

Spring 2013

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Recommended Citation

Jessica M. Eaglin, *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, 47 Val. U. L. Rev. 179 (2013).

Available at: <https://scholar.valpo.edu/vulr/vol47/iss3/7>

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NEOREHABILITATION AND INDIANA'S SENTENCING REFORM DILEMMA

Jessica M. Eaglin*

I. INTRODUCTION

Indiana incarcerates at a rate of 442 persons per every 100,000, which is almost three times the rate of the surrounding states in the Midwest region and slightly above the national average rate of incarceration amongst the states.¹ Even as several states around the country have stabilized or decreased their prison populations in the last decade,² Indiana's prison population grew by almost fifty percent.³ Moreover, as the national rate of incarceration stabilized and decreased in recent years,⁴ Indiana's rate of incarceration continued to increase with little signs of slowing.⁵ If current practices and trends remain, Indiana's

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¹ E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011 23 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>. The national state average rate of incarceration in 2011 was 430 persons per every 100,000. *Id.* See generally Michael O'Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. L. REV. 709 (2013) (studying incarceration rates in Indiana, Minnesota, and Wisconsin, as well as discussing potential explanations for their diverging trends).

² See JUDITH GREENE & MARC MAUER, THE SENT'G PROJECT: RESEARCH AND ADVOCACY FOR REFORM, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 2 (2010), www.sentencingproject.org/doc/.../inc_DownscalingPrisons2010.pdf (describing the reform efforts that led to Michigan, New York, Kansas, and New Jersey reducing their prison populations by five percent or more even while other states' incarceration rates continued to rise between 2000 and 2010).

³ See CARSON & SABOL, *supra* note 1, at 3 tbl.2 (reporting that state prison populations declined nationally two consecutive years in a row).

⁴ *Id.* (showing that the national rate of incarceration dropped 0.1% in 2009-10 and 0.9% in 2010-11); see PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 2 (2010) [hereinafter PRISON COUNT 2010], http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Count_2010.pdf (providing that although prison rates had dropped nationally, Indiana had the largest increase in prison rates nationally).

⁵ O'Hear, *supra* note 1, at 724 tbl.3 (depicting the growth of Indiana's state prison population). Between 2000 and 2010, Indiana's prison population increased by forty-one percent, from 20,125 to 28,322 prisoners. JUSTICE CTR.: THE COUNCIL OF STATE GOV'TS, JUSTICE REINVESTMENT IN INDIANA: SUMMARY REPORT & POLICY FRAMEWORK 3 fig.1 (2010) [hereinafter JUSTICE REINVESTMENT REPORT], <http://www.in.gov/legislative/interim/committee/reports/CCECDB1.pdf>. Between 1999 and 2009, New York's prison population decreased by twenty percent, from 72,899 to 58,456. GREENE & MAUER, *supra* note 2, at 2. The national average rate of incarceration steadied beginning in 2008, and in 2010

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prison population will likely grow another twenty-one percent between 2010 and 2017.⁶

Despite these realities, Indiana has yet to implement meaningful sentencing reforms to address its growing prison population. This Article explores the complications surrounding Indiana's efforts to implement sentencing reform by contextualizing the struggle within a new model of criminal justice reform. As I have discussed elsewhere, the emergency sentencing reforms adopted by several states reflect an emerging theory of neorehabilitation.⁷ This problematic model has legitimated the implementation of emergency reforms by providing a rhetoric of rehabilitation while at the same time pandering to society's continued desire to incapacitate the vast majority of criminal offenders.⁸ Indiana's recent battle over sentencing reform proposals concerning low-level offenders illustrates both the prevalence and the shortcomings of this emerging model.

This Article proceeds in four parts. Part II sets forth Indiana's current sentencing reform dilemma.⁹ In recent years, the state has considered and rejected several sentencing reforms, even as surrounding states have taken steps to manage their growing prison populations. Part III discusses briefly the neorehabilitative model of sentencing reform.¹⁰ As I have discussed elsewhere, this theory focuses upon implementing reform to manage low-level offenders in particular. Part IV situates Indiana's struggle to implement reform within the neorehabilitative framework.¹¹ Consistent with this approach, Indiana's reform efforts hinge upon the question of what constitutes a low-level offender. Part V argues that Indiana's potential rejection of the neorehabilitative model does not necessarily mean an end to meaningful sentencing reform.¹² This section further suggests that Indiana may

decreased for the first time since 1972. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 1-2 & tbl.1 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>. But see CARSON & SABOL, *supra* note 1, at 3 tbl. 2 (showing Indiana's incarceration rate slowing from 2009-2010 and then increasing in 2011).

⁶ JUSTICE REINVESTMENT REPORT, *supra* note 5, at 2.

⁷ Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013).

⁸ *Id.*

⁹ See *infra* Part II (exploring Indiana's booming prison population and subsequent struggle to implement meaningful reform).

¹⁰ See *infra* Part III (discussing some of the inherent weaknesses in the neorehabilitative model).

¹¹ See *infra* Part IV (using Indiana as a case study to illustrate the inadequacies of the neorehabilitative model).

¹² See *infra* Part V (explaining why the neorehabilitative model failed in Indiana and exploring the obstacles the state must confront in the future).

represent a significant battleground to the spreading and unquestioned acceptance of the neorehabilitative rhetoric in the context of sentencing reform.

II. THE EXPLODING PRISON POPULATION AND INDIANA'S STRUGGLE TO IMPLEMENT REFORM

Various factors have contributed to the exponential growth in the U.S. prison population since the 1970s.¹³ In large part, the prison population explosion has been attributed to the increasing criminalization of drug use¹⁴ and the expanded convictions for drug-related offenses starting in the 1980s.¹⁵ At the same time, crime and punishment issues became political "wedge" issues and hot topics used to incite public fear and motivate passage of draconian sentencing legislation.¹⁶ Legislative intervention in sentencing reform resulted in federal and state imposed mandatory minimum sentences, three-strike policies, zero-tolerance policies, and habitual offender laws; all of which extended sentences for broad categories of offenders.¹⁷ These sentencing reforms contributed to the U.S. prison population quintupling in size from the late 1970s to today.¹⁸

¹³ See generally O'Hear, *supra* note 1 (providing a summary of leading theories explaining the causes of the mass incarceration phenomenon).

¹⁴ Nicola Lacey, *American Imprisonment in Comparative Perspective*, DAEDALUS, Summer 2010, at 102, 107 ("Over the last forty years, the increasing criminalization of drug use has had a decisive impact on levels of punishment, with a particularly marked impact on young African American men.") (footnotes omitted); Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 353 (2011) ("[M]ass incarceration can be linked to the War on Drugs . . .").

¹⁵ Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1631 (2012) ("Expanded sentences for drug convictions perpetuated a significant portion of the increase in state prisoners beginning in the late 1980s . . ."); see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 102 (2010) ("The uncomfortable reality is that arrests and convictions for drug offenses—not violent crime—have propelled mass incarceration.").

¹⁶ See Michael Tonry, *Why Are U.S. Incarceration Rates so High?*, 45 CRIME & DELINQ. 419, 420 (1999) (finding that some conservative politicians have used this issue, among others, to "separate White working-class voters from the Democratic Party"); see also O'Hear, *supra* note 1, at 712–13 (summarizing William Stuntz's explanation for mass incarceration as the interplay of "politics, changing legal doctrine, and the allocation of funding responsibility for prisons").

¹⁷ McLeod, *supra* note 15, at 1631 (recognizing that increased penalties for violent crimes, particularly robbery and assaults, contributed to explosion in the U.S. prison population in addition to the increase in drug convictions). See generally Lynn Adelman, *The Adverse Impact of Truth-in-Sentencing on Wisconsin's Efforts to Deal with Low-Level Drug Offenders*, 47 VAL. U. L. REV. 689 (2013) (discussing and criticizing the effects that Wisconsin's truth-in-sentencing law has had in Wisconsin).

¹⁸ O'Hear, *supra* note 1, at 709.

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The momentum has turned in recent years away from the mass incarceration of drug offenders.¹⁹ States are being pressured to manage their exploding prison populations in response to both economic and political pressures. Economically, correctional costs are busting tightening state budgets.²⁰ Politically, mass incarceration is becoming increasingly less popular, particularly for drug offenders.²¹ Conservative calls for reform to address the exploding prison population are increasingly common, particularly in reference to drug offenders.²² The debate over legalization of marijuana is gaining traction amongst various policymakers.²³ Race politics also contribute to the demand for an alternative method of managing drug offenders in the criminal justice system.²⁴ Moreover, polls indicate that the public increasingly prefers drug treatment as opposed to incarceration for low-level drug offenders.²⁵

¹⁹ See Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, DAEDALUS, Summer 2010, at 62 (noting that Congress is reconsidering its drug-sentencing policies, while states have been debating marijuana decriminalization).

²⁰ Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 300-01 (2010). State corrections budgets have increased by more than 300% in the past twenty years. *Id.*

²¹ See, e.g., Adam Nagourney, *In California, It's U.S. vs. State Over Marijuana*, N.Y. TIMES, Jan. 13, 2013, at A1 (criticizing the Department of Justice's decision to prosecute a medicinal marijuana distributor for drug trafficking); Editorial, *Unjust Mandatory Minimums*, N.Y. TIMES, Feb. 18, 2013, at A22 (criticizing excessive punishment of low-level drug offenders); Editorial, *Too Many Prisoners*, N.Y. TIMES, Aug. 4, 2012, at SR12 (urging the Department of Justice to adjust its policies on drug cases in order to incarcerate fewer low-level drug trafficking offenders).

²² Eaglin, *supra* note 7, at 190-91 n.5.

²³ See, e.g., Kirk Johnson, *Marijuana Referendum Divides Both Sides*, N.Y. TIMES, Oct. 14, 2012, http://www.nytimes.com/2012/10/14/us/vote-on-legalizing-marijuana-divides-washington-groups.html?_r=0 (explaining the efforts in Washington D.C. to legalize marijuana).

²⁴ See generally ALEXANDER, *supra* note 15. Drug policies have disproportionately affected black citizens who are more likely to be arrested, convicted, and sentenced for drug offenses, even though their rate of drug use is similar to the rate of drug use for white citizens. HUMAN RIGHTS WATCH, *DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 1* (2009), <http://www.hrw.org/reports/2009/03/02/decades-disparity-0>. See generally Jeanne Bishop, *Where the Rubber Meets the Road: Injecting Mercy into a System of Justice*, 47 VAL. U. L. REV. 819 (2013) (illustrating the detrimental effects of the war on drugs on the African-American community in Cook County, Illinois); Russell L. Jones, *A More Perfect Nation: Ending Racial Profiling*, 41 VAL. U. L. REV. 621 (2006) (discussing the pitfalls of racial profiling and the disproportionate effect that profiling has on Blacks and Latinos). "[T]he practice of racial profiling requires blacks and Mexican-Americans to pay a type of racial tax for the war against drugs and illegal immigration that whites and other groups escape." *Id.* at 627 (citing RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 161 (1997)).

²⁵ See, e.g., Roger K. Warren, *A Tale of Two Surveys: Judicial and Public Perspectives on State Sentencing Reform*, 21 FED. SENT'G REP. 276, 280-81 (2009) (recognizing widespread public support for rehabilitation-focused reform for low-level offenders); see also Alfred

In response, states have adopted several sentencing reforms particularly aimed at managing drug offenders through alternative measures other than incarceration. For example, recent legislation has shortened prison terms, reclassified certain drug offenses as misdemeanors rather than felonies, and expanded early release programs that reduce sentences for nonviolent offenders.²⁶ The most prevalent method of managing these specific offenders has been through drug courts.²⁷ Designed in the late 1980s to address the large numbers of drug offenders cycling in and out of prison without treatment, drug courts have exponentially increased in the last thirty years. Today, more than 2,500 drug courts exist.²⁸ Additional specialized criminal courts, many of which explicitly model themselves after drug courts, are developing around the country.²⁹

Indiana, like several other states, finds itself on the precipice of change in the era of mass incarceration. In the last decade, Indiana's prison population has ballooned by more than forty percent, even as several states have reduced their prison population by almost the same amount.³⁰ At the same time, the state faces prison overcrowding

Blumstein, *Approaches to Reducing Both Imprisonment and Crime*, 10 CRIMINOLOGY & PUB. POL'Y 93, 99 (2011) ("California initiated that rethinking [of incarceration] as a result of Proposition 36, which led to The Substance Abuse and Crime Prevention Act of 2000. That Act mandated that first-time drug offenders should be offered treatment as an alternative to incarceration and, thus, has saved many millions of dollars of incarceration costs.").

²⁶ See, e.g., The Omnibus Crime Reduction and Sentencing Reform Act, S. 1154, 118th Gen. Assemb., Reg. Sess. §§ 38, 48 (S.C. 2010) (providing several proposed measures for prison reforms); see also Eaglin, *supra* note 7, at 200–10.

²⁷ Warren, *supra* note 25, at 277 (examining surveys conducted by the National Center for State Courts finding that expanding drug courts and other problem-oriented courts were amongst the leading current sentencing reforms in 2006); see also McLeod, *supra* note 15, at 1606–11 (describing the quick proliferation of drug courts and other problem-oriented courts in the United States since the 1990s).

²⁸ There are currently 2,734 drug courts in the United States. *Types of Drug Courts*, NAT'L ASS'N OF DRUG CT. PROFS., <http://www.nadcp.org/learn/what-are-drug-courts/models> (last visited Apr. 25, 2013).

²⁹ There are approximately 300 mental courts, 200 domestic violence courts, 30 community courts, and more than 500 other specialized criminal courts in the United States. McLeod, *supra* note 15, at 1610–11. These courts are modeled after drug courts in their "problem-oriented" focus and desire to create non-carceral alternative approaches to punishment in the United States. *Id.* at 1591; see also Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 127 (2007) (noting that several specialized courts are explicitly designed after the drug-court model).

³⁰ See *supra* notes 1–5 (explaining generally the reasons for the increase in Indiana's prison population). This contribution concerns less of the "why" question regarding Indiana's larger prison population. For an interesting analysis of the factors that contribute to Indiana's relatively larger prison population, see generally O'Hear, *supra* note 1. It is interesting to note, for purposes of this contribution, that Indiana is a conservative-leaning state and at the same time incarcerates a relatively larger portion of drug offenders.

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pressures. The Indiana Department of Corrections predicts that this overcrowding, combined with the rate of incarceration, will result in a twenty-one percent increase in the prison population from 2010 to 2017.³¹ Additionally, it projects that the state will need to spend an additional \$1.2 billion on top of what it already spends to accommodate the prison population increase and continue running correctional facilities.³² Finally, the Indiana state budget is relatively strapped, making the demand for prison expansion problematic considering the rising price of Medicaid and other state budget demands.³³ Combined, these factors suggest that Indiana will need to address the growing prison population in order to maintain its fiscal integrity in coming years.

Considering this confluence of factors, it is unsurprising that Indiana policymakers recently began considering a “smart on crime” approach to criminal justice reform. In 2010, the Pew Center for the States released a report suggesting that too many low-level offenders were incarcerated in the state of Indiana.³⁴ Commissioned by Governor Mitch Daniels and conducted in partnership with the Council of State Governments’ Justice Center, the report examined the state’s sentencing structure.³⁵ It concluded that the two-tiered sentencing scheme for drug and theft offenders amounted to a basic “one size fits all” model and suggested that a graduated sentencing scheme could easily reduce the prison population.³⁶

In response to the report, the Indiana state legislature attempted to implement sentencing reform aimed to reduce the number of low-level drug and property offenders incarcerated in the state. The 2011 sentencing policy reforms aimed to implement a graduated sentencing structure for drug possession and dealing offenses.³⁷ This would include

³¹ JUSTICE REINVESTMENT REPORT, *supra* note 5, at 2.

³² *Id.*

³³ While Indiana does have a minimal surplus in the 2013 budget, lawmakers anticipate the additional funding will be spent almost entirely on the increased Medicaid recipients pursuant to the Affordable Health Care Act. See Eric Bradner, *State Lawmakers Return to Statehouse to Start 2013 Session, Budget Is Priority*, THE INDY CHANNEL (Jan. 6, 2013), <http://www.theindychannel.com/news/local-news/state-lawmakers-return-to-statehouse-to-start-2013-session-budget-is-priority>. Any residual funding will likely be allocated to education and transportation improvements. *Id.*

³⁴ See PRISON COUNT 2010, *supra* note 4 (providing that although prison rates had dropped nationally, Indiana had the largest increase in prison rates nationally).

³⁵ Press Release, Governor Announces Partnership to Improve Public Safety (June 28, 2010), available at http://www.in.gov/portal/news_events/55200.htm.

³⁶ Maureen Hayden, *Indiana Looking at Rewriting Criminal Code*, TRIBSTAR (Jan. 18, 2013), <http://tribstar.com/news/x1303522042/Indiana-looking-at-rewriting-criminal-code/print>.

³⁷ S. 561, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011), available at <http://www.in.gov/legislative/bills/2011/PDF/SB/SB0561.3.pdf>.

raising the minimum for drug weight from three to ten grams before increasing penalties.³⁸ It would also increase the estimated theft value to \$750 before triggering felony charges.³⁹ Under the proposed legislation, judges would be required to issue suspended sentences to low-level offenders, directing them to probation, community corrections, or problem-solving courts.⁴⁰ Additionally, the reforms would incorporate risk assessment tools to classify offenders on probation and determine their appropriate levels of supervision.⁴¹ The proposed reforms were not without criticism. Probation officials expressed concern that the increased requirements for probation officers, such as increasing the number of active status probationers depending upon their risk assessment classification, would create too large a workload without proper funding.⁴² The Governor threatened to veto the bill due to amended provisions seeking to partially impose “truth-in-sentencing” policies for several types of criminal offenders.⁴³

Despite these proposals, state lawmakers failed to adopt sentencing reforms. Perhaps the most harmful blow to potential sentencing reform legislation came by way of the political mobilization of the state prosecutors’ office. According to the prosecutors’ office, the perception that low-level offenders fill the Indiana prison population was misleading. The state prosecutors’ office argued that the data collected from the Pew Center report was inaccurate because it relied upon prison population data from 2000–2008 but excluded the 2009 and 2010 population numbers, which demonstrated some stabilization in the prison population.⁴⁴ The state prosecutors bolstered their assertion in 2012 by citing and supporting the follow-up study by the Center for Criminal Justice Research at Indiana University’s Public Policy Institute

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *Indiana Senate Committee Passes Sentencing Reform Bill*, COURIER PRESS (Feb. 15, 2011, 10:39 AM), <http://www.courierpress.com/news/2011/feb/15/indiana-senate-committee-passes-sentencing-reform/> (“Probation officials worry they won’t have the resources to deal with the larger workload under the reform.”).

⁴³ Eric Berman, *Daniels Threatens Veto of Sentencing Reform Bill*, WIBC (Mar. 22, 2011), <http://www.wibc.com/news/Story.aspx?id=1389314>. Ultimately, the legislature chose to let the bill die rather than send it to the Governor without his approval. Maureen Hayden, *Prison Reform Left off Wish List of Gov. Mitch Daniels*, IND. ECON. DIG. (Dec. 17, 2011, 6:12 PM), <http://www.indianaeconomicdigest.net/main.asp?SectionID=31&SubSectionID=77&ArticleID=63106> (providing that the sentencing reform bill was not likely to pass prior to Governor Mitch Daniel’s final term).

⁴⁴ Maureen Hayden, *State Prison Data Used to Drive Reform Legislation Under Review*, NEWS AND TRIB., Aug. 17, 2011, <http://newsandtribune.com/local/x175565583/State-prison-data-used-to-drive-reform-legislation-under-review>.

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in Indianapolis (“IU Public Policy Report”). The study explores the characteristics of the Class D felons being considered for diversion from incarceration under the proposed sentencing reform before the Senate.⁴⁵ Ultimately, the report concludes the majority of state prison inmates convicted of Class D felonies are repeat offenders and first time offenders that committed violent crimes, such as battery or domestic assault.⁴⁶ The insinuation from the IU Public Policy Report, of course, is that such offenders do not deserve to be diverted from incarceration.⁴⁷

The state legislature continues to consider reform efforts to address the state’s growing prison population. The legislature, in conjunction with the prosecutor’s office, is set to propose new sentencing reform legislation in 2013.⁴⁸ Moreover, though legislative reform has stalled, the state has broadly expanded its problem-solving courts. Since the legislature authorized their development in 2002, Indiana has established thirty-six drug courts.⁴⁹ In addition, there are eight reentry courts.⁵⁰ Moreover, the legislature authorized the establishment of domestic-violence courts, mental health courts, and veterans’ courts in 2010.⁵¹ Policymakers encourage the development of even more specialized courts in coming years to manage the state’s prison population despite the legislature’s failure to enact sentencing reform.⁵²

III. NEOREHABILITATION AND EMERGENCY REFORM

Neorehabilitation is an emerging theory of reform recognizable in several states’ emergency reform efforts.⁵³ Unlike the previous model of rehabilitation prevalent until the 1970s, this theory of reform depends upon actuarial models of prediction and evidence-based programming

⁴⁵ See generally G. ROGER JARJOURA, THOMAS D. STUCKY, KATHY LISBY, KONRAD HAIGHT & TRENT SHAFFER, IND. UNIV. CTR. FOR CRIM. JUST. RES., REVIEW OF IDOC ADMISSION COHORT OF D FELONY AND SELECT C FELONY OFFENDERS (2012), <https://www.policyinstitute.iu.edu/PubsPDFs/DAWG%20final%20report%20090512.pdf>.

⁴⁶ *Id.* at 55.

⁴⁷ See *supra* note 19 and accompanying text.

⁴⁸ *Sentencing Reform Returns Under New Indiana Legislation*, COURIER PRESS (Jan. 20, 2013, 12:01 AM), <http://www.courierpress.com/news/2013/jan/20/sentencing-reform-returns-under-new-indiana/>.

⁴⁹ See Elaine B. Brown, *Smart on Crime*, RES GESTAE, June 2012, at 50.

⁵⁰ *Id.*

⁵¹ See IND. CODE § 33-23-16-4 (2012) (establishing domestic violence courts); IND. CODE § 33-23-16-7 (2012) (providing the authority for mental health courts); IND. CODE § 33-23-16-10 (2012) (creating veterans’ courts).

⁵² See generally Brown, *supra* note 49.

⁵³ Eaglin, *supra* note 7, at 200-10.

as opposed to medical expertise.⁵⁴ The purpose is to manage criminal offenders more efficiently and effectively, at times through treatment rather than incarceration.⁵⁵ Unlike the old rehabilitative model, neorehabilitation does not seek to improve the offender for that end purpose. Its goals are to manage the risk of recidivism for low-level offenders through supervision and treatment and to use particular statistically proven tools to improve criminal justice reforms in the hopes of ensuring a more cost-effective and efficient system. Neorehabilitation thus identifies and manages offenders through treatment for the benefit of society, not the individual.⁵⁶ This societal benefit makes neorehabilitation particularly appealing as a bipartisan platform for reform because the services that may be provided to an offender are framed within the language of individual responsibility, permanent criminal risk, and risk management.⁵⁷

The language of the new penology, set forth by Professors Jonathan Simon and Malcolm Feeley, heavily influences this new model.⁵⁸ Unlike the old model of rehabilitation, the new penology aims to “regulate levels of deviance, not intervene or respond to individual deviants or social malformations.”⁵⁹ Under the new penology, certain offenders are considered permanently dangerous, and actors in the criminal justice system seek to use aggregate information to manage these populations according to their likelihood of recidivism.⁶⁰ The new rehabilitative model, recognizable in the emergency sentencing reforms adopted around the country, embraces the language of the new penology, as demonstrated by its focus upon cost-efficiency, evidence-based programming, and the use of predictive tools. However,

⁵⁴ *Id.* at 202–03. Actuarial tools predict an offender’s likelihood of recidivism through the use of statistical data to measure the offender’s dangerousness according to several factors.

⁵⁵ *Id.* at 201.

⁵⁶ *Id.* at 201–02.

⁵⁷ Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 427 (2009).

⁵⁸ See generally Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992) (describing the emergence of new discourses, objectives, and techniques based in predictive tools and cost-efficiency in the arena of criminal justice reform); see also Miller, *supra* note 57, at 427 (advocating for a bipartisan platform for reform to the criminal system).

⁵⁹ Feeley & Simon, *supra* note 58, at 452.

⁶⁰ See *id.* at 459 (explaining that under the new penology, criminal offenders are “sort[ed] . . . into groups according to the degree of control warranted by their risk profiles”); see also Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 128 (2007) (describing Simon and Feeley’s new penology as a “disturbing trend in criminal justice systems’ management of dangerous populations”).

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neorehabilitation also finds meaning in the traditional penal purpose of rehabilitation, though the end goals and methods have changed.

While neorehabilitation may appear to be a positive shift in sentencing reform, I have previously argued that the expansion of this new model suffers inherent limitations.⁶¹ This new rehabilitative model focuses upon the wrong offenders due to the cost-efficiency and evidence-based pressures to manage the largest possible amount of prisoners most efficiently.⁶² Studies show that high-risk offenders benefit most from rehabilitative efforts, and yet low-risk offenders are the subpopulation most benefiting from neorehabilitative reforms.⁶³ Neorehabilitation also stands to exacerbate racial disparities in this specific prison population through the overreliance upon predictive tools, such as risk assessment measurements, which depend largely upon structural factors that disproportionately disadvantage historically disadvantaged populations already overrepresented in the prison population, particularly poor African-American men.⁶⁴ Finally, neorehabilitation distorts the meaning of justice in the criminal justice system, as it obscures the appropriateness of punishment and even supports longer sentences for certain offenders.⁶⁵

These limitations demonstrate the theoretical shortcomings of the neorehabilitative model. While it provides a dramatic shift in the rhetoric surrounding punishment, the theoretical underpinnings of neorehabilitation are similar to those of total incapacitation.⁶⁶ Neorehabilitation attempts to incapacitate as many offenders as possible for as long as possible, except for those few offenders who meet criteria suggesting that they are almost certain not to reoffend.⁶⁷ As a result, the model may stabilize prison populations, but it will neither reduce public

⁶¹ See generally Eaglin, *supra* note 7 (citing to several scholars who positively encourage sentencing reform based upon evidence-based programming, risk assessments, and cost-efficiency).

⁶² *Id.* at 211-14.

⁶³ *Id.* at 211-12; see also Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 151 (2005) (reporting researchers findings indicate that treatment programs targeting “higher-risk rather than lower-risk offenders” is most effective for rehabilitation).

⁶⁴ Eaglin, *supra* note 7, at 214-18.

⁶⁵ *Id.* at 218-22.

⁶⁶ *Id.* at 222-25. Professor Jonathan Simon argues that total incapacitation has been the leading theory of reform in the United States since at least the late 1990s. Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of Life Without Parole*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 282, 293 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012). This model aims to incapacitate as many offenders as possible for as long as possible. *Id.* It is identifiable in the passage of truth-in-sentencing policies, habitual offender laws, and mandatory minimum sentences. Eaglin, *supra* note 7, at 196.

⁶⁷ Eaglin, *supra* note 7, at 218-22.

punitiveness nor significantly reduce the size of the U.S. prison population.⁶⁸ And while reducing prison populations may not be the explicit end goal of these smart-on-crime sentencing reforms, the cost-efficiency arguments signify a desire to save money in the context of correctional budgets. However, stabilizing prison populations is not enough to realize meaningful savings; we must decarcerate.⁶⁹

IV. INDIANA'S COMPLICATED RELATIONSHIP WITH NEOREHABILITATION

Indiana's efforts to pass sentencing reform to address its drug offender overincarceration problem illustrate the shortcomings of neorehabilitation to downsize state prison populations. This section demonstrates how the debate over low-level offenders obscures the problem of mass incarceration in the context of the proposed sentencing reform. Moreover, it highlights the ways that this debate reflects neorehabilitation's ability to change the rhetoric of punishment without affecting the overly punitive perspective that drives mass incarceration in the United States.

Indiana's debate over implementing reform in the state has circled around whether the prison population is in fact filled with low-level offenders who could be treated outside the prison. The Pew Center report suggests that low-level offenders overpopulate the state prisons, and subsequent sentencing reform needs to address this population's growing representation in prison. State prosecutors vehemently opposed sentencing reform in Indiana and recently produced correctional data demonstrating that the majority of Indiana prisoners are repeat offenders.⁷⁰ This evidence debunked the perception that Indiana's prisons were filled with low-level, first time offenders.⁷¹ Prosecutors have used this study to suggest that the "right" offenders are in jail—the majority of offenders are not first-time offenders. In response to this political pressure, subsequent reform efforts have stalled.

⁶⁸ *Id.*

⁶⁹ *Id.* at 225; Gottschalk, *supra* note 19, at 67 ("Most prison costs are fixed and are not easily cut. The only way to substantially reduce spending on corrections is to send fewer people to jail or prison and shut down penal facilities."); *see also* McLeod, *supra* note 15, at 1631 ("[T]he scholarly consensus suggests that prison commitments must be reduced *and* prison release increased *and* return to prison after parole failure decreased.") (footnote omitted).

⁷⁰ In fact, more than fifty percent of the state prison population is filled with individuals who violated their parole or probation. On average, the lowest level of offenders (Class D offenders) has five prior criminal convictions. *See* JARJOURA ET AL., *supra* note 45, at 21.

⁷¹ Maureen Hayden, *Report on Prison Inmates May Shape Next Debate on Sentence Reform*, IND. ECON. DIGEST (Sept. 7, 2012, 8:08 AM), <http://www.indianaeconomicdigest.net/main.asp?SectionID=31&subsectionID=135&articleID=66507>.

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These efforts fit into the framework of neorehabilitation. First, the reform efforts were motivated not by concern with the large amount of persons incarcerated in the United States explicitly, but rather by the threat of fiscal pressures as a result of this growing population. These reform efforts were designed to be more cost-effective and justified in the potential savings they will provide to the state.⁷² Thus, the language of cost-efficiency dominates the discourse on sentencing reform. Moreover, the reform efforts intend to increase reliance on actuarial tools. Low-level offenders are selected based upon risk assessments not only in the context of probation supervision, but also in the context of diversionary program qualification.

The two limitations of the neorehabilitative model most relevant to this analysis concern the focus on the wrong offenders and the distortion in the appropriateness of punishment for certain offenders.⁷³ The determination of whether the “right” offenders are incarcerated aims to exclude the offenders most likely to rehabilitate themselves. The prosecutors’ study attacked the Pew Center study based upon the aggregate number of offenders incarcerated for particular types of crimes. Their evidence suggested that most offenders are not first-time offenders. And, yet, first-time offenders are not necessarily the easiest to rehabilitate. Evidence suggests that older, more high-risk offenders are more responsive to rehabilitative efforts.⁷⁴ However, the types of offenders being considered for the diversionary courts and graduated sentencing reforms are typically first-time offenders and low-risk based upon assessment tools.⁷⁵

Secondly, the proposed legislation, even if successful, would have increased sentences for violent criminal offenders at the same time that it would have reduced the terms of incarceration for low-level offenders. Currently, the state’s sentencing scheme requires most offenders to serve a minimum of fifty percent of their sentence imposed by the court. The Indiana Department of Corrections allows offenders to reduce the length

⁷² The proposed sentencing reforms were estimated to save the state over \$1 billion in additional correctional costs. Hayden, *supra* note 44.

⁷³ I do not suggest that the third inherent limitation of this new rehabilitative model—the potential exacerbation of racial disparities—is not present in this instance. Indiana, like all states, maintains a prison population with great racial disparities. The potential that these disparities will be exacerbated through increased reliance on predictive tools that emphasize structural inequalities already present in the state is likely. However, it is not the focus of this contribution.

⁷⁴ Eaglin, *supra* note 7, at 148–49; Talesh, *supra* note 60, at 211–12.

⁷⁵ See S. 561, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011), available at <http://www.in.gov/legislative/bills/2011/PDF/SB/SB0561.3.pdf> (proposing, as an amendment to Indiana Code § 35-38-2.23, that courts order an offender’s participation in reentry courts as a condition of probation subject to the offender’s risk classification).

of their prison sentence by earning "credit time" for good behavior during incarceration.⁷⁶ The amount of mitigation time an offender can earn varies depending upon the conviction offense and the offender's "credit class." For example, the maximum sentence reduction available for those convicted of murder is ten years (18%) of the presumed sentence of fifty-five years for murders, and two years (50%) for a presumed sentence of four years for Class C felons.⁷⁷ However, each offender is placed into a "credit class," which limits the amount of good-behavior credit time available to the offender.⁷⁸

The failed 2011 legislation would have expanded the "credit restricted" felons' classification, thus requiring a broader scope of offenders to serve at least eight-five percent of their prison sentences.⁷⁹ Currently, only offenders convicted of sentences related to child molestation are "credit restricted felons."⁸⁰ The 2011 legislation would have expanded the scope to include those convicted of voluntary manslaughter, battery, criminal deviant conduct, kidnapping, neglect of a dependent, robbery, and rape.⁸¹ Additionally, it would have expanded a prosecutor's ability to punish habitual offenders more severely by limiting judicial intervention through specific mitigating court findings.⁸² This reform could trigger longer sentences for many offenders, particularly considering the large number of repeat offenders the prosecutors' office allege exist in the state.⁸³ In total, the sentencing

⁷⁶ See generally IND. DEP'T OF CORRECTIONS, POLICY AND ADMINISTRATIVE PROCEDURES: MANUAL OF POLICIES AND PROCEDURES 37-60 (2011), available at http://www.in.gov/idoc/files/01-04-101_Adult_Offender_Classification_AP_5-1-11.pdf.

⁷⁷ *Id.* at 40 tbl. VII-1. Class D felons, who serve a maximum of one and a half years in prison, can mitigate their sentences by a year (66%) for good behavior. These offenders were the focus of much of the 2011 reform efforts.

⁷⁸ *Id.* at 4 (defining the three credit categories that offenders may be assigned for purposes of earning credit time as Credit Class 1 through 4); see also IND. CODE § 35-50-6-3 (statutorily creating "credit time classes," which regulate the amount of time an offender can earn towards early release). "Credit restricted felons" earn one day of credit time for every six days of imprisonment and accordingly must serve approximately eighty-five percent of an imposed sentence. IND. DEP'T OF CORRECTIONS, *supra* note 76, at 51-54.

⁷⁹ Ind. S. 561. Governor Mitch Daniels opposed the proposed legislation, indicating that this provision would undermine the bill's goal to "incarcerate people in a smarter way and save Indiana taxpayers a lot of money . . ." Berman, *supra* note 43.

⁸⁰ IND. CODE § 35-31.5-2-72 (2012) (defining "credit restricted felons" to include offenders convicted of offenses related to child molestation).

⁸¹ Ind. S. 561.

⁸² *Id.* (applying the credit restricted felon status to habitual offenders and habitual substance offenders and restricting judicial discretion to reduce sentences for habitual drug offenders).

⁸³ It is estimated that if the proposed legislation had passed, the state would have had to build three new prisons to accommodate the likely increases in prison time for certain offenders. ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES

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reforms proposed by the Senate Committee, though ultimately failing, reflected the distorted view of justice perpetuated in the neorehabilitative framework—rehabilitation for some, but harsher punishment for most. And the proposed sentencing reform leaves the bulk of the harsher punishments untouched.

V. INDIANA AS A BATTLEGROUND STATE IN NEOREHABILITATIVE REFORM:
FIGHTING THE BATTLE VERSUS WINNING THE WAR

Indiana has the opportunity to implement criminal justice reforms that may affect the longevity of the era of mass incarceration. Several factors are present to allow meaningful sentencing reform to address overincarceration in the state. However, in adopting the neorehabilitative model, Indiana illustrates the potential shortcomings of such a framework. There is a danger that states will be so consumed with potential cost-savings that any type of reform that appears to address this growing population will be accepted, no matter how ineffective such reform may be. Moreover, there is a very real possibility that the institutionalization of specialized courts and risk assessment tools may create such a small pool of diversion-qualified offenders that such reforms may not address the actual problem of overincarceration.⁸⁴

As it turns out, the neorehabilitative-based reforms proposed in Indiana failed to garner sufficient support for passage. Governor Daniels rejected the amended bill as costly and ineffective.⁸⁵ Though the original bill was criticized as soft on crime, Daniels himself refused to support the revised bill that emerged from the Senate Committee because it would not lead to the fiscal savings he initially sought in proposing the bill.⁸⁶ This rejection suggests hope that the neorehabilitative model does not have to lead to the further expansion of the incapacitation-heavy reforms that led to the problem of mass incarceration in the first place. This will require policymakers to endeavor to do more than appear to be concerned with the problems of overincarceration and truly to seek to change the causes, both sentencing

AND COSTS WHILE PROTECTING COMMUNITIES 56 (2011) [hereinafter ACLU REPORT], <http://www.aclu.org/files/assets/smartreformispossible.pdf>.

⁸⁴ Eaglin, *supra* note 7, at 213–14 (explaining that while offenders sentenced to life without parole are one of the largest growing incarcerated populations in the country, such offenders are systematically excluded from early release reforms).

⁸⁵ ACLU REPORT, *supra* note 83, at 56.

⁸⁶ Eric Bradner, *Indiana Gov. Daniels' Sentencing Bill Tweaked; Benefits Now Unknown*, COURIER PRESS (Feb. 14, 2011, 11:59 PM), <http://www.courierpress.com/news/2011/feb/14/prison-bill-tweaked-benefits-now-unknown/>.

policies and social issues, which led to the problem of overincarceration in the first place.

Indiana has the opportunity to implement bipartisan reform that does more than manipulate the rhetoric of rehabilitation. The state has the opportunity to revise its sentencing structure because the current structure is excessively punitive and mass incarceration is unsustainable. The addition of sentencing policies that increase punishment for large portions of the criminal offender population are not necessary to make this small improvement. Thus far, the state has avoided falling prey to the obscured costs of neorehabilitation. It remains to be seen whether this resistance will result in stagnation in any kind of sentencing reform whatsoever or result in better and truly smarter reforms, which will reduce the pressures of mass incarceration on the state.⁸⁷ Ultimately, lawmakers and the public more generally will have to reach the underlying normative question of whether total incapacitation has reached its zenith. Reforms that aim to prevent most offenders from serving the most amount of time in prison possible would signal that the shift is occurring. However, the implementation of reforms that lengthen the terms of incarceration for other subpopulations of criminal offenders would suggest that the rhetoric of rehabilitation does nothing to affect society's continued desire to remove criminal offenders from society permanently.

VI. CONCLUSION

For the first time since the 1970s, using the term "rehabilitation" carries a positive connotation with certain offenders and in certain contexts within the criminal justice system. This may or may not be a positive shift in policymaking. Neorehabilitation permits rhetoric more acceptable to the public while obscuring the reality of offender management rather than criminal justice. If Indiana is any indication, neorehabilitation suffers from limitations that may be insurmountable—particularly the focus upon the wrong offenders. At the same time, the state's rejection of emergency sentencing reforms, falling prey to the

⁸⁷ Sentencing reforms were not a priority in the 2012 term, because there was a lack of political will after the flawed 2011 bill failed to pass. Hayden, *supra* note 36. In April 2013, the House reintroduced a bill to make various changes to the criminal code. See H.B. 1006, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013). The bill introduces several mandatory minimum sentences depending upon the felony level of conviction. *Id.* It also increases the state's ability to prosecute offenders as habitual offenders. *Id.* Furthermore, the bill reduces the maximum earned credit time available so that no offender, even in the most favorable credit category, earns release after serving fifty percent of his or her sentence. *Id.* The persistence of some of these reforms may suggest that at least some of the inherent limitations of the neorehabilitative model are here to stay.

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total-incapacitation-friendly reforms as a trade-off for some headway in addressing low-level offenders, also provides hope that such reforms do not have to become the standard. Indiana, like states across the country, can do better within or outside the neorehabilitative framework. It remains to be seen if they will.