
A CRIMINAL LAW BASED ON HARM ALONE: THE STORY OF CALIFORNIA CRIMINAL JUSTICE REFORM

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For many criminal justice reformers, the Holy Grail of change would be a criminal system that ends the war on drugs; punishes minor property and public order offenses without incarceration (or does not handle them criminally at all); and reserves prison mainly for violent offenders. What few appreciate is that California over the last nine years has done exactly that, and the results are breathtaking in their magnitude and suddenness: from 2011 to 2019, California released 55,000 people convicted mostly of nonviolent offenses (a quarter to a third of all California prisoners) and has been declining imprisonment—which often means declining arrest and prosecution altogether—for tens of thousands more who likely would have been imprisoned a decade ago. The changes happened piecemeal; this Article is the first to put the whole picture together. But we are now in a position to describe and evaluate the whole.

We come to three conclusions. First, California criminal justice reform reduced incarceration without increasing violence, but in so doing increased property crime, public drug use, street-level disorder, and likely homelessness to such an extent as to change the texture of everyday life in some California cities, including Los Angeles and San Francisco. Second, these changes alter the relationship between individual and state substantially enough to constitute a new social contract: California has gone farther than any other American state toward a society based on John Stuart Mill's harm principle.

Third, this array of costs and benefits is complex and nuanced enough that it is not irrational or otherwise normatively illegitimate for someone to

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think them either justice-enhancing or -diminishing, good for human welfare or bad for it. But what unequivocally redeems California's new policies for California are their democratic credentials: they were accomplished through a series of elections over multiple years at multiple levels of government with a high degree of public deliberation. Criminal justice democratizers and strong proponents of federalism should endorse what California has done as a matter of political self-determination. But they might rationally not want the same thing for their own states.

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INTRODUCTION

Criminal justice reform has been a leading issue in American politics for a decade or more.¹ The Holy Grail of reform for many advocates would

1. As President Obama remarked in a speech about criminal justice reform in 2015: “[W]hen, let’s face it, it seems like Republicans and Democrats cannot agree on anything . . . a lot of them agree on this.” Barack Obama, President of the U.S., Remarks by the President at the NAACP Conference (July 14, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/JS9J-3QYN>]; see Stephanie Clifford, *From the Bench, a New Look at Punishment*, N.Y. TIMES (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html> [<https://perma.cc/F3T9-JKA4>]; Carl Hulse, *Unlikely Cause Unites the*

be a criminal system that ends the war on drugs, legalizing marijuana and treating other drug use as a matter of private liberty or public health rather than as a matter of criminal wrongdoing; that rejects incarceration as a response to minor property and public order offenses (or, again, takes an altogether noncriminal approach to such offenses); and that reserves prison mainly for violent offenders, sex offenders, and perhaps drug dealers. What few appreciate is that, between 2011 and 2019, California did just that, and we are now in a position to evaluate the early results.

The process by which California so radically altered its criminal system is a case study in the peculiarities of contemporary American government. Jumbled together in it was federal judicial review, direct democracy via state ballot initiatives, representative democracy via state legislation, and an array of local elections, local funding decisions, and local enforcement decisions. There was practical and ideological pressure in a certain direction but no master plan; no one had control of all the pieces and likely no one anticipated how they would all fit together. But to summarize in broad strokes the discussion in Part I, below, change began after four decades of swelling incarceration rates and two decades of prison litigation with a 2011 U.S. Supreme Court case affirming that California prison overcrowding constituted cruel and unusual punishment and that mass prisoner release was necessary to remedy the constitutional violation.² The democratic elements of state government then immediately pivoted to reform, with an act of the state legislature in 2011³ and a popular referendum in 2014⁴ that jointly reduced many drug, property, and public order crimes from felonies to misdemeanors, reduced sentences for those crimes, and released many prisoners convicted of those crimes. Notably, the drugs in question were not just marijuana; they included cocaine, heroin, and methamphetamine. The enforcement wing of state government—local mayors, police, and prosecutors—then got involved, wielding their discretionary powers over arrest and prosecution to effectively decriminalize the drug, theft, and public order offenses that state law and public opinion had by then declared to be too minor for felony incarceration. This enforcement-based “decriminalization” depended a great deal on locality, but it is not too much to say that, in some neighborhoods, California has effectively legalized drugs.

Left and the Right: Justice Reform, N.Y. TIMES (Feb. 18, 2015), <https://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html> [<https://perma.cc/8EMJ-8X35>].

2. See *Brown v. Plata*, 563 U.S. 493, 545 (2011).
3. Public Safety Realignment Act (A.B. 109), 2011 Cal. Stat. 271.
4. Safe Neighborhoods and Schools Act (Proposition 47) (2014).

The results are breathtaking in their magnitude and suddenness: in the space of five years (2011 to 2016), 55,000 people imprisoned for mostly nonviolent offenses literally walked out of California's jails and prisons—26% of the state's total prison population at its peak.⁵ Tens of thousands more nonviolent offenders never walked in, as crimes that would have been punished harshly a decade earlier came to earn a slap on the wrist in some localities and no arrest at all in others. The impact extends far beyond the prison walls—in a sense, far beyond the criminal justice system. The texture of life in California's public spaces has changed. The scope of acceptable behavior has expanded; the ways in which strangers can behave around and toward one another, and in and toward shared spaces, has been altered, and thus the relationship between individual and state is altered. In short, California has a new social contract.⁶

Our first goal in this Article is just to describe concretely what happened in those years of California criminal justice reform. No published work has done that before. This Article is the first to put the pieces of the reform puzzle together.

Our second goal is to articulate the terms of California's new social contract. We conclude that California over the last decade has gone farther than any other American state toward a society based on John Stuart Mill's harm principle. Mill wrote: "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."⁷ California's version of this principle is not quite like Mill's, insofar as Mill was concerned with property rights as well as bodily rights, and focused as much on the coercive force of public opinion as on the operation of government, while in California criminal justice today, "harm" is understood mainly in terms of violence, health, or physical hazard—that is, in bodily terms. But Mill's principle has never been an ordinary item of philosophy, restricted in its meaning to that given it in Mill's text, restricted in its followers to Mill's readers. The principle

5. MAGNUS LOFSTROM, MIA BIRD & BRANDON MARTIN, PUB. POLICY INST. OF CAL., CALIFORNIA'S HISTORIC CORRECTIONS REFORMS 3, 6 (2016).

6. See *Social Contract*, ENCYCLOPEDIA BRITANNICA (Aug. 6, 2019), <https://www.britannica.com/topic/social-contract> [<https://perma.cc/Y2GC-L3L3>] (defining the social contract as "an actual or hypothetical compact or agreement between the ruled and their rulers, defining the rights and duties of each"); see also JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 15 (Ernest Rhys ed., G. D. H. Cole trans., E. P. Dutton & Co. 2d reprt. ed. 1920) (1762) ("Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.").

7. JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

preceded Mill,⁸ and its life in the century-and-a-half since Mill wrote has always been defined by a discourse among adherents about what sorts of acts are sufficient in kind and magnitude to constitute “harm.”⁹ The principle is less the possession of a particular philosopher than it is an emanation of a certain kind of civilization. It is in that sense that California has adopted Mill’s principle. The direction of change in California is Mill’s. The underlying attitudes are Mill’s, at least with respect to state force (perhaps not as to the tyranny of opinion). And just as Mill argued that a society based on the harm principle would both reflect and foster virtues of toleration, California is moving toward a political culture in which it is a mark of good character not to object to what others do in public spaces provided they do not cause bodily harm. It might perhaps be more accurate to say, not that California has adopted *Mill’s* harm principle, but that California has joined a current of thought to which Mill most unforgettably gave voice.

Our third goal in this Article is to think through California’s transformation normatively. Our conclusion is that the moral stakes in California criminal justice reform are complex and nuanced enough that it is not irrational or otherwise normatively illegitimate for someone to think them either justice-enhancing or -diminishing, good for human welfare or bad for it—at least, no such verdict should be seen as obvious. But what unequivocally redeems California’s choices *for* California is their democratic credentials. Notwithstanding the fact that the opening shot was a U.S. Supreme Court decision, every subsequent step has been highly responsive to voters, and there have been many such steps—many instances of voters at different levels of government engaging in serious public deliberation and making their voices heard at the polls. In other words, if one focuses on the first-order normative question of whether California’s transformation has been, on balance, justice- and welfare-enhancing, there

8. In 1789, seventy years before Mill’s essay, the revolutionary French National Assembly adopted the Declaration of the Rights of Man and of the Citizen. Translated, Article Four states: “Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has for its only limits those that secure to the other members of society the enjoyment of these same rights. These limits can be determined only by law.” Article Five states: “The law has the right to forbid only such actions as are injurious to society. Nothing can be forbidden that is not interdicted by the law, and no one can be constrained to do that which it does not order.” FRANK MALOY ANDERSON, *THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789–1907*, at 15, 59–60 (1967). The comparison between the Declaration and Mill’s harm principle comes from WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 74–78 (2011).

9. See, e.g., 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 31–36 (1984) (limiting the harm principle to “setbacks of interests that are wrongs, and wrongs that are setbacks to interest”); H.L.A. HART, *LAW, LIBERTY AND MORALITY*, at vi, 4–6 (1963) (defending and developing Mill’s principle in a storied debate with Lord Patrick Devlin over the criminalization of homosexual sex).

are good arguments on both sides. If one focuses on the second-order normative question of whether California's transformation reflects the will of a democratic people, the answer is a clear yes. Democratizers in criminal justice and other strong proponents of federalism should therefore endorse what California has done as a matter of political self-determination. But they might rationally not want the same thing for their own polities.

Pulling these threads together, our thesis is this: California's social contract now reflects the conviction that a high degree of homelessness, drug use, and petty theft—a high degree of what used to be called or associated with “vagrancy”—is a price worth paying for decarceration. Put more abstractly, California's social contract now accommodates a high degree of public disorder as the price worth paying for a high degree of personal liberty. This tradeoff should be endorsed *for* California because it reflects Californians' democratic will. But whether other states wish to follow California's lead will depend on whether they want to similarly amend their social contracts.

Part I will take up the descriptive question of how criminal justice reform unfolded in California. Part II turns to the normative question of how we should evaluate reform. The Conclusion examines what reform means for California's social contract.

In multiple ways, this Article reflects ideas developed elsewhere in the work of Joshua Kleinfeld. While our aim here is to have a light touch on matters of theory, it is worth taking note of this larger theoretical backdrop at the outset. Kleinfeld has propounded a theory under which criminal law

has a distinctive role to play in the social world, a function that gives it a different center from other areas of law, because criminal law is the primary legal institution by which a community reconstructs the moral basis of its social order, its ethical life, in the wake of an attack on that ethical life.¹⁰

This theory, “reconstructivism,” focuses on the ways in which crime and punishment reflect and define a society's moral culture: where an act is “of such a nature as to attack the values on which social life is based,” societies respond with measures of condemnation and control designed to reaffirm or “reconstruct” their “violated normative order.”¹¹ A theft, for example, performatively denies rights of property; punishing theft reaffirms rights of

10. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1489 (2016).

11. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1457–58 (2017).

property. An assault performatively denies rights of physical security; punishing assault shows that society's commitment to physical security is undimmed. "To use the clichéd but helpful metaphor, where crime tears the social fabric, criminal law's distinctive function is to restitch it."¹²

An implication is that criminal law is the repository of those normative commitments whose systematic violation would undo a society's form of life. Criminal law thus has something to teach us about "the terms of the social contract."¹³ We punish that which, if unpunished, would change the kind of society we have. That is sometimes a good thing, sometimes a bad one, but always instructive regarding who we are.

Societies particularly reveal their fundamental norms in deciding whom to *exclude*. "Punishment is not just about hard treatment or control; it is also about *social membership*. Punishment is among other things an instrument of communal self-definition and social exclusion, an element in an ongoing societal conversation about the terms of social life."¹⁴ From formal exile, ostracism, and death, to civil invisibility, the small-scale banishment of being ushered out of public spaces, and above all the banishment implicit in the very nature of imprisonment, the history of punishment is filled to the brim with formulas of exclusion. Exclusion tells us when a society is so unwilling to tolerate a certain form of behavior that it becomes unwilling to live with the kind of *person* who behaves in the prohibited way, crossing the line from act to actor, from condemning and discouraging to, in a sense, withdrawing citizenship. These acts of exclusion-for-wrongdoing thus delimit with particular clarity the terms on which a society's social life is based—its social contract.

It follows as a matter of scholarly methodology that one can, as it were, "read" a part of a society's social contract from its practices of punishment and especially its practices of exclusionary punishment: "The central methodological idea . . . is that our existing social practices and institutions imply or reflect certain normative commitments—that values are *immanent* in our social practices and institutions—and that one important philosophical project in the law is to bring those immanent normative commitments to light."¹⁵ Bringing those values to light is also to "expose them to a distinctive kind of critique,"¹⁶ that is, critique from an internal point of view, or at least critique only after understanding them from an internal point of view. That

12. *Id.* at 1458.

13. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 933, 941 (2016).

14. *Id.* at 941.

15. Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1151 (2013).

16. *Id.*

is exactly our project in this Article: we examine California's practices of punishment, particularly with respect to exclusion, to bring to light and expose to question the changing terms of California's social contract.

Above all, this Article carries forward the project of radical democracy in criminal justice reform set forth in Kleinfeld's *Manifesto of Democratic Criminal Justice*,¹⁷ *Three Principles of Democratic Criminal Justice*,¹⁸ and *White Paper of Democratic Criminal Justice*.¹⁹ If criminal law is to reconstruct a culture's violated moral order, it must have a democratic political organization; it must be authored by "We the People."

"Democracy" as we use that term in the movement to democratize criminal justice . . . submits the law and administration of criminal justice to public deliberation and to the values embedded in the way we live together as a culture, rather than treating it mainly as a tool of social management under the control of our institutional bureaucracies; . . . [It is] given into the hands of local communities as an instrument of collective self-determination and cultural self-creation Our conception of democracy is thus antibureaucratic, deliberative, and participatory under a constitutional structure. Or to put all that in as few words as I can muster: the democratization movement stands for the "We the People" principle in criminal justice.²⁰

For a democratizer, the best normative argument in favor of a society's criminal law, barring exceptional cases, is that the law was arrived at through genuinely democratic means and substantively reflects the will of the people whose society it helps define. Our normative shift in this Article from the question, "Is California criminal justice reform good or bad for justice and welfare?" to "Does California criminal justice reform reflect Californians' democratic will?" reflects this larger normative backdrop. One might agree or disagree with what California has done, but it is truly Californian, and that is typically the most important thing that can be said of any criminal law.

Indeed, California criminal justice reform shows just how radical and interesting true democracy in criminal justice can be. For those of us who prize democratization in criminal law, one of the reasons we prize it so is our faith in democracy's transformative potential. California's example now

17. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017).

18. Kleinfeld, *supra* note 11.

19. Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthy Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R. A. Duff, Albert W. Dzur, Thomas F. Geraghty, Adriaan Lanni, Marah Stith McLeod, Janice Nadler, Anthony O'Rourke, Paul H. Robinson, Jonathan Simon, Jocelyn Simonson, Tom R. Tyler & Ekow N. Yankah, *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017) [hereinafter *White Paper*].

20. Kleinfeld, *supra* note 17, at 1397.

joins the growing body of evidence demonstrating that potential. Others not presently in the democratization camp, but who also think American criminal law stands in urgent need of reform, should consider this evidence.

A final note: This Article was mostly written in 2019 and early 2020, before the 2020 pandemic led California and other states to release prisoners in order to reduce infection rates, and before the 2020 protest movements touched off by the deaths of George Floyd and other Black Americans. The events of 2020 are likely to increase the decarceration and decriminalization trends to which California was already committed in 2019. The descriptive portion of this Article thus presents a snapshot of California criminal justice reform just before the explosive events of 2020. The story isn't over, but its direction was clear before COVID-19 and before George Floyd's death.

I. FROM PRISON OVERCROWDING TO A NEW SOCIAL CONTRACT

Part I is a narrative of how California criminal justice reform unfolded, and the narrative presents a scholarly dilemma. To tell the story requires empirical claims that in some cases have not been demonstrated according to the extraordinarily rigorous standards of contemporary empirical social science. To insist on those standards would leave the story in essential respects untold; not to insist on them reduces the certainty of our conclusions. Our view is that, in these circumstances, it is reasonable to sacrifice some empirical rigor, appealing to available evidence and intuition to make a good causal argument, while admitting that further empirical work could revise the argument. This then is our disclaimer. Some of our causal claims involve jumps, but we think they are plausible jumps.

A. MASS INCARCERATION AND COURT-ORDERED MASS RELEASE: 1970–2011

In the 1970s, like the rest of the country, California began incarcerating more offenders and doling out longer sentences. In the thirty years between 1980 and 2010 alone, California increased its prison population by 572%.²¹ Prison construction, however, failed to keep pace and overcrowding became endemic. By the 2000s, prisons operated at 200% and sometimes 300% of their intended capacity.²² On any given night, over 15,000 inmates slept on “bad beds” (double or triple bunks crammed into nonhousing areas like

21. Jody Sundt, Emily J. Salisbury & Mark G. Harmon, *Is Downsizing Prisons Dangerous? The Effect of California's Realignment Act on Public Safety*, 15 CRIMINOLOGY & PUB. POL'Y 315, 316 (2016).

22. *Id.* at 317.

cafeterias and gymnasiums).²³ Access to healthcare became all but impossible and approximately one inmate per week committed suicide, a rate 80% higher than the national average for prison populations.²⁴ In 2006, at the height of the crisis, Governor Arnold Schwarzenegger proclaimed a “Prison Overcrowding State of Emergency,” citing an increased risk of violence and health risks from “thousands of gallons of sewage spills and environmental contamination.”²⁵ The decree enabled California to move some inmates to prisons in other states but did nothing to stem the inflow of offenders or build new prisons.²⁶

In 2009, as 156,352 prisoners crammed into facilities meant to accommodate 80,000, a three-judge district court panel found that overcrowding in California’s prison system so inhibited access to medical and mental health care that it violated the Eighth Amendment’s prohibition on cruel and unusual punishment.²⁷ The panel issued an injunction ordering California to release prisoners in order to reduce overcrowding, reasoning that such releases were authorized under the Prison Litigation Reform Act (“PLRA”) to remedy the Eighth Amendment violation.²⁸

In 2011, the United States Supreme Court affirmed this judgment in the landmark case of *Brown v. Plata*.²⁹ Justice Kennedy, writing for the majority, held that “[t]he medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eighth Amendment,” that “a remedy will not be achieved without a reduction in overcrowding,” and that the district court’s decision to reduce overcrowding through a prisoner release order was “authorized by Congress in the PLRA.”³⁰ The majority buttressed these findings with photographs of bunks crammed into common spaces and the narrow holding cells used for mental health patients, which Kennedy likened to “telephone-booth sized cages without toilets.”³¹ The Court affirmed the District Court’s order requiring California to reduce its prison population to roughly 110,000—137.5% of

23. *Id.*

24. *Id.*; *Brown v. Plata*, 563 U.S. 493, 504 (2011).

25. Arnold Schwarzenegger, Governor of Cal., Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), <https://www.library.ca.gov/Content/pdf/GovernmentPublications/executive-order-proclamation/38-Proc-2006-93.pdf> [<https://perma.cc/5YAP-Y3GB>].

26. See Jennifer Warren, *State Prison Crowding Emergency Declared*, L.A. TIMES (Oct. 5, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-oct-05-me-prison5-story.html> [<https://perma.cc/9QN6-C88K>].

27. See *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 908, 912, 949 (E.D. Cal. 2009).

28. See *id.* at 889, 965.

29. *Plata*, 563 U.S. at 545.

30. *Id.*

31. *Id.* at 503, 549–50.

design capacity—within two years, evidently reasoning that the overcrowding did not become severe enough to constitute an Eighth Amendment violation until the 137.5% mark.³²

In theory, California could have accommodated the Court’s decision by building new prisons rather than releasing prisoners. But even in the text of the *Plata* decision, the Court recognized that pragmatically, there was “no realistic possibility that California would be able to build itself out of [the] crisis.”³³ California was running a \$26 billion deficit in 2011.³⁴ Adequate prison construction was estimated to cost \$7.5 billion plus an additional \$1.6 billion per year in upkeep.³⁵ Mass release was the only constitutional remedy California could afford. The Court’s decision thus effectively required releasing some 46,000 convicted felons.³⁶ Kennedy concluded that the mass release would be the “least intrusive means necessary to correct the violation.”³⁷

B. REALIGNMENT: 2011–2014

California responded to *Plata* with “The California Public Safety Realignment Act,” or “Realignment” as the law is commonly known.³⁸ Governor Jerry Brown championed it; the California state legislature supported it; and the new law took effect on October 1, 2011, less than five months after the *Plata* ruling.³⁹

Realignment “reduced” the prison population in three ways. Since the *Plata* benchmark only applied to state prisons, the first was simply to reallocate inmates from prisons to jails. Before Realignment, the default for all inmates convicted of a felony was to go to state prison. After Realignment, so-called “non-non-nons”—felons convicted of nonviolent, nonserious, nonsexual offenses—served their time in county jails, alongside

32. *See id.* at 545.

33. *Id.* at 528.

34. Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California’s Prison Realignment*, 5 CAL. J. POL. & POL’Y 266, 302 (2013).

35. *Id.* at 303.

36. *Plata*, 563 U.S. at 510.

37. *See id.* at 530, 545 (citing 18 U.S.C. § 3626(a)); *see also id.* at 558 (Scalia, J., dissenting) (“Admittedly, the [District Court] did not generate that number entirely on its own; it heard the numbers 130% and 145% bandied about by various witnesses and decided to split the difference.”).

38. Public Safety Realignment Act (A.B. 109), 2011 Cal. Stat. 271.

39. *See* Paige St. John, *Gov. Jerry Brown’s Prison Reforms Haven’t Lived Up to His Billing*, L.A. TIMES (June 21, 2014, 7:30 PM), <https://www.latimes.com/local/politics/la-me-ff-pol-brown-prisons-20140622-story.html> [<https://perma.cc/3EBM-M2Q7>].

misdemeanor convicts and pretrial detainees.⁴⁰

Second, Realignment *did* shorten sentences—indeed, shortened them substantially and for huge numbers of offenders—but did so in such a bureaucratic way as to almost pass beneath public notice. Realignment required that all jail (not prison) inmates receive four days of custody credit for every two they spent behind bars.⁴¹ That functionally cut sentences in half: serving one year counts as serving two; serving two years counts as serving four. Convicted inmates in California jails—that is, misdemeanants and non-non-non felons—now serve only half of their announced sentences.

Third, Realignment changed the system of post-release supervision facing non-non-nons, shortening or eliminating the period of supervision, shortening sentences for those who do violate the terms of their conditional release, moving reincarceration for violators from prisons into jails, and shifting authority over the process from prison systems to jail systems.⁴² All this is, again, bureaucratic, technical, and more important than it might seem. Parole and probation violators accounted for a quarter of the total number of people incarcerated in California in 2018.⁴³ Shortening the window in which

40. The structure of the Realignment statute is to list some 500 different felonies that would previously have yielded prison terms and to state that they are all now to be sentenced “pursuant to subdivision (h) of Section 1170 of the Penal Code”—a phrase that is repeated over 800 times in the statutory text. *See, e.g.*, Public Safety Realignment Act (A.B. 109), *supra* note 38, § 2. Section 1170 was already the state’s primary trial court sentencing provision. The new (h) subdivision—California Penal Code § 1170(h)—prescribes a county jail rather than prison sentence for all those 500 or so felonies, where the sentence can be no longer than three years unless otherwise specified in the statute defining the offense, with four groups excluded from the benefit: defendants currently or previously convicted of “serious” felonies (defined by reference to Penal Code §1192.7(c)), defendants currently or previously convicted of “violent” felonies (defined by reference to Penal Code § 667.5(c)), defendants currently or previously required to register as a sex offender (defined by reference to Penal Code Chapter 5.5), and defendants subject to the “aggravated white collar crime enhancement” for a pattern of fraud or embezzlement (defined by reference to Penal Code § 186.11). *See also* Albert Camacho & Mark Harvis, *Realignment of California’s Criminal Justice Policies*, L.A. LAWYER., Apr. 2012, at 15.

41. Mechanically, the Realignment statute amended California Penal Code § 4019—the portion of the penal code that specified how much custody credit someone should get per day spent in county jail: “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.” Public Safety Realignment Act (A.B. 109), *supra* note 3838, § 482; CAL. PENAL CODE § 4019(f). There is a nuance here: before Realignment, California jail inmates *already* received extra custody credit for every actual day of custody served, such that, assuming good behavior, they served only two-thirds of their announced sentence. Realignment did two things: it made the custody credit system more generous—from two-thirds to one-half—and, by shifting the non-non-non felons from prison to jail, expanded the number of inmates eligible for it. *See* Camacho & Harvis, *supra* note 40, at 17.

42. Public Safety Realignment Act (A.B. 109), *supra* note 3838, § 479; CAL. PENAL CODE §§ 3450-3458; *see also* Sundt et al., *supra* note 21, at 318.

43. Michael Finch II, *Why ‘Technical’ Violations Are Still Sending Ex-Cons Back to California Lockups*, SACRAMENTO BEE (June 27, 2019, 6:23 AM), <https://www.sacbee.com/news/california/article231975682.html> [<https://perma.cc/K6NX-FT4D>] (“[A] quarter of the people incarcerated in

released inmates are subject to violations has real impact, as does shortening the length of sentences for those who are sent back to jail.

It is important here to stave off a misunderstanding. The legislation and rhetoric around Realignment so emphasizes nonviolent *felonies* that one might think it did not benefit violent offenders at all. But not every violent offender is a felony offender; most violent crimes are misdemeanors.⁴⁴ The catch-all term for criminally striking another person is “assault” or “battery” (depending on how a jurisdiction defines the terms), and ordinary assaults and batteries are misdemeanors in every or virtually every state, including California.⁴⁵ The violent *felonies* that Realignment did not reach are things like murder, arson, kidnapping, carjacking, assault that causes disability or other grave bodily harm, gang-related extortion, and the like—crimes that reflect a type of criminality and level of violence well beyond a typical striking.⁴⁶ Misdemeanant violent offenders went to county jail, not prison, long before Realignment, and benefited from Realignment’s custody credit system (cutting sentences in half) along with the non-non-nons and everyone else in jail.

Realignment was both politically clever and very high impact. The Brown administration generally favored criminal justice reform and had to comply with the Court’s mandate but had announced that its goal was “to not release inmates at all.”⁴⁷ Realignment reduced imprisonment without eliminating any crimes or pardoning any prisoners; it also made the benefit to violent offenders difficult to see. Yet its impact on incarceration was massive and rapid. Within a year, the prison population dropped by 27,000 and the county jail population increased by 9,000, resulting in a net decarceration of 18,000 offenders.⁴⁸ The 137.5% threshold set by *Plata* was in sight but not yet realized.

California in 2018 were previously on probation or parole. In 2017, more than 12,000 former inmates were sent back to lockups, mostly county jails—35 percent of whom were being locked up again because of so-called technical [as opposed to substantive] violations of their supervised release.”)

44. See *infra* Part II.C.

45. CAL. PENAL CODE §§ 241, 243; see also *infra* Part II.C.

46. Realignment defines the “violent felonies” excluded from its purview by reference to a list at CAL. PENAL CODE § 667.5(c). See *supra* note 38.

47. Jennifer Medina, *Prison Ruling Raises Stakes in California Fiscal Crisis*, N.Y. TIMES (May 23, 2011), <https://www.nytimes.com/2011/05/24/us/24california.html> [<https://perma.cc/LMG5-TGDQ>]; Sundt et al., *supra* note 21, at 318–19.

48. See MAGNUS LOFSTROM & STEVEN RAPHAEL, PUB. POLICY INST. OF CAL., REALIGNMENT, INCARCERATION, AND CRIME TRENDS IN CALIFORNIA 1 (2015).

C. PROPOSITION 47: 2014–2019

Federal courts were the first movers in California criminal justice reform. With realignment, democratic *representative* forces—a governor and state legislature—were the second. The third step was *popular* democracy through popular referendum.

Prison reform entered the California popular consciousness in the early 2010s. The origins of this movement are difficult to isolate, but the period was the dawn of a national reckoning over mass incarceration: from 2010 to 2012, President Obama became the first sitting president to tour an active prison, Michelle Alexander’s *The New Jim Crow* topped bestseller lists, and newspapers carried stories about bipartisan efforts at criminal justice reform.⁴⁹ Taking advantage of California’s referendum system, criminal justice reformers put Proposition 47 (“Prop 47”) on the November 2014 ballot.⁵⁰

Prop 47’s core move was to reclassify drug possession for personal use and theft-related property offenses involving less than \$950 as misdemeanors rather than as felonies or “wobblers” (crimes chargeable either as misdemeanors or felonies).⁵¹ Crucially, the drugs at issue were not marijuana; marijuana possession had already been reduced from a misdemeanor to a simple infraction in 2011.⁵² Prop 47 de-felonized virtually *all* drug possession for personal use.⁵³ Misdemeanors carry a maximum sentence of one year in county jail.⁵⁴ Thus, Prop 47 effectively made one

49. See, e.g., John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 11, 2012), <https://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html> [<https://perma.cc/WAF9-F63V>] (“[The public policy of] mass incarceration . . . appears increasingly dubious to both conservative and liberal social scientists.”).

50. Voters saw this summary on their ballots: “Requires misdemeanor sentence instead of felony for certain drug and property offenses. Inapplicable to persons with prior conviction for serious or violent crime and registered sex offenders. Fiscal Impact: State and county criminal justice savings potentially in the high hundreds of millions of dollars annually. State savings spent on school truancy and dropout prevention, mental health and substance abuse treatment, and victim services.” *California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative [<https://perma.cc/8QVZ-R588>].

51. Prop 47 was codified as “The Safe Neighborhoods and Schools Act,” 2014 Cal. Legis. Serv. Prop. 47, codified at CAL. PENAL CODE § 1170.18. MIA BIRD, MAGNUS LOFSTROM, BRANDON MARTIN, STEVEN RAPHAEL & VIET NGUYEN, PUB. POLICY INST. OF CAL., *THE IMPACT OF PROPOSITION 47 ON CRIME AND RECIDIVISM* 4 (2018).

52. Patrick McGreevy, *Before Proposition 64, Simple Possession of Marijuana Was Already Decriminalized*, L.A. TIMES (Nov. 3, 2016, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-prop-osition-64-marijuana-legalization-crime-snap-20161103-story.html> [<https://perma.cc/2UG6-6HWS>].

53. BIRD ET AL., *supra* note 51, at 4.

54. *Id.* at 4, 6.

year in county jail and a misdemeanor conviction the maximum sentence for drug use and minor theft. The law applied both prospectively and retroactively, allowing prisoners serving time for offenses previously deemed felonies to petition for reduced sentences and amended rap sheets.⁵⁵ Prop 47 promised to take the savings from decarceration and dedicate them mainly to mental health and substance abuse programs.⁵⁶

Prop 47 represented a broad vision of criminal justice reform—indeed, the reform trifecta of reduced punishment for drug offenses, reduced punishment for property offenses, and more spending on social services—and, in the leadup to the 2014 election, it received considerable publicity and debate. Californians for Safe Neighborhoods and Schools, the measure’s sponsoring organization, summarized Prop 47 as a measure that “[s]tops wasting prison space on low-level nonviolent crimes” yet “[k]eeps rapists, murderers and child molesters in prison.”⁵⁷ Advocacy groups ran television ads highlighting the measure’s capacity to reunite families and rehabilitate addicts.⁵⁸ Politicians from Gavin Newsom to Newt Gingrich and celebrities from Jay-Z to Tim Robbins gave their endorsement.⁵⁹ A coalition of law enforcement officials and citizen advocacy groups voiced their opposition, yet seemed on the defensive from the outset, highlighting specific types of thefts (such as theft of handguns) and drugs (such as date rape drugs) that could go underpunished, rather than opposing reform altogether.⁶⁰ The pro-reform movement raised vastly more money than the opposition and outspent it twenty to one.⁶¹ Prop 47 passed with nearly 60% voter approval.⁶²

A striking feature of Prop 47 was the suddenness of its effect. The prison population dropped below the 137.5% *Plata* threshold within *two months* of its passage.⁶³ While causation is always difficult to definitively establish, the graph in Figure 1 shows that both Realignment and Prop 47 were closely followed by precipitous drops in California’s prison population:

55. *Id.* at 4.

56. *Id.*

57. *California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)*, *supra* note 50.

58. *See id.*

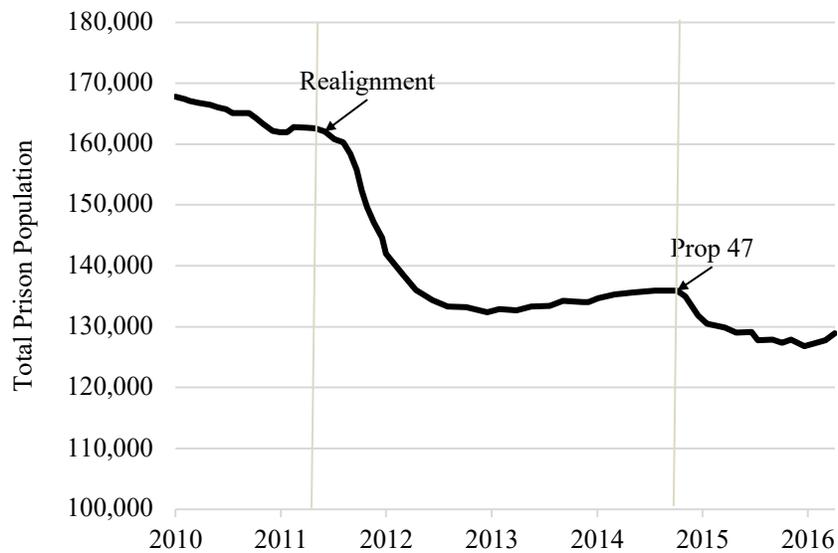
59. *Id.*

60. *See id.*

61. *Id.*

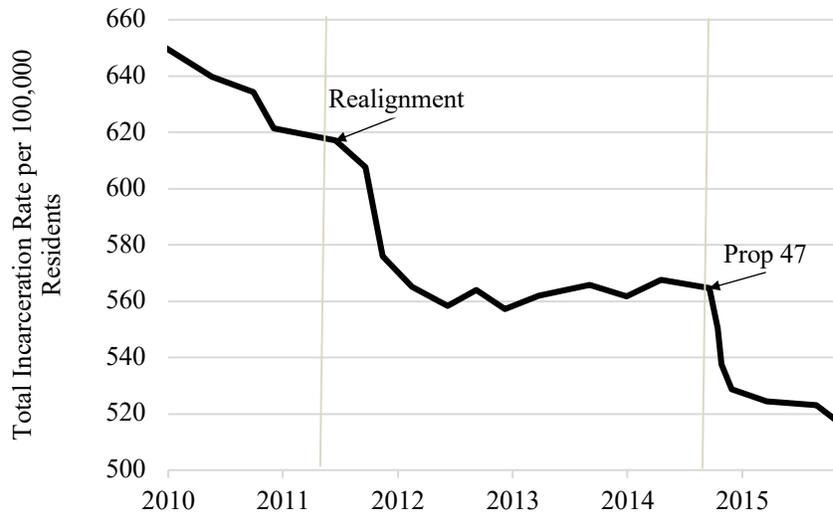
62. BIRD ET AL., *supra* note 51, at 4.

63. LOFSTROM ET AL., *supra* note 5, at 7.

FIGURE 1. Decline in Prison Population⁶⁴

But Figure 1, since it focuses on prisons alone rather than prisons and jails together, might overstate the impact of Realignment and understate the impact of Prop 47. Realignment essentially moved a group of inmates from prison to jail and shortened sentences in jail. Prop 47 turned two huge groups of people who had been felons into misdemeanants, both retrospectively and prospectively—which meant many prisoners were simply released, others’ sentences were greatly shortened, and, as we later discuss, many people whose conduct would previously have landed them behind bars were never arrested or charged. Thus, the more revealing graph might be Figure 2, which shows that the decline in the total *incarceration* rate (including prisons and jails) following Prop 47 was about equal in magnitude to the one that followed Realignment:

64. *Id.* at 7 fig.3.

FIGURE 2. Decline in Total Incarceration⁶⁵

Just as remarkable were Prop 47's ripple effects on the behavior of police and prosecutors. The law did not simply reduce sentences: in many localities, police stopped arresting people and district attorneys stopped prosecuting people for offenses that were now considered minor.⁶⁶ Reclassifying drug use and small-scale theft as misdemeanors is not legalization—not formally. But misdemeanors and felonies are very different things in terms of law-in-action. In some jurisdictions, Prop 47, combined with the change in public opinion that it signaled, brought about effective decriminalization—at least for drug possession.⁶⁷ Prosecutors and police officers in the United States are generally local officials exercising high levels of discretion according to local norms. Police *choose* to give a ticket; they do not have to. “The patrolman’s role is defined more by his responsibility for *maintaining order* than by his responsibility for enforcing the law,”⁶⁸ James Q. Wilson famously wrote, and while true of crime enforcement generally, that has always been *more* true of misdemeanors than

65. *Id.* at 6 fig.2.

66. See BIRD ET AL., *supra* note 51, at 21 (“We find evidence that Prop 47 reduced both arrests by law enforcement and convictions resulting from prosecutions by district attorneys.”).

67. See *infra* notes 69–70 and accompanying text; see also *infra* Section II.A (recounting the authors’ observations of open drug use in San Francisco’s Tenderloin neighborhood).

68. JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW & ORDER IN EIGHT COMMUNITIES* 16 (1968).

felonies. It may be inescapable in contemporary conditions of near-comprehensive legal regulation and large backdrops of unenforced law. District attorneys likewise *choose* to bring charges; they don't have to. They are typically elected at the level of the county, which makes them responsive to popular opinion, and they operate with limited resources and are accustomed to picking and choosing which cases to pursue based on policy considerations. Thus, enforcement of criminal law can vary with police officers' and district attorneys' understanding of public order within a given locality. That locality can be as large as a county or as small as a neighborhood. Prop 47 signaled a change in criminal justice enforcers' understandings.

The evidence suggests that reform greatly altered enforcement practices among some California police departments, particularly with respect to drug possession. It is now common in some places for police to shrug rather than pursue misdemeanor arrests for Prop 47 offenses.⁶⁹ In San Francisco's Tenderloin neighborhood, for example, even intravenous drug use occurs in public with impunity.⁷⁰ Other neighborhoods and cities are less lenient. Statewide, in the first year of Prop 47 relative to the year prior, California police made 92,425 fewer arrests for drug felonies (a category that no longer included simple possession for use) and 70,604 additional arrests for drug misdemeanors (which now included simple possession for use)—an overall decline of roughly 22,000 arrests for all drug-related crimes.⁷¹ From a “whole state” perspective, then, the story is one of drug-related arrests continuing, albeit many fewer of them. But that 22,000 decline was not randomly distributed. Parts of California saw effective legalization of drug use.⁷² Others looked much the same as they had before the legal change.⁷³

As drug enforcement abated, so too did enforcement of other “public order” offenses. Statewide, between 2013 and 2018, arrests for lewd conduct declined by 18%, prostitution by 37%, and drunkenness by 35%.⁷⁴ California

69. See *infra* text accompanying notes 128–24.

70. See Phil Matier, *Shopping in SF's Tenderloin Is Wide Open — For Illegal Drugs, That Is*, S.F. CHRONICLE (Sept. 13, 2020, 7:39 A.M.), <https://www.sfchronicle.com/bayarea/philmatier/article/Shopping-in-SF-s-Tenderloin-is-wide-open-15561282.php> [<https://perma.cc/99S4-3QU9>].

71. See CAL. DEP'T OF JUSTICE, CRIMINAL JUSTICE STATISTICS CTR., CRIME IN CALIFORNIA 29, 34 (2018).

72. See, e.g., Matier, *supra* note 70.

73. See MAGNUS LOFSTROM, BRANDON MARTIN, JUSTIN GOSS, JOSEPH HAYES & STEVEN RAPHAEL, PUB. POLICY INST. OF CAL., KEY FACTORS IN ARREST TRENDS AND DIFFERENCES IN CALIFORNIA'S COUNTIES 10–12 (2019); Magnus Lofstrom, Justin Goss, Joseph Hayes & Brandon Martin, *Arrests in California's Counties*, PUB. POLICY INST. OF CAL. (Mar. 2019), <https://www.ppic.org/publication/arrests-in-californias-counties> [<https://perma.cc/EZY3-YE4V>].

74. *Id.* at 35.

authorities, it appears, are increasingly looking the other way at a wide range of nonviolent misbehavior that would previously have led to arrest.

A useful window into police and district attorney enforcement practices is jail populations. That is where arrestees normally go, whether arrested for a misdemeanor or felony: jail is where defendants await trial and sentencing, as well as where misdemeanor convicts serve their sentences. Formally, Realignment and Prop 47 only directly impact outcomes *postsentence* and thus should have no effect on the two-thirds of jail inmates who are still awaiting arraignment, trial, or sentencing.⁷⁵ Yet in the first year of Prop 47 alone, the number of jail inmates held for property offenses declined by 13.6% while the number held for drug offenses dropped by 34.6%.⁷⁶ The number of jail inmates held for crimes against persons, however, jumped by 7.3% over the same period.⁷⁷ This, in turn, led to statewide declines in jail intake, with overall jail populations declining by 7,000 (8.5%).⁷⁸

Taken together, Realignment and Prop 47 accomplished a very big change in a very short period of time. In 2009, there were 246,487 adults incarcerated statewide.⁷⁹ Realignment came in 2011, Prop 47 in 2014. By June 2019, there were 197,881 adults incarcerated statewide.⁸⁰ Essentially, tens of thousands of people incarcerated for nonsexual and mostly nonviolent offenses walked out of California's prisons. Tens of thousands more who would have been arrested and incarcerated had Realignment and Prop 47 never happened were either not arrested or received short sentences. Thus, Prop 47 and Realignment accomplished two things: statewide prisoner release and localized decriminalization.

In effect, 50,000 people who would have been incarcerated a decade ago are today free in California. Which raises the questions: Who are those 50,000 people? What became of them? And how did their release affect California as a society?

75. Ryken Grattet, Mia Bird, Viet Nguyen & Sonya Tafoya, *California Jails Under Realignment and Proposition 47*, 9 CAL. J. POL. & POL'Y 1, 5 (2017).

76. *Id.* at 6.

77. *Id.*

78. BIRD ET AL., *supra* note 51, at 6.

79. *About*, CAL. SENTENCING INST., <http://casi.cjcg.org/about.html#download> [https://perma.cc/8PP8-P8RB] (download the files "2009-adult.xls" and "2016-adult.xlsx," available in the "Download data" column on the right of the page).

80. *Compare* CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JUNE 30, 2019 (2019) [hereinafter JUNE 2019 MONTHLY REPORT OF POPULATION] (reporting 125,472 prisoners incarcerated in California state prisons), *with* CAL. BOARD OF STATE AND COMTY. CORR., THE JAIL PROFILE SURVEY (last visited Dec. 15, 2020) [hereinafter THE JAIL PROFILE SURVEY], <https://app.bscc.ca.gov/joq/jps/QuerySelection.asp> (reporting a total of 72,409 prisoners incarcerated in California country jails in June 2019).

D. WHO GOT OUT? WHO NEVER WENT IN?

The 50,000 people who walk the streets of California today, but would have been incarcerated a decade ago, largely fall into two groups with considerable overlap: drug users (but not sellers) and small-scale thieves.⁸¹ This changes the texture of life on some California streets. It also changes the character of California's prisons.

To become a prison inmate in California, one must be convicted of a felony and given a sentence of at least a year. Not-yet-convicted defendants and all other offenders are in jails, not prisons. As drug users and small-scale thieves are no longer in the prison inmate group, prison inmates in California are now, in the main, people involved in major violence (beyond simple battery),⁸² sex offenders, drug dealers, serious property offenders, and multiple-strike recidivists. Between 2009 and 2016, the number of prison inmates serving time for property felonies declined by 57% (from 19% of state prisoners to 11%); the remainder presumably committed offenses in which the value of the property was over \$950.⁸³ Over the same period, the number of prison inmates serving time for drug possession declined by a staggering 91%; the remainder presumably were convicted of possession with intent to distribute.⁸⁴ Put differently, in 2009, 11,384 state prisoners were serving time for drug possession, which amounted to 7% of the overall prison population, and, by 2016, 1,042 state prisoners were serving time for drug possession—less than 1% of the overall prison population.⁸⁵ Meanwhile, the proportion of prisoners serving time for major violence was going up: in 2009, 59% of prison inmates were serving time for a violent felony; by 2016, 76% were.⁸⁶ Essentially, with Realignment and Prop 47, California prisons shed their drug users and small-scale thieves and are now shrinking toward a nucleus of highly violent offenders, multiple-strike recidivists, and a smattering of sex offenders and drug dealers.

81. Some other groups probably contribute to that 50,000 number as well, such as those engaged in prostitution or public drunkenness but not drug use or small-scale theft. How big are those groups? Although there was a considerable decrease in arrests for prostitution, public drunkenness, and the like after reform, there were never many arrests, let alone incarcerations, for those crimes to begin with. In 2014, for example, 8,822 Californians were arrested for prostitution. Following Prop 47, that number declined to 7,820 in 2015. This is a rounding error relative to the big groups of petty theft and drug use, which combined for 320,400 arrests in 2014 and 288,112 in 2015. See CAL. DEP'T OF JUSTICE, CRIMINAL JUSTICE STATISTICS CTR., *supra* note 71, at 28–29, 34–36.

82. See *supra* notes 44–46 and accompanying text.

83. See CAL. SENTENCING INST., *supra* note 79.

84. See *id.*

85. See *id.*

86. See *id.*

One can think of this, to some extent, as a “Europeanization” of American prisons. As James Whitman has written of France, Germany, and other countries of continental Europe: “In place of the broad-gauged harshness of the American kind, these northern European societies have seen a narrowly crafted harshness aimed at a relatively restricted class: violent offenders, terrorists, certain sex offenders, drug dealers.”⁸⁷ Yet it is possible to overstate the similarity: French and German criminal justice is quite tough, relative to their baselines, toward drug dealers, and strikingly lenient toward violent offenders: only extreme violence in those countries leads to any sort of incarceration at all, jail or prison.⁸⁸ France and especially Germany are also mild toward recidivists.⁸⁹ From a comparative perspective, California criminal justice is soft on drugs, tough on violence, and tough on recidivists. Increasingly, the very instrument of the prison is, in California, *about* the control of repeat violent offenders. As we later discuss at length,⁹⁰ this reflects surprisingly contemporary American attitudes about violent crime as its own, distinctively serious category. It is also just what many progressive criminal justice reformers have been aiming at for decades. California has substantially achieved that progressive aim—achieved it incompletely, to be sure, and through an exceedingly peculiar political process, but achieved it nonetheless.

Prison inmates are also more humanely treated now than they were a decade ago. California prisons became compliant with *Plata*’s 137.5% of capacity threshold in 2015.⁹¹ As a result, mere incarceration in California state prisons no longer constitutes cruel and unusual punishment under current constitutional law. Prisoners no longer sleep on triple bunks in the cafeteria. They no longer live under a state of emergency.⁹² California prisons, although increasingly comprised of violent offenders, are safer, cleaner, and less crowded than they were a decade ago.⁹³ This too makes

87. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 71 (2003) (footnotes omitted).

88. See Kleinfeld, *supra* note 13, at 962.

89. *Id.* at 979–84.

90. See *infra* Part II.C.

91. LOFSTROM ET AL., *supra* note 5, at 7.

92. Angie Wootton, *AB 109 and Its Impact on Prison Overcrowding and Recidivism: A Policy Analysis*, 4 *THEMIS* 99, 108 (2016) (Governor Brown terminated the state of emergency in 2013, claiming that “[p]rison overcrowding no longer poses safety risks to prison staff or inmates, nor does it inhibit the delivery of timely and effective health care services to inmates”).

93. In the first year of Realignment alone, a 17% decline in prison population corresponded with a 15% drop in inmate-on-inmate assaults and a 24% drop in inmate-on-staff assaults. Compare LOFSTROM ET AL., *supra* note 5, at 7 (reporting the decline in prison population), with Joan Petersilia, *California Prison Downsizing and Its Impact on Local Justice Systems*, 8 *HARV. L. & POL’Y REV.* 327, 349 (2014) (reporting the drops in assaults).

California prisons more similar to European ones.⁹⁴

Who are the 50,000 people who would have been locked up before reform and now are free? A distinction is useful here between reform's *direct* and *indirect* beneficiaries. The direct beneficiaries are those who were in prison and were then released. The indirect beneficiaries are those who likely would have been arrested given law and practice before reform but are likely not arrested after reform.

In terms of offense type, the direct beneficiaries of reform are largely those convicted of drug use and small-scale theft. Demographically, these beneficiaries represent a cross section of California society, but not all groups benefit to the same degree. In 2017, there were 32,448 fewer men in California state prisons than there were in 2006.⁹⁵ Of those 32,448 men, 15% are Hispanic, 31% are Black, and 51% are white.⁹⁶ Indexed to their overall population shares, this means that the incarceration rate declined 11% for Hispanic men, 17% for Black men, and 45% for white men.⁹⁷ Thus, Realignment and Prop 47 benefitted drug and theft offenders of all races and ethnicities, but the benefit flowed to whites at three to four times the rate it did to Blacks and Hispanics.

Even though Californians of all colors are getting out of prison, the disparate rates at which they leave exacerbates the already skewed demographics behind bars. Overall prison populations may be shrinking, but those who remain imprisoned are increasingly nonwhite. Statewide, California is 39% Hispanic, 7% Black, and 37% white.⁹⁸ In 2006, when state prison populations were at an all-time high, 38% of male state prisoners were Hispanic, 29% were Black, and 27% were white.⁹⁹ In 2017, these numbers

94. See Kleinfeld, *supra* note 13, at 999.

95. Compare AMANDA BAILEY & JOSEPH M. HAYES, PUB. POLICY INST. OF CAL., WHO'S IN PRISON? THE CHANGING DEMOGRAPHICS OF INCARCERATION 3 (2006) (showing the number of men incarcerated in California at the start of 2006; male prisoner count derived by multiplying percentage of male inmates by overall prison population), with CAL. DEP'T OF CORR. & REHAB., OFFENDER DATA POINTS FOR THE 24-MONTH PERIOD ENDING IN JUNE 2018 4 (2019) [hereinafter OFFENDER DATA POINTS] (reporting the number of men incarcerated in June 2017).

96. Compare BAILEY & HAYES, *supra* note 95, at 4 (showing race and sex demographics in 2006; counts are approximated by multiplying overall percentages by overall populations), with OFFENDER DATA POINTS, *supra* note 95, at 14, 30 (reporting race and sex demographics of male California prisoners in 2017).

97. Compare BAILEY & HAYES, *supra* note 95, at 4, with HEATHER HARRIS, JUSTIN GOSS, JOSEPH HAYES & ALEXANDRIA GUMBS, PUB. POLICY INST. OF CAL., JUST THE FACTS: CALIFORNIA'S PRISON POPULATION 1-2 (2019)

98. *QuickFacts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> [<https://perma.cc/3VJ3-GGN8>].

99. BAILEY & HAYES, *supra* note 95, at 4.

stood at 44%, 29%, and 22%, respectively.¹⁰⁰ This indicates that, relative to their share of the overall population, Hispanics were proportionately incarcerated prior to reform, and today are incarcerated to a slightly disproportionate degree. Blacks were incarcerated at an extremely disproportionate rate pre-reform and remain that way today. Whites were incarcerated at a low rate before reform and are incarcerated at an even lower rate today.

Turning to indirect beneficiaries, the biggest group is drug users, particularly habitual drug users. While occasional drug users benefit to some extent—they are now largely free from the risk and fear of arrest—they were not particularly likely to be arrested before reform. While small-scale thieves benefit to some extent—police expend fewer resources pursuing them and they avoid prison if caught—they are, nonetheless, typically arrested if caught. The sea change is the legal environment facing habitual drug users, who once led lives in and out of prison and now are treated nonpunitively to a substantial extent.

An analysis of drug arrests indicates that intake declines benefitted all major ethnic groups to roughly the same extent. Using data from the 1,001,502 California drug arrests made between 2011 and 2016, empirical scholars have determined that “felony drug arrest rates dropped immediately and precipitously for all racial/ethnic groups during the first month [of Prop 47] and continued to decrease over time.”¹⁰¹ During the first year of Prop 47 alone, overall drug arrests declined by 19% among whites, 22.5% among Blacks, and 23.7% among Latinos.¹⁰² Arrests for drug *felonies*, meanwhile, declined 75.9% among whites, 66.1% among Blacks, and 73.7% among Latinos.¹⁰³ As the study noted:

Although the absolute Black-White disparity in felony drug arrests decreased, the relative disparity increased, in part because of differences in preexisting felony offense composition by race/ethnicity. Blacks had larger proportions of felony drug offenses that Prop 47 did not alter, such as sale. Whether this reflects racial/ethnic differences in offending or racial/ethnic biases and practices in drug law enforcement cannot be determined from our data¹⁰⁴

100. OFFENDER DATA POINTS, *supra* note 95, at 14.

101. Alyssa C. Mooney, Eric Giannella, M. Maria Glymour, Torsten B. Neilands, Meghan D. Morris, Jacqueline Tulsy & May Sudhinaraset, *Racial/Ethnic Disparities in Arrests for Drug Possession After California Proposition 47, 2011–2016*, 108 AM. J. PUB. HEALTH 987, 988–89 (2018).

102. *Id.* at 991.

103. *Id.*

104. *Id.*

Overall, the data suggests that every ethnicity is less likely to face drug charges today than they were pre-reform. But among those who do get arrested for the shrinking list of drug *felonies* that can still lead to a prison term—generally, drug dealing or possession with intent to distribute—whites remain advantaged. The extent to which this pattern is due to disparities in criminal conduct versus disparities in law enforcement is unclear.

E. IMPACT ON VIOLENT CRIME

From the earliest murmurs of reform, there were vocal detractors keen to warn of violent criminals flooding California communities. In his *Plata* dissent, Justice Alito noted that “[i]f increased incarceration in California has led to decreased crime, it is entirely possible that a decrease in imprisonment will have the opposite effect.”¹⁰⁵ He further sounded the alarm by citing a “spectacularly unsuccessful” 1990s court-ordered decarceration program in Philadelphia where, within eighteen months of release, inmates were rearrested and charged with “79 murders, 90 rapes, 1,113 assaults, 959 robberies, 701 burglaries, and 2,748 thefts, not to mention thousands of drug offenses.”¹⁰⁶ (Unlike the *Plata* decision, which left implementation to California authorities, the Philadelphia consent decree capped prison capacity without granting the city discretion on how to safely get there. Wherever Philadelphia prisons exceeded the cap, the decree placed a moratorium on all prisoner intake apart from “persons charged with, or convicted of, murder, forcible rape, or a crime involving the use of a gun or knife in the commission of an aggravated assault or robbery.”)¹⁰⁷ Justice Scalia made a similar argument.¹⁰⁸

These concerns resonated with California law enforcement officials following the *Plata* decision. As Los Angeles County sheriff Lee Baca told *The New York Times*, “The public does not want to see a violent predator slip through the cracks on this We have to assure them that the department of corrections will not make a mistake on who gets released.”¹⁰⁹ Hoping to prevent that, Realignment and Prop 47 were tailored so as *not* to benefit violent felons (though Realignment’s increased custody credits did benefit violent misdemeanants).¹¹⁰

105. *Brown v. Plata*, 563 U.S. 493, 579 (2011) (Alito, J., dissenting).

106. *Id.* at 577.

107. *Harris v. Reeves*, 761 F. Supp. 382, 384–85 (E.D. Pa. 1991).

108. *Plata*, 563 U.S. at 554 (Scalia, J., dissenting).

109. Medina, *supra* note 47.

110. See *supra* Parts I.B–C.

Did those efforts work? Did California manage to release some 50,000 non-non-nons from custody without increasing violent crime? The empirical information available now indicates that the answer is, “Yes.” As stunning as that finding might appear, multiple studies support it, and the studies’ authorship, underlying data, and methods seem reliable.¹¹¹

Some caution about this “no increased violence” finding is warranted. First, the number of studies investigating the issue is not large; it is not as though dozens of studies with distinct methodologies have come to the same conclusion over time. Second, we are not ourselves empiricists and cannot confidently validate the available studies’ methodologies. Third, in a context as ideologically charged as this one, there is reason to fear research bias, whether deliberate or through motivated reasoning (though at least one of the studies comes to conclusions about property crime that are unwelcome from a pro-reform perspective).¹¹² Fourth, in measuring violent crime, none of the studies takes account of ordinary assault or battery, which is typically a misdemeanor, measuring only aggravated assault and other felony violence.¹¹³ It seems plausible that non-non-nons might be involved in minor assaults. There is also extensive evidence of California police classifying aggravated assaults as ordinary ones, perhaps to make the crime rate, the felony crime rate, or what is thought to be the violent crime rate appear lower than it is.¹¹⁴ Finally, there is reason to think that the situation might very recently be changing—that violent crime in California may be increasing—though, even if so, Realignment and Prop 47 are not necessarily to blame. Yet for all these points of caution, the fact remains that the academic work available at this time simply does not show an increase in violence on account of Realignment or Prop 47. One of us has doubts that the “no increased violence” finding could possibly be true, but it must be acknowledged that the doubts are based only on anecdote and intuition. The verdict of the published research is presently on the other side.

111. See LOFSTROM & RAPHAEL, *supra* note 48, at 1; BIRD ET AL., *supra* note 51; Sundt et al., *supra* note 21, at 329; Bradley J. Bartos & Charis E. Kubrin, *Can We Downsize Our Prisons and Jails Without Compromising Public Safety? Findings from California’s Prop 47*, 17 CRIMINOLOGY & PUB. POL’Y 693 (2018).

112. While Sundt’s scholarship downplays the correlation between Realignment and property crime (see *infra* text accompanying notes 123–19), her underlying data and conclusions about violent crime appear consistent with publicly available data. Lofstrom and Raphael did not sugarcoat their findings on property crime, and they arrived at a similar data-driven conclusion on violent crime. See LOFSTROM & RAPHAEL, *supra* note 48, at 1.

113. See LOFSTROM & RAPHAEL, *supra* note 48, at 1, 8 fig.3, 11 fig.4; Sundt et al., *supra* note 21, at 324, 327, 335; Bartos & Kubrin, *supra* note 111, at 699, 703. For the distinction between misdemeanor and felony assault or battery, see *supra*, notes 44–46 and accompanying text.

114. LOFSTROM & RAPHAEL, *supra* note 48, at 9, 23 n.9.

To start with Realignment in 2011, plotting 2010 and 2012 violent crime rates in a fifty-state regression model, researchers found that Realignment did not displace the state from its predictable spot on the curve.¹¹⁵ In other words, California's violent crime rate after Realignment was exactly what scholars would have predicted had Realignment not happened at all. This pattern continued to hold in 2013 and 2014.¹¹⁶ It even held when violent crimes were disaggregated: murder, rape, robbery, and aggravated assault were all statistically unaffected by Realignment (although, again, the study did not investigate ordinary assault or battery).¹¹⁷ Some 18,000 inmates convicted of mostly nonviolent offenses walked free in the first year of Realignment alone.¹¹⁸ This study suggests that in the years after their release, they did not become violent.

To evaluate Prop 47's impact on violent crime, researchers at the University of California Irvine used data from states with similar 1970–2014 crime patterns to create a synthetic “Counterfactual California” and anticipate 2015 crime if California had never implemented Prop 47 at all.¹¹⁹ Much as George Bailey was shown the hamlet of Bedford Falls as it would have been without him in *It's a Wonderful Life*, these researchers used advanced statistical modeling to see California as it would have been without Prop 47. Unlike Bedford Falls, which became the dystopian Pottersville, 2015 “Counterfactual California” looked strikingly like 2015 “Actual California” with respect to violence. Researchers noted that “[f]or homicide, rape, aggravated assault, robbery, and burglary, we find no evidence that the impact of Prop 47 was any different from zero. In other words, Prop 47 appears to have a null effect on these offenses.”¹²⁰ Again, over 15,000 offenders convicted of nonviolent offenses left custody in the first two years of Prop 47 alone.¹²¹ Many others never entered the system due to a corresponding decline in arrests. As with Realignment, it appears that these nonviolent offenders (mostly drug users and petty thieves) did not turn to violence.

115. Sundt et al., *supra* note 21, at 325–26.

116. *Id.* at 326–27.

117. *Id.* at 326.

118. See LOFSTROM & RAPHAEL, *supra* note 48.

119. Bartos & Kubrin, *supra* note 111, at 700.

120. *Id.* at 703; see also BIRD ET AL., *supra* note 51, at 7–13. Bird and her coauthors' study indicates that, after declining in 2013 and 2014, California's rate of violent crime increased in 2015 and 2016, after Prop 47 was passed. But, Bird's report argues: (a) the degree to which that increase exceeded a similar increase seen in neighboring states was not statistically significant; (b) the apparent increase turned partly on a redefinition of rape in the FBI's Uniform Crime Report; and (c) an even greater share of the apparent increase turned on more accurate assault reporting by the LAPD.

121. BIRD ET AL., *supra* note 51, at 5.

To close his *Plata* dissent, Justice Alito wrote, “I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years, we will see.”¹²² A few years have gone by. Ten years have gone by. We see no such grim roster.

F. IMPACT ON PROPERTY CRIME

Are those released offenders continuing to commit *nonviolent* crimes? Several empirical studies suggest that they have. Realignment and Prop 47 are both correlated with an increase in property crime statewide and there is some statistical evidence for causation.

Early cause for concern appeared in the years between Realignment and Prop 47. The scholars who found no statistical variance in violent crime from the fifty-state regression after Realignment noted that “Realignment had an immediate effect on rates of auto theft,” although that effect “decayed between 2012 and 2013.”¹²³ The researchers cautioned against interpreting this statistic as an indictment of reform, noting that “the qualities of the data, knowledge about motor vehicle theft, and research on offense diversification warn against making strong causal inferences.”¹²⁴ This admonition appears intended to bolster reform in spite of the concerning uptick in vehicle theft. The data, however, is difficult to ignore. And auto theft is not petty crime; it is major within the property crime category.

Following Prop 47, the link between sentencing reform and property crime became harder to play down. Leveraging the “Counterfactual California” (*It’s a Wonderful Life*) method to compare what California property crime rates would look like absent Prop 47 with how they actually looked in 2015, researchers at the University of California Irvine found another difficult-to-ignore correlation.¹²⁵ The study noted that “[f]or larceny and motor vehicle theft . . . the gap that emerged in 2015 (that is, post-Prop 47) was more than twice the size of the model’s preintervention [root mean squared prediction error], suggesting that Prop 47 did have an impact on these offenses.”¹²⁶

Outside of a synthetic setting, the overall numbers are sobering and perhaps easier to grasp. While larceny remained flat in other states, they rose 9% in California following Prop 47, with three-quarters of the increase

122. *Brown v. Plata*, 563 U.S. 493, 581 (2011) (Alito, J., dissenting).

123. Sundt et al., *supra* note 21, at 328.

124. *Id.* at 329.

125. *See supra* text accompanying notes 119–15.

126. Bartos & Kubrin, *supra* note 111, at 703.

attributable to vehicle break-ins.¹²⁷ Vehicle break-ins are considered an especially good proxy for property crime because, unlike stolen packages or shoplifted t-shirts, they are almost always reported to police for the sake of collecting insurance.¹²⁸ In San Francisco alone, thefts from vehicles nearly tripled from 2011 to 2017, when they hit 29,851 per year.¹²⁹ Confoundingly, over the same time period, arrests for property crimes in San Francisco County *declined* by 21% to a mere 1,121 arrests in 2017.¹³⁰ To the extent that law enforcement mirrors society's values, this suggests a unique tolerance toward low-level property crime in San Francisco.

In sum, violent crime was unaffected by the past decade's reforms; property crime shot up; and nonetheless—notwithstanding the fact that property offenses remain formally criminal—arrests and incarceration for property crime went down. So long as thefts are nonviolent and low-level, the state or at least significant localities within the state have come to regard them with a shrug.

G. IMPACT ON RECIDIVISM

Reducing California's stubbornly high recidivism rate was a stated goal of both Realignment and Prop 47.¹³¹ Advocates argued that incarceration itself is criminogenic: avoiding prison would reduce exposure to toxic influences and maintain offenders' access to legal economic opportunities. Prop 47 also aimed to reduce recidivism by directing funding toward mental health and substance abuse programs for at-risk individuals.¹³²

Did it work? Prior to Prop 47, 72.6% of people released from California

127. BIRD ET AL., *supra* note 51, at 3.

128. Abbie VanSickle & Manuel Villa, *The Great California Prison Experiment*, MARSHALL PROJECT (Dec. 20, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/12/20/the-great-california-prison-experiment> [<https://perma.cc/C53X-5GD5>]; *see also* BIRD ET AL., *supra* note 51, at 10–11. Beyond vehicle break-ins, monthly reported incidents of shoplifting jumped from between 7,800 and 8,100 to 9,900 in the first three months after Prop 47. The shoplifting rate then declined to pre-reform levels in 2016, but Bird notes that this could be due to declining reporting. *Id.*

129. VanSickle & Villa, *supra* note 128. This trend is especially striking in light of the fact that there are 492,336 vehicles registered in San Francisco County, so up to 6% of cars on the road were broken into in 2017 alone. *Compare id.*, with CAL. DEP'T OF MOTOR VEHICLES, ESTIMATED VEHICLES REGISTERED BY COUNTY FOR THE PERIOD OF JANUARY 1 THROUGH DECEMBER 31, 2019 (2019).

130. CAL. DEP'T OF JUSTICE, *Criminal Justice Data: Arrests*, <https://openjustice.doj.ca.gov/data> [<https://perma.cc/7AZ2-8S JL>] (download the "Arrest Dispositions" CSV).

131. *See* CAL. PENAL CODE § 17.5(a)(1) (West 2011) ("The Legislature reaffirms its commitment to reducing recidivism among criminal offenders."); CAL. ATTORNEY GENERAL, PROPOSITION 47: OFFICIAL TITLE AND SUMMARY (2014) ("State savings resulting from the measure would be used to support . . . programs designed to keep offenders out of prison and jail.").

132. BIRD ET AL., *supra* note 51, at 4.

custody were rearrested within two years,¹³³ and 49.1% were reconvicted.¹³⁴ In the two years following Prop 47, rearrests were 70.8% and reconvictions were 46%—essentially a 2–3% improvement.¹³⁵ That might be tepidly encouraging, but these modest declines in recidivism are misleading, as they are affected by the overall decline in arrests and prosecutions for Prop 47 offenses during the same period.¹³⁶ A decline in enforcement does not mean there has been a decline in underlying criminal behavior. There is no obvious reason to believe that less drug abuse or theft occurs in California today than occurred a few years ago. Rather, voters and law enforcement simply care less. Police departments appear to have concluded that arresting a suspect with a small amount of heroin is not worth the hassle when the suspect, charged with a misdemeanor or not, is likely to end up on the same corner within a matter of days.

Should we come to the opposite conclusion—that nonenforcement is so pronounced that a 2–3% decline in rearrest and reconviction suggests an *increase* in lawbreaking among those with criminal records? That possibility is not unreasonable, but there is no proof of it. The most defensible conclusion is that, in the face of changing values and police practices, overall recidivism loses its potency as a metric.

H. IMPACT ON HOMELESSNESS

From 2014 to 2019, 19,470 adults left California jails and prisons,¹³⁷ and 18,168 adults joined the ranks of California’s homeless population.¹³⁸ As of 2019, Los Angeles County has 58,936 homeless people living in cars or on the streets, a 71% rise since Prop 47 took effect in 2014.¹³⁹ These

133. *Id.* at 17.

134. *Id.* at 18.

135. *Id.* at 17–18.

136. *Id.* at 17 (two-year rearrest rates for drug crimes de-felonized by Prop 47 declined from 32.3% to 21%); *see also supra* text accompanying notes 79–83.

137. Compare JUNE 2019 MONTHLY REPORT OF POPULATION, *supra* note 80 (reporting the total inmate population in 2019), with CAL. SENTENCING INST., *supra* note 79 (reporting the total inmate population in 2014; download the file “2014-adult.xlsx” available in the “Download data” column on the right of the page.); *see also* The JAIL PROFILE SURVEY, *supra* note 80 (compares June 2014 and June 2019).

138. See NAT’L ALLIANCE TO END HOMELESSNESS, CALIFORNIA FACT SHEET (2019), <https://endhomelessness.org/wp-content/uploads/2019/08/CA-fact-sheet-2019-copy.pdf> [<https://perma.cc/3BCT-S2UL>].

139. Press Release, L.A. Homeless Servs. Auth., Greater Los Angeles Homeless Count Shows 12% Rise in Homelessness (June 4, 2019), <https://www.lahsa.org/news?article=558-greater-los-angeles-homeless-count-shows-12-rise-in-homelessness> [<https://perma.cc/9NYS-Q47Y>]; DEP’T OF HOUS. & URBAN DEV., 2014 POINT IN TIME ESTIMATE [hereinafter 2014 POINT IN TIME ESTIMATE], <https://www.hud>

numbers have led many to wonder whether Prop 47's defanging of drug laws simply moved people from jail to the streets. Could it really be that some drug addicts are fated to a stark binary: homelessness or incarceration? Are societies doomed to that same choice?

The disclaimer above, regarding the difficulties of establishing causation according to the rigorous standards of contemporary social science, becomes acute in this context. But it is intuitively reasonable to think drug addicts released from prison would end up on the streets, and, given the high visibility of the issue, many journalists have examined whether there is a causal link between California's mass prisoner releases and the state's homelessness crisis. In 2016, journalists from *The Desert Sun*, *The Ventura County Star*, *The Record Searchlight*, and *The Salinas Californian* conducted an investigative report into the impact of Prop 47 that highlighted individual stories of people caught up in a cycle of addiction, incarceration, and homelessness.¹⁴⁰ The story's key subject, Ruben Lopez, Jr., was twenty years into a life sentence stemming from a third strike meth possession conviction when Prop 47 went into effect. He successfully petitioned to reduce his conviction to a misdemeanor and was freed into a state that barely enforced drug possession law.¹⁴¹ Adrift on the outside, Lopez quickly relapsed, claiming, "It was like putting a kid loose in the candy store and telling them there's no consequences . . . Eat whatever you want. Party up. That was me."¹⁴² At the time of the report, Lopez alternated between living in his cousin's garage and under a bush on the side of a Los Angeles street.¹⁴³

The *Desert Sun* report lauded the reforms that got nonviolent offenders like Lopez out of prison but criticized the state for failing to provide Prop 47 petitioners with the treatment necessary to combat addiction and live productive lives.¹⁴⁴ Not only did the rehabilitative funds associated with Prop 47 underwhelm, but the state struggled to convince addicts on the outside to seek treatment at all. Prior to Prop 47, local authorities wielded a so-called "felony hammer" and could pressure arrestees to join a one-year

exchange.info/resource/3031/pit-and-hic-data-since-2007 [https://perma.cc/9W9K-F7W6] (download "2007–2019 PIT Counts by CoC").

140. Jill Castellano, Brett Kelman, Kristen Hwang, Brian Indrelunas & Christopher Weddle, *Two Years After Prop 47, Addicts Walk Free with Nowhere to Go*, DESERT SUN (Dec. 22, 2016, 4:24 PM), https://www.desertsun.com/story/news/crime_courts/2016/12/14/prop-47-california-addiction/94083338 [https://perma.cc/ERK9-GGVZ].

141. *See id.*

142. *Id.*

143. *Id.*

144. *Id.*

rehabilitation program instead of facing a multiyear prison sentence.¹⁴⁵ With misdemeanor penalties capped at one year in county jail (six months with custody credits), today's addicts are simply refusing the recovery option. The longest-running drug court recovery program on Los Angeles's Skid Row saw enrollment decline in the two years after Prop 47 from eighty addicts to *four*.¹⁴⁶ Prop 47 got addicts out of prison, but it failed to get them off drugs or off the streets.

County-level data both buoys and qualifies the idea of a causal relationship between prisoner release and homelessness, especially in urban areas. Los Angeles saw both the largest exodus of county jail prisoners (2,034) and the largest influx of homeless people (15,562) between 2014 and 2018.¹⁴⁷ The county's overall population grew by nearly 150,000 at the same time, however, making it difficult to account for the different factors contributing to homelessness.¹⁴⁸ Other urban counties (such as Orange, Alameda, and Sacramento) showed a similar pattern: drops in jail populations and gains in homeless populations, but alongside gains in overall populations, confounding efforts to discern a causal link.¹⁴⁹ San Francisco saw its jail population decline by only 5 people and its homeless population grow by only 449, but this may be because San Francisco already had lax drug enforcement, high homelessness, and generous social services.¹⁵⁰ The empirical difficulty is that so many factors besides criminal justice reform can contribute to homelessness, including population growth, housing availability, availability of social services, and local economic conditions. All told, the county-level data indicates a correlation between sentencing reform and homelessness but neither confirms nor disconfirms a causal link.

Could it be, as the *Desert Sun* article suggests, that the homelessness associated with Prop 47 is really just a failure of state funding? Would an additional earmark prevent addicts who would have been incarcerated a decade ago from ending up on the streets? A review of recent attempts to

145. *Id.*

146. *Id.*

147. THE JAIL PROFILE SURVEY, *supra* note 80; 2014 POINT IN TIME ESTIMATE, *supra* note 139; DEP'T OF HOUS. & URBAN DEV., 2018 HOUSING INVENTORY COUNT [hereinafter 2018 HOUSING INVENTORY COUNT], <https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007> [https://perma.cc/9W9K-F7W6] (download "2007–2019 HIC Counts by CoC").

148. Press Release, State of Cal. Dep't of Fin., State's Population Increases by 141,300, While Rate of Growth Continues to Decline (Dec. 20, 2019), <http://www.dof.ca.gov/Forecasting/Demographics/Estimates/E-2/documents/PressReleaseJuly2019.pdf> [https://perma.cc/C6YG-B6LM].

149. See THE JAIL PROFILE SURVEY, *supra* note 80; 2014 POINT IN TIME ESTIMATE, *supra* note 139; 2018 HOUSING INVENTORY COUNT, *supra* note 147; State of Cal. Dep't of Fin., *supra* note 148.

150. See THE JAIL PROFILE SURVEY, *supra* note 80; 2014 POINT IN TIME ESTIMATE, *supra* note 139; 2018 HOUSING INVENTORY COUNT, *supra* note 147.

address endemic homelessness suggests one of two conclusions: that simply spending more to accommodate the homeless makes little difference, or that, if spending more can make a difference, it needs to be a *lot* more. Consider Los Angeles, the epicenter of California's homelessness crisis. As the problem ballooned, the city poured money into building shelters. In 2018, the city and county spent \$600 million, raised in part with tax hikes and a state grant, on social services and supportive housing.¹⁵¹ The following summer, the state earmarked an additional \$130 million to Los Angeles's homelessness efforts.¹⁵² Mayor Eric Garcetti has vowed to build a homeless shelter in each of LA's fifteen council districts.¹⁵³ Yet Los Angeles's homeless rate continues to rise. Even the mayor concedes that Angelinos are being pushed into homelessness "faster than they can be lifted out."¹⁵⁴ Despite Los Angeles's considerable investment, shelter construction is simply not solving the problem.

Statewide, leaders blame a housing shortage for California's growing homeless population, but the homelessness crisis is new, at least at such scale, and the housing crisis is not.¹⁵⁵ Prior to Prop 47, homelessness was declining, even as demand for housing exceeded supply.¹⁵⁶ In the four years following Prop 47, the state's population grew 2.77%, outpaced by housing supply growth at 4.24%.¹⁵⁷ The unsheltered homeless population, however, leapt up by 25.34%.¹⁵⁸ Building homes and shelters has not stemmed the growth of homelessness, and many homeless would rather sleep on the

151. Anna Scott, *Despite Increased Spending, Homelessness Up 12% in Los Angeles County*, NPR (June 4, 2019, 2:00 PM), <https://www.npr.org/2019/06/04/729599946/despite-increased-spending-homelessness-up-12-in-los-angeles-county> [<https://perma.cc/A9UF-3QVC>].

152. Liam Dillon & Taryn Luna, *California Leaders Strike Deal to Give Cities and Counties Hundreds of Millions to Fight Homelessness*, L.A. TIMES (June 27, 2019, 3:39 PM), <https://www.latimes.com/politics/la-pol-ca-homeless-housing-money-state-budget-20190627-story.html> [<https://perma.cc/MU5K-SSRC>].

153. *Id.*

154. Scott, *supra* note 151.

155. *See id.* (Mayor Garcetti blames "skyrocketing rents statewide and federal disinvestment in affordable housing, combined with an epidemic of untreated trauma and mental illness"); *see also* Dillon & Luna, *supra* note 152 (in signing a \$1 billion homelessness budget, Governor Newsom pointed to the cost of housing as "chief among the affordability and quality-of-life challenges families face").

156. *See California*, NAT'L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/california> [<https://perma.cc/5K6V-V2WK>]; CAL. DEP'T OF HOUS. & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES 33 (2017).

157. *See* State of Cal. Dep't of Fin., *supra* note 148, at 5, 9; *QuickFacts: California*, *supra* note 98; U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES, CALIFORNIA (2014).

158. *See California*, *supra* note 156.

streets than in a shelter.¹⁵⁹ Homelessness is not solely a crisis of housing.

But how to address it? Incarceration was “successful” at housing those on the margins of society, but its harshness did not comport with California values. Optional sheltering has not worked. Might a third option be some sort of mandatory yet nonpenal rehabilitation?

While involuntary hospitalization for the drug addicted and moderately mentally ill largely went by the wayside decades ago, incarceration has often been used as a substitute. As Bernard Harcourt stunningly demonstrated in 2006, if one thinks of “involuntary commitment” as a composite of both incarceration and involuntary mental hospitalization—if one thinks, that is, in terms of the total number of beds in mental hospitals and prisons combined—then the United States at the peak of mass incarceration did *not* involuntarily commit more people than it did fifty years before, in the middle of the twentieth century.¹⁶⁰ Incarceration rates at mid-century were low, but involuntary mental hospitalization was extremely high. Incarceration rates at end-of-century were high, but involuntary mental hospitalization was low. In other words, the number of beds stayed roughly the same; they just shifted from mental hospitals to prisons. “[W]hen the data on mental hospitalization rates are combined with the data on prison rates for the years 1928 through 2000,” Harcourt concludes, “the incarceration revolution of the late twentieth century barely reaches the level of aggregated institutionalization that the United States experienced at mid-century.”¹⁶¹ Harcourt’s history suggests that the only way out of the incarceration/homelessness trap may be involuntary mental commitment. But California may have neither the stomach nor the budget to involuntarily detain its homeless addicts, even under the auspices of rehabilitation, and even if the courts ruled such a massive program of noncriminal detention constitutional.

159. See Anna Scott, *California Gives Mayors Funding for Homelessness*, NPR (July 13, 2019, 8:26 AM), <https://www.npr.org/2019/07/13/741391214/california-gives-mayors-funding-for-homelessness> [<https://perma.cc/CY86-3Y2W>].

160. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1754 (2006). Harcourt focuses on prison populations alone rather than prison and jail populations together due to difficulties getting reliable data about midcentury jail populations, though the flawed data available suggests that, even if prison and jail populations were combined, “[t]he results essentially do not change.” *Id.* at 1764.

161. *Id.* Harcourt’s second conclusion is still darker: homicide rates, he found, are tightly and inversely correlated to total involuntary commitment. That is, when the United States involuntarily institutionalized a large portion of its population in mental hospitals at midcentury, homicide rates were low. When the United States involuntarily institutionalized a large portion of its population in prisons at century’s end, homicide rates were low. In the time between—that is, in the 1960s, 1970s, and 1980s, when the country released most of those mental patients from hospitals but did not yet incarcerate them—the homicide rate was high. *Id.* at 1755–56.

If the hope of criminal justice reform is decarceration with low crime and nonhomelessness based on *optional* shelters and *voluntary* rehabilitation, California has not achieved it yet. Rather, reform may mark California's entry into a new stage of the institutionalization paradigm that Harcourt began to map out. At stage one, mid-twentieth century, the United States involuntarily detained a large group of people in mental hospitals. At stage two, late twentieth century, the United States incarcerated that group in jails and prisons. Now, at stage three, California has altogether deinstitutionalized a large group of drug users and low-level thieves. The result is a higher degree of freedom for nonviolent offenders, more humane prisons for violent and other serious offenders, and, nonetheless, a low violent crime rate for the public. But property crime has increased, drugs are increasingly used publicly and with impunity, and homelessness has become a major feature of public life. There may yet be a solution, a yet-unknown path toward a society of freedom, humane treatment of offenders, low crime, and reasonable public order. Or it may be that we are coming up against some permanent limitations of the human condition. For now, at least, the prisons are shrinking, and the tent cities are growing.

II. MORAL CONSIDERATIONS AND DEMOCRATIC CREDENTIALS

The last Part was descriptive; this one is normative. Reform changed California profoundly, but the changes are complicated and the normative considerations far from clear. We present an argument below, the thrust of which is this: reform increased personal freedom and humane treatment of offenders at significant cost to some aspects of community life. The costs should not be regarded dismissively: they are not small and do not reflect simple intolerance. Yet the normative balance ultimately tips in favor of reform because of reform's democratic credentials. In essence, we should celebrate reform in California because it is what Californians have said they want in multiple elections at multiple levels of government. But that does not mean others are bound as a matter of justice to follow California's example.

A. PATTERNS OF MORAL THOUGHT

One lens through which to view the costs and benefits of reform is financial: does incarcerating fewer people save taxpayers money? Yet for all the rhetorical pull of that question in public debate, it may be unanswerable and is definitely not the whole issue. Letting someone out of a California prison saves taxpayers around \$60,000 per year.¹⁶² But what does it cost

162. See Castellano et al., *supra* note 140.

taxpayers if that person ends up homeless and refuses to live in a shelter? If he gets away with shoplifting or stealing a car stereo? There is psychological loss when parents feel compelled to change the way they take their kids to school in order to avoid needles on the sidewalk, or when drivers feel they must leave their car unlocked because they'd rather thieves just let themselves in than break the window. But how does one quantify that psychological loss? The savings from prisoner release or nonimprisonment—that \$60,000 per year—is relatively straightforward and knowable, which gives the number power. But the overall economic comparison is subtle and may be unknowable.

Perhaps the greatest moral benefit of decarceration is the greater humanity shown to offenders. Both of us are Chicagoans who recently had jobs in the Bay Area. We witnessed firsthand the effect of reform in, for example, San Quentin, which one of us toured in August 2019. San Quentin houses California's dormant death row population alongside a diverse general population. It is designed for a maximum of 3,082 inmates.¹⁶³ Prior to Realignment, the prison housed as many as 5,984 inmates.¹⁶⁴ In August 2019, there were 4,193—a hair under *Plata's* 137.5% threshold.¹⁶⁵ Upon stepping into the prison, one sees three stories of four-by-ten-foot cells sprawling through a dim, dank warehouse. Each closet-sized cage holds a narrow bunk bed, a metal toilet, and two full-grown men. Privacy and elbow room are nonexistent. Still, general population inmates who play by the rules can earn hours of free time in the yard every day and jobs in the furniture factory, which pays a nominal wage redeemable at the commissary. Life is cramped and harsh but livable at current population levels. Mere incarceration in San Quentin no longer represents an Eighth Amendment violation according to the Supreme Court. Yet it is shocking to imagine squeezing 1,791 more men into those conditions—and even more shocking to imagine men guilty of anything other than major crimes subjected to such conditions.

Humane treatment of offenders comes at a cost. Working in San Francisco, one of us walked every weekday north along Church Street, then along Market Street, then along Polk Street, to the court building kitty-corner from City Hall. One begins that commute in an upscale area, with the

163. CAL. DEP'T. OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT AUGUST 31, 2019, at 2 (2019) [hereinafter AUGUST 2019 MONTHLY REPORT OF POPULATION].

164. *San Quentin State Prison (SQ)*, LIGHT IN PRISON, <https://lightinprison.org/us/ca/institutions/san-quentin-state-prison-sq> [<https://perma.cc/4GCM-EKZJ>] (hover over graph entitled "Inmate Population Over Time"; the cited population highpoint was reported on January 22, 2003).

165. AUGUST 2019 MONTHLY REPORT OF POPULATION, *supra* note 163, at 2.

Mission neighborhood on one side and the trendy Castro neighborhood on the other, walking past a middle school and beautiful Mission Dolores Park along the way. Still, a small tent city waxed and waned on the fringe of the park and a half dozen homeless people slept on the steps of the school. By some unwritten agreement, they mostly rolled up their sleeping bags and dispersed prior to the children's arrival. Then one comes to Market Street—the principal artery of San Francisco, with four lanes of car traffic and two bike lanes stretching diagonally across the peninsula, a vintage streetcar running aboveground, a modern subway running below. But Market Street does not resemble the major promenades of other cities (Michigan Avenue, Fifth Avenue, Las Vegas Boulevard). There are very few walking commuters even at rush hour. But one is never alone. A large group of homeless people congregates outside the Safeway—some openly using heroin, some knocking on car windows at red lights. Further up Market, near the corner of Valencia, a small tent city stands in perpetuity outside a liquor store. One needs to pay attention to one's feet so as not to step on needles or human excrement. Turning onto Polk Street for the last leg of the commute takes one into San Francisco's "Tenderloin" neighborhood—a rough neighborhood long before California's recent criminal justice reform. (It happens that City Hall and the Supreme Court building are adjacent to the Tenderloin.) Every city has its rough neighborhoods, of course. But what is different about San Francisco today is that the social decay of the Tenderloin now spreads so far throughout the city.

This picture of public disorder is *not* meant to suggest a risk of violence. Going from Chicago to San Francisco statistically reduces one's likelihood of being the victim of a violent crime by 29% (although much depends on the distribution of violence by neighborhood, especially in Chicago, which is at once one of the safest and most dangerous cities in the world depending on neighborhood).¹⁶⁶ One can nonetheless find it shocking to experience the daily chaos of a city with a property crime rate 85% higher than Chicago's and a homelessness rate *thirty-nine times* higher.¹⁶⁷

166. For example, the two largest neighborhoods in Chicago—Austin and Lakeview, at about 100,000 people each—had 2016 homicide rates of 87 per 100,000 and 1 per 100,000 respectively, which makes Austin more violent than any country on earth for which there is data and Lakeview as nonviolent as almost any country on earth. Kleinfeld, *supra* note 17, 1373–74 n.25. *But see Livability Score Comparison: Chicago & San Francisco*, AREAVIBES, <https://www.areavibes.com/compare-results/?place1=Chicago%2C%20IL&place2=San%20Francisco%2C%20CA#cri> [https://perma.cc/6PXH-ASMA] (reporting that, for every 100,000 residents, 943 violent crimes are committed in Chicago, while only 670 violent crimes are committed in San Francisco).

167. *See Livability Score Comparison: Chicago & San Francisco*, *supra* note 166 (reporting that, for every 100,000 residents, 2,983 property crimes are committed in Chicago, while 5,506 property crimes are committed in San Francisco); Kevin Drum, *Raw Data: The Homeless Rate in Big Cities*, MOTHER

Numbers that high change the texture of everyday experience. In San Francisco, homeless and intoxicated people are not just *in* public spaces but often *dominate* public spaces. On our commutes, we would observe people openly urinating and defecating, and shopkeepers hosing human waste off the sidewalk in front of their stores. Small-scale theft is considered a fact of life. Friends from San Francisco would caution us to have packages delivered to UPS or Amazon lockers because they would surely be stolen otherwise, and not only to keep personal items in the trunk of the car but to leave the car doors unlocked so that thieves wouldn't break the windows. Now, many of our friends in the city did not consider any of this particularly objectionable. A fact of life is not the sort of thing one complains about. One of us saw, in the coffee shop near his workplace, an obviously homeless man lean over the counter, pretend to squint at the menu and then, in an instant, lunge for the tip jar. The store clerk was expecting it and beat him to it. The two grappled over the jar, and the man made off with only a couple of loose bills. Was the clerk upset by the experience? Did she call the police? No—she beamed and exclaimed at how good her reflexes had become.

How does one weigh the moral urgency of freeing thousands from cruel and unusual punishment against this sort of public disorder? Consider two perspectives. For one, the costs of chaotic public spaces are significant even if they do not involve a likelihood of violence or major financial loss. To people of this view, if a place is to be livable, and a culture to bring out the best in people, strangers must uphold shared norms of decent comportment in common spaces. To raise a child in San Francisco is to worry about him stepping on a contaminated needle, to accept that strangers sleep on the steps of his schoolhouse, to know that grown men urinating on the sidewalk will be a regular sight in his youth. Such things have, on this view, subtle but vital cultural and psychological costs. They erode the happiness of those who do behave according to basic norms of decent comportment. They thwart reasonable and widely shared desires to live in a place that we can love because it is lovely.¹⁶⁸ And they loosen the cultural grip of norms on which social life depends, which pulls people on the margins of an ordered life into the chaos and distorts the values of others who, although not pulled into the chaos, modify their moral outlook to justify the social world in which they find themselves, or cease to find norms compelling that are so often violated,

JONES: KEVIN DRUM (June 5, 2019), <https://www.motherjones.com/kevin-drum/2019/06/raw-data-the-homeless-rate-in-big-cities> [<https://perma.cc/59JM-L5VE>] (graphing homelessness rates in San Francisco County and Cook County).

168. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE AND OTHER WRITINGS 492 (Jesse Norman ed., Alfred A. Knopf 2015) (1790) (“To make us love our country, our country ought to be lovely.”).

or just lose their taste for things worth caring about. From this perspective, since norm-abiding people should not have to put up with the kind of behavior that comes with mass vagrancy, it is morally acceptable to use state force to clean up the streets if no milder option is available. That is, police power and punishment might not be one's first choice to enforce public order, but it is not wrong to use it, for criminal law is a legitimate means to achieve social ends beyond the elimination of physical risk.

The other perspective objects on grounds of justice to using state force to clean up the streets and enforce behavioral norms where violence is not at stake. To those of this view, the imposition of such norms absent concrete physical harm or major financial harm reflects illiberal and intolerant attitudes, and to impose those norms by means of police power and punishment is something still worse—hardhearted, violent. The truly distorted moral outlook is the one that values order so much that it would impose force and pain on others to get it, even when physical safety is not on the line. The costs of homelessness and petty theft are not great enough to merit penal sanction and might indeed come with benefits, insofar as they teach members of the polity to develop tolerance and empathy and expose people to an edgier, less controlled array of experiences. To those of this perspective, the child who sees and interacts with heroin addicts on her way to school will be richer for the experience, as her empathy and understanding of the world expand in ways a more sheltered child's do not. Fear is not a legitimate reaction to the nonviolent addict groaning on the sidewalk; tolerance and fellow-feeling are.

How is one to negotiate between these two perspectives? They seem to reflect a conflict of worldviews. One could point to nuances and potential common ground: those who care about enforcing public order offenses might be willing to tolerate marijuana but not heroin; those who object to police enforcement of behavioral norms might relent where public health is implicated. But that just nips along the edges of the disagreement; it doesn't resolve the central conflict. One could present the values on each side in more philosophical terms—public order versus personal liberty, perhaps—but that doesn't resolve the conflict either. It just recapitulates the conflict more abstractly; it still fails to provide either side with a *reason* to accept the other's view. One could make an argument from a deontological justice perspective: perhaps there is a moral right answer to these questions, an argument which would show that the issue is not just one of costs and benefits or conflicting worldviews but of *right* in a nonperspectival sense. Yet one need not be a moral relativist or skeptic of moral reason generally to think that the prospects for such an argument in this context are dim. One of

us has worked for many years in the fields of moral and political philosophy. Typically, to build a theory of justice, one must weigh the claims of public order against the claims of personal liberty *internally* in the course of constructing the theory itself. To then apply the view to a case like the one at hand only disguises the question one purports to answer.

A further problem is that it is difficult even to find the words with which to articulate the first perspective fairly. The words used to that end in earlier eras—"clean streets," "vice," "morality," "public order"—today sound quaint and antiquated, or worse, irrational, or worse still, authoritarian. But what are the substitute words? It is as though the vocabulary of contemporary moral discourse has put a thumb on the scale of the debate, rendering one side inarticulate, empowering the other with forms of words on which the culture has bestowed a glow of approval before the debate even gets underway. Perhaps that means the perspective oriented to public order is unsupportable. But not necessarily. Verbally outfencing an opponent does not necessarily mean that one has answered the hard questions. Rendering a concern mute does not make it invalid. Imagine an aesthetic culture takes hold in the world of classical music composition that denigrates traditional ideas of beauty and emotional force in favor of "conceptual art." (This is not such a stretch.) Someone who tries to criticize the music by saying it isn't beautiful or moving could easily be made to sound ridiculous; few rhetorical weapons are more powerful than the academic scoff. But the listener might nonetheless have a valid point.

These questions of ultimate moral right and human flourishing might be intractable. They are at least exceedingly difficult. But we do not necessarily need to answer them as philosophers looking for ultimate moral truth. If we can accept that there are values on both sides, and that the question is mainly what mixture or balance of values a particular community *wants*, we can change the question from "Who is right?" to "What is a genuine expression of this community's democratic will?" There is nothing remarkable about policy situations that pit public order against personal liberty; those two values come into conflict in numerous ways, and different communities strike different balances between them. With reform, California rebalanced its scale in favor of personal liberty. The policy question need not be about justice or human flourishing in some ideal sense, but about democracy: Do Californians *want* this balance of public order and personal liberty? Is California's recalibration of the balance between those values a genuine expression of democratic will?

B. DEMOCRATIC CREDENTIALS: DO CALIFORNIANS SUPPORT REFORM?

Perhaps the most remarkable thing about California's criminal justice reform is that, although it started with litigation in the U.S. Supreme Court, California voters have been steadily behind it over the course of multiple elections at multiple levels of government. It is common to suppose that American voters inevitably favor tough-on-crime policies. That supposition is historically false: American voters generally favored or tolerated mild criminal justice from the Founding through the 1960s, turned to tough-on-crime politics in the 1970s, and, in some states and cities, have been supporting criminal justice reform in the direction of greater mildness since about 2010.¹⁶⁹ California is exhibit A for that trend in majoritarian politics. Of course, consensus is impossible in a state of 39 million, and reform is not without its vocal detractors. But the actions of California voters suggest a general consensus on the side of personal liberty and in favor of reform.¹⁷⁰ Crucially, California voting trends on this issue are not a one-off: they reflect the sort of sustained pattern that is typically our best evidence of what the democratic will really is.

Although Realignment happened at the behest of the United States Supreme Court in 2011, the governor and state legislature were involved; it was they who crafted the legislation to implement the Court's order. Since then, it is voters who have carried the ball. Prop 47 passed with 60% voter support in 2014. In November of 2016, 64% of California voters approved Proposition 57, which increased parole and good behavior opportunities for nonviolent felons to gain early release.¹⁷¹ On the same ballot, 57% of voters approved Proposition 64, which legalized marijuana for recreational use.¹⁷²

In Los Angeles—the city hardest hit by the homelessness spike—voters approved an increased sales tax in 2017 for the express purpose of creating a fund to help homeless people transition to planned affordable housing.¹⁷³ Los Angeles voters also twice elected Eric Garcetti mayor with a stated

169. See Kleinfeld, *supra* note 13, at 935–39.

170. But see Marc Debbaudt, *California's Prop 47 Revolution: Voters Were Sold a Bill of Goods*, L.A. TIMES (Oct. 26, 2015, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-1026-debbaudt-prop-47-anti-20151026-story.html> [<https://perma.cc/X5WW-HFU6>].

171. *California Proposition 57, Parole for Nonviolent Criminals and Juvenile Court Trial Requirements (2016)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_57_Parole_for_No_nviolent_Criminals_and_Juvenile_Court_Trial_Requirements_\(2016\)](https://ballotpedia.org/California_Proposition_57_Parole_for_No_nviolent_Criminals_and_Juvenile_Court_Trial_Requirements_(2016)) [<https://perma.cc/XTZ3-YTAV>].

172. *California Proposition 64, Marijuana Legalization (2016)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_\(2016\)](https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_(2016)) [<https://perma.cc/TE5C-CT88>].

173. Susan Abram, *LA County's Sales Tax Increases Sunday to Help the Homeless. Here's How Much*, L.A. DAILY NEWS (Oct. 5, 2017, 12:06 PM), <https://www.dailynews.com/2017/09/29/la-county-residents-to-see-25-cent-increase-in-sales-tax-to-help-homeless-people> [<https://perma.cc/42GD-6X3N>].

platform of treating homelessness as a housing crisis, not a criminal justice crisis.

In San Francisco in 2018, voters approved a tax on businesses that would double the city's homelessness budget.¹⁷⁴ San Franciscans also elected Chesa Boudin, who ran on a platform of “prioritiz[ing] treatment over jail and conviction rates” and whose personal biography suggested highly antipunitive views, to be their District Attorney.¹⁷⁵ Boudin narrowly defeated Suzy Loftus, who sought to “get serious about dealing with the epidemic of car break-ins that have plagued this city.”¹⁷⁶ In addition, San Franciscans twice elected Ed Lee and then elected London Breed to be mayor, both of whom, like Eric Garcetti in Los Angeles, campaigned on plans of providing treatment and housing to the homeless and drug-addicted—and spoke openly about the need to raise public funds for the purpose—rather than using law enforcement to clean up the streets.

Our personal experiences talking with friends and acquaintances in California are consistent with these voting patterns. Most of them simply do not react as we do to the level of public disorder on San Francisco streets; they just do not find the situation singularly disturbing or offensive. While some are frustrated with the level of homelessness, none want to see people dragged off in handcuffs. With regard to drug use, especially, their attitudes are ambivalent. The Californian ethos of tolerance, it seems, has strong democratic foundations.

Particularly striking from a democratizer's perspective is the balance between state and local power in California criminal justice reform. A principle of democratic criminal justice is that communities should be able to use local enforcement discretion to craft a criminal justice system that comports with their values.¹⁷⁷ The chief principle of restraint is that voters and political officials should not be able to externalize costs: the choice of

174. Heather Kelly, *San Francisco Voters Approve Homeless Tax on Business*, CNN (Nov. 7, 2018, 5:58 AM), <https://www.cnn.com/2018/11/07/tech/prop-c-results/index.html> [<https://perma.cc/DT4F-EXQA>].

175. *Chesa Boudin*, BALLOTPEDIA, https://ballotpedia.org/Chesa_Boudin [<https://perma.cc/D9ZH-2M5F>]. Boudin's parents were members of the leftwing radical group the Weather Underground; he grew up visiting them in prison following their involvement in the murder of two police officers and a security guard. He was raised by other members of the group, who had been federal fugitives. After college, he served as a translator in Hugo Chavez's administration in Venezuela. Allan Smith, *Parents Guilty of Murder and Raised by Radicals, Chesa Boudin is San Francisco's Next District Attorney*, NBC NEWS (Dec. 16, 2019, 2:28 AM), <https://www.nbcnews.com/politics/elections/parents-guilty-murder-raised-radicals-chesa-boudin-san-francisco-s-n1101071> [<https://perma.cc/WFW7-SGQW>].

176. *Suzy Loftus*, BALLOTPEDIA, https://ballotpedia.org/Suzy_Loftus [<https://perma.cc/C64N-NKEJ>].

177. See Kleinfeld et al., *White Paper*, *supra* note 19, at 1697.

how harsh or lenient to be should belong to the same people who will enjoy the benefits and bear the costs of that choice. As the principle was expressed in the *Manifesto of Democratic Criminal Justice*: “The costs and benefits of crime and punishment must fall together into the hands of those with control over the criminal system.”¹⁷⁸ This is exactly what we see in Los Angeles and San Francisco. As California has moved in the direction of reform, Los Angeles and San Francisco have done so dramatically and repeatedly at the local level; they have, by means of enforcement discretion, localized their criminal justice systems. In choosing a high degree of personal liberty over public order, they have borne the costs of homelessness, drugs, and petty crime. Their choice would not be to everyone’s taste. But it is their democratic choice.

In sum, our normative view is that California criminal justice reform has brought substantial costs as well as benefits, but it is truly democratic, and it should be celebrated as such even by those who would not want it for their own communities.

C. CODA: REFORM’S IMPLICATIONS FOR THE CONCEPT OF SERIOUS CRIME

A last word is in order—not on reform’s merits but on its implications for the concept of crime. Central to both Realignment and Prop 47 is the assumption that violent crime is a singularly serious category deserving of harsher punishment than other kinds of crime. That assumption might seem like second nature to us today, but it was not always so; even the singling out of violent crime as a distinct category, let alone treating it as the worst sort of crime, is a recent development in American law and culture.

Since the Middle Ages, the most important distinction between bad crimes and worse crimes was the distinction between misdemeanors and felonies. Historically, neither category has had a strong correlation with violence.¹⁷⁹ The common law felonies included a grab bag of property crimes, crimes against the state, nonviolent sexual offenses, and crimes involving major violence (for example larceny, treason, sodomy, and murder). The common law misdemeanors also included a grab bag of violent and nonviolent offenses, including, most importantly, *assault*. Assault at common law included the vast majority of all violence—essentially all violence that did not cause death or disability, constitute rape, or otherwise come with special circumstances that made it worse than “ordinary” criminal

178. Kleinfeld, *supra* note 17, at 1409.

179. See generally DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 41–54 (2021).

violence. The fact that, at common law, *most* violence was a misdemeanor speaks to one of the central facts about the moral history of humankind: the profound change in the last two centuries in attitudes toward violence.¹⁸⁰ A new relationship to violence is part of what modernity means.

As a formal, legal matter, American legislators and legal scholars did not begin isolating violent crimes as a distinct category until the second half of the twentieth century, and then did so only gradually. The first step was perhaps the Model Penal Code of 1962, which grouped felonies into three degrees depending on their severity, with only violent offenses in the first degree.¹⁸¹ In the ensuing decades, as violent crime spiked across the United States (increasing threefold between 1960 and 1980), specific carve-outs for “violent crime” and “crimes of violence” infiltrated state penal codes and federal statutes.¹⁸² In formal law and American culture alike, violence took on a unique status it had never had before. The transformation is incomplete: formally, most crimes of violence are still assaults and most assaults are still misdemeanors.¹⁸³ But myriad aspects of criminal law now treat violence as a distinct category for which the greatest efforts at control and condemnation are reserved.

Seen in historical perspective, then, California criminal justice reform is the latest step in the process of reconceptualizing crime as either “violent” or “nonviolent,” where those terms perform the same cultural and legal function “felony” and “misdemeanor” once did. Our culture got there before our law. In the discourse about criminal justice reform in California, people focused on the violence/nonviolence distinction so intuitively that it did not

180. See generally STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 169 (2011) (“The most sweeping change in everyday sensibilities left by the Humanitarian Revolution is the reaction to suffering in other living things.”); ROBERT DARNTON, *THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY* 75–78 (1984) (describing attitudes toward animal cruelty that were widely accepted in France in the 1700s but which today would be found morally revolting); NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (Eric Dunning, Johan Goudsblom & Stephen Mennel eds., Edmund Jephcott, trans., rev. ed., Blackwell 1994) (examining the process of historical change by which European culture came to find violence—along with bodily functions and other forms of coarseness—distasteful, wrongful, or uncivilized); 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 658 (Arthur Goldhammer trans., Library of Am. 2004) (1840) (describing the “general compassion for all members of the human species” fostered in democracies and wondering, “Why is that? Are we more sensitive than our fathers? I do not know, but of one thing I am certain: our sensibility extends to a wider range of objects”); Joshua Kleinfeld, *supra* note 13, at 936 (“A deep change in attitudes to suffering and violence—a softening, a sentimental humanism more vital and basic than any articulate position—is among the Enlightenment’s most mysterious and important legacies and one linked to democratic forms of life and government.”).

181. SKLANSKY, *supra* note 179, at 53–54.

182. *Id.* at 41–45, 51–55.

183. *Id.* at 48.

occur to them that they were doing something conceptually innovative. When Californians for Safe Neighborhoods and Schools argued that Prop 47 “stops wasting prison space on low-level nonviolent crimes” yet “[k]eeps rapists, murderers and child molesters in prison,”¹⁸⁴ they did not think they were contributing to a historical process of revising the concept of serious crime. But they were. California criminal justice reform might indeed prove to be a significant step in this process.

The revision is not as unproblematic as it might seem. Most “violent crime” is not rape, murder, or child molestation. Combined, homicide and sex offenses amount to only 3.6% of arrests for violent felonies in California.¹⁸⁵ The vast majority of violent crime, both felony and misdemeanor is—as it has always been—some sort of assault.¹⁸⁶ That is a huge category, encompassing everything from a slap to a gunshot. Realignment and Prop 47 recognized some nuance among different forms of violence, differentiating between ordinary assault and more serious violent crimes.¹⁸⁷ But it wasn’t just rapists, murderers, and child molesters who stayed in California’s jails and prisons. Someone who committed robbery, assault with intent to cause serious harm, or a long list of other crimes involving significant but not extreme violence stayed in too.

Many crimes are not even easily sorted into violent and nonviolent categories. Is a drug dealer whose work carries the ever-present risk of violence a “violent offender”? In a trio of recent cases, the United States Supreme Court echoed this definitional unease when it held the terms “violent felony” and “crime of violence” so ill-defined as to be void for vagueness.¹⁸⁸ California defines violent crimes by fiat: the various sections of the penal code referring to homicide, rape, robbery, kidnapping, and the like are grouped together and deemed “violent” without further attempt at a definition.¹⁸⁹ Whether these offenses cause any more or less harm than other crimes is immaterial to their designation.

Furthermore, if ending mass incarceration is criminal justice reform’s end goal, a violence/nonviolence distinction will not achieve it. As John Pfaff has demonstrated empirically, violence is such a large proportion of the

184. *California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)*, *supra* note 50.

185. *See* CAL. DEP’T OF JUSTICE, CRIMINAL JUSTICE STATISTICS CTR., *supra* note 71, at 24.

186. *See id.* at 11.

187. *See supra* notes 44–46 and accompanying text. CAL. PENAL CODE §§ 667(e)(2)(C)(iv), 667.5(c) (West 2020).

188. *See* *United States v. Davis*, 139 S. Ct. 2319, 2323–24 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210, 1223 (2018); *Johnson v. United States*, 135 S. Ct. 2551, 2555, 2557–58 (2015).

189. *See* CAL. PENAL CODE §§ 667(e)(2)(C)(iv), 667.5(c) (West 2020); *see also* CAL. DEP’T OF JUSTICE, CRIMINAL JUSTICE STATISTICS CTR., *supra* note 71, at 9, 76.

incarceration pie that reformers who wish to end mass incarceration have only two choices: they must either substantially reduce the amount of violent crime in society or substantially reject a policy of imprisonment for violence.¹⁹⁰ In particular, there is just not enough incarceration based on drugs for drug decriminalization to solve the incarceration crisis: nationally, more than half of all state prisoners are there for crimes of violence, only about 16% for drug crimes, and only about 5–6% of that group (arguably as few as 1% of the overall state prison population) for drug crimes that could be characterized as low-level and nonviolent, such as simple possession.¹⁹¹ California's focus on violence versus nonviolence has its merits, and may be enough to solve the problem of prison overcrowding, but it will not by itself solve the mass incarceration problem.

CONCLUSION

So what does California criminal justice reform tell us about the “California Social Contract”? It tells us that Californian society now holds that violence is categorically unacceptable, but little else is, and that objections to chaotic but nonviolent public spaces are morally illegitimate, at least as justification for the use of state force. In the inevitable tradeoff between public order and personal liberty, California declares by example that personal liberty should win unless and until violence or a narrow band of other major crimes are at issue.

There is a philosophical history to this point of view. The tradition of

190. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 5–6, 31–36, 185 (2017); John Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong and Where We Can Go from Here*, 26 FED. SENT'G REP. 265, 265–66, 269 (2014). There is, theoretically, one other possibility: substantially ending incarceration for *all* non-violent crimes—including drug dealing and serious financial and property crimes—in the hopes that the sum would be enough to end mass incarceration. Would that work? Because crimes of violence constitute more than half of all state prisoners, if literally everyone convicted of a nonviolent crime were released tomorrow, the U.S. incarceration rate would still be high by international standards. Furthermore, there is so much unsolved violent crime that a mild increase in clearance rates for major violence alone could massively increase the number of people imprisoned; we could return to the peak of mass incarceration and beyond just by *solving* more homicides, rapes, serious assaults, and other crimes that virtually everyone in contemporary public discourse thinks should lead to imprisonment. PFAFF, *supra*, at 94. Finally, it is unrealistic to imprison no one but violent criminals: some nonviolent crime (burglary, large-scale fraud, etc.) is quite serious. Perhaps an approach to criminal justice reform based on a violence/nonviolence distinction could solve the problem of mass incarceration if “mass” were defined modestly enough. But a more effective and realistic approach would probably have to be combinatorial, taking decarceration bites out of each category of crime, with big bites coming out of drug, property, and public order offenses (imprisoning only the worst offenders in each category) and a smaller bite coming out of violent offenses (declining imprisonment for most assaults). Even this combinatorial approach, however, would require rethinking common attitudes about imprisonment for violent crime.

191. *Id.*

Enlightenment liberalism arguably reached its zenith (and modern philosophy its most famous pronouncement aside from Nietzsche's phrase about the "death of God") with John Stuart Mill's harm principle: "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."¹⁹² Of course, everything depends on how "harm" is defined. A person's psychological sense of offense or disturbance at seeing drug use or public urination on city streets could constitute "harm" if the term were defined capaciously enough. On such an interpretation, however, the harm principle would lose its libertarian point. Thus, Mill and his followers have long filled in the definition of "harm" with a set of limiting criteria.¹⁹³ To count as harmful, for example, an action must be "other-regarding" and "without consent."¹⁹⁴ It must involve "temporal harm," that is, harm that is "tangible, secular, material—physical or financial, or, if emotional, focused and direct—rather than moral or spiritual."¹⁹⁵ The paradigm is "a punch in the nose."¹⁹⁶ Injuries of a "moral or spiritual" kind—which is really an inapt way of describing injuries of a cultural kind—are thus not just outweighed but excluded from consideration: they just don't count as harm.

American criminal law has *not* accepted the harm principle in the past. As Bill Stuntz and Joseph Hoffman write:

If the law followed Mill's harm principle, criminal punishment would be barred in . . . prostitution cases, and in the large majority of drug cases. Criminalizing the possession of unregistered guns would be impermissible, as would a range of regulatory offenses. And that is only a partial list. In other words, Mills' argument would transform American criminal justice—if it were adopted. But it hasn't been adopted . . .¹⁹⁷

Mill's harm principle is now instantiated, embodied, or immanent in California law and culture. True, California's version of the principle has less regard for property than others in the Millian tradition, as discussed above.¹⁹⁸ But it is quite clearly the twenty-first-century descendent of Mill's vision. Furthermore, California's twenty-first-century version of the

192. MILL, *supra* note 7, at 80.

193. See, e.g., 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 36 (1984) ("The sense of 'harm' as that term is used in the harm principle must represent the overlap of senses two and three: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense."); H. L. A. HART, *LAW, LIBERTY, AND MORALITY* 4–5 (1963).

194. Richard A. Posner, *On Liberty: A Revaluation*, in MILL, *supra* note 7, at 197, 197.

195. *Id.*

196. *Id.*

197. JOSEPH L. HOFFMAN & WILLIAM J. STUNTZ, *DEFINING CRIMES* 58 (3d ed., 2017).

198. See *supra* notes 7–10 and accompanying text.

principle is consistent with Mill's larger project. Mill announced the harm principle in an essay entitled *On Liberty*: it was always meant to be the principle of government most favorable to personal liberty in the various tradeoffs between liberty and everything else. It was also meant to foster the virtue of tolerance as a character trait and to encourage a culture of tolerance. One could justly question whether California's version of tolerance is as open to dissent and concerned with the stifling character of public opinion as Mill's. But a certain conception of what it means to be tolerant is unmistakably at work in California criminal justice reform. In other words, the larger ideas afoot in California and in Mill's essay are substantially a match.

Thus, California's new social contract has something to teach us about the harm principle and the harm principle has something to teach us about the California social contract. To the extent one believes Mill's principle is the capital-T-Truth about political life, California now represents the high-water mark of Enlightenment liberalism in America today. To the extent one believes Mill's harm principle leaves out certain indispensable facets of political life, California's public disorder is evidence of the principle's shortcomings. Coming at the matter from the opposite direction, if one observes and experiences California and thinks, "This is the kind of society in which I want to live," one has reason to believe the harm principle is true. If one observes and experiences California and thinks, "This is not the right way to live together," one has reason to think the harm principle unsound.

More prosaically, can California criminal justice reform be used as a blueprint for other states to reduce their incarceration rates? Absolutely. Will the likely result of those policies comport with the social values of every other state? Absolutely not. Prior to looking outward for a decarceration blueprint, states should first look inward and determine how much they are willing to alter their social contracts in order to effect change.

