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DOWNSIZING IMPRISONMENT

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INTRODUCTION

This Essay employs a variation of the “interest convergence” concept to examine the competing interests at stake in downsizing imprisonment in the United States. In the last few decades, the country has become the world leader in both incarceration rates and number of inmates. Reversing these trends is a common goal of multiple parties, who advocate prison reform under different rationales. Some advocate less imprisonment as a means of tempering the disparate effects of imprisonment on individual offenders and the communities to which they return. Others support downsizing based on conservative values that favor reduced government size, spending, and interference in the lives of citizens. Still others see downsizing primarily as a means of reducing fiscal spending and balancing budgets; with some state correctional systems having morphed into a multi-billion dollar a year commitment, punishment has become a great financial drain. Of these competing rationales, interest convergence theory suggests that economic interests will be a driving force of prison reform. If the last few years are indicative, legislatures, courts, and executive officials will continue to take cost into increasing consideration in creating law and policy, and ultimately the need to save money will rein in the criminal justice system. This Essay contends that downsizing imprisonment in the name of saving money may not be the most principled basis for reform, but it should nonetheless be welcomed by prison reformers of all stripes. As unfortunate as it may be, for the bedraggled communities and neighborhoods burdened by the collateral costs of mass imprisonment, any means will suffice.

This Essay explores the issues in five parts, first focusing on Convergent Interests in Downsizing, second Cutting Costs in Corrections and Realignment

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Ideology, third Reducing Structural Harm on the Inside and Out, then the Economic Interests Will Rein in Criminal Justice, and finally By Any Means Necessary: Ending American Exceptionalism.

I. CONVERGENT INTERESTS IN DOWNSIZING

*Conservatives should recognize that the entire criminal justice system is another government spending program fraught with the issues that plague all government programs. Criminal justice should be subject to the same level of skepticism and scrutiny that we apply to any other government programs. But it's not just the excessive and unwise spending that offends conservative values. Prisons, for example, are harmful to prisoners and their families. Reform is therefore also an issue of compassion.*¹

This Essay employs a variation of the “interest convergence” concept to examine the interests at stake in downsizing imprisonment.² This concept, as advanced by Professor Derrick Bell, is a means of understanding certain developments in law and policy. At its core, the theory suggests that understanding African-American advancement in the United States is inextricable from analysis of the value to Whites.³ Bell argues that Black advancement is a by-product of advancing White interests through analysis of *Brown v. Board of Education*, a decision whose importance was more than advancing Black legal and political status:

I contend that the decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.

¹ Richard Viguier, *A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013), http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html?_r=0.

² See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

³ *Id.* at 524–25 (outlining three ways *Brown* benefitted whites, “First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. . . . Second, *Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might be given meaning at home. . . . [Third], segregation was viewed as a barrier to further industrialization in the South.”).

The thesis is somewhat of a reversal of the common understanding of the case, since as one commentator describes it, “any benefits to blacks from the decision were incidental to, and contingent upon, benefits that whites received . . . blacks will only receive help when white interests are implicated (and assuaged), even when (or perhaps especially when) white interests remain silent.”⁴ As such, the interest convergence theory

rejects the notions of classical legal theory that idealism, abstract legal doctrine, or the deployment of novel legal strategies will bring about significant advances in civil rights. While all of these may play a role, interest convergence theory holds that it is the actual or perceived alignment of the interests of the elite with those of the subordinated that is outcome determinative in achieving substantive justice.⁵

Although the *Brown* decision captured a discrete historical moment, the interest convergence concept sheds light on prison reform in the present. Today, there is a similar struggle around reducing America’s reliance on incarceration. Broadly speaking, there are private prison corporations and an entire cottage industry interested in maintaining and expanding use of incarceration,⁶ simultaneously, there are forces for reform that want to curb criminal justice

⁴ Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell’s Interest Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 NW. J.L. & SOC. POL’Y 30, 31 (2007); see also D. Aaron Lacy, *The Aftermath of Katrina: Race, Undocumented Workers, and the Color of Money*, 13 TEX. WESLEYAN L. REV. 497, 511 (2007) (“progress for African-Americans will come only when that progress benefits powerful whites as well”); David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 370–71 (2010) (abstracting interest convergence as “a case in which two parties, usually on different sides of an issue, find common ground for their own very different reasons”); Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT’L SEC. J. 185, 187 (2012) (describing interest convergence as “the process by which the divergent self-interests of different political groups overlap to the degree necessary to enable the formation of an issue-specific coalition powerful enough to effect serious policy change”).

⁵ William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 23 (2011).

⁶ See, e.g., Cindy Chang, *Louisiana is the World’s Prison Capital*, THE TIMES-PICAYUNE, May 13, 2002 (reporting that Louisiana has the highest rate of imprisonment in the world and that a majority of Louisiana inmates are housed in for-profit facilities, with many parties who are deeply invested in maintaining this situation); Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589 (2011).

spending.⁷ Interest convergence explains how a shift away from this model is nonetheless in the interest of poor ethnic communities.⁸

For proponents of downsizing imprisonment, “cost” takes on layered and multiple meanings, including literal and metaphorical meanings. For fiscal reformers, cost is quite literal—the spending that goes into incarceration. For others, cost is ideological, and involves departure from commitments to freedom, liberty, smaller government, and less spending.⁹ With the most prisoners of any country in the world, American criminal justice may appear the epitome of big government at its biggest, most expensive, and most oppressive. For the more skeptical, prison supports a form of public welfare, fueling a system that clothes, shelters, and feeds the poor. For communities that have felt the harsh whip of punishment, “cost” may include all the above, but with additional structural harms that contribute to decreased political, physical, and mental health.

Analysis of prison reform through this lens shows that saving money and cutting costs will continue to guide criminal justice reform. It also shows that the powers that ultimately determine the outcomes of prison reform are largely struggles between the forces of white power. Like *Brown’s* era, when white Southerners opposed civil rights advancement and racial equality, today there are formidable forces in opposition to prison reform; as racial oppression was in the south, mass incarceration has been profitable for Whites, including tough on crime politics that have built many a political career and tax dollars that have provided jobs to depressed rural regions, enriching construction company coffers and providing wealth for private corporations.¹⁰ Over the course of the last four decades, the correctional system has funneled billions of government dollars into

⁷ See, e.g., *Prison Construction: Clear Communication on the Accuracy of Cost Estimates and Project Changes is Needed*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, May 29, 2008 (describing a prison construction project for three prisons that went \$278 million dollars over initial estimates, which amounted to 62% more in funding being provided than initially estimated), <http://www.gao.gov/products/GAO-08-634>.

⁸ See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 933 (describing that a number of scholars have used interest convergence as “a tool of prediction”).

⁹ Although this essay uses the term mass incarceration as a relative term to refer to the over-500% increase in prison population, the term is not without critics. See, e.g., Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS 74, 74 (2010) (Noting that “mass incarceration” is a misnomer because it implies that nearly everyone has been subject to the new system of control.).

¹⁰ Stec, *supra* note 4, at 46.

the hands of white America. Today, however, the need to conserve resources is challenging that model. Whereas mass incarceration put money into the hands of white America—fiscal reformers in the present want to keep from having to spend in the first place.

Regardless of which side ultimately prevails, proponents of incarceration or their adversaries, Whites are unconditional beneficiaries. On the contrary, in the developments from the peak of mass imprisonment to the falling population in the present, the powerlessness of prisoners and their communities is evident; they have little agency over the course of criminal justice despite being a punitive subject.

This assessment of criminal justice reform that follows will be intelligible inasmuch as one recognizes imprisonment as a racialized space for black and brown bodies; the American government, in turn, is a white body. Although some may contest the idea that the government is white, even a cursory glance at the branches of government show that white males are largely in power. By presuming the white government as proxy for white interests, this essay takes the very leap of faith Bell made in his analysis of the *Brown* decision, which advanced white interests through the judiciary.

Although this Essay stands for the proposition that interest convergence is a useful explanatory for efforts to reform imprisonment, the concept is not without critics.¹¹ One has criticized that Bell's model accords "an almost complete absence of agency" to the Black citizenry in the cause of advancement.¹² The concept has also been criticized for failing to define "black interest" or "white interest," in the face of complex populations that such words attempt to describe.¹³ More critical are charges that interest convergence invariably involves racial conspiracy theory.¹⁴ Despite these and other criticisms, the interest convergence thesis has had academic staying power as a means of seeing deeper into race relations in the United States, and has remained the subject of rigorous academic debate.¹⁵

¹¹ See, e.g., Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011).

¹² *Id.* at 175.

¹³ *Id.* at 176.

¹⁴ *Id.* at 192.

¹⁵ Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248 (2012) (criticizing Driver's analysis and characterization of interest convergence); David A. Singleton, *Kids, Cops, and Sex Offenders: Pushing the Limits of the Interest-Convergence Thesis*, 57 HOW. L.J. 353 (2013) (analyzing Driver and Feldman's claims).

In its longevity, the concept has proved resilient to criticisms, and its continued relevance is highlighted in scholarship.¹⁶ For example, the claim that Bell's model afforded the black citizenry little agency in law and policy is hardly disputable, because in reality, they have very little agency. In the present, paradoxically enough, the lack stems in part from the collateral consequences of entanglement with the justice system. Furthermore, the struggles around prison reform show that interest convergence is not dependent on a purely black and white binary, since the struggles are between white powers as well; that is, the theory does not depend on strictly monolithic groupings, since as in the past, there are divergent interests among Whites.¹⁷ Lastly, employing interest convergence as a means of interpreting prison reform suggests that the binary Bell built perhaps may have been too generous since there are more than black interests at stake in prison reduction, including disproportionate Latino, Native American, and Asian populations. Hence, interest convergence in the prison context is the intermingling of "white" and simply "other" interests.

II. CUTTING COSTS IN CORRECTIONS & REALIGNING IDEOLOGY

*The sequestration would cut \$338 million from [the Bureau of Prisons'] current budget. . . . Further BOP would slow the ongoing activations of new prisons that have completed construction during the last few years. . . . To be blunt, sequestration means less money, not fewer inmates.*¹⁸

In the above letter to the Chairwoman of the Committee on Appropriations, Attorney General Holder indicates how spending cuts will affect the Bureau of Prisons. Not only will staff and private sector jobs be cut, newly-built prisons will not be used. Instead, as Holder makes clear, the sequestration represents a

¹⁶ See Kevin Terry, *Community Dreams and Nightmares: Arizona, Ethnic Studies, and the Continued Relevance of Derrick Bell's Interest Convergence Thesis*, 88 N.Y.U. L. REV. 1483 (2013) (rebutting the assertion that the interest convergence thesis has become less relevant to understanding contemporary Intergroup conflict in the United States).

¹⁷ See Catherine A. Smith, *Unconscious Bias and "Outsider" Interest Convergence*, 40 CONN. L. REV. 1077, 1077 (2008) ("exploring the biases within and among subordinated groups").

¹⁸ Letter from Eric Holder, Attorney General, to Hon. Barbara A. Mikulski, Chairwoman, Committee on Appropriations (Feb. 1, 2013), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Fwww.appropriations.senate.gov%2Fht-full.cfm%3Fmethod%3Dhearings.download%26id%3Da964a654-90e0-421a-9d76-187ef8187072&ei=SUP-U5y1BoaSyAHP24GgCQ&usg=AFQjCNGefupEzzqEIgij-bVG_BeA_aLA9A&sig2=PYpFQ01X145ry0zhLeWtuQ&bvm=bv.61190604,d.aWc.

reduction in funding without a reduction in prison population. These developments give the BOP tremendous incentive to develop ways of both diverting inmates from prison and releasing existing inmates.¹⁹ Although this letter exemplifies how spending sequestrations involuntarily slash a corrections budget, state governments are increasingly developing ways to do this voluntarily, including as a matter of ideological realignment.

The financial costs of corrections are at an all time high and some states rank among the largest and most expensive penal operations in the world.²⁰ As an indication of the scale, one report noted that corrections is second only to Medicaid as the fastest growing general fund expenditure.²¹ In 2011, state correctional costs were estimated at \$52 billion annually.²² According to one study, the total aggregate percentage of state spending on corrections is six percent,²³ the majority of which funds incarceration.²⁴ At the federal level alone, construction costs between 1998–2008 have totaled over \$3.6 billion.²⁵ These figures go to show the enormous amounts of money at stake in reducing imprisonment.

Reducing spending on incarceration aligns with other ideological values. For conservatives in particular, there are a number of political rationales for downsizing. As one in four prisoners in the world is being held in the United

¹⁹ However, it is important to recognize the ambiguous relationship between population size and costs. See James Austin, *Myths and Realities in Correctional Cost-Benefit Analysis*, CORRECTIONS TODAY 54, 55 (Feb. 2010) (describing a major weakness in cost-benefit analysis in corrections is the assumption that “correctional budgets change directly in relation to the number of people being supervised or incarcerated. This assumption allows the advocates of a particular program, policy or law to claim potential savings when in fact such savings or averted costs will not occur.”).

²⁰ See David A. Singleton, *Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform*, 34 N. KY. L. REV. 663, 675–76 (2007) (describing Ohio incarceration costs).

²¹ Christine S. Scott-Hayward, *The Fiscal Crisis in Corrections: Rethinking Policies and Practices*, Vera Institute of Justice 3 (July 2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf.

²² PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 1 (2011).

²³ CORINA ECKL & ARTURO PEREZ, NAT’L CONFERENCE OF STATE LEGISLATURE, STATE BUDGET ACTIONS 2003, at 14 (2004).

²⁴ CHRISTIAN HENRICHSON & RUTH DELANEY, CENTER ON SENTENCING AND CORRECTIONS, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS (2012) (“Corrections departments pay the vast majority of costs for state prisons.”).

²⁵ Viguerie, *supra* note 1.

States, the scale of criminal justice is anathema to conservative mistrust of big government and interference with the lives and liberties of citizens. With two hundred thousand individuals incarcerated in federal facilities alone, and states like California employing tens of thousands of individuals and contractors for their imprisonment operations, the growth of criminal justice systems places ever-growing power into the hands of the government, a feat that is funded by citizens. Despite conservatives having helped construct the status quo, according to one commentator, “conservatives known for being tough on crime should now be equally tough on failed too-expensive criminal programs. They should demand more cost-effective approaches that enhance public safety and the well-being of all Americans.”²⁶ This critical perspective points to conservative ideology as a powerful means of realigning the justice system to be more in accordance with these traditional values.

III. REDUCING STRUCTURAL HARM ON THE INSIDE AND OUT

*Felony is the new N-word. They don't have to call you a nigger anymore. They just say you're a felon. In every ghetto you see alarming numbers of young men with felony convictions. Once you have that felony stamp, your hope of employment, for any kind of integration into society, it begins to fade out. Today's lynching is a felony charge. Today's lynching is incarceration. Today's lynch mobs are professionals. They have a badge; they have a law degree. A felony is a modern way of saying, "I'm going to hang you up and burn you." Once you get that F, you're on fire.*²⁷

The social, economic and political “costs” of imprisonment weigh most heavily on poor, ethnic minority communities. These are the same communities that supply the majority of prisoners and reabsorb the most who return.²⁸ The tolls occur at various levels, particularly for the family and community, which is strained in various ways, including disrupted parental bonds, separated spouses,

²⁶ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 7.

²⁷ SASHA ABRAMSKY, CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE 140 (2006) (quoting a black minister in Mississippi).

²⁸ PRISONER REENTRY AND CRIME IN AMERICA 35 (Jeremy Travis & Christy Visher eds., 2005) (“Ex-prisoners do not reenter communities randomly. They return to the communities from which they came or go to places that are very similar. Because the people who go to prison are overwhelmingly poor . . . they are drawn from and return to characteristically poor, ethnic neighborhoods.”).

stress on the remaining caregivers, and loss of discipline in the household.²⁹ As such, “States may not fully internalize the costs to neighborhoods that experience a high concentration of incarcerated residents—costs that include the disruption of family ties and social networks, the dampening of the communicative value of sanctions, the difficulty of returning prisoners to enter the labor market, the increase in single parent households, the stigmatization of neighborhoods, and other dynamics. . . .”³⁰ Already struggling with higher rates of crime and violence, the problems are compounded with growing numbers of ex-prisoners returning to society from prison with illnesses and afflictions that were acquired while incarcerated.³¹ The systemic harm is thus twofold, first from the removal of the individual from the community and second, when released prisoners return to the community. These communities are the most at risk of reaching the point where further increases in incarceration have diminishing returns as a means of making communities safer.

In the prison setting, an individual’s most immediate problem is dealing with the deprivations of imprisonment. Prisoners are at risk of a number of threats the moment they enter prison. Most prominent is the threat of violence, which is markedly increased in prison; in federal prisons an individual is fifty times more likely to be assaulted than on the outside.³² A specific threat is sexual and gender violence against inmates, which in some prison systems is systemic.³³ Inmates also have decreased mental and physical health in prison, with mental illness and

²⁹ Ricardo Barreras et al., *The Concentration of Substance Use, Criminal Justice Involvement, and HIV/AIDS in the Families of Drug Offenders*, 82 J. URBAN HEALTH: BULL. N.Y. ACAD. MED. 168 (2005).

³⁰ Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1308 (2005).

³¹ *Id.*

³² ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE: BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES: NATIONAL INMATE SURVEY 2008–09, at 22 (2010).

³³ See Spearlt, *Gender Violence in Prison & Hyper-masculinities in the ‘Hood: Cycles of Destructive Masculinity*, 37 WASH U. J.L. POL’Y 89 (2011).

suicide often coinciding,³⁴ inmates also have higher rates of tuberculosis, hepatitis, and STDS, such as HIV, than the rest of the population.³⁵

Prisoners acquire psychological dispositions in prison that result from their institutional experience. For example, inmates subject to prolonged solitary confinement are prone to becoming mentally ill.³⁶ Likewise, victims of violence and sexual violence experience post-traumatic stress disorders that may continue well after release from prison. Victims of sexual violence in particular are vulnerable to perpetuating gender violence against others, some of whom do it as a means of regaining their masculinity.³⁷

The return of ex-prisoners to the community leads to consideration of the institutional harms that reach out beyond the prison walls. For example, some undoubtedly bring their mental and physical afflictions with them when they reenter their community, which presents numerous challenges. As these places absorb a disproportionate number of such individuals, they are concomitantly at risk for exposure to physically and mentally ill individuals. They are also at greater risk for future crimes that will be perpetrated against the community, since mentally ill individuals are likely to recidivate by reoffending, with severely inmates recidivating at 80%.³⁸

These socially retarding effects are impacted by the significant economic burden of imprisonment for the families and communities of prisoners. According

³⁴ Raymond F. Patterson & Kerry Hughes, U.S. NAT'L LIBR. OF MED.: NAT'L CENTER FOR BIOTECHNOLOGY INFO., *Review of Completed Suicides in the California Department of Corrections and Rehabilitation*, 1999–2004 6 (2008), available at <http://www.ncbi.nlm.nih.gov/pubmed/18511589>.

³⁵ WILL H. COURTENAY & DON SABO, PREVENTIVE HEALTH STRATEGIES FOR MEN IN PRISON, IN PRISON MASCULINITIES 172 (2001) (noting that “prisons are not sealed off from their surrounding communities, and men constantly move in and out of the corrections system. . . . Upon release, many infected male prisoner return to communities in which low income and racially oppressed populations of both males and females already exhibit high rates of infectious disease.”); LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE: BUREAU OF JUSTICE, HIV IN PRISONS, tpls. 4, 7 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp06.pdf>; cf. Nat'l Alliance of State and Territorial AIDS Dirs., *Staggering Rates Among African American Women, MSM and the Incarcerated*, THE BODY (Nov. 2005), available at <http://www.thebody.com/content/art6867.html>.

³⁶ Spearlt, *Mental Illness in Prison: Inmate Rehabilitation and Correctional Officers in Crisis*, 14 BERKELEY J. CRIM. L. 277, 284 (2009).

³⁷ See ANTHONY M. SCACCO, MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSION (Anthony M. Scacco ed., 1982).

³⁸ *Incarcerated Mentally Ill: A Growing Issue in California*, CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/COMIO/Legislation.html>.

to one study, family income is 22 percent lower after a father is incarcerated.³⁹ Another showed that ex-prisoners earned wages 26–28 percent lower than the general population.⁴⁰ Often, loved ones are sentenced vicariously with long drives to correctional facilities, expending personal and work-related time, gas, postal expenses and money for legal fees,⁴¹ not to mention collect phone calls and putting money in commissary accounts. In due course, “relatives find that providing money and other items for their imprisoned relatives is a byproduct of maintaining family contact.”⁴²

Imprisonment impacts economics in other unseen ways. For example, some states have census policies that permit the county in which a prisoner is held to claim the prisoner as a resident for state funding purposes.⁴³ This practice diverts state funding from the home county of an offender to the county that holds the prisoner, effectively putting counties in direct resource competition. On a more personal level, the initial financial shock is the immediate order to pay a number of penalties associated with the crime. Commonly called Legal Financial Obligations (“LFOs”), these include restitution, fines, fees, and costs.⁴⁴ LFOs can carry an interest rate of up to 12 percent,⁴⁵ with unpaid obligations being subject to further penalties including surcharges and collection fees.⁴⁶ Hence, LFOs challenge the notion that one can ever repay one’s debt to society. Still, the consequences of nonpayment are severe for debtors including wage garnishment, bad credit,

³⁹ Bruce Western & Becky Petit, *Incarceration and Social Inequality*, DAEDALUS 5 (2010).

⁴⁰ Bruce Western, Jeffrey R. King & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410, 418 (July 2010) (Originally prepared for the Urban Institute Re-Entry Roundtable, Oct. 12–13, 2000).

⁴¹ Joseph Murray, *The Effects of Imprisonment on the Families and Children of Prisoners*, in THE EFFECTS OF IMPRISONMENT (Alison Liebling & Shadd Maruna eds., 2005).

⁴² JEREMY TRAVIS & MICHELLE WAUL, PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (2004).

⁴³ See generally PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION (Tara Herival & Paul Wright eds., 2007).

⁴⁴ RESEARCH WORKING GROUP TASK FORCE ON RACE & THE CRIMINAL JUSTICE SYSTEM, PRELIMINARY REPORT ON RACE AND WASHINGTON’S CRIMINAL JUSTICE SYSTEM 648 (2011); Michael L. Vander Giessen, *Legislative Reforms for Washington State’s Criminal Monetary Penalties*, 47 GONZ. L. REV. 547, 548 (2012).

⁴⁵ See, e.g., WASH. REV. CODE §§ 4.56.110(4), 10.82090(1), 19.52.020(1) (2010 & Supp. 2011).

⁴⁶ See generally Alexis Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AMER. J. SOC. 1753 (2011).

prolonged court supervision, and issuance of an arrest warrant, which itself may trigger other forfeitures.⁴⁷

An even more basic consideration is the value of freedom itself. Often, the corollary impacts of a conviction overshadow the raw fact that an individual is deprived of the most basic of freedoms. The depth of loss is great, including lost contact with friends, family, and being forced into a state of celibacy for the duration of one's prison sentence.⁴⁸ One study attempted to understand the value of freedom for prisoners, estimating that serious offenders value freedom at \$1,000 per 90 days of freedom, whereas less serious offenders value freedom more, for an estimated \$6,800 for the same period.⁴⁹ Although loss of freedom is a hard concept to quantify, the figures offer a financial sense of what freedom means to offenders.

Finally, are the political costs associated with a felony conviction, primarily, the effects of felony disenfranchisement. The great majority of states opt to disenfranchise felony convicts, with all but 2 states placing some form of voting restrictions on convicted felons.⁵⁰ Thirteen states and the District of Columbia prohibit convicted felons from voting only during imprisonment,⁵¹ while thirty-five states extend disenfranchisement to probation, parole or both, and in some states the restriction may be permanent.⁵² The political effect is that approximately six million adults in the United States are prohibited from voting due to their criminal record.⁵³

⁴⁷ *Id.* at 1761.

⁴⁸ The exceptions are a few states that allow conjugal visits, but these have been traditionally restricted to married inmates in good standing with the institution.

⁴⁹ David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 949 (2013).

⁵⁰ THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2012), available at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Aug2012.pdf.

⁵¹ MODEL PENAL CODE § 306.3 likewise proposed limiting disqualifications from voting and jury service solely to the time of incarceration or the length of one's sentence.

⁵² *Id.*

⁵³ CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 1 (2012), available at http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006).

In states that permanently disenfranchise individuals, the effect over time is permanently weakened voting power, which aggregates into disenfranchisement of an entire community.⁵⁴ The disenfranchisement contributes to a vicious cycle “that further disadvantages communities of color. . . . At a state level, beleaguered communities are affected through a diminished impact on public policy.”⁵⁵ The disparities in criminal justice thus correlate to disparities in political representation.⁵⁶ The situation embodies a form of voter dilution among these communities. For example, in 2002, it was reported that over one-third of the total disenfranchised population were black men and that in fifteen states, over ten percent of the black voting-age population cannot vote.

A felony conviction incurs other political costs since felons are typically stripped of the right to serve on juries, and federal felons are excluded from federal grand and petit jury service unless the offender’s civil rights are restored.⁵⁷ The duration of this restriction varies in different states, ranging from minority states, which make no exceptions for felons, to the majority of states, which excludes felons from jury service for life unless their rights have been restored. The double bar against jury duty and voting renders felons effectively impotent to influence the very system they know best, since “the right to vote gives people the ability to influence the application of all the other collateral consequences.”⁵⁸

This brief outline of the “costs” of imprisonment on communities show why reducing incarceration would reduce structural harms for the individuals who must “pay” for punishment in these various ways. Despite these debilitating effects of imprisonment giving numerous rationales, economic interest convergence points to fiscal concerns as being the dominant mode of creating law and policy. As the next section details, the government’s various branches are already devising ways to make downsizing a reality.

⁵⁴ See generally Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

⁵⁵ RYAN S. KING & MARC MAUER, *THE VANISHING BLACK ELECTORATE: FELONY DISENFRANCHISEMENT IN ATLANTA, GEORGIA* 15 (2004), available at http://www.sentencingproject.org/doc/publications/fd_vanishingblackelectorate.pdf.

⁵⁶ UGGEN ET AL., *supra* note 53.

⁵⁷ 28 U.S.C. § 1865(b)(5) (2006).

⁵⁸ Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 255 (2002).

IV. ECONOMIC INTERESTS WILL REIN IN CRIMINAL JUSTICE

Pragmatic considerations may change America's infatuation with "harsh punishment" Driven by fiscal considerations, numerous states have developed strategies to avoid continued increases in their prison population. They have abolished mandatory minimums, opted for quicker release of prison inmates, and have reinstated parole.⁵⁹

Of the competing rationales for downsizing imprisonment, innovations in law and policy suggest that saving money is driving decision-making in criminal justice reform.⁶⁰ This observation is unmistakable considering how each branch of government has already taken steps to reduce imprisonment.⁶¹ The expenses involved in mass incarceration are being reevaluated like never before, and there is every reason to suspect that cost-cutting will continue to drive developments. This section outlines some of the measures; even though incarceration has long been advocated by criminologists as a punishment of "last resort," government officials are starting to make good on the idea.

A number of legislatures have developed ways to divert offenders from prison, as well as reclassify certain kinds of crimes as a means of reducing sentences. Some legislatures, even those that have embraced a tough on crime posture, have voted to stop imprisoning certain offenders, particularly drug offenders, and divert them into cheaper, community based programming.⁶² Around

⁵⁹ Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1270 (2005); *see also* RAM SUBRAMANIAN & RUTH DELANEY, PLAYBOOK FOR CHANGE STATES RECONSIDER MANDATORY SENTENCES 4 (2014) (describing how curbing has been growing at the federal level as well).

⁶⁰ CHRISTINE S. SCOTT-HAYWARD, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 2 (2009), *available at* http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf (Reporting that in fiscal year 2010 the budgets for at least 26 state departments of corrections had been cut, "and even those whose budgets have not been cut are reducing expenditures in certain areas.").

⁶¹ *See, e.g.*, THE JUSTICE REINVESTMENT INITIATIVE, EXPERIENCES FROM THE STATES 1 (2013), *available at* <https://www.bja.gov/Publications/UI-JRI-State-Experiences.pdf> (describing that some states attempt to devise "data driven approaches to criminal justice reform designed to generate cost-savings that can be reinvested in high-performing public safety strategies") [hereinafter THE JUSTICE REINVESTMENT INITIATIVE].

⁶² *See, e.g.*, THE PEW CENTER ON THE STATES, 2012 GEORGIA PUBLIC SAFETY REFORM LEGISLATION TO REDUCE RECIDIVISM AND CUT CORRECTIONS COSTS (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Georgia_Safety_Reform.pdf; *see also* Juliene James et al., *A*

the country, this is happening in various ways: The state of Georgia passed legislation that creates drug courts and other reforms that are projected to save the state \$256 million over the next five years;⁶³ New York has developed a “close to home” diversion program for juveniles designed to help keep youth close to their home communities.⁶⁴ The Washington State Legislature has been exploring alternative “evidence-based” options that can reduce future need for prison beds, as a means to save money for state and local taxpayers, and contribute to lower crime rates.⁶⁵ Other states have passed legislation to develop and expand the use of “problem solving” courts, such as drug courts.⁶⁶

Developing effective sentencing is a common area of reform.⁶⁷ According to one report, over the last half decade, nearly half of the states have redefined sentencing standards.⁶⁸ Regarding mandatory sentences specifically, at least 29 states have taken steps to roll back mandatory sentences since 2000.⁶⁹ At the federal level, legislation like the Fair Sentencing Act,⁷⁰ which reduced the weight ratio of the amount of crack and powder cocaine from 100:1 to 18:1, has cut sentencing of crack offenders. Some states have created sentencing commissions as a means of reforming sentencing. In addition to devising fair and effective sentencing, commissions produce resource impact statements for the legislature to assess how a piece of legislation will affect criminal justice resources.⁷¹ Sentencing

View from the States: Evidence-Based Public Safety Legislation, 102 J. CRIM. L. & CRIMINOLOGY 821 (2012) (examining legislative reforms in year 2011).

⁶³ 2011 Special Council on Criminal Justice Reform for Georgians; enact recommended provisions, GEORGIA GENERAL ASSEMBLY LEGISLATION, <http://www.legis.ga.gov/legislation/en-US/display/20112012/HB/1176> (last visited Mar. 26, 2014).

⁶⁴ *Juvenile Justice and Opportunities for Youth: Frequently Asked Questions*, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, http://www.ocfs.state.ny.us/main/rehab/close_to_home/faqs.asp (last visited Mar. 26, 2014).

⁶⁵ Steve Aos et al., *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, 19 FED. SENT’G REP. 275 (2007).

⁶⁶ *Id.*

⁶⁷ See, e.g., Randall T. Shepard, *The Great Recession as a Catalyst for More Effective Sentencing*, 23 FED. SENT’G REP. 146 (2010).

⁶⁸ THE JUSTICE REINVESTMENT INITIATIVE, *supra* note 61; Barkow, *supra* note 30.

⁶⁹ SUBRAMANIAM & DELANEY, *supra* note 59, at 8.

⁷⁰ Fair Sentencing Clarification Act of 2013, H.R. 2369, 113th Cong. (2013), available at <http://beta.congress.gov/bill/113th-congress/house-bill/2369/text>.

⁷¹ Barkow, *supra* note 30, at 1288; see also Scott-Hayward, *supra* note 21.

commissions have also been charged with developing risk assessment instruments for incorporation into sentencing guidelines, as a means of determining an individual's risk of re-offense.⁷²

Like the legislative, judicial institutions play a major part in cutting costs in criminal justice. For example, the *Booker* decision, which made the Federal Sentencing Guidelines advisory only, has “allowed judges to take greater advantage of alternatives, including treatment programs and home confinement.”⁷³ In addition to acquiring greater discretion, courts have developed various means of reducing imprisonment, particularly in trying to divert felons from prison. Some of these designs include developing and participating in problem solving courts, including mental health and reentry courts.⁷⁴ Other strategies focus more on reforming sentencing practices, developing better reentry support, and developing what has been described as “cost-conscious justice.”⁷⁵ In Missouri, to cite an example, the state's sentencing commission has recommended that judges take cost into account when deciding sentences,⁷⁶ indicating how a court may engage in cost-cutting as a matter of law.

Executive branches of the government are reducing spending in criminal justice by various means. Some agencies have adopted “smart on crime” policies,

⁷² See, e.g., Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis in Pennsylvania Sentencing*, 49 DUQ. L. REV. 707 (2011); see also Gregory A. Knott, *Cost and Punishment: Reassessing Incarceration Costs and the Value of College-in-Prison Programs*, 32 N. ILL. U. L. REV. 267, 281 (2012) (Characterizing “risk management” under three critical elements: “1) a rhetoric of probability and risk, 2) an emphasis on systemic goals, rather than individualized or external social ideals, and 3) the view of offenders as an aggregate, rather than individuals.”).

⁷³ Nora V. Demleitner, *Replacing Incarceration: The Need for Dramatic Change*, 22 FED. SENT'G REP. 1, 2 (1999).

⁷⁴ But see Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004) (Arguing that drug courts effectively divert offenders into the system rather than out of it and that “treatment is better understood as a form of incapacitation in which the length of the treatment is often much longer than the alternative prison sentence.”).

⁷⁵ See Emily M. Grant, *Cost Conscious Justice: The Case for Wholly Informed Discretionary Sentencing in Kentucky*, 100 KY. L.J. 391 (2011–2012).

⁷⁶ Chad Flanders, *Cost as a Sentencing Factor: Missouri's Experiment*, 77 MO. L. REV. 391, 395 (2012) (“Cost should be, at most, a marginal consideration in sentencing and should not be something that judges are urged to consider as a primary sentencing factor.”); but see Jeff Milyo, “Cost as a Sentencing Factor”: A Response, 77 MO. L. REV. 411, 416 (2012) (Arguing that “objective expert reports on the costs of sentencing, recidivism, and the like can improve sentencing policy by counteracting the influence of voters who ignorantly prefer excessively punitive sentences.”).

which focus on risk management, diversion strategies, and procedural innovations. In Miami, prosecutors and police have developed a “civil citation” campaign to reduce court backlogs by issuing civil citations for certain crimes rather than issuing criminal misdemeanors.⁷⁷ Some states have made efforts not to re-incarcerate non-violent offenders for minor “technical” violation of parole or probation including missing appointments with probation officers or violating curfews.⁷⁸ At the federal level, the Bureau of Prisons has experimented with an “Elderly Offender” pilot study that sought to understand the relative savings of early release for elderly offenders;⁷⁹ it has also sought to determine whether privately contracted facilities provide better or worse value than other low and minimum security confinement alternatives.⁸⁰

As these measures indicate, fiscal concerns play a growingly important role in criminal justice, a trend that is likely to increase in the upcoming decades. As the next section concludes, this development should be welcomed by advocates of downsizing since it reverses the more menacing trend of harsh punishment.

V. BY ANY MEANS NECESSARY: ENDING AMERICAN EXCEPTIONALISM

Beginning in the 1970s, the United States embarked on a three-decade-long shift in its penal policies . . . as a result of these changes, punishment in the United States has become an outlier, not only among prevailing practices in the Western world, but also in comparison to the United States’ own long-standing practices. United States imprisonment rates are now almost five times higher

⁷⁷ *The Miami-Dade Civil Citation Program: Diverting Youth from System Involvement*, NATIONAL CENTER FOR JUSTICE PLANNING, <http://ncjp.org/content/miami-dade-civil-citation-program-diverting-youth-system-involvement> (last visited Mar. 27, 2014).

⁷⁸ Katti Gray, *Who Belongs in Prison?*, THE CRIME REPORT, available at <http://www.thecrimereport.org/news/inside-criminal-justice/2013-02-who-belongs-in-prison>.

⁷⁹ U.S. Government Accountability Office, *Incarcerations Costs and Elderly Offender Pilot Results* (2012) (indicating there were no cost savings due to the small number of inmates who met eligibility requirements).

⁸⁰ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *Federal Bureau of Prisons: Incarcerations Costs and Elderly Offender Pilot Results* (July 27, 2012) (indicating that there were no cost savings due to the small number of inmates who met eligibility requirements), available at <http://www.gao.gov/assets/600/593089.pdf>.

*than the historical norm prevailing throughout most of the twentieth century, and they are three to five times higher than in other Western democracies.*⁸¹

This Essay offers a snapshot of the various interests at stake in downsizing incarceration, including financial, ideological, and humanistic. As has been noted, “Prison is an expensive social tool, and its costs are absorbed at multiple levels of the community. The operating costs are high for both the prison’s physical plant and the programs preventing recidivism. The lasting economic effects of a prison commitment and the conviction itself continue to exert an impact on the convicted individual, the family, the neighborhood, and the larger state community.”⁸² Today, however, the “corrections bubble” has burst, and governments are on the move to rein in spending. There may even be a race to the bottom, since, according to one commentator, political conservatives will have “more credibility” than liberals in addressing prison reform through use of “free-market and Christian principles . . . to put their beliefs into practice as an alternative to government-knows-best programs that are failing prisoners and the society into which they are released.”⁸³ Whether conservative Christians can take up this challenge is only speculation, but it is not hard to fathom this proposition, given that Jesus himself was prisoner who was tortured and capitally executed by today’s standards.

Although governments have made strides to downsize, there are underused measures that can be tapped to hasten the process. Doing so not only reduces expenses quicker, but will also serve disadvantaged communities that feel the impacts of imprisonment the most. The shift to less imprisonment will take the country in the direction that is more like its democratic peers, who seem to do well enough without harsh sentences and capital execution.

In the judicial arena, courts should explore other means of diverting individuals from prison. For example, it has been argued that under existing law, courts have authority to consider the harms of mass incarceration at sentencing.⁸⁴ This perspective not only has potential to reduce prison populations further, but also roots in a principle that takes the social effects into account as well. Furthermore, some scholars note that state judges have power to defer adjudication,

⁸¹ Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307 (2009).

⁸² Gregory Trout, *The Cost of Incarceration: Ohio Prisons*, 42 U. TOL. L. REV. 891, 901 (2011).

⁸³ Viguerie, *supra* note 1.

⁸⁴ Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 425 (2013).

which can result in an offender neither serving prison time nor creating a criminal record.⁸⁵ Although federal courts do this in rare cases, this might be developed into a more systematic practice in both state and federal courts.

Executive officials have yet to develop a sophisticated plan for downsizing, but there are untapped discretionary powers available. For example, college-in-prison programs have potential to respond to prison population growth and growing costs.⁸⁶ Although the effect is limited in scale, college programming reduces long-term costs through investments in education.⁸⁷ Executive officials also possess powers to commute a sentence or give clemency to prisoners. This power has gone largely unexercised in the era of tough on crime politics. Hence, this power has hardly been used, let alone been used as a part of systematic strategy to release prisoners, particularly, those who pose the least risk to society, including, elderly, sickly, and non-violent offenders.⁸⁸ Executive powers are also responsible for deciding whom to prosecute, which presents a vast arena for reform. Indeed the proverbial “prosecutorial discretion” could be strategized to reduce the number of prosecutions, and consequently, reduce the number of individuals sent to prison. The same holds true for law enforcement decision making, which is in great part, discretionary. Like their executive counterparts, law enforcement holds enormous discretion regarding whom to stop or search, whether to give a ticket, or file a complaint. Taken wholly, the executive branch can reduce imprisonment through principled use of its various powers and discretions more than it has to the present.

Legislatures hold powers that can further reduce imprisonment. For example, some have advocated writing sunset provisions into criminal and sentencing legislation.⁸⁹ With such precautions in place, bad legislation can simply fall off the books, rather than permanently lock in the law. Sunset provision are especially valuable for charting new terrains in sentencing without making indefinite commitments; they allow immediate, but not permanent, action in order to buy time for analysis and debate of the problem. Such an approach ostensibly would have been invaluable for mandatory sentencing regimes that have been created in the last

⁸⁵ *Id.*

⁸⁶ Knott, *supra* note 72, at 268.

⁸⁷ *Id.*

⁸⁸ *Id.* at 269 (citing California and Illinois as states that have led in early release programs as a part of cost-cutting measure needed to balance state budgets).

⁸⁹ See generally Michael M. O’Hear, *Editor’s Observations: Perpetual Panic*, 21 FED. SENT’G REP. 69 (2008).

few decades. Rather than going back and having to revise laws, as some many states have done, unworkable mandatory laws would have faded off into the sunset rather than continue to cause damage in the present. One scholar has forcefully proposed the defunding of state prisons altogether in favor of reallocating money spent on prisons to localities to use as they see fit, including law enforcement treatment, or even prisons.⁹⁰

More than merely offering some normative strategies to facilitate downsizing, this Essay tries to persuade prisoner reformers of all shades to welcome the changes as convergent with their own interests. After a four-decade long punishment binge that has depleted communities of all sorts of human resources, the social costs have been heavy. For these communities, it makes little difference why downsizing occurs—so long as it continues.

That multiple interests converge in prison reform hardly means that there will be permanency and says nothing about how long converging interests will last; interest convergence does not predict whether these reforms will represent a short-run response to immediate fiscal pressures or whether it is a part of a longer-run plan to alter more fundamentally how state resources are spent.⁹¹ Likewise, it does not guard against a future where money is abundant or fear-mongering politicians foment a renaissance in punishment. Instead, as used in this Essay, economic interest convergence invites one to fathom criminal justice reform as a battle between Whites over Black and Brown bodies.

⁹⁰ W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. (2014).

⁹¹ John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73, 77 (2010).