteenth-century treatise is hardly necessary to explain why. A parent disciplining a child understands the concept more intuitively than does a professor. HOPE-style programs are sprouting across the country. Fort Worth, Texas, for example, has launched a comparable program called Supervision With Intensive enForcemenT (SWIFT).<sup>119</sup> Whatever it is called and wherever it

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110. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 63 (Richard Bellamy ed., Cambridge Univ. Press 1995).

111. KLEIMAN, *supra* note 47, at 40.

112. *Id.*

113. *Id.*

114. *Id.* at 39.

115. *Id.* at 37.

116. *Id.*

117. ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 18 (Dec. 2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> [<http://perma.cc/WUH8-UNMM>].

118. See *id.* at 33.

119. Vikrant P. Reddy, *SWIFT Sanctions Can Change Adult Probation in Tarrant County*, TEX. PUB. POLICY FOUND. (Apr. 12, 2012), <http://www.texaspolicy.com/>

is located, HOPE has generated tremendous admiration among conservative reformers.

### *C. Problem-Solving Courts*

Accountability courts, sometimes called problem-solving courts, are specialized courts in which a judge oversees the supervision and treatment of the offender.<sup>120</sup>

A mental health court, for example, provides certain offenders with appropriate treatment rather than traditional sentences.<sup>121</sup> Importantly, mental health courts are relatively inexpensive to create in comparison to their potential benefits. “Merrill Rotter, the Medical Director and Co-Project Director of the Bronx Mental Health Court, notes that some of the programs ‘cost as little as \$150,000 while others cost multiples of that.’”<sup>122</sup>

A RAND Institute study of mental health courts found that “the leveling off of mental health treatment costs and the dramatic drop in jail costs yielded a large cost savings.”<sup>123</sup> In the Washoe County Mental Health Court in Reno, Nevada, for instance, the 2007 class of 106 graduates went from 5,011 jail days one year prior to mental health court to 230 jail days one year after, a ninety-five percent reduction.<sup>124</sup> The overall cost to the system was reduced from \$566,243 one year prior to the institution of mental health courts to \$25,290 one year after.<sup>125</sup>

In Santa Barbara County in California, an evaluation of mental health courts found that the participants averaged fewer “jail days after treatment than before, with a greater reduction in

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center/effective-justice/opinions/swift-sanctions-can-change-adult-probation-tarrant-county [http://perma.cc/JWR3-Z8FF].

120. See generally Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POLY 125, 125–38 (2001) (providing background information on problem-solving courts).

121. See generally Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 L. & PSYCHIATRY 457, 457–58 (2001) (providing background information on mental-health courts).

122. Marc A. Levin & Vikrant P. Reddy, *Peach State Criminal Justice: Controlling Costs, Protecting the Public*, GA. PUB. POLY FOUND. (Feb. 16, 2012), [http://www.georgiapolicy.org/peach-state-criminal-justice-controlling-costs-protecting-the-public-2/#ff\\_s=fKu1Z](http://www.georgiapolicy.org/peach-state-criminal-justice-controlling-costs-protecting-the-public-2/#ff_s=fKu1Z) [http://perma.cc/F2UB-QMUU] (citing Interview with Merrill Rotter, Medical Director, Bronx Mental Health Court (Jan. 13, 2009)).

123. M. SUSAN RIDGELY ET AL., RAND INFRASTRUCTURE, SAFETY & ENV'T, JUSTICE, TREATMENT, AND COST: AN EVALUATION OF THE FISCAL IMPACT OF ALLEGHENY COUNTY MENTAL HEALTH COURT xi (2007).

124. Interview with Julie Clements, Pretrial Services Officer, Washoe County Mental Health Court (Jan. 13, 2009).

125. *Id.*

jail days noted for participants in the [mental health court] than for participants in [the traditional judicial system].”<sup>126</sup> The *American Journal of Psychiatry* reported that “participation in the mental health court program was associated with longer time without any new criminal charges or new charges for violent crimes.”<sup>127</sup>

Drug courts are another proven alternative to incarceration. They combine intensive judicial oversight of low-level drug offenders with mandatory drug testing and escalating sanctions to achieve results.<sup>128</sup> According to the National Association of Drug Court Professionals, the average recidivism rate for offenders who complete a drug court program is between four percent and twenty-nine percent.<sup>129</sup> In contrast, the average recidivism rate for offenders who do not participate in a drug court program is a whopping forty-eight percent.<sup>130</sup> Similarly, the Government Accountability Office reports that re-arrest rates among drug-court participants are ten to thirty percentage points below re-arrest rates in a comparison group.<sup>131</sup>

Drug courts can be exceptionally cost-effective. Some drug courts cost less than \$3,000 per participant, and their estimated net savings, taking into account both reduced corrections spending and avoided victims costs, average \$11,000 per participant.<sup>132</sup>

Mental health courts and drug courts—along with other problem-solving courts such as Veterans’ Courts<sup>133</sup> and Prostitution Diversion Courts<sup>134</sup>—exist because the standard

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126. MERITH COSDEN ET AL., EVALUATION OF THE SANTA BARBARA COUNTY MENTAL HEALTH TREATMENT COURT WITH INTENSIVE CASE MANAGEMENT 4 (2004).

127. Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1395 (2007).

128. KLEIMAN, *supra* note 47, at 39–40.

129. *Do Drug Courts Work?*, SUPERIOR COURT OF CAL. DRUG COURT SERVS., <http://www.alameda.courts.ca.gov/dcs/facts2.html> [<http://perma.cc/C8ZR-L4ZN>] (last visited May 24, 2014).

130. *Id.*

131. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 45 (2005), available at <http://www.gao.gov/new.items/d05219.pdf> [<http://perma.cc/MK9E-HMAA>].

132. CAL. ADMIN. OFF. OF THE COURTS, CALIFORNIA DRUG COURT COST ANALYSIS STUDY 3 (2006), [http://www.courts.ca.gov/documents/cost\\_study\\_research\\_summary.pdf](http://www.courts.ca.gov/documents/cost_study_research_summary.pdf) [<http://perma.cc/9CHG-ADHA>].

133. See generally MARC A. LEVIN, TEX. PUB. POLICY FOUND., VETERANS’ COURTS (2009).

134. See generally Tristan Hallman, *Texas Bill on Prostitution Diversion Modeled on Dallas County*, DALL. NEWS, June 5, 2013, <http://www.dallasnews.com/>

adversarial litigation model is not always optimal. The model may be effective for civil justice matters and for determining whether a defendant is guilty of a crime, but it has limited efficacy in addressing criminality.

## V. CONCLUSION

Prisons, of course, are a necessary part of any society. In *The Scarlet Letter*, Nathaniel Hawthorne observed that “[t]he founders of a new colony, whatever Utopia of human virtue and happiness they might originally project, have invariably recognized it among their earliest practical necessities to allot a portion of the virgin soil . . . as the site of a prison.”<sup>135</sup> Conflict and crime will always exist. So too will prisons.

Prisons, however, are not a source of pride. Conservative philosophy recognizes that an unusually high number of prison cells indicates a society with too much crime, too much punishment, or both. This understanding was set aside in the 1960s to deal with perceived emergency conditions, but the bottom line is that prisons evince nothing about conservative political and legal principles. First principles in conservative thought counsel skepticism of all government programs—including prisons.

All conservatives—fiscal conservatives, libertarians, and social conservatives—are now returning to first principles. Perhaps the key indicator of this is the robust language in the 2012 Republican Platform:

Government at all levels should work with faith-based institutions that have proven track records in diverting young and first time, non-violent offenders from criminal careers, for which we salute them. Their emphasis on restorative justice, to make the victim whole and put the offender on the right path, can give law enforcement the flexibility it needs in dealing with different levels of criminal behavior. We endorse State and local initiatives that are trying new approaches to curbing drug abuse and diverting first-time offenders to rehabilitation.<sup>136</sup>

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news/politics/state-politics/20130605-texas-bill-on-prostitution-diversion-modeled-on-dallas-county.ece [http://perma.cc/GK96-T36L].

135. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 33 (Dover Publ'ns 1994) (1850).

136. REPUBLICAN PARTY PLATFORM 2012: WE BELIEVE IN AMERICA 38 (2012), *available at* <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> [http://perma.cc/M6U7-FUNM].

Conservatives know that there are methods other than incarceration for holding offenders accountable. These methods can improve public safety and increase the likelihood that victims receive restitution. Utilizing these methods does not mean making excuses for criminal behavior; it simply means “thinking outside the cell” when it comes to punishment and accountability.