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Community Punishments in a
Rational Society

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Abstract

Reduction of mass incarceration in the United States will require substantial increases and substantial decreases in use of community punishments. Compared with other developed countries, American jurisdictions overuse community punishments as much as they overuse imprisonment, but mostly for minor and low risk offenders for whom they are often not necessary. That is a waste of money and an unjust intrusion into peoples' lives. In most developed countries, 5 to 20 percent of convicted offenders are sentenced to confinement and the rest receive community punishments, fines, and suspended prison sentences. Compared with jail or prison terms, community punishments are less expensive, less criminogenic, and more humane. They do less collateral damage to the lives and futures of offenders and their loved ones. They can be scaled to the seriousness of crimes. Well managed, well targeted, and adequately funded programs result in lower reoffending rates. If American sentencing policies and practices were rational and evidence-based, community punishments would be imposed much more often than they now are for mid-level and serious crimes, and imprisonment much less.

Key words: Community punishments, alternatives to incarceration, intermediate punishments, mass incarceration, probation

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

In 2010, for example, the most recent year for which standardized national European data are available, 9.6 percent of convicted offenders in Sweden were sentenced to confinement¹. In Germany, 5.4 percent of convicted offenders. In Finland, 3.1 percent.² By contrast, in the United States in 2009, also the most recent year for which national data are available, 73 percent of people convicted of felonies were sentenced to jail or prison, including 83 percent of violent, 75 percent of property, and 71 percent of drug offenders.³ In the federal courts in 2015, 92.8 percent of convicted people were sentenced to confinement.⁴

Stop for a minute and think about the contrast between the extreme cases. Ninety-three percent of convicted US federal offenders received prison sentences; 97 percent of convicted Finnish offenders did not. The explanation for that stunning difference is neither that most federal offenders have committed substantially more serious crimes than most Finnish offenders nor that Finland is an extraordinarily pacific, Eden-like place. Well under 5 percent of sentenced federal offenders in 2015 were convicted of violent crimes; nearly a third were convicted of immigration offenses, mostly minor, a fifth of drug offenses, and a fifth of property offenses. Both Finland and the United States have crime patterns and rates that fall in the middle among developed countries⁵. After the United States, Finland has and long has had the highest homicide rate among Western developed countries. The Finnish rate is typically two to three times higher than those of other Western European countries.

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

The United States cannot avoid continued mass incarceration unless use of community punishments increases enormously for people who otherwise would be (and now are) sentenced to confinement. Shorter prison terms and repeal of mandatory minimum sentence and similar

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

² Aebi, Marcelo F., Galma Akdeniz, Gordon Barclay, Claudia Campistol, Stefano Caneppele, Beata Gruszczyńska, Stefan Harrendorf, Markku Heiskanen, Vasilika Hysi, Jorg-Martin Jehle, Anniina Jokinen, Annie Kensey, Martin Killias, Chris J. Lewis, Ernesto Savonna, Paul Smit, and Rannveig Bórisdóttir. 2014. *European Sourcebook of Crime and Criminal Justice Statistics: 2014*. 5th ed. Helsinki: Helsinki European United Nations Institute.

³ Reaves, Brian A. 2013. *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*. Washington, DC: US Department of Justice, Bureau of Justice Statistics.

⁴ U.S. Sentencing Commission. 2016. *Sourcebook of Federal Sentencing Statistics—2015*, fig D. Washington, D.C.: U.S. Sentencing Commission.

⁵ Van Dijk, Jan, John van Kesteren, and Paul Smit. 2007. *Criminal Victimization in International Perspective: Key Findings from the 2004–2005 ICVS and EU ICS*. The Hague: Netherlands Ministry of Justice.

⁶ Morris, Norval, and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University.

laws also are necessary, but those things by themselves will not do the job. A wide range of community punishments could be adopted that are widely used in other Western countries. These include resolution by mediation; diversion from prosecution conditioned on payment of fines, making restitution, or performance of community service; much greater use of fines for non-trivial crimes; suspended prison sentences; community service; and diverse forms of supervision and community-based treatment.

A complete package will also include substantially increased use of unconditional discharges following conviction and sentences to unsupervised probation. In neither instance do convicted offenders thereby escape punishment. Anyone convicted of crime has endured fear and anxiety. All experience demeaning assembly line processing. Many spend overnight in jail awaiting a preliminary hearing. Many remain in jail until they are convicted. All will understand, as a classic study of criminal courts long ago showed, that “the process is the punishment.”⁷ For such cases, unconditional discharges should be the norm, unsupervised probation the exception. Otherwise, probation agencies will have to allocate resources to lowest risk offenders, and probationers who judges believe do not warrant further state intrusion in their lives will be at risk of revocations and imprisonments for violation of technical conditions. New crimes, when they occur, should be handled as new crimes.

If policy makers want to adopt policies based on evidence, doing so is rational, cost-effective, and easy. Community programs that are well conceived, well managed, well targeted, and adequately financed have repeatedly been shown to reduce reoffending⁸. Many hundreds of evaluations have shown that participants in community punishments achieve reoffending rates no worse than those of comparable people sentenced to confinement. That last finding means that, except concerning a small percentage of unusually dangerous people, vast sums spent on imprisonment are—from a crime prevention perspective—wasted. Historian James M. McPherson said of the pre-Civil War southern response to abolitionism, “The South closed its mind.”⁹ American policy makers of the past three decades likewise closed their minds to meaningful use of community punishments in place of imprisonment. Not much will happen until that attitude changes.

A steadily accumulating literature confirms the observation two centuries ago by John Howard, the first prominent English prison reformer, that prisons are “schools for crime.” All else being equal people sentenced to imprisonment are more, not less, likely to reoffend than are comparable people sentenced to community punishments.¹⁰ There is nothing surprising about this. Prisoners are immersed in inmate subcultures and intensively exposed to the deviant values of chronic offenders. Many prisons are brutal and brutalizing places to which prisoners must accommodate for self-protection. Almost all prisons are resource-poor and unable to provide adequate drug, mental health, and other treatment, training, and educational programs to meet prisoners’ needs.

⁷ Feeley, Malcolm M. 1979. *The Process is the Punishment: Handling Cases in a Lower Criminal Court*. New York: Russell Sage Foundation.

⁸ E.g., MacKenzie, Doris Layton. 2006. *What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents*. Cambridge, UK: Cambridge University Press.

⁹ McPherson, James M. 2016. Review of *The Slave’s Cause: A History of Abolitionism*. *New York Review of Books* LXIII (16):63-65 at p. 64.

¹⁰ Nagin, Daniel S., Francis Cullen, and Cheryl Lero Jonson. 2009. “Imprisonment and Re-offending.” In *Crime and Justice: A Review of Research*, vol. 38, edited by Michael Tonry. Chicago: University of Chicago Press; Cullen, Francis, Cheryl Lero Jonson, and Daniel S. Nagin. 2011. “Prisons Do Not Reduce Recidivism.” *Prison Journal* 91(3):48–65.

Being sentenced to imprisonment undermines and often impoverishes prisoners' families and children. The resulting stigma and collateral legal consequences foreclose opportunities and access to resources that make released prisoners' later lives more difficult and their employment prospects worse¹¹.

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

Creating effective community punishments will require much more than new programs, increased funding, and better management. It will require a change of heart by policy makers which, despite seeming, much ballyhooed, bipartisan support for change, shows few signs of happening. One compelling sign is the failure of most "justice reinvestment" efforts to reduce prison populations substantially and reallocate enormous foreseeable savings in prison expenditure to community corrections programs. Most have not produced substantial declines in actual as opposed to projected prison populations. Where prisoner numbers have fallen significantly, the savings have seldom been reallocated to community corrections.¹² If and when the change of heart occurs, the knowledge exists to create and run effective programs.

The auguries are not yet especially good. Despite the work of conservative organizations such as Justice Fellowship and the Texas Public Policy Foundation, and the Right on Crime initiative both organizations support, no bipartisan consensus has yet emerged that massive policy changes are required because mass incarceration is unjust, unwise, and ineffective. Fundamental change will occur only when it becomes widely accepted that mass incarceration is morally wrong. A handful of liberal reform advocates have long said this. Some spokesmen for Right on Crime say it. In 2014, former House majority leader Newt Gingrich and former Democratic White House staffer Van Jones wrote that "It would be hard to overstate the scale of this tragedy. For a nation that loves freedom and cherishes our rights to life, liberty and the pursuit of happiness, the situation should be intolerable. It is destroying lives and communities."¹³

Many conservative critics of the status quo, however, make no such admission. Instead they propose new policies for first and nonviolent offenders, say that current policies cost too much, and promote policies aimed primarily at saving money and reducing recidivism¹⁴. Former Texas governor Rick Perry observed, "There are thousands of non-violent offenders in the system whose future we cannot ignore." Former drug czar William Bennett declared:

¹¹ Travis, Jeremy, Bruce Western, and Steve Redburn, eds. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequence*. Washington, DC: National Academies Press.

¹² Austin, James, Eric Cadora, Todd R. Clear, Kara Dansky, Judith Greene, Vanita Gupta, Marc Mauer, Nicole Porter, Susan Tucker, and Malcolm C. Young. 2013. *Ending Mass Incarceration: Charting a New Justice Reinvestment*. Washington, DC: Sentencing Project; LaVigne, Nancy, Samuel Bieler, Lindsey Cramer, Helen Ho, Cybele Kotonias, Deborah Mayer, David McClure, Laura Pacifici, Erika Parks, Bryce Peterson, and Julie Samuels. 2014. *Justice Reinvestment Initiative State Assessment Report*. Washington, D.C.: Urban Institute.

¹³ Gingrich, Newt, and Van Jones. 2014. "Prison System Is Failing America." <http://CNN.com> (May 22). <http://www.cnn.com/2014/05/21/opinion/gingrich-jonesprison-system-fails-america/index.html>.

¹⁴ The quotations in this paragraph can be found at the Right on the Crime website (<http://rightoncrime.com>).

“Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending. That means demanding more cost-effective approaches.” The Right on Crime Statement of Principles, endorsed by, among many others, Gingrich, Perry, Bennett, former attorney general Edwin Meese, and former Florida governor Jeb Bush, lists five objectives: “Protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution, and conserving taxpayers’ money.” Reducing mass incarceration because it is wrong, and treating suspects, convicted persons, and prisoners more justly, fairly, and humanely are conspicuously absent.

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

I. Community Punishments since the 1970s

Community punishments in the United States are imposed following criminal convictions, or as conditions following release from prison¹⁵. Usually they do not involve confinement. They include nominally and intensively supervised probation; fines and restitution; community service; and participation in community-based treatment programs of various sorts. Sometimes, but comparatively rarely, they involve intermittent confinement—for example, in programs in which participants leave prisons, jails, or halfway houses to work or attend school. Sometimes, but again comparatively rarely, they are imposed as the back component of “split” sentences that include a short period of confinement.

Use of community punishments expanded substantially in most Western countries during the 1970s, 1980s, and 1990s when crime rates, including homicide rates, increased almost everywhere by three to four times before peaking and dropping precipitously.¹⁶ Legislation in many countries authorized new community punishments and new or expanded programs that allowed prosecutors or judges to divert cases on the condition that fines or restitution be paid or community service be performed. The policy aims were almost always the same: to reduce the flow of people into to imprisonment and find less damaging but proportionate ways to punish wrongdoers. The new initiatives mostly achieved their goals. Despite harsher public attitudes toward violent and sexual offending, in most countries imprisonment rates remained stable or increased only slightly during the period of rising crime rates, and have since declined. There have been three distinct phases of attempted but largely unsuccessful efforts to establish community punishments as prison alternatives in the United States: “alternatives to incarceration” in the 1970s, “intermediate punishments” in the 1980s, and a *mélange* of initiatives since the early 1990s. Most were meant to replace sentences to imprisonment. Few were.

¹⁵ Laws in many European countries authorize prosecutors to resolve cases without convictions if suspects agree to pay fines or restitution or perform community service (e.g., conditional dismissals in Germany [Weigend, Thomas. 2016. “Sentencing in Germany.” In *Sentencing Policies and Practices in Western Countries*, edited by Michael Tonry. Chicago: University of Chicago Press] and transactions in The Netherlands [van de Bunt, Henk, and Jean-Louis van Gelder. 2012. “The Dutch Prosecution Service.” In *Prosecutors and Politics: A Comparative Perspective*, edited by Michael Tonry. Chicago: University of Chicago Press.]).

¹⁶ Tonry, Michael. 2014. “Why Crime Rates Are Falling Throughout the Western World.” In *Why Crime Rates Fall and Why They Don’t*, edited by Michael Tonry. Chicago: University of Chicago Press.

A. Alternatives to Imprisonment in the 1970s

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

Legislators in some states, and corrections officials in many, also created new community corrections programs that sought to reduce prison use by diverting convicted offenders from imprisonment. In practice the new initiatives were comparatively seldom used for otherwise prison-bound offenders and, as I explain below, often produced net increases in prison populations and corrections budgets.¹⁷

During the heyday of the Law Enforcement Assistance Administration in the 1970s, enormous numbers of pilot and demonstration projects were established and evaluated.¹⁸ They included victim-offender mediation, restitution, and community service programs meant explicitly to serve as “alternatives to incarceration.” Evaluations typically were methodologically weak, but their three main findings were consistent with findings of later, stronger evaluations. First, judges seldom used the new programs as substitutes for imprisonment. Second, participation in them was seldom shown significantly to reduce reoffending. Third, though, participants’ reoffending rates were seldom higher than those of comparable people in control groups.

It is ironic that community service, mediation, and restitution failed; all were pioneered in the United States.¹⁹ In a wide range of other Western countries, perhaps most extensively in Scandinavia, all three were widely adopted and have been extensively used to divert people from imprisonment.²⁰

By the 1980s in the United States, however, it became evident that the alternatives movement was bucking an emerging law-and-order political culture. Officials became tougher. Judges and prosecutors sent more people to prison for longer times, and parole boards held them there longer before release.²¹ Judges and prosecutors were not especially interested in diverting prison-bound offenders to “softer” punishments. This had a number of results. Most mediation, community service, and restitution programs disappeared when federal funding ceased; few legislators supported their goals and were willing to spend money on them.

¹⁷ Morris, Norval, and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University.

¹⁸ See, e.g., on restitution: Warren, Marguerite, A. Harland, E. Brown, M. Buckman, K. Heide, K. Maxwell, P. van Voorhis, and J. Simon. 1983. *Restitution in Law and Practice: The Experience of Ten Programs*. Final Report to the National Institute of Justice. Department of Criminology, University of Cincinnati; on community service: McDonald, Douglas C. 1986. *Punishment without Walls*. New Brunswick, N.J.: Rutgers University Press.

¹⁹ Morris, Norval, and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University.

²⁰ Lappi-Seppälä, Tapio. 2016. “Sentencing Policy in Scandinavia.” In *Sentencing Policies and Practices in Comparative and Cross-National Perspective*, edited by Michael Tonry. Chicago: University of Chicago Press; Tonry, Michael. ed. 2016. *Sentencing Policies and Practices in Western Countries*. Chicago: University of Chicago Press.

²¹ Blumstein, Alfred, and Allen Beck. 1999. “Population Growth in US Prisons, 1980–1996.” In *Prisons*, edited by Michael Tonry and Joan Petersilia. Chicago: University of Chicago Press.

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

B. Intermediate Punishments in the 1980s

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

Numerous intermediate punishment programs were established in the 1980s. They were conceived as falling between prison and routine probation but in their promoters’ minds generally had the same ultimate purpose as the 1970s “alternatives” —to divert convicted offenders from prison. The logic was that “alternatives to imprisonment” failed because judges considered them sufficiently punitive; the solution was to make community punishments look more punitive, intrusive, and stigmatizing. That happened. The new programs were more intrusive and controlling, they were often strictly enforced, and majorities of participants wound up in prison for breaches of conditions. The perverse result was that programs meant to divert people from prison and save money instead sent more people to prison and increased costs. In retrospect, proponents of intermediate punishments made a huge mistake in not anticipating that the new programs would be used to toughen sentencing rather than, as they hoped, to reduce the use of imprisonment.

Examples illustrate the toughening dynamic. The National Institute of Justice (NIJ) provided funding for several states to establish and evaluate day-fine systems for use as prison alternatives. Day fines are common in Germany and Scandinavia as penalties for low and moderate severity offenses. The seriousness of the crime determines the number of day fine units (for example, 30). The individual’s daily income (adjusted for wealth) determines the amount of a single unit. A low-income offender might be required to pay 20 euros per day and an affluent one 300. The NIJ evaluation design called for randomized allocation of eligible offenders to day fines or to whatever sentence the judge ordinarily would order. The projects failed. In most, despite the federal grants that paid for the pilot projects, practitioners refused to implement day fines at all. In none did practitioners agree to random allocation.²²

Intensive supervision programs offer a second example. NIJ funded a multi-jurisdiction experiment to determine the programs’ effects on recidivism. Eligible offenders were to be randomly allocated by judges or corrections officials to intensive supervision or the default disposition. Researchers would track the experiences of program participants and control group

²²Hillsman, Sally T. 1989. “Fines and Day Fines.” “Prisoner Reentry Programs.” In *Crime and Justice: A Review of Research*, vol. 12, edited by Michael Tonry and Norval Morris. Chicago: University of Chicago Press.

members to learn what happened. There was, however, an insuperable obstacle. Judges in all participating jurisdictions refused to follow the experimental research design and insisted on being able case-by-case to sentence eligible offenders to imprisonment. Follow-ups of programs in which parole or probation officials randomly allocated cases showed that intensive supervision had no effects on recidivism rates but increased revocation rates. This was no surprise because, evaluators found, the closer supervision disclosed more breaches of conditions and the program operators seldom had adequate access to treatment programs and other services.²³

Changes in the ethos of parole and probation revocation practice illustrate a third obstacle. Throughout the 1980s, probation and parole revocations and their shares of prison admissions steadily increased as judges' and parole boards' attitudes toward offenders became more unforgiving. Officials responded more harshly to breaches of conditions than in earlier periods, especially for technical violations such as failing drug tests or not appearing for scheduled appointments.²⁴ In some states, revocations came to constitute a large fraction, often more than half, of all prison admissions.

The new intermediate punishments often had the perverse effect that more, not fewer, offenders wound up in prison.²⁵ Their rationale was that diversion of prison-bound offenders would reduce prison crowding and save substantial money because the per capita costs of intermediate punishments programs, typically \$1000 to \$10,000, are a small fraction of the, depending on the state, \$30-75,000 per capita cost of imprisonment. The experience was otherwise.

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

C. Community punishments since the Early 1990s

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

1. A Lot Has Happened. There has been substantial program development, most conspicuously under the banners "drug and other problem-solving courts" and "prisoner reentry." Research on the effectiveness of treatment programs has burgeoned; more is known, and known more confidently, about the effects and operation of a wide variety of programs and

²³ Petersilia, Joan, and Susan Turner. 1993. "Intensive Probation and Parole." In *Crime and Justice: A Review of Research*, vol. 17, edited by Michael Tonry. Chicago: University of Chicago Press.

²⁴ Tonry, Michael. 1990. "Stated and Latent Functions of Intensive Supervision Probation." *Crime and Delinquency* 36:174-91.

²⁵ Morris, Norval, and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University.

services. Under the right circumstances many kinds of programs can enhance participants' human capital and reduce their reoffending.²⁶

Many judges want to impose sentences that do something more constructive, and more humane, than simply send troubled people to jail or prison. Drug courts, mental health courts, and other specialized problem-solving courts for domestic violence, gun crimes, drunk driving, and military veterans have proliferated. The first drug court was established in Miami in the early 1990s. By 2017, there were thousands and many hundreds of other problem-solving courts. Well-regarded evaluations and research reviews conclude that well run and targeted specialty courts produce better results than business as usual.²⁷ The vast majority were established before credible evidence of effectiveness was available, because judges and others believed them to be the right thing to do. Despite the large numbers of programs, caseloads are typically small, however, and can deal with only a tiny fraction of offenders who could benefit.

The reentry movement took off early in this century, heralded by writings of Jeremy Travis²⁸ and Joan Petersilia.²⁹ They observed that hundreds of thousands of people are released from prison each year and it is in everyone's interest that as many as possible achieve satisfying, law-abiding lives. Those arguments were widely accepted. Within a few years, federal funding became available to support state programs. Programs were established in most, probably all, states. Reentry targets people being released from jail or prison, ideally providing continuity of treatments and services provided inside the institution and assistance in meeting the challenges of reentering mainstream life.

In practice, little or nothing about reentry is new except the term and the enthusiasm. Programs and service for people released from prison are indistinguishable from those traditionally provided parolees and probationers in community settings. Evaluations of reentry programs produce the same kind of mixed findings as do evaluations of community corrections programs more generally. Well run, adequately funded programs can achieve good results; poorly run and funded programs do not.³⁰

The big change in the past quarter century is that many more people believe that correctional treatment programs can, under the right circumstances, reduce reoffending. In 1990, "nothing works" remained the predominant and much more influential view. Landmarks that underlay the change include the "Drug treatment works!" conclusion of the President's Commission on Model State Drug Laws (1993),³¹ work by Canadian scholars beginning in the 1980s that demonstrated the effectiveness of cognitive skills training and proposed best

²⁶ MacKenzie, Doris Layton. 2006. *What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents*. Cambridge, UK: Cambridge University Press; Petersilia, Joan, and Richard Rosenfeld, eds. 2007.

Parole, Desistance from Crime, and Community Integration. Washington, DC: National Academy Press.

²⁷ Mitchell, Ojmarrh, David B. Wilson, Amy Eggers, and Doris L. MacKenzie. 2012. "Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-traditional Drug Courts." *Journal of Criminal Justice* 40:60–71.

²⁸ Travis, Jeremy. 2000. "But They All Come Back: Rethinking Prisoner Reentry." Papers from the Executive Sessions on Sentencing and Corrections. Washington, DC: US Department of Justice, National Institute of Justice; Travis, Jeremy. 2005. *But They All Come Back: Facing the Challenges of Prisoner Reentry*. Washington, DC: Urban Institute Press.

²⁹ Petersilia, Joan. 2003. *When Prisoners Come Home: Parole and Prisoner Reentry*. New York: Oxford University Press.

³⁰ Jonson, Cheryl Lero, and Francis Cullen. 2015. "Prisoner Reentry Programs." In *Crime and Justice: A Review of Research*, vol. 44, edited by Michael Tonry. Chicago: University of Chicago Press.

³¹ President's Commission on Model State Drug Laws. 1993. *Final Report*. Washington, DC: US Government Printing Office.

implementation practices, and a long list of metaanalyses and systematic reviews of evaluations of community corrections programs that showed positive results.³²

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

Like flies in amber, policies and programs that emerged from ways of thinking consistent with the crime control politics of the 1980s continue to win support. Here is a popular example³³. More than 150 corrections programs have emulated Hawaii's Project HOPE, a probation initiative based on "swift, fair, and certain" sanctions.³⁴ Probationers are told that any breach of conditions will result in immediate sanctions, initially modest but progressing in severity with each subsequent breach, eventually resulting in revocation and a trip to prison for a period of years. An initial evaluation purported to show that probationers subjected to the program reoffended less often than others and were less likely to be imprisoned.³⁵ NIJ funded a series of replications that were evaluated using randomized assignments of eligible offenders to treatment and control groups. The new evaluations concluded that the programs were ineffective.³⁶

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

³² Cullen, Francis. 2013. "Rehabilitation: Beyond Nothing Works." In *Crime and Justice in America: 1975–2025*, edited by Michael Tonry. Chicago: University of Chicago Press; Cullen, Francis T., Cheryl Lero Jonson, and Daniel P. Mears. 2017. "Reinventing Community Corrections." In *Reinventing American Criminal Justice*, edited by Michael Tonry and Daniel S. Nagin. Chicago: University of Chicago Press.

³³ A second is contemporary preoccupation with use of predictions of reoffending in sentencing and parole decision making. Enormous ethical and technical issues stand in the way (e.g., Harcourt, Bernard E. 2007. *Against Prediction: Profiling, Policing, and Punishment in an Actuarial Age*. Chicago: University of Chicago Press.; Starr, Sonja. 2014. "Evidence-based Sentencing and the Scientific Rationalization of Discrimination." *Stanford Law Review* 66:803–72; Tonry, Michael. 2014. "Legal and Ethical Issues in the Prediction of Recidivism." *Federal Sentencing Reporter* 26(3):167-76). Ethical issues include use of predictive variables such as age, sex, and social status characteristics correlated with race and ethnicity. Technical issues include high false positive rates (people predicted to reoffend who will not but are treated more severely), routine failure to validate instruments on populations to which they are applied, and failure to restrict the reoffending outcome measure to serious sexual and violent offending.

³⁴ Kleiman, Mark A. R. 2009. *When Brute Force Fails: How to Have Low Crime and Low Punishment*. Princeton, NJ: Princeton University Press.

³⁵ Hawken, Angela, and Mark Kleiman. 2009. "Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE." Final Report, grant no. 2007-IJ-CX-0033, to the National Institute of Justice. Washington, DC: US Department of Justice.

³⁶ Lattimore, Pamela K., Doris Layton MacKenzie, Gary Zajac, Debbie Dawes, Elaine Arsenault, and Stephen Tueller. 2016. "Outcome Findings from the HOPE: Demonstration Field Experiment. Is Swift, Certain, and Fair an Effective Supervision Strategy?" *Criminology and Public Policy* 15 (4):1103-41; O'Connell, Daniel J., John J. Brent, and Christy A. Visser. 2016. "Decide Your Time: A Randomized Trial of a Drug Testing and Graduated Sanctions Program for Probationers." *Criminology and Public Policy* 15(4):1073-1102.

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

II. Invigorating Community Punishments

There were two overriding causes of the failures of the alternatives to incarceration and intermediate punishments movements. Policy makers were committed to a regime of harsh punishments and unwilling to invest substantial resources in community programs. Judges and prosecutors were unwilling to divert offenders whom they believed deserved to be sent to prison. Community punishments were seldom seen as appropriate for other than the most minor crimes.

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

Assuming, that politicians and practitioners minds wanted people convicted of non-trivial offenses to be sentenced to community punishments, the way forward is clear. A large literature offers advice on effective targeting and management of community corrections and treatment programs.³⁷ I make no effort to summarize it here. Instead I offer an action list of community penalty programs that would be established if sentencing were to be made rational, evidence-based, and humane, and if mass incarceration is to be reduced.

A. Reduce Use of Community Punishments for Minor and Low-Risk Offenders

American judges and parole boards much too often use community punishments for people convicted of minor crimes and for people who present little risk of reoffending. In 2015, American prisons and jails held 2.17 million people. Another 4.65 million were under community supervision. Calculated as population rates, both of those numbers are vastly higher than in any other Western country³⁸. Current use of community supervision is enormously wasteful; the vast majority of people being supervised present little risk to public safety. One of the most robust findings of the last two decades' research on correctional programs is that resources should target high-risk offenders. The current failure to do that makes little sense from cost-effectiveness or public safety perspectives. The following proposals call for increased use of a wide range of community punishments, but assume that they will be deployed in ways that are cost-effective and sensibly targeted.

³⁷Cullen, Francis. 2013. "Rehabilitation: Beyond Nothing Works." In *Crime and Justice in America: 1975–2025*, edited by Michael Tonry. Chicago: University of Chicago Press; Cullen, Francis T., Cheryl Lero Jonson, and Daniel P. Mears. 2017. "Reinventing Community Corrections." In *Reinventing American Criminal Justice*, edited by Michael Tonry and Daniel S. Nagin. Chicago: University of Chicago Press.

³⁸ Kaeble, Danielle, and Lauren Glaze. 2016. *Correctional Populations in the United States, 2015*. Washington, D.C.: Bureau of Justice Statistics.

B. Prosecutorial Diversion and Community Punishments

One way to avoid judicial reluctance to divert convicted offenders from imprisonment is to keep cases out of judges' hands. Most European countries use one or both of two approaches. German conditional dismissals and Dutch transactions offer suspects, usually on a take-it-or-leave-it basis, without negotiation, the opportunity to accept the fine, restitution, or community service that would be imposed if they were formally charged and convicted. If they accept, the charge is conditionally dismissed. The Scandinavians, the Dutch, and several other countries offer parallel programs, usually referred to as penal orders, that involve a conviction and a community penalty. Large percentages of all resolved cases result from these kinds of diversionary programs.³⁹ For the obvious reason of collateral consequences, programs that do not involve convictions are preferable for the United States.

C. Mediation, Restitution, and Restorative Justice

Some European countries handle diversion by means of pre-charge mediation, restitution, and restorative justice programs.⁴⁰ If victims and offenders agree on a resolution of the offense, or if the defendant pays restitution, the charge is dismissed. In Norway and Finland, a large fraction of resolved cases is disposed of via mediation. In concept, such programs should be congenial to American attitudes because they involve victim agreement or restitution of victim losses.

D. Fines and Community Service

Both fines and community service are in principle ideal community punishments to be used in lieu of imprisonment. Both can easily be scaled in proportion to the seriousness of the crimes for which they are imposed. Day fines are frequently used in Germany and Scandinavia for minor and moderately serious, including violent, crimes. In the United States, however, the absence of income supports for poor people means that most criminal defendants lack sufficient money to pay fines.

That problem need not, however, obstruct much wider use of community service. Ironically, the first publicized modern community service programs were pioneered in the United States for use in lieu of imprisonment for people convicted of welfare fraud. The idea was quickly and successfully emulated in England and Wales, Scotland, and The Netherlands and later spread throughout Europe. By the 1990s, however, American use of community service as a freestanding punishment had largely ended. When it was used, it was as one among many conditions of probation.⁴¹ This is the federal court practice. No freestanding community punishments other than probation are authorized in the federal sentencing guidelines: all are available only as probation conditions.

³⁹ Asp, Petter. 2012. "The Prosecutor in Swedish Law." In *Prosecutors and Politics: A Comparative Perspective*, edited by Michael Tonry; van de Bunt, Henk, and Jean-Louis van Gelder. 2012. "The Dutch Prosecution Service." In *Prosecutors and Politics: A Comparative Perspective*, edited by Michael Tonry. Chicago: University of Chicago Press; Weigend, Thomas. 2016. "Sentencing in Germany." In *Sentencing Policies and Practices in Western Countries*, edited by Michael Tonry. Chicago: University of Chicago Press.

⁴⁰ Lappi-Seppälä, Tapio. 2016. "Sentencing Policy in Scandinavia." In *Sentencing Policies and Practices in Comparative and Cross-National Perspective*, edited by Michael Tonry. Chicago: University of Chicago Press.

⁴¹ Morris, Norval, and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University.

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

E. Probation with Treatment Conditions

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

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

III. Conclusion

Community punishments should be used much less for people whose characteristics and lives do not warrant them, and much more for people who would otherwise receive jail or prison sentences. Diverting a large percentage of people now sentenced to jail or prison into well-run, adequately funded, professionally operated community punishments could save huge amounts of money, substantially reduce imprisonment rates, and be more crime preventive than the current regime. Crime prevention would result from the reduced reoffending rates good community programs can deliver and from reduction of the effects of the criminogenic conditions to which people are exposed in prison. Community punishments would do much less harm to offenders and their families than prison and jail sentences now do.

Whether large-scale diversion from imprisonment to community punishments will happen will depend on political will. So far, little is evident. Sentencing and parole initiatives have focused on minor and first offenders.⁴² Federal efforts to stimulate development of specialty courts and reentry programs have been modest, far less than is needed. States so far have not been prepared to make the substantial investments required. Justice Reinvestment initiatives have targeted low-hanging fruit but more importantly have offered a free lunch: legislators need not appropriate substantial new sums but simply tweak sentencing laws or revocation policies in order to reduce prison spending and reallocate all or part of any savings.

⁴² Beckett, Katherine, Anna Reosti, and Emily Knaphus. 2016. "The End of an Era? Understanding the Contradictions of Criminal Justice Reform." *Annals* 664:238-59; Tonry, Michael. 2016. *Sentencing Fragments—Penal Reform in America, 1975–2025*. New York: Oxford University Press

Even then, Justice Reinvestment has seldom resulted in major funding increases for community punishments.

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