

The Prospects and Perils of Ending Mass Incarceration in the United States

By
CHARIS KUBRIN
and
CARROLL SERON

Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” Atkins v. Virginia ... (quoting Trop v. Dulles...) ... A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

—Justice Anthony M. Kennedy, U.S. Supreme Court, majority opinion in *Brown v. Plata* (May 23, 2011)

In the domain of justice, empirical evidence by itself cannot point the way to policy, yet an explicit and transparent expression of normative principles has been notably missing as U.S. incarceration rates dramatically rose over the past four decades. Normative principles have deep roots in jurisprudence and theories of governance and are needed to supplement empirical evidence to guide future policy and research.

*Charis E. Kubrin is a professor of criminology, law & society and (by courtesy) sociology at the University of California, Irvine. She is co-author of *Researching Theories of Crime and Deviance* (Oxford University Press 2008) and *Privileged Places: Race, Residence, and the Structure of Opportunity* (Lynne Rienner 2006), and co-editor of *Introduction to Criminal Justice: A Sociological Perspective* (Stanford University Press 2013), *Punishing Immigrants: Policy, Politics, and Injustice* (New York University Press 2012), and *Crime and Society: Crime* (Sage Publications 2007, 3rd ed).*

*Carroll Seron is a professor of criminology, law & society in the School of Social Ecology with courtesy appointments in the Department of Sociology and School of Law at the University of California, Irvine. Her research examines gender inequalities in the professions and has appeared in the *American Sociological Review*, *Work & Occupations*, *Law & Society Review*, *The Annual Review of Law & Social Science*, and *Criminology*.*

DOI: 10.1177/0002716215616341

—National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014, 341)

This [California's Realignment law] is the biggest criminal justice experiment ever conducted in America, and most people don't even realize it's happening.

—Joan Petersilia, Professor of Law, Stanford University, National Institute of Justice Conference, keynote address (June 2012)

On July 14, 2015, President Obama became the first sitting president in American history to step inside a federal prison when he paid a visit to the Federal Correctional Facility El Reno about thirty miles from Oklahoma City. As he moved through the various metal detectors and observed the concertina wires circling the facility, the president reflected on how his own life might have taken a very different turn given his experimentation with drugs in his youth. His political agenda in making this visit was, however, to bring attention to growing bipartisan support for a sweeping reform of the entire criminal justice system.

In staking his position on the long-overdue need to reform our criminal justice system, President Obama reminded us that the U.S. has less than 5 percent of the world's population yet nearly 25 percent of the world's incarcerated population (National Research Council 2014). The causes and consequences of the nation's historically unprecedented imprisonment boom over the past four decades have been well studied and theorized by social scientists and legal scholars. Indeed, since the beginning of the twenty-first century, *The ANNALS* has devoted multiple issues to various direct and collateral consequences of the build out of the criminal justice system.¹

Beginning in 2009, however, imprisonment patterns began shifting downward. In its year-end 2011 report, the U.S. Bureau of Justice Statistics announced that for the third consecutive year, the adult correctional population (which includes probationers, parolees, local jail inmates, and prisoners in the custody of state and federal facilities) declined (Glaze and Parks 2012). In 2011 alone, the Bureau

NOTE: We gratefully acknowledge support from the National Science Foundation (NSF) (Grant # SES-1322228); the University of California, Irvine (UCI); and the University of California, Office of the President, that allowed us to convene a conference at the University of California, Irvine. We are deeply grateful to Valerie Jenness, dean of the School of Social Ecology at UCI, who worked with us on the design of the project and provided provocative closing remarks at the conference; in addition, Val provided support for a graduate research assistant, Anjuli Verma, which allowed us to develop our initial proposal to NSF. Val's support made the project possible: thank you. We thank Erwin Chemerinsky, dean of the School of Law at UCI, for his stimulating opening remarks, which nicely set the stage at the conference. Beginning with her work on the NSF proposal through the very final stages of publication of this volume, Anjuli Verma has provided exemplary support, creative ideas, rigorous management, and effective communication with our many contributors. We trust that each of the authors in this volume join us in thanking Anjuli. Chris Bates did a fantastic job creating the conference website, for which we are most grateful. Finally, we thank Mary Underwood and Robin Weirich for their careful management of our budget.

of Justice Statistics reported a decline of nearly 100,000 offenders under criminal justice supervision. The most recent reports indicate that these declines have persisted in subsequent years—but at a slower rate (Glaze and Kaeble 2014). California remains the epicenter of this transformation. Seventy percent of the nationwide decrease in state-level incarceration from 2010 to 2011, and over 50 percent from 2011 to 2012, were due to reductions in this state alone (Carson and Sabol 2012; Carson and Golinelli 2013). California is, thus, an ideal laboratory for exploring the future of U.S. decarceration.

Within the U.S., until only recently, the state of California was home to the nation's largest state prison system. After several decades of rapid growth, California's prison population peaked at 173,000 in 2006, despite the fact that state prisons were designed to hold a maximum of 79,858 people. This extreme overcrowding led the U.S. Supreme Court to take a historic step, ordering the state to reduce its prison population to comply with constitutional standards. On May 23, 2011, the Supreme Court ruled in *Brown v. Plata* that overcrowding in California's prisons resulted in cruel and unusual punishment in violation of the Constitution's Eighth Amendment. The decision was the result of nearly 20 years of litigation in which the lower federal court found that the "convergence of tough-on-crime policies and an unwillingness to expend the necessary funds to support the population growth has brought California's prisons to the breaking point" (*Plata/Coleman v. Brown* 2009, 182; Schlanger, this volume). The Supreme Court's *Plata* decision required the California Department of Corrections and Rehabilitation (CDCR) to reduce the state prison population by approximately 33,000 people (to 137.5 percent of design capacity) over a two-year time frame. In response, the state enacted a controversial new law in October 2011: "Public Safety Realignment" (Assembly Bill [AB] 109). Realignment is designed to comply with the *Plata* order by devolving from the state to each of its fifty-eight counties the responsibility for supervising a sizable class of offenders. Realignment has implications for state systems across the country. As commentators note, "policymakers in different criminal justice systems across the country, from the federal courts down to the local justice systems, might be inspired to look in new directions" for criminal justice reform (Strutin 2012, 1342).

This volume of *The ANNALS* represents the first effort by scholars to systematically and scientifically analyze what Joan Petersilia (2012) has described as "the biggest criminal justice experiment ever conducted in America." She went on to note that "most people don't even realize it's happening," a point underscored by Franklin Zimring in the volume's concluding remarks. At a historic moment in which imprisonment patterns across the U.S. are shifting for the first time in nearly 40 years, the California case is ripe for in-depth examination. The political landscape around decarceration is also shifting in ways that do not fit the debate of the last 40 years. The initiative behind the prison buildup was largely an offshoot of more conservative, law and order political agendas, but as the nation debates a move toward prison downsizing and decarceration, there is support from both the Left and the Right for this fundamental shift in policy (Aviram, this volume; Beckett et al., this volume)—unusual bedfellows at a time of political polarization. While this political convergence will no doubt be contested, as Joan

Petersilia emphasizes in the volume's preface, it nonetheless represents an important moment to have a systematic, rigorous, and scientific evaluation of California's experiment and its implications on hand for policy-makers.

We began this exploration with a workshop held at the University of California, Irvine, from October 17 to 18, 2014. With support from the National Science Foundation; University of California, Irvine; and the University of California, Office of the President, our goal was to bring together the leading scholars who research prisons, mass incarceration, and related policies, broadly understood, to analyze the trajectory of prison downsizing, from its origins in California to its implications for the nation and beyond.

California's Transformation in Real Time

AB 109 (2011) makes fundamental changes to California's correctional system, including realigning from state to local jurisdictions certain responsibilities for lower-level nonviolent offenders and parolees. Specifically, AB 109 requires that terms of incarceration for nonviolent, nonserious, and nonsex offenses ("the triple nons") be served in county jails instead of state prisons, thus shifting responsibility for punishment from prisons, which in the U.S. are state or federal operations, to jails, which are run by counties and their elected sheriffs. A similar change applies to nearly all of those released from state prison. Before implementation, these individuals were automatically on "parole" (a state term), which has now been replaced by local "post-release community supervision."

Implementation of Realignment began on October 1, 2011, and is already producing drastic changes in the population and operation of county jail facilities throughout one of the nation's largest criminal justice systems. In line with expectations, the state prison population is declining and the flow of new admissions into state prisons has begun to dry up. According to a report released by the Center on Juvenile and Criminal Justice, new state prison commitments have declined to levels not seen since the 1980s, when California had seven million fewer residents (Males 2012). This report reveals that during the first eight months of implementation, there was a 41 percent reduction in new prison admissions as of March 31, 2012, and a drop of 28,300 in the prison population as of May 31, 2012. Within the first year of Realignment, then, CDCR already progressed two-thirds of the way toward its goal of reducing inmate populations by 40,000 by 2017, far exceeding the initial decrease the Legislative Analyst's Office projected for fiscal year 2011–2012 (Males 2012). More recent figures indicate that CDCR managed to bring the prison population below the mandated threshold to 135.8 percent of design capacity by March 2015 (Grattet and Hayes 2015).

However, these trends are not uniform across California's fifty-eight counties, which raises important questions. Twenty-eight counties reported larger than average declines in prison commitments after implementation, and eighteen of these showed declines of more than 50 percent in the numbers of new prisoners

committed to CDCR facilities since implementation (Males 2012). Such differences may reflect, in part, variation in how counties across the state are responding to AB 109 as well as fundamental differences in their implementation plans (Abarbanel et al. 2013; Bird and Grattet 2015; Verma 2015). For example, some counties may choose to add more bed space in their jails, others may elect to place more individuals on probation, and still others may provide more rehabilitative services to parolees (Austin, this volume; Still, this volume). And of course some may alter charging and sentencing practices in ways designed to avoid Realignment's intended shift in supervisory responsibilities. These developments, among others, raise the question of how we measure decarceration and downsizing (Verma, this volume), as well as the impact on crime and recidivism (Bird and Grattet, this volume; Lofstrom and Raphael, this volume). Despite such variation, though, it is clear that Realignment has progressed rapidly toward its goal of reducing the state's prison population and complying with the *Plata* order.

Early reported trends aside, Realignment remains, as a *Huffington Post* article characterized it, "a tangle of undetermined details" (Watkins and Thompson 2011) that, perhaps, awaits reenvisioning (Simon, this volume). Although the state is providing funding to counties to offset some local costs, securing sufficient funding for county jails and other local services remains a concern today, as it historically has since the inception of statehood (Ball, this volume; Campbell, this volume). Moreover, few of California's jails have the luxury of unused space. How many state inmates are actually housed in the county lockups? What will happen when bed space is no longer available? In fact, just months into implementation, many counties experienced overcrowding in their jails. And there is a growing need for treatment programs and targeted interventions for specific offender populations (e.g., drug offenders) (Males 2012). As such, there remain challenges inherent in such a dramatic policy shift that must be met if the initial "success" is to continue (Krisberg, this volume).

These challenges have generated some criticism regarding the efficacy and potential unintended consequences of Realignment (Schoenfeld, this volume). Some question whether Realignment is merely "shifting a humanitarian disaster from the state to its 58 counties" (Rushford 2012). Currie (2011) argues, "as things stand it's unlikely that Realignment can be much more than shuffling the problem from one strapped and ineffectual level of government to another." For example, the crowded conditions of many local facilities in California, like the overwhelmed state prisons, have not been directly factored into AB 109 legislation (Strutin 2012, 1340). Another concern is that current dynamics might lead thousands of inmates to spend significantly less time behind bars or under supervision as counties cope with the influx expected to peak over the next several years. These are empirical questions that merit scientific study. This volume represents an effort to bring together an interdisciplinary group of criminologists, sociolegal scholars, and practitioners to address some of these questions. We view this project as especially critical in light of the fact that AB 109 legislation provided neither funding nor a mandate for research and evaluation.

Legacies of the Past, the Great Experiment, and Trajectories for the Future

In developing the trajectory of California's experiment, we begin with four broad themes that capture the arc from litigation through implementation and beyond: the origins of the crisis, the diffusion and translation of law and policy reform, the impact of prison downsizing on the criminal justice system, and the future of decarceration. With this in mind, we explain why these themes offer the most fruitful line of inquiry to frame an analysis of California's experiment in decarceration and set the agenda for future research.

Origins of the crisis. The legal mandates spawned by the U.S. Supreme Court's ruling in *Brown v. Plata* and the state's response to the ruling via Realignment are products of over 20 years of controversy and litigation involving government actors, special interest groups, public interest or "cause" lawyers and advocacy groups. The *Plata* case and the AB 109 legislation represent windows into the complex ecosystem of social movements, political groups and cause lawyering efforts that have helped to shape the debate over California's correctional policy. Leading up to *Plata*, scholars have broadly characterized the history of U.S. corrections and criminal justice policy in terms of the decline of the rehabilitative ideal in the late 1960s and early 1970s and the corresponding punitive turn in sentencing policy that led to historically unprecedented increases in incarceration throughout the 1980s and 1990s. The overall incarceration rate in the U.S. fell, however, for the first time in nearly four decades in 2007 (Carson 2014). Much of this decline is explained through state-level imprisonment decreases. This fact has drawn recent scholarly attention to the importance of examining subnational units—that is, states, counties, cities, and neighborhoods—to better understand the dynamics of crime and punishment. The lessons learned from this body of research and the questions it urges us to ask lay the conceptual foundation for our examination of the California case. The questions this section addresses include, What were the macro-social conditions that undergirded California's prison buildup? How has the character of California's political system influenced policy choices about crime and punishment? What role did cause lawyering play in developing and sustaining the legal claims in *Plata*? Will the *Plata* ruling and AB 109 legislation affect the legal and political landscapes of other states facing similar prison overcrowding issues as California?

The diffusion and translation of law and policy reform. As law and society scholars have pointed out, complex legal translation processes occur first in the formulation of a legal claim and second in the diffusion of a legal order throughout different levels of government and society. The political environment mediates these translation processes in important and often surprising ways. In this section, we explore the effects of the *Plata* case and Realignment, including the ways in which the Court's order is diffusing itself throughout government and society as well as the multiple forces that are mediating its diffusion. Some of the most pertinent questions include, What have been the legal and regulatory forces

that drove California's shifting incarceration patterns? Has there been variation in county responses to AB 109? If so, what may account for this variation, and what are its implications for the reform goal of system-wide decarceration? As more and more states beyond California develop policies to deal with prison overcrowding, what is the research agenda moving forward?

The impact of prison downsizing on the criminal justice system. Realignment envisions major organizational changes within community criminal justice systems and fundamentally restructures how a sizable class of offenders is to be supervised on probation, on parole, and behind bars. Similarly, the effect of the *Plata* ruling has been to impose a limiting principle for the first time in the state's history on how large its prison population can swell, regardless of changes in crime rates. Although these legal mandates have aimed at institutional reform, it remains to be systematically studied just how far they will go toward changing practices and cultures. Of keen interest to policy-makers and the public is also whether Realignment has caused crime to increase or decrease, including whether those implicated by the law will reoffend at higher or lower rates. The system-wide questions this section explores include, What effect has AB 109 had on public safety, including crime and recidivism rates? Does the impact of Realignment on public safety vary across California counties, each with its own demographic, economic and political profile? To what extent has Realignment provided opportunities for changes in practice and culture on the ground?

The future of decarceration. The ultimate aim of this volume is to produce and leverage knowledge gained about the developments in California to advance theory and method concerning the broader questions of decarceration. This requires connecting the relevant literatures in criminology and sociolegal studies that, taken together, more comprehensively explain both the origins and conditions of possibility for downsizing as well as their effects on crime and public safety. Key questions of interest in this section include, As a case study, how does California figure into the national conversation around incarceration? In terms of leveraging this case to theorize the viability of prison downsizing more broadly, how does federalism in a neoliberal context condition possibilities for criminal justice reform beyond California? In what ways does California's great experiment provide a moment to rethink the place of prisons and jails in society?

Conclusion

In a 2014 report, the National Research Council of the National Academies called for law and policy reforms to reduce U.S. incarceration. However, unless we are able to develop a more nuanced account of the prospects and perils of decarceration attempts, similar reform efforts across the nation risk unintended consequences and, ultimately, failure. The *Plata* ruling has breathed new life into ongoing conversations about ending mass incarceration and has extended them

well beyond the domain of theory, placing them squarely into the policy domain. Burrowing down into the complexities of decarceration by law—whether in the form of court, legislative, or executive intervention—reveals both the opportunities and limits of attempts to end mass incarceration through top-down legal mandates.

Note

1. See, e.g., the following volumes of *The ANNALS*: January 2014, “Detaining Democracy: Criminal Justice and American Civic Life,” eds. Christopher Wildeman, Jacob S. Hacker, and Vesla M. Weaver; May 2009, “Race, Crime and Justice: Context and Complexities,” eds. Lauren J. Krivo and Ruth D. Peterson; May 2006, “Democracy, Crime and Justice,” eds. Susanne Karstedt and Gary Lafree; May 2004, on policing, ed. Wesley Skogan; September 2003, on evidence-based crime control practices and policymaking, ed. Lawrence Sherman; May 2003, on evaluating evidence-based crime control policies, eds. David Weisburd, Anthony Petrosino, and Cynthia M. Lum; and July 2002, on drug control policy and laws, eds. Robert MacCoun and Peter Reuter.

References

- Abarbanel, Sara, Angela McCray, Kathryn McCann Newhall, and Jessica Snyder. 2013. *Realigning the revolving door: An analysis of California counties' AB 109 2011-2012 implementation plans*. Palo Alto, CA: Stanford Law School Criminal Justice Center.
- Assembly Bill No. 109 (AB 109) (Public Safety Realignment), 2011-2012 Regular Session, Ch.15 (2011) California State Penal Code.
- Atkins v. Virginia, 536 U.S. (2002).
- Bird, Mia, and Ryken Grattet. 2015. Policy change and recidivism: The effects of California's realignment and local implementation strategies on rearrest and reconviction. *Criminal Justice Policy Review* 20:1–23.
- Brown v. Plata, 563 U.S. (2011).
- Carson, E. Ann. 2014. *Prisoners in 2013*. NCJ 247282. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.
- Carson, E. Ann, and Daniela Golinelli. 2013. *Prisoners in 2012—Advance counts*. NCJ 242467. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.
- Carson, E. Ann, and William J. Sabol. 2012. *Prisoners in 2011*. NCJ 239808. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.
- Currie, Elliott. 31 October 2011. “Realigning” criminal justice in California: Real reform, or shifting the deck chairs? *Dissent*. Available from <https://www.dissentmagazine.org>.
- Glaze, Lauren E., and Danielle Kaebler. 2014. *Correctional populations in the United States, 2013*. NCJ 248479. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.
- Glaze, Lauren E., and Erika Parks. 2012. *Correctional populations in the United States, 2011*. Washington, DC: U.S. Department of Justice, U.S. Bureau of Justice Statistics.
- Grattet, Ryken, and Joseph Hayes. 2015. *California's changing prison population*. San Francisco, CA: Public Policy Institute of California.
- Males, Mike. 2012. *One year into Realignment: Progress stalls, stronger incentives needed*. Oakland, CA: Center on Juvenile and Criminal Justice.
- National Research Council. 2014. *The growth of incarceration in the United States: Exploring causes and consequences*. Edited by J. Travis, B. Western, and S. Redburn. Washington, DC: The National Academies Press.

- Petersilia, Joan. 2012. Looking back to see the future of prison downsizing in America. *Keynote Address, National Institute of Justice Conference*, June. Available from <http://nij.ncjrs.gov/multimedia/video-nijconf2012-laub-petersilia.htm#petersilia1>.
- Plata/Coleman v. Brown, E.D. California (2009).
- Strutin, Ken. 2012. Realignment of incarcerative punishment: Sentencing reform and the conditions of confinement. *William Mitchell Law Review* 38 (4): 1313–74.
- Trop v. Dulles, 356 U. S. (1958).
- Verma, Anjali. 2015. The law-before: Legacies and gaps in penal reform. *Law & Society Review* 49 (4): 847–82.
- Watkins, Thomas, and Don Thompson. 29 September 2011. California prison population reduction: Corrections “Realignment” starts now. *Huffington Post*. Available from <http://www.huffingtonpost.com>.