



2013

Against Neorehabilitation

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Recommended Citation

Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. Rev. 189 (2013)
<https://scholar.smu.edu/smulr/vol66/iss1/6>

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AGAINST NEOREHABILITATION

Jessica M. Eaglin*

ABSTRACT

In the face of severe budget constraints, bipartisan calls for reform, dropping crime rates, and judicial intervention, states are seriously considering and implementing criminal justice reform to manage prison populations for the first time in three decades. Scholars agree that states need a guiding theory to transform emergency and short-term reforms into a long-term shift in policy and practice away from mass incarceration. Numerous scholars advocate for a return to an improved theory of rehabilitation to guide the states in implementing such reform. This return—through neorehabilitation, or the rehabilitation of rehabilitation—centers on the use of evidence-based programming and predictive tools to create a rehabilitative model that “works.”

Despite the intriguing nature of this new rehabilitative model, this Article challenges this general shift in scholarly and practical reform. It argues that the problem of mass incarceration cannot be resolved through a return to this particular form of rehabilitation, no matter how “improved” it may be. To that end, this Article demonstrates that current rehabilitation-guided sentencing reforms—with their emphasis on evidence-based programming and the use of predictive tools—have several inherent flaws that will limit the efforts to downsize prison populations beyond mere budget-cut crises. Specifically, the neorehabilitative model stands to institutionalize a focus on the wrong offenders, exacerbate racial disparities, and distort our perception of justice. Moreover, this new rehabilitation model fails to provide a sufficiently different theory of reform from total incapacitation, which grew out of the desire to improve rehabilitation. For these reasons, this Article argues that the neorehabilitative model is a dangerous theory of reform as states shift towards broader and long-term sentencing policies.

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TABLE OF CONTENTS

I. INTRODUCTION	190
II. TOTAL INCAPACITATION	196
III. NEOREHABILITATION AND EMERGENCY SENTENCING REFORMS.....	199
A. EARLY RELEASE REFORM	203
B. PAROLE REVOCATION REFORM	206
C. DRUG COURTS	208
IV. THE LIMITATIONS OF NEOREHABILITATION TO DOWNSIZE STATE PRISON POPULATIONS	210
A. LOW-HANGING FRUITS: REHABILITATING THE WRONG OFFENDERS	211
B. EXACERBATING RACIAL DISPARITIES	214
C. DISTORTION OF JUSTICE.....	218
V. NEOREHABILITATION AND TOTAL INCAPACITATION: TWO SIDES OF THE SAME COIN	222
VI. CONCLUSION	225

A man loses his keys near his car in the dark of night. A friend finds the man looking for the keys under a street lamp yards away from his car. When the friend asks why the man is looking for his keys in that location, the man says, "Because that's where the light is."¹

I. INTRODUCTION

Currently, more than half of the states are considering implementing or are implementing some type of criminal justice reform to downsize their prison populations.² In the face of dropping crime rates,³ budget con-

1. This common analogy is used in various stories and articles. Bernard Harcourt uses the analogy to describe the shift towards the actuarial in punishment. See BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHMENT IN AN ACTUARIAL AGE* 193 (2007) (citing Carol Steiker). This Article will demonstrate that reforms guided by the neorehabilitative-model are similar to the man looking for his keys under the street lamp far from his car: well-intentioned but potentially illogical and unhelpful to resolving the larger problems driving mass incarceration in the United States.

2. NICOLE D. PORTER, *THE SENTENCING PROJECT, THE STATE OF SENTENCING 2011: DEVELOPMENTS IN POLICY AND PRACTICE 2-4* (2012), available at http://sentencingproject.org/doc/publications/publications/sen_State_of_Sentencing_2011.pdf. In 2011 alone, eighteen "states adopted sentencing policy measures to manage state prison populations." *Id.* at 4.

3. Since 1990, the national murder rate fell by half, and the violent and property crime rates have dropped considerably. See U.S. SENTENCING COMM'N, *HEARING ON FEDERAL SENTENCING OPTIONS AFTER BOOKER: CURRENT STATE OF FEDERAL SENTENCING BEFORE THE U.S. SENTENCING COMMISSION* (2012) (statement of Matthew Axelrod, Associate Deputy Attorney General), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Axelrod.pdf. The decreasing crime rate incentivizes states to downsize their prison populations by "draining the political potency from crime fears" to unquestioningly support policy decisions to mass

straints,⁴ bipartisan calls for reform,⁵ and judicial encouragement through recent Supreme Court decisions,⁶ many states are now forced to reconsider the punitive policies that have expanded the carceral states of America and created the phenomenon of mass incarceration.⁷

A growing body of scholarship discusses the emergency sentencing reforms that several states have undertaken to alleviate their increasing prison populations.⁸ These emergency reforms lack theoretical guidance

incarcerate large swaths of the prison population. Charlie Savage, *Trend to Lighten Harsh Sentences Catches On in Conservative States*, N.Y. TIMES, Aug. 13, 2011, at A14.

4. Mass incarceration is undeniably expensive. In 2008, the cost of corrections in the United States was \$52 billion; the states accounted for \$47 billion of that expense. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 11 (2009). For a comprehensive explanation on why the states, rather than the federal government, are pressured to reconsider the punitive policies leading to mass incarceration as a result of growing fiscal constraints, see Rachel E. Barkow, *Panel Four: The Institutional Concerns Inherent in Sentencing Regimes: Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1305–06 (2005), noting that the federal government has more fiscal leeway in spending than the states, whose budgets are finite and must be balanced each year. This distinction becomes increasingly less meaningful with the additional budgetary pressures recently placed on the federal criminal justice system through sequestration. See, e.g., Andrew Cohen, *How the Sequester Threatens the U.S. Legal System*, THE ATLANTIC, Mar. 11, 2013, <http://www.theatlantic.com/national/archive/2013/03/how-the-sequester-threatens-the-us-legal-system/273878/>.

5. In recent years, both Republicans and Democrats have called for criminal justice reform, particularly in the area of sentencing. Conservative groups like “Right on Crime” have increasingly influenced sentencing reform in various states, particularly in conservative and tough-on-crime states like Texas. See Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>; RIGHT ON CRIME, <http://www.rightoncrime.com> (last visited Sept. 13, 2012); see also ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011), available at http://www.aclu.org/files/assets/smartreformis-possible_web.pdf.

6. In 2010, the Supreme Court held that it is unconstitutional to impose life imprisonment without the possibility of parole for juvenile nonhomicide criminal offenders. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010). Though this decision did not reduce the prison population by any significant number, the 6–3 decision signaled a shift in the Supreme Court’s Eighth Amendment jurisprudence and a turn away from judicial deference to the legislature regarding the imposition of punishment. See *id.* at 2035–36, 2043. More significantly, in 2011 the Supreme Court affirmed an order requiring California to reduce its state prison population by 38,000 to 46,000 prisoners over the course of two years in response to the state’s persistent prison overcrowding. *Brown v. Plata*, 131 S. Ct. 1910, 1928, 1947 (2011). The Supreme Court justified the decision under the Eighth Amendment’s Cruel and Unusual Punishment Clause, concluding that the overcrowded prisons prevented the state of California from providing constitutionally required medical and mental health care to its state prisoners. *Id.* at 1947.

7. David Garland describes mass imprisonment as a social phenomenon in the United States defined by both the sheer size of the U.S. prison population and its concentrated effect on poor black males in urban centers. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1–2 (David Garland ed., 2001). Scholars have subsequently used the terms “mass imprisonment” and “mass incarceration” interchangeably. This Article uses the term “mass incarceration” because of its growing popularity outside of legal scholarship, particularly with grassroots organizations. See, e.g., THE STOP MASS INCARCERATION NETWORK, <http://www.stopmassincarceration.org/> (last visited Oct. 13, 2012).

8. See, e.g., JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 1–4 (2010), available at http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf;

and thus are in danger of incoherence and temporality. In recent years, several “[s]tates have enacted a slew of penal reforms aimed at shrinking their state prison populations” in response to the crushing economic burdens of mass incarceration.⁹ Nevertheless, most leading scholars refuse to recognize a theoretical shift in policy reform. Professor Michael M. O’Hear, for example, acknowledges that these emergency reforms reflect an “apparent disconnect” with the leading theory of penal reform advocated by the American Law Institute—limiting retributivism¹⁰—but nevertheless argues that such emergency policies *can be* incorporated into current practice.¹¹ He does not, however, argue that they *have been* incorporated into the theoretical framework.¹² Moreover, Professor Marie Gottschalk raises a red flag to these emergency reforms, arguing that the economic pressures to downsize state prison populations may in fact result in more punitive policies—as opposed to softened punishment—during hard times.¹³ At the same time, several advocates and scholars have endorsed the expansion of rehabilitation-focused reforms, most notably drug courts, as a method to manage prison populations and divert low-level offenders from unnecessary and expensive incarceration terms.¹⁴ Thus, tension exists within legal scholarship regarding not only how states should endeavor to manage their prison populations but also which methods are best at implementing reforms that address the political and economic behemoth of overincarceration in the United States.¹⁵ Legal scholars grapple with providing states with both guiding theories of reform to manage their prison populations and frameworks to transform

Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581 (2012); Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, DÆDALUS, Summer 2010, at 62; Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011); Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010) [hereinafter Klingele, *Judicial Sentence Modification*]; Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415 (2012) [hereinafter Klingele, *Early Demise*]; see also MICHAEL JACOBSON, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (2005).

9. Gottschalk, *supra* note 8, at 62–63.

10. Limiting retributivism is a theory of punishment advocated by several leading sentencing scholars, including Michael M. O’Hear and Kevin R. Reitz. See Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1247, 1251 (2011); Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 528–29 (2002). The basis of the theory is that the outer limits of punishment are measures of blameworthiness—retribution—but that the actual sentence an individual receives may be influenced by other theories of punishment, including rehabilitation, deterrence, and incapacitation. See O’Hear, *supra*, at 1259.

11. O’Hear, *supra* note 10, at 1250–51 (recognizing an “apparent disconnect” between theorists and policymakers in implementing sentencing reform).

12. *Id.* at 1252.

13. Gottschalk, *supra* note 8, at 63.

14. See *infra* Part III.C.

15. See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1589–90, 1644–57 (2012) (recognizing the growing pressures to decarcerate, then discussing several competing theoretical models for specialized courts potentially aimed to reduce incarceration levels).

successful short-term emergency responses into long-lasting and permanent sentencing policies.¹⁶

This Article intervenes at the intersection of these two debates. It identifies and critiques the expansion of the neorehabilitative model of sentencing reform as states attempt to manage their prison populations. It does so by demonstrating that this new rehabilitative model is present in several leading emergency sentencing reforms adopted in response to the political and economic pressures to manage state prison populations. Rehabilitation, once the leading penal theory of reform in the United States, fell into disrepute in the 1970s as states shifted towards more punitive models of criminal justice.¹⁷ In the wake of this shift, states adopted a more punitive theory of total incapacitation, and the prison population swelled.¹⁸ Today, several advocates and scholars are calling for a return to rehabilitation once more.¹⁹ The neorehabilitative theory, however, has been modified to avoid the shortcomings of the old rehabilitative model. Scholars and advocates now emphasize evidence-based rehabilitative programming that proves its efficacy and cost efficiency.²⁰ At the same time, several scholars advocate the use of predictive tools to further increase the likelihood of successful early release and rehabilitative programming.²¹ These reforms represent a shift towards penal policies aimed at

16. *Fan, supra* note 8, at 633 (recognizing that “[r]elease-value reforms are often practice in need of theory” and arguing for a new theory of rehabilitation to guide reform); *McLeod, supra* note 15, *O’Hear, supra* note 10, at 1284 (describing a way for the theory of limiting retributivism to fit into practice of indeterminate sentencing reemerging as states implement emergency sentencing reform).

17. *See infra* Part III.

18. *See infra* Part II.

19. *See* Francis T. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, 43 *CRIMINOLOGY* 1, 3 (2005) (“Rehabilitation is making a comeback.”); *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 10 (Mary Louise Frampton et al. eds., 2008) (recognizing that “rehabilitation is back on the table”); *Fan, supra* note 8, at 653 (advocating for “rehabilitation pragmatism”). *But cf.* *O’Hear, supra* note 10, at 1250 (acknowledging that the indeterminate sentencing structure closely tied to the rehabilitative ideal has grown in popularity in recent years, but refusing to go so far as to recognize a theoretical shift towards rehabilitation).

20. *See* *Fan, supra* note 8, at 634 (arguing for the adoption of “rehabilitation pragmatism”: a new theory of rehabilitation based in efficacy, cost-effectiveness, and success, unlike the “starry-eyed” and “egalitarian” theory of yesteryear); Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 *CRIME AND JUSTICE* 207, 207, 270–73 (2008) (arguing that California must adopt evidence-based rehabilitation programs as part of a six-part plan to manage its exploding prison population); Roger K. Warren, *A Tale of Two Surveys: Judicial and Public Perspectives on State Sentencing Reform*, 21 *FED. SENT’G REP.* 276, 285 (2009) (recognizing widespread public and judicial support for evidence-based, rehabilitation-focused reform for low-level offenders).

21. *See, e.g.,* J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 *SMU L. REV.* 1329, 1395–98 (2011) (endorsing sentencing reform from a scholarly perspective); Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 *IND. L.J.* 1307, 1311 (2007) (endorsing the expansion of actuarial tools in sentencing reform from a practical perspective); Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 *N.Y.U. L. REV.* 1389, 1404–07 (2008) (describing Missouri’s adoption of risk assessment tools into sentencing practices). *Cf.* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Correc-*

managing prison populations through selective treatment and discipline while simultaneously focusing on alternatives to incarceration for certain, supposedly more deserving, offenders.²² This shift is popular both politically and publicly because it emphasizes individual responsibility and risk management to insulate the state and potentially protect the public from the perceivedly unmanageable threat of crime in the United States.²³

This Article also argues that this new model of punishment suffers from several inherent limitations that make this framework a dangerous model of reform going forward. The Article joins several scholars in identifying evidence of the new penology in criminal justice reform.²⁴ It extends previous critiques by locating the new penology in recent emergency sentencing reforms, and it expands on the dangers of its adoption by identifying three key institutionalized perversions to the criminal justice system. This Article argues that this new rehabilitative model, particularly through the expansion of evidence-based programming and predictive tools, suffers from serious and inherent limitations that may prevent this theory of reform from guiding states past the current problem of overincarceration in the United States. The neorehabilitative model potentially focuses on the wrong offenders,²⁵ exacerbates racial disparities in the prison populations,²⁶ and distorts our perception of criminal justice.²⁷ Moreover, it stands to continue the theoretical underpinnings of total incapacitation, which created the problem of mass incarceration in the first place.²⁸ Because neorehabilitation may provide a rhetorical solution to mass incarceration without providing a significant change in the problematic policies that led us to the current crisis, this Article argues that this particular theory of rehabilitation should not guide states in their reform efforts.

To demonstrate the prevalence and limitations of the neorehabilitative model, this Article focuses on three popular emergency sentencing reforms adopted in several states: early release reform,²⁹ parole revocation

tions and Its Implications, 30 *CRIMINOLOGY* 449, 449–50, 470 (1992) (describing the emergence of new discourses, objectives, and techniques based in predictive tools and cost-efficiency in the arena of criminal justice reform, but expressing skepticism rather than endorsement).

22. The focus on risk management through selective treatment is a classic characteristic of the new penology, as identified by Malcolm Feeley and Jonathan Simon. Feeley & Simon, *supra* note 21, at 457. The use of treatment in tandem with discipline for certain offenders, however, is the unique confluence of the neorehabilitative model and the new penology. See *infra* Part III.

23. See *infra* Part III.

24. See, e.g., Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 *STAN. L. & POL'Y REV.* 417, 425 (2009).

25. See *infra* Part IV.A.

26. See *infra* Part IV.B.

27. See *infra* Part IV.C.

28. See *infra* Part V.

29. See O'Hear, *supra* note 10, at 1248, 1288 (noting that at least thirty-six states have reactivated or adopted early release reforms to manage their prison populations).

reform,³⁰ and the proliferation of drug courts.³¹ These particular changes demonstrate not only emergency reforms enacted in the face of converging pressures on the states but also the new model of rehabilitation. Thus, the Article speaks to scholars and policy makers advocating for the expansion of these emergency reforms to manage prison populations. This Article does not explore the new rehabilitated model of rehabilitation through the lens of the current prisoner reentry movement. This may seem surprising because numerous scholars agree that the return of rehabilitation is most prevalent in this context;³² however, this Article purposefully abstains from entering the discourse on prisoner reentry as a way to demonstrate the ubiquity of this shift towards neorehabilitation in criminal justice reform. Though the emergence of a renewed focus on rehabilitation may be most obvious in the context of reentry,³³ there is a broader shift in criminal justice reform that this Article identifies through the lens of sentencing reform specifically.

The Article unfolds in four parts. Part II identifies the problem of mass incarceration through the paradigm of the current leading theory of reform, total incapacitation. Part III discusses the general trend towards the neorehabilitative model of sentencing reform and demonstrates this shift through a discussion of the three leading types of emergency sentencing reforms recently adopted by several states: early release reform, parole revocation reform, and the proliferation of drug courts to divert low-level drug offenders from incarceration. Part IV lays out the limitations of framing criminal justice reform through the lens of neorehabilitation. It addresses three major limitations: focusing on the wrong offenders, exacerbating racial disparities, and distorting our perception of criminal justice. Part V explains the persistence of these inherent limitations by identifying the link between current neorehabilitation, the new penology, and total incapacitation theory.

30. See John Schwartz, *Report Finds States Holding Fewer Prisoners*, N.Y. TIMES, Mar. 17, 2010, at A15 (“The most common reform that we’re seeing . . . [is] various strategies to hold parole violators accountable, short of jamming them back into a \$25,000-a-year, taxpayer-funded prison cell.”).

31. Warren, *supra* note 20, at 277 (recognizing that a 2006 National Center for State Courts report identified “[e]xpand[ed] . . . use of drug courts, problem-solving courts, and evidence-based practices . . . as being among the leading current sentencing reform efforts in the states.”).

32. See, e.g., Jessica S. Henry, *The Second Chance Act of 2007*, 45 CRIM. L. BULL. 416, 419 (2009) (noting that rehabilitative efforts now focus upon reentry); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC’Y REV. 33, 55 (2011) (concluding after review of empirical work that “to whatever extent ‘rehabilitation is back on the table,’ it is on the table in a new format increasingly focused on [prisoner reentry initiatives]”). Cf. Michael M. O’Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 FED. SENT’G REP. 75, 75, 81–82 (2007) (recognizing the growing focus on the prisoner reentry reform movement and its impact on criminal justice reform more broadly).

33. This Article does not address the reentry movement; thus the author does not opine on whether neorehabilitation—with its focus on cost-efficiency, predictive tools, risk management, and individual responsibility—has the same deleterious effects on the reentry movement as those identified here in the sentencing reform context. See *infra* Part III. This issue will be explored in a future article.

II. TOTAL INCAPACITATION

The United States leads the world in its rate of incarceration.³⁴ This figure is the direct result of punitive sentencing policies. Beginning in the 1970s, a wave of tough-on-crime policies spread across the United States as the states and the federal government moved away from the rehabilitative model towards an incapacitation-focused model of punishment. The most notable manifestation of this shift is the abandonment of indeterminate sentencing systems in favor of determinate, punitive sentencing practices. At the same time, politicians passed truth-in-sentencing policies, habitual offender laws, and tough mandatory minimum sentences for a broad scope of crimes. These reforms resulted in a severe and rapid increase in the U.S. prison population.³⁵ By 2010, one in every ninety-nine persons in the United States was incarcerated.³⁶ Though these numbers have stabilized and even decreased slightly in recent years, the United States continues to maintain its distinction as the most punitive country in the world.³⁷

The guiding theory of reform during the past three decades is best characterized as incapacitation.³⁸ Where the rehabilitative model of pun-

34. In 2010, the United States incarcerated at a rate of 731 persons per every 100,000 adult citizens. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 7 tbl.2 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>. This rate of incarceration is particularly egregious when compared to similar Western or Capitalist economies. See Nicola Lacey, *American Imprisonment in Comparative Perspective*, DÆDALUS, Summer 2010, at 102, 103 fig.1 (demonstrating that the United States incarcerated at a rate nearly four times that of the closest neoliberal market economy—New Zealand—in 2008). Even accounting for the recent dip in the rate of incarceration, the United States continues to outstrip comparable countries. See GLAZE, *supra*, at 1; Lacey, *supra*, at 103 Fig. 1.

35. Between 1970 and 2010, the prison population in the United States quadrupled. Mark Engler, *America: Life in Prison Nation*, NEW INTERNATIONALIST, Oct. 2011, at 53. In 1970, state and federal prisons housed fewer than 200,000 inmates, and the prison population had been relatively stable over the past fifty years. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 298 (2007). The prison population has increased exponentially in recent decades, and today nearly 2.3 million people are incarcerated in state and federal prisons around the United States. GLAZE, *supra* note 34, at 2.

36. Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1493 (2010).

37. *Id.* at 1492. In 2010, the combined U.S. prison population decreased for the first time since 1972. PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 1 (2011). Additionally, the number of incarcerated persons declined by 0.3% in 2010. *Id.* This number becomes even more significant when considering the state prison population separate from the federal system. Although the federal prison population increased by 0.8% in 2010, the state prison population decreased by 0.5%. *Id.* Scholars are hesitant to rejoice in this slight decrease, speculating whether the decline indicates a broader trend towards reducing prisoners or simply represents a brief aberration. See Gottschalk, *supra* note 8; Marc Mauer, *Sentencing Reform: Amid Mass Incarceration—Guarded Optimism*, 26 CRIM. JUST. 27 (2011). This Article intervenes into this discourse by asserting that several recent efforts leading to states' downsized populations are not at this point long-term reform sufficient to make a permanent change in the prison populations.

38. While there was a brief period in the 1980s where retribution and deterrence best characterized criminal justice reform, the leading theory since the 1990s has been incapacitation. See Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452, 452 (1998).

ishment centered on incarcerating individuals until they were prepared to reenter society as productive citizens,³⁹ incapacitation focuses on incarcerating criminal offenders for the longest period possible to reduce the risk to public safety of reoffending.⁴⁰ Jonathan Simon defines the current penal theory as “total incapacitation,” a more extreme version of incapacitation theory.⁴¹ As he explains, “total incapacitation” hinges on “the idea that imprisonment is appropriate whenever an offender poses any degree of risk to the community,” to the exclusion of alternative methods of addressing an offense.⁴²

Total incapacitation finds its roots in what Professors Jonathan Simon and Malcolm Feeley have identified as the “new penology” of crime.⁴³ First introduced in 1992, this theory of punishment focuses on risk management, aggregation of subpopulations, the rise of the actuarial methods, and “populist punitiveness.”⁴⁴ Though the new penology cuts across the four traditional purposes of punishment, it resonates most with the theory of incapacitation.⁴⁵ Incapacitation removes offenders from society, and the new penology approaches crime as something permanent and unpreventable.⁴⁶ Thus, incapacitation is the only way to defer the commission of crime, and total incapacitation endeavors to defer the future recommitment of crime for the longest possible period by the most likely offenders, which is seen as inevitable.

The best representation of the new penology theory is the proliferation of truth-in-sentencing policies,⁴⁷ habitual offender laws,⁴⁸ and mandatory

39. See *Mistretta v. United States*, 488 U.S. 361, 364–65 (1989).

40. Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 271–72 (2011) (recognizing that the theory of incapacitation has “taken center stage in recent years”). There are, of course, limitations to how long an offender may be incarcerated for an offense. The Eighth Amendment has been interpreted to include a proportionality review of criminal sentences. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). Additionally, the parsimony principle in sentencing encourages the shortest term of incarceration necessary to achieve the goals of sentencing. *United States v. Martinez-Barragan*, 545 F.3d 894, 904 (10th Cir. 2008). These principles, however, have been interpreted narrowly to provide very limited protection against increasingly longer and more severe sentences. *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991). The Eighth Amendment’s “narrow proportionality principle,” for example, “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.* at 997, 1001. It remains to be seen whether the Supreme Court’s recent decision in *Graham* will breathe new life into the proportionality review outside the context of nonhomicide juvenile offenders.

41. 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) [hereinafter *LIFE WITHOUT PAROLE*].

42. *Id.*

43. Feeley & Simon, *supra* note 21, at 458.

44. See *id.* at 450; Simon, *supra* note 38, at 452–55.

45. Simon, *supra* note 38, at 452, 455.

46. See Feeley & Simon, *supra* note 21, at 452.

47. See Fan, *supra* note 8, at 589–90.

48. The typical examples of habitual offender laws are the “three strikes” laws that proliferated throughout the United States in the 1990s. See Scott A. Grosskreutz, *Strike Three: Even Though California’s Three Strikes Law Strikes Out Andrade, There Are No Winners in this Game* [Lockyer v. Andrade, 583 U.S. 63 (2003)], 43 WASHBURN L.J. 429, 455 (2004).

minimum sentences designed to extend prisoners' terms of incarceration.⁴⁹ California's three-strikes law, one of the most draconian habitual offender laws in the country, resulted in a severe increase in the state's prison population.⁵⁰ Today more than five percent of all state prisoners in California are sentenced to life under this law.⁵¹ In 2010, more than forty percent of California's third-strike population was serving life for a non-violent, nonserious offense due to the broad scope of the statute.⁵² But total incapacitation signifies more than simply the passage of several laws in the 1980s–1990s; this theory captures a larger shift towards excluding criminal offenders from society in any way possible. The expansion of collateral consequences and the reduction in grants of parole to even those offenders qualified for release further illustrate the theory of total incapacitation.⁵³

49. Mandatory minimums increase the minimum punishment an offender can receive for conviction of certain crimes with particular characteristics. For example, several states have mandatory minimum terms of incarceration that must be served for all offenders convicted of possessing more than a certain amount of a particular drug. Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 (2001). Additionally, an offender may receive a legislatively mandated minimum term of incarceration for possession of a firearm during the commission of a crime. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm. Such characteristics of the crime trigger the mandatory minimum term of punishment, thus creating a higher floor from which the trial judge must decide the appropriate sentence. See *id.* In some cases, these legislatively mandated minimum terms of punishment push an offender to the maximum statutory punishment permissible for the original crime of conviction. See *Blakeley v. Washington*, 542 U.S. 296, 303–05, 308 (2004) (invalidating determinate state sentence where judicial fact-finding created a mandatory minimum in excess of the maximum statutory term of imprisonment for the crime of conviction); *United States v. Booker*, 543 U.S. 220, 226, 259 (2005) (rendering the Federal Sentencing Guidelines advisory for the same reason).

50. Bettye Miller, *Three-Strikes Law Fails to Reduce Crime*, UCR TODAY (Feb. 28, 2012), <http://ucrtoday.ucr.edu/3557>.

51. In 2010, when the prison population amounted to nearly 160,000 prisoners, the total three-strikes population was estimated at 8,500 prisoners. GUERINO ET AL., *supra* note 37, at 14 tbl.1; Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES, May 23, 2010, at MM40.

52. Bazelon, *supra* note 51. California's three-strikes statute is particularly harsh in application. While the first and second offense must be "violent" or "serious," CAL. PENAL CODE § 667(c)(7) (West 2010), the term "serious" is construed broadly enough to include criminal offenses not typically considered violent or serious. See *Ewing v. California*, 538 U.S. 11, 15–17 (2003) (explaining "wobbler" offenses, which may be considered felonies or misdemeanors depending upon an offender's criminal history or other factors). There are numerous examples of the perversity of this statute in application. For example, Leandro Andrade received a three-strikes life sentence for shoplifting videotapes adding up to less than \$150 in value. *Lockyer v. Andrade*, 538 U.S. 63, 66, 68 (2003). Gary Ewing received a life sentence for shoplifting three golf clubs. *Ewing*, 538 U.S. at 17–18, 20. The Supreme Court upheld these convictions against Eighth Amendment challenges because the state legislature was arguably meeting a legitimate purpose of punishment in implementing those offenses: incapacitation. *Id.* at 20, 24–25, 30 (explaining that the Court deferred to the legislature's policy decision that some repeat offenders "must be isolated from society in order to protect the public safety"); *Lockyer*, 538 U.S. at 77.

53. PEW CTR. ON THE STATES, *supra* note 4, at 19 (noting that many policy makers have "embraced longer sentences through broadly defined 'three strikes' statutes and pa-

Despite the dominance of incapacitation as the leading penal theory, some of the punitive policies that drove the problem of mass incarceration have been placed into doubt in recent years. States are now at the point where they cannot afford to incarcerate at the rates they have reached in the past three decades.⁵⁴ Moreover, data suggests that the size of the incarcerated population in the United States has reached the “tipping point” whereby more incarceration no longer reduces crime rates,⁵⁵ and in fact it may be criminogenic.⁵⁶ As a result, politicians, advocates, and scholars alike have called for and implemented several sentencing reforms driven by the need to reconsider the policies behind incarceration.⁵⁷ These reforms can be characterized as a return to the guiding theory of rehabilitation. The following Part will discuss these emergency reforms in the context of a broader growing shift in criminal justice reform towards neorehabilitation.

III. NEOREHABILITATION AND EMERGENCY SENTENCING REFORMS

The premise of the original theory of rehabilitation was the belief that every criminal offender should be released from prison when he or she has been treated for the illness of criminality and can reenter society as a meaningful and law-abiding citizen. For the majority of the twentieth century, this theory of rehabilitation dominated state and federal sentencing systems in the United States.⁵⁸ However, beginning in the 1970s, both the

role policies that are hiking up the average age of inmates”); Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE, *supra* note 41, at 96, 116 (observing that the breadth of collateral consequences in the United States demonstrates a commitment to an exclusionary penal theory). Cf. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 137–41 (2010) (noting collateral consequences as part of a broader project to exclude portions of society).

54. See Fan, *supra* note 8, at 595–96; Gottschalk, *supra* note 8, at 62 (quoting Attorney General Eric Holder’s 2009 statement that the country’s extraordinary incarceration rate is economically unsustainable); Klingele, *Early Demise*, *supra* note 8, at 422. See generally *supra* notes 2–5.

55. PEW CTR. ON THE STATES, *supra* note 4, at 18–20 (summarizing scholarly data and concluding that “[m]any states appear to have reached a ‘tipping point’ where additional incarceration will have little if any effect on crime”).

56. *Id.* at 19. This is particularly true for nonviolent offenders and drug offenders. Fan, *supra* note 8, at 594–95.

57. See *infra* Part III.

58. Under the rehabilitative model of indeterminate sentencing, the trial court had wide discretion to select a prison sentence for criminal offenders with mild limitations from broad legislatively imposed statutory ranges. *Mistretta v. United States*, 488 U.S. 361, 363–64 (1989) (describing indeterminate sentencing under the rehabilitative model in the federal system). Once offenders spent a third of their prison terms incarcerated, the authority shifted to back-end players, like parole boards or correctional officers, to determine whether they should be released. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226–27 (1995). When offenders were released from prison, it was because they were rehabilitated, as determined by a parole board. See *id.* at 227. Thus, the judge imposed an indeterminate sentence with a term of incarceration, but the parole board determined the precise moment when—due to programming, good behavior, and other factors—an offender would be released from prison. See *id.*

left and the right attacked the rehabilitative model of punishment.⁵⁹ On the left, critics argued that rehabilitation was unjust, arbitrary, and racially discriminatory.⁶⁰ On the right, tough-on-crime lawmakers argued that this theory led to indeterminate sentences that were too uncertain and lenient to actually deter criminal offending.⁶¹

In the wake of Robert Martinson's influential essay *What Works—Questions and Answers About Prison Reform*, critics from both the left and the right supported the eradication of the rehabilitative model of punishment. Martinson's essay asserted that offender rehabilitation programs failed to reduce recidivism.⁶² Though Martinson later recanted and revised his perspective on rehabilitative programming,⁶³ the damage was done. As scholars and activists called for a reform of sentencing laws in this country, politicians agreed that the rehabilitative model was unsuccessful and that determinate sentences were more favorable.⁶⁴ Though numerous states maintained indeterminate sentencing systems over the following three decades,⁶⁵ the rehabilitative model of punishment declined.⁶⁶

Even as the decline of the rehabilitative model intensified, several scholars have attempted to “rehabilitate” the dying model, defending the

59. Several sociopolitical events converged to bring an end to the rehabilitative model of punishment, along with the critiques discussed in the following footnotes. These include backlash to the civil rights movement, the Vietnam War, and the politicization of crime. See Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 33–36 (1997); Phelps, *supra* note 32, at 37 (describing Francis Allen's argument that events like Vietnam, Hiroshima, and the Watergate scandal “reduced confidence in the malleability of human nature”); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007) (describing punitive crime policies as a negative response to the civil rights movement). While outside the scope of this Article's critique of rehabilitation, it is important to recognize that the shift away from the rehabilitative model was influenced greatly by broader social forces as well.

60. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 21–25 (1973); Stith & Koh, *supra* note 58, at 227 (arguing that sentences were allegedly racially discriminatory because judges had unlimited discretion to sentence based on their own views of the offender); see also TASK FORCE ON THE ADMIN. OF JUSTICE, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 50–57 (1967) (discussing threats to justice caused by prejudice).

61. See Stith & Koh, *supra* note 58, at 277; see also Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1040 (2010).

62. See Robert Martinson, *What Works—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 28 (1974).

63. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252–54 (1979) (withdrawing his conclusion that nothing works).

64. See Stith & Koh, *supra* note 58, at 277–78.

65. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1103 n.79 (2005) (noting that “[i]ndeterminate systems remain in use in nearly half of all states, including New York, Alabama, Iowa, and Texas”).

66. See Phelps, *supra* note 32, at 33.

theory through empirical studies.⁶⁷ Although scholars are skeptical of Martinson's conclusion that "nothing works," there is a general consensus that rehabilitative programming reduces recidivism but does not eradicate it.⁶⁸ Indeed, the promising findings of many studies indicate that results are offense-specific and offender-specific.⁶⁹ Consequently, scholars and advocates have attempted to identify those offenders who are most suited to receive rehabilitative programming, be released early, or both.⁷⁰

Neorehabilitation emerged with the advent of drug courts in the late 1980s.⁷¹ Witnessing the way in which drug addictions kept low-level offenders perpetually cycling in and out of the justice system, courts sought to both divert offenders and provide treatment for the underlying cause of their reappearances.⁷² This led to a rehabilitative-focused revolution in the criminal justice system.⁷³ But neorehabilitation is not like the old rehabilitative model. Its purpose is to manage criminal offenders more efficiently and effectively, at times through treatment rather than incarceration.⁷⁴ Unlike the old rehabilitative model, neorehabilitation does not merely seek to improve the offender,⁷⁵ but to manage the risk of recidivism through responsabilization and the use of particular tools to improve treatment and reduce the likelihood of future crime.⁷⁶ Neorehabilitation thus identifies and manages offenders through treatment for the benefit of society, not the individual. This societal benefit makes neorehabilitation particularly appealing as a bipartisan platform for re-

67. See Rachel E. Barkow, *Life without Parole and the Hope for Real Sentencing Reform*, in *LIFE WITHOUT PAROLE*, *supra* note 41, at 190, 199 & n.63; Lipsey & Cullen, *supra* note 35, at 298.

68. See Barkow, *supra* note 67, at 199 (noting that "while certain treatments (either alone or in combination) lower rates of recidivism, recidivism remains relatively high even after treatment"); Lipsey & Cullen, *supra* note 35, at 303 & tbl.2 (finding that all studies on the effectiveness of rehabilitation programs demonstrate between a 10% and 40% average reduction in recidivism).

69. Barkow, *supra* note 67, at 199. Studies suggest that rehabilitation programming has the largest effect on juvenile offenders, though no studies have compared effectiveness between juveniles and adults. Lipsey & Cullen, *supra* note 35, at 304. Still, comparing different types of treatments while controlling for age group demonstrates that no particular treatment program can be defined as effective consistently, suggesting that treatment success varies for different offenders and different offenses. See *id.* at 309–310.

70. Lipsey & Cullen, *supra* note 35, at 306 ("The most important challenge for contemporary rehabilitation research is to identify the factors that most influence the likelihood of positive treatment effects.").

71. See *infra* Part III.C and notes 125–26. Professor Eric Miller first used the phrase "neorehabilitation" in his 2009 article critiquing the ways in which the therapeutic model of drug courts obscures the racialized social forces that drive the overcriminalization of drug offenders. Miller, *supra* note 24, at 441. Several other scholars have since used the term in relation to drug court reform. See, e.g., McLeod, *supra* note 15, at 1595. This Article expands the term neorehabilitation beyond the framework of therapeutic jurisprudence and drug courts to a broader model of criminal justice reform.

72. Miller, *supra* note 24, at 417.

73. McLeod, *supra* note 15, at 1591 (recognizing that some commentators believe "specialized criminal courts . . . facilitat[ed] 'a quiet revolution among American criminal courts'" and created "a new 'criminal justice paradigm'").

74. See Miller, *supra* note 24, at 439–40.

75. See *id.* at 439.

76. See *id.* at 437.

form because the services that an offender may receive are framed within the language of individual responsibility, permanent criminal risk, and risk management.⁷⁷

Central to neorehabilitation is the contribution of evidence-based programs and risk assessment tools to inform penal and sentencing policies.⁷⁸ Social science research and empirical evidence testify to the success of evidence-based programs in reducing recidivism.⁷⁹ Risk assessment tools are predictive models that assist parole boards, correctional officers, and sometimes judges to predict which offenders are most likely to recidivate and thus inform decisions on which sanctions and what programs are appropriate for the offenders to prevent them from recidivating.⁸⁰ Combined, these two tools are referred to as “the actuarial methods” or, more generally, “the actuarial.”⁸¹ The increased use of these resources arguably rehabilitates rehabilitation: It prevents the theory from falling prey to the criticisms launched against rehabilitation in the 1960s through 1970s that led to its national demise.⁸²

In recent years, some form of rehabilitation has become more appealing as states struggle with converging pressures demanding the management of their prison populations. As states struggle to cope with the inevitable human and economic expenses of total incapacitation, scholars recognize that rehabilitation is at least “back on the table.”⁸³ Policy makers have recently shown interest in rehabilitative-focused programming and reform as well.⁸⁴ Similarly, surveys indicate that the public would

77. *See id.* at 427–28.

78. *See, e.g.,* Fan, *supra* note 8, at 633–34 (“This evidence-based approach [to rehabilitation] diminishes the opacity and seemingly unfettered discretion besieged by critics on the left and right during the heyday of the rehabilitative ideal.”).

79. Lipsey and Cullen define an evidence-based perspective on corrections as one in which “offender interventions are evaluated and adopted only if they prove to inhibit criminal behavior.” Lipsey & Cullen, *supra* note 35, at 298. While correctional sanctions and rehabilitative treatment are distinguishable in the sense that the rehabilitative treatment need not be provided along with a correctional sanction, the evidence-based perspective for both is the same: reducing recidivism. *See id.* at 302.

80. *See* Wolff, *supra* note 21, at 1405. For example, Missouri uses a risk assessment tool to distinguish between inmates who can be safely paroled and those who need to stay behind bars. *Id.* at 1404–05; *see* PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 6 (2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Count_2010.pdf; *see also* Fan, *supra* note 8, at 639 (describing how evidence-based rehabilitative programs use risk assessment tools to screen offenders and determine which offenders are eligible for parole and early release).

81. Harcourt defines the actuarial methods as those that use statistical methods—rather than clinical methods—on large datasets of criminal offending rates in order to determine the different levels of offending associated with a group or with one or more group traits and, on the basis of those correlations, to predict the past, present, or future criminal behavior of a particular person and to administer a criminal justice outcome for that individual. Harcourt, *supra* note 1, at 16.

82. *See* Fan, *supra* note 8, at 633.

83. *See* AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION, *supra* note 19, at 10.

84. For example, recent statements include those of Rick Perry, Governor of Texas (“I believe we can take an approach to crime that is both tough and smart. . . . [T]here are thousands of non-violent offenders in the system whose future we cannot ignore. Let’s

prefer to spend tax dollars on rehabilitation, not prisons.⁸⁵ Thus, there is a general consensus that it is worth investing in rehabilitation—so long as it works. At the same time, the disappearance of the welfare state and the social safety net make the neorehabilitative model all the more intriguing to the public, policy makers, and the judiciary because neorehabilitation potentially provides otherwise inaccessible services to overwhelmingly poor subpopulations.⁸⁶

The following subsections provide examples of recent emergency reforms that states have implemented to manage their prison populations. These emergency reforms also represent the growing trend towards adopting neorehabilitative sentencing policies. Although several of the state reforms discussed below are the result of cataclysmic incentives to reduce their state prison populations, they also reflect the scattered and unguided responses that many states have implemented or are considering implementing as a means to address short-term pressures to reduce their prison populations.⁸⁷

A. EARLY RELEASE REFORM

In the face of converging pressures to manage prison populations, numerous states have abandoned in part or in full the truth-in-sentencing policies that partially contributed to their exploding prison populations.⁸⁸ At least thirty-six states have reactivated or created early release programs designed to identify and prepare prisoners for release before the

focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again.”); Tom Coburn, U.S. Senator from Oklahoma (“As a physician, I believe that we ought to be doing drug treatment rather than incarceration.”); and Eli Lehrer, The Heritage Foundation (“Conservatives should support four policies: improved follow-up, better drug treatment, in-prison work programs, and faith-based rehabilitation.”). *What Conservatives Are Saying*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/what-conservatives-are-saying/> (last visited July 23, 2012).

85. See Warren, *supra* note 20, at 280 (reporting that seventy-nine percent of respondents surveyed by the National Center for State Courts believed that “many offenders can turn their lives around” through rehabilitation).

86. See Miller, *supra* note 24, at 425–27 (recognizing the bipartisan appeal of drug courts but challenging their benefit to poor and minority communities).

87. There is reason to believe these pressures are short term, at least for most states. Gottschalk, *supra* note 8, at 70–71; see also ALEXANDER, *supra* note 53, at 14 (dismissing states’ efforts to downsize prison populations as a means to address the racial subordination aspect of mass incarceration because it does not represent long-term policy reform).

88. Truth-in-sentencing policies—otherwise known as the adoption of determinate sentencing systems in which prisoners serve at least 85% of their prison sentence—cannot be solely blamed for the exponential increase in state prison populations. See, e.g., 42 U.S.C. § 13704(a) (2006) (incentivizing states to adopt truth-in-sentencing policies). While this sentencing structure ascended in the United States at the same time that the prison population exploded, other sentencing policies enacted into law during this period, such as mandatory minimums and habitual offender laws, increased the length of sentences. Reitz, *supra* note 65, at 1103–04; Ben Trachtenberg, Note, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479, 487–89 (2005). The reinstatement or adoption of early release reform policies, however, directly contradicts truth-in-sentencing policies as it reduces the length of an imposed sentence served by a prisoner.

completion of their sentences.⁸⁹ Prevalent examples of these programs include the expansion of “earned time” or “good-time” programs,⁹⁰ the expansion or reinstatement of parole eligibility,⁹¹ and the enactment of “compassionate releases.”⁹² Though these programs are not without criticism and public failures,⁹³ states have relied heavily on such measures to manage their prison populations and correctional costs over the course of the past decade.⁹⁴

The state of Washington provides an excellent example of the implementation of early release reform based on the neorehabilitative framework. In 2003, it passed reforms that allowed specified prisoners to reduce their sentences by up to fifty percent through participation in prison rehabilitation programs.⁹⁵ Previously, prisoners could only reduce their sentences by up to thirty-three percent.⁹⁶ The new law applied to low-risk, nonviolent offenders as determined by state-validated risk-assessment tools.⁹⁷ On average, Washington prisoners participating in the program reduced their prison stays by sixty-three days.⁹⁸ The Washington legislature allowed the reform to sunset in 2010 without renewal.⁹⁹ State legislators have considered alternative cost-saving measures to manage Washington’s offender population since 2010.¹⁰⁰ Notably, a Senate subcommittee proposed a bill that would reduce most prisoners’ sentences by 60 to 120 days depending upon their risk classification.¹⁰¹ The provi-

89. See *supra* note 29. For a more detailed account of early release reform, see Klingele, *Early Demise*, *supra* note 8, at 417–20, noting that early release from prison was the rule, not the exception, under the indeterminate sentencing systems that were widespread in the United States until the late 1970s.

90. O’Hear, *supra* note 10, at 1275.

91. See W. David Ball, *Normative Elements of Parole Risk*, 22 *STAN. L. & POL’Y REV.* 395, 398–99 (2011) (describing California’s recent expansion of parole eligibility and concluding that such reform “accounts for cases where the cost is prohibitive and the risk is infinitesimal”).

92. Compassionate release includes medical parole and elderly parole. Klingele, *Judicial Sentence Modification*, *supra* note 8, at 492–93. The theory behind compassionate release is that those prisoners cost the state more in medical expenses assumed by the prison and are simultaneously somehow less dangerous either because they have aged out of the high recidivist age bracket or they are so seriously ill that they cannot pose a measurable threat to public safety. See *id.*

93. See Klingele, *Early Demise*, *supra* note 8, at 428; Reitz, *supra* note 65, at 1103–04.

94. O’Hear, *supra* note 10, at 1275. These states include Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 1288.

95. Klingele, *Early Demise*, *supra* note 8, at 429.

96. *Id.* at 430.

97. *Id.*; see also S.B. 5891, 62d Leg., Reg. Sess. (Wash. 2011).

98. Klingele, *Early Demise*, *supra* note 8, at 430.

99. *Id.* Prisoners sentenced after July 2010 are once again limited to reducing their sentences by a third.

100. See H.B. 1020, 62d Leg., Reg. Sess. (Wash. 2011); S.B. 5866, 62d Leg., Reg. Sess. (Wash. 2011).

101. Jordan Schrader, *Early Release Plan Disappears*, *THE OLYMPIAN* (Apr. 29, 2011), <http://www.theolympian.com/2011/04/29/1633598/early-release-plan-disappears.html>.

sion failed to become law. Conservative state representatives did not support the bipartisan reform; more surprisingly, liberal state representatives overwhelmingly refused to support the proposal as well.¹⁰² There are two interesting take-aways from Washington's struggle to manage its prison population from initial incarceration to early release. First, early release reforms were driven by a desire to realize more cost-savings in the criminal justice system. This illustrates the economic justification central to the neorehabilitative model of reform. Second, support for the reform efforts was grounded in heavy reliance upon evidence-based programming and predictive tools.

Illinois provides an example of unsuccessful early release reform that was not grounded within the framework of neorehabilitation. Illinois has struggled very publicly to manage its prison population through back-end sentencing reform. The state informally permitted a "meritorious good time credit," or MGT-Push, program in which correctional officers could use their discretion to grant lower level prisoners early release.¹⁰³ Though the state customarily permitted early release through meritorious good time only to prisoners who served at least sixty days in prison, media reports revealed that prisoners were "secret[ly]" being released after serving only a few weeks of their sentences.¹⁰⁴ In reality, the state expanded the MGT-Push program as a means to manage its overcrowded prison population, and "[w]ithin several months' time, nine releasees had been charged with new crimes, seventeen had been returned to prison on allegations of new violent criminal activity, and thirty-one had been taken into custody on allegations of nonviolent rule violations."¹⁰⁵ The public outcry in response to this practice resulted in immediate suspension of the program and new legislation restricting prison officials' ability to award good time credit for early release from state prison.¹⁰⁶ The discourse surrounding Illinois's push program did not center on neorehabilitation. As a result, the state lost several of the key tools used to manage its state prison population and subsequently struggled to deal with additional pressures from overcrowded prisons.¹⁰⁷ Recent legislation

102. *See id.* Only one democratic state senator supported Senate Bill 5891. *Id.* That bill would have imposed the flat rate reductions in sentences for most offenders without reinvestment in evidence-based programming and risk assessment tools. Adam Kline, *Early Release with a Conscience*, SENATE DEMOCRATS BLOG (Dec. 1, 2011), <http://blog.senate-democrats.wa.gov/kline/early-release-with-a-conscience/>.

103. Klingele, *Early Demise*, *supra* note 8, at 433 (internal quotation marks omitted).

104. *See* Fan, *supra* note 8, at 626–27; Klingele, *Early Demise*, *supra* note 8, at 433–34. In 2009, the Associated Press reported that the MGT-Push program was a "secret program" to release state prisoners early. *See* Klingele, *Judicial Sentence Modification*, *supra* note 8, at 496.

105. Klingele, *Judicial Sentence Modification*, *supra* note 8, at 496.

106. Fan, *supra* note 8, at 627; Klingele, *Early Demise*, *supra* note 8, at 434; Klingele, *Judicial Sentence Modification*, *supra* note 8, at 496.

107. Illinois legislators reintroduced legislation to expand the MPT-Push Program in the face of economic pressures and over-incarceration. *See Illinois Prison Overcrowding: State Lawmaker Pushes for Early Release Program's Return*, HUFF. POST (Apr. 12, 2012), available at http://www.huffingtonpost.com/2012/04/12/illinois-prison-overcrowding_n_1421007.html.

proposed in Illinois to address overcrowded prisons, however, does fit within the neorehabilitative framework. In 2012, new legislation passed which reintroduces the MPT-Push Program with the assistance of risk assessment tools.¹⁰⁸ In particular, it focuses on diverting low-level, nonviolent offenders through good time credits accumulated for early release.¹⁰⁹ Legislators emphasized efficacy in the criminal justice system and measurements of the likelihood of rehabilitation amongst certain offenders when promoting the new bill.¹¹⁰

B. PAROLE REVOCATION REFORM

Texas and California provide good examples of parole revocation reforms aimed specifically at managing their exploding prison populations by promoting rehabilitation. In 2006, when Texas faced the prospect of building three new prisons to meet increased demand for prison beds, then Texas Republican Representative Jerry Madden proposed investing in cheaper alternatives that divert low-level offenders from incarceration, such as rehabilitative programs.¹¹¹ This alternative approach also included assigning nonviolent offenders to mental health and drug treatment programs instead of prison, placing those serving less than two years in short-term jails, and engaging in early intervention, such as helping low-income mothers.¹¹² In its chosen reforms, Texas allocated a portion of the savings realized through these reforms for reinvestment into the treatment programs generating the savings.¹¹³ Consequently, Texas successfully averted spending an anticipated \$2 billion to expand its prison system, and, further, its prison population stabilized.¹¹⁴ In recent years, however, these cost-saving initiatives have suffered from budget cuts.¹¹⁵ Additionally, the prison population has started to increase

108. See 730 ILL. COMP. STAT. 5/3-6-3 (2013) (requiring Director to consider risk assessment analyses among other factors when determining eligible inmates for the award of sentence credits).

109. *Id.*

110. State Senator Kwame Raoul, chief sponsor of the bill, emphasized that the legislation "allows the Department of Corrections to take into account factors, such as past offenses and an assessment of the likelihood of successful rehabilitation, to make smart and safe choices about the early release of inmates." *Illinois Law Passed to Reduce Prison Overcrowding, Improve Public Safety*, AUSTIN TALKS, <http://austintalks.org/2012/06/illinois-laws-passed-to-reduce-prison-overcrowding-improve-public-safety/>. He also endorsed a broader investment in using risk assessment tools to improve criminal justice policies and use correctional resources more wisely. *Id.*

111. Texas projected an increase in prison bed use of 17,332 by 2012. TEX. LEGISLATIVE BUDGET BD., ADULT AND JUVENILE CORRECTIONAL POPULATION PROJECTIONS FISCAL YEARS 2007-2012 10 (2007). The beds were estimated to cost the state \$2 billion. Fan, *supra* note 8, at 636. Madden proposed an investment package costing only \$240 million. *Id.*

112. Fan, *supra* note 8, at 636.

113. TEX. GOV'T CODE ANN. § 509.016 (West 2008); ACLU, *supra* note 5, at 20-21.

114. ACLU, *supra* note 5, at 17.

115. Brandi Grissom, *Budget Cuts Would Undo Prison Re-Entry Reforms*, THE TEXAS TRIBUNE (Mar. 13, 2011), <http://www.texastribune.org/texas-dept-criminal-justice/texas-department-of-criminal-justice/budget-cuts-would-undo-prison-re-entry-reforms/>.

again.¹¹⁶

California's recent and drastic criminal justice reforms also demonstrate a shift towards neorehabilitation. California has notoriously struggled with its exploding prison population.¹¹⁷ In response to a federal order to reduce its prison population by up to 46,000 prisoners, the state implemented several sentencing reforms to divert offenders from state prison.¹¹⁸ For example, California recently enacted medical parole for prisoners so severely ill that they pose little threat to public safety.¹¹⁹ Most notably, however, California implemented the 2011 Realignment Legislation addressing public safety.¹²⁰ The state's new plan shifts the responsibility for nonserious, nonviolent, and nonsexual offenders from the state to the counties.¹²¹ Though it remains to be seen whether this reform will actually reduce the state's mass incarceration problems,¹²² the reform contributed to California having the largest decline in the nation of state

116. Over the past ten years, the Texas prison population has generally increased. See TEX. LEGISLATIVE BUDGET BD., CURRENT CORRECTIONAL POPULATION INDICATORS: ADULT AND JUVENILE CORRECTIONAL POPULATIONS MONTHLY REPORT 1 (2012) (referencing the Texas Department of Criminal Justice population graph for 2002 to present). But see Mike Ward, *Texas Prison Population Shrinks as Rehabilitation Programs Take Root*, STATESMAN (Aug. 11, 2012), <http://www.statesman.com/news/texas-politics/texas-prison-population-shrinks-as-rehabilitation-programs-take-2434526.html>.

117. See Klingele, *Judicial Sentence Modification*, *supra* note 8, at 484–85; see also Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275, 1298–99 (2012) (noting that “commentators have speculated that California’s budget crisis would force the state to consider comprehensive sentencing reform” since at least 2004).

118. *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011). Though the Supreme Court affirmed the order in 2010, a three-judge panel ordered the reduction in 2009. See *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TBH, 2009 WL 2430820, at *1 (E.D. Cal. Aug. 4, 2009). Thus, California took preliminary steps to address the overcrowded prison population even as the order was pending review before the United States Supreme Court. See Klingele, *Judicial Sentence Modification*, *supra* note 8, at 485 & n.85.

119. See S.B. 1399, 2009–2010 Reg. Sess. (Cal. 2010) (enacted) (allowing early release for a prisoner “permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour care” if he or she does not “reasonably pose a threat to public safety”); see also Vitiello, *supra* note 117, at 1300 & n.224 (collecting data to illustrate that California’s Parole Hearing Board is not using its newfound discretion in a way that “open[s] the prison doors” through compassionate release programs).

120. A.B. 109, 2011–2012 Reg. Sess. (Cal. 2011) (enacted).

121. See CAL. DEP’T OF CORR. & REHAB., 2011 PUBLIC SAFETY REALIGNMENT FACT SHEET 3 (2012) [hereinafter CDOC].

122. It remains to be seen whether this reform emphasizes rehabilitation through its diversion of offenders. At the same time that the state approved A.B. 109, it also decreased restrictions for counties to obtain funding for new jail sites. A.B. 111, 2011–2012 Reg. Sess. (Cal. 2011) (enacted). Thus, realignment could potentially shift state offenders from state prisons to county jails without affecting the rate of incarceration in the state. This poses a very serious problem because the ACLU continues to file suit against the county of Los Angeles for persistent Eighth Amendment violations. See *Rosas, et al. v. Baca et al.*, ACLU (Jan. 18, 2012), <http://www.aclu.org/prisoners-rights/rosas-et-al-v-baca-et-al> (The ACLU of Southern California filed a federal class action suit against Los Angeles County Sheriff on January 18, 2012, alleging a longstanding and widespread pattern of violence by deputies against county inmates.). Because the transition to counties will take a full two years to achieve, the effectiveness of realignment in reducing incarceration in the state is not yet an area ripe for detailed analysis. See CDOC, *supra* note 121 (stating that realignment will be implemented by 2013). However, some scholars suggest that, at the very least, California

prisoners in 2010.¹²³ Much of the justification for California's Realignment Legislation centers on rehabilitation.¹²⁴ For example, the plan allocates power to counties to decide whether to incarcerate or rehabilitate,¹²⁵ and the plan encourages several rehabilitative-focused programs as a means to manage the increase in offenders handled by counties.¹²⁶ Nevertheless, the statute maintains an explicit focus on cost efficiency and public safety.¹²⁷

C. DRUG COURTS

Drug courts are perhaps the most obvious examples of the neorehabilitative model in the context of sentencing policy reform. As diversionary programs, they divert drug offenders from the typical criminal justice response to drug crimes—incarceration—and instead offer drug treatment to qualifying, addicted offenders. Established by Miami courts in 1989, drug courts have grown in popularity as recent events have required states to manage their prison populations.¹²⁸ According to a 2008 survey conducted by the National Center for State Courts, the expansion

missed an opportunity to implement more comprehensive sentencing reforms when it enacted the Realignment Legislation. See Vitiello, *supra* note 117, at 1303.

123. GUERINO ET AL., *supra* note 37, at 14 app. Tbl.1. California accounted for 71% of the states' composite 4% decrease in parole revocations from 2000 to 2010, a direct result of the realignment plan. *Id.* at 6.

124. CAL. PENAL CODE § 3450(b)(8) (West 2011) (expecting counties to use alternative sanctions and county social services programs to manage parole violators); DEAN MIS-CZYNSKI, PUB. POLICY INST. OF CAL., RETHINKING THE STATE-LOCAL RELATIONSHIP: CORRECTIONS 24 (2011) (explaining that realignment reflects the belief that counties can do better at rehabilitating offenders than the state); Elliott Currie, "Realigning" Criminal Justice in California: Real Reform, or Shifting the Deck Chairs?, DISSENT MAGAZINE (Oct. 31, 2011), <http://dissentmagazine.org/online.php?id=554> (noting that promoters of realignment claim the new approach to criminal justice will "devote considerably more resources to the rehabilitation and reintegration of prisoners into the community").

125. MIS-CZYNSKI, *supra* note 124, at 26 (describing options available to counties).

126. As part of the Realignment Legislation, the state legislature envisioned a partnership between local public safety entities and the counties to provide and expand community-based punishment for offenders paroled from state prison. CAL. PENAL § 3450(b)(6). "Community-based punishment" means evidence-based correctional sanctions and programming," including intermediate sanctions to prevent offenders from returning to prison. *Id.* § 3450(b)(8). The statute lists several alternatives to incarceration, including intensive community supervision; home detention with electronic monitoring or GPS monitoring; mandatory community service; restorative justice programs; furlough programs; work release programs; day reporting; mandatory residential or nonresidential substance abuse treatment programs; mother-infant care programs; and community-based rehabilitative programs offering supervision, drug and alcohol treatment, literacy programming, employment counseling, psychological counseling, and mental health treatment. *Id.* § 3450(b)(8)(A)–(L).

127. CAL. PENAL § 3450(b)(7) (requiring correctional practice to fit into the "justice reinvestment strategy"—"a data-driven approach to reduce corrections and related criminal justice spending"—as part of a larger movement towards "manag[ing] and allocat[ing] criminal justice populations more cost effectively" while increasing public safety).

128. See Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 479 (2009) (explaining that since their creation in Miami in 1989, drug courts have expanded and now exist in all fifty states); Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 305 (noting that drug courts have been a prevalent emphasis of recent state and federal sentencing reform).

of drug courts is a primary reform effort employed by the states.¹²⁹ Today, there are more than 2,500 drug courts in the United States,¹³⁰ and that number is likely to increase in light of the Obama administration's pledge to grant more funds towards federal drug courts.¹³¹

The explicit goal of drug courts is to provide certain drug offenders with treatment to cure their drug addictions in order to prevent future recidivism induced by addiction.¹³² A traditionally nonadversarial model, drug courts require the prosecutor, defense attorney, and judge to agree that diversion will promote public safety and rehabilitation.¹³³ Drug courts use evidence-based programming and risk assessment tools to determine which programs are most effective to treat addiction and which offenders are most likely to rehabilitate.¹³⁴ Typically, drug courts include only individuals convicted of specific drug possession offenses and only low-level, first-time offenders.¹³⁵

Drug courts are generally considered a successful alternative to incarceration. In a recent study, California concluded that investing in drug courts has saved the state \$11,000 per offender in recidivism reduction

129. Warren, *supra* note 20, at 277 (noting that a survey by the National Center for State Courts reported that the expansion of drug courts was "among the leading current sentencing reform efforts in the states").

130. There are currently 2,734 drug courts in the United States. *Types of Drug Courts*, NAT'L ASS'N DRUG COURT PROF'LS, <http://www.nadcp.org/learn/what-are-drug-courts/models> (last visited May 27, 2013).

131. Kreit, *supra* note 128, at 305–06. Drug courts are slowly developing at the federal level. See Mosi Secret, *Outside Box, Federal Judges Offer Addicts a Free Path*, N.Y. TIMES, Mar. 2, 2013, at A1 ("So far, federal judges have instituted programs in California, Connecticut, Illinois, New Hampshire, New York, South Carolina, Virginia and Washington."). In addition, there are several other specialized criminal courts developing around the country in large numbers. McLeod, *supra* note 15, at 1606. These include "mental health courts, . . . domestic violence courts, . . . veterans courts, sex offense courts, and reentry courts." *Id.* These courts differ in the relative amount of rehabilitation they intend to offer, but each was designed after the drug court model and thus falls within the broader paradigm of reducing incarceration through diversion and "problem-oriented" resolution of the criminal offense. See *id.* at 1611. Although this Article does not detail the limitations of alternative problem-oriented courts, the arguments launched in reference to drug courts generally apply to those courts as well, given the similar underlying incentives. See Jessica M. Eaglin, *The Drug Court Paradigm* (forthcoming 2014) (exploring the influence of specialized courts on broader sentencing reforms).

132. Drug courts were initially conceived as a means to manage the pressures of high drug caseloads. Fan, *supra* note 8, at 640. However, their contemporary goal is to provide an alternative to incarceration by focusing on addiction treatment as a means to reduce recidivism. See Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 799 (2008) ("The supposed first-order drug-court aim [is] to stop the cycle of addiction and incarceration among recidivist addicted drug users.").

133. Kreit, *supra* note 128, at 306–07.

134. Wolf, *supra* note 21, at 1412 ("Because [drug] courts focus on nontraditional methods of rehabilitation, the evaluations that are done—especially those that measure recidivism—have promoted the use of statistical analysis and, hence, the goals of evidence-based sentencing.").

135. Bowers, *supra* note 132, at 798–99; Kreit, *supra* note 128, at 308; O'Hear, *supra* note 128, at 480; see also AVINASH SINGH BHATI ET AL., URBAN INST. JUSTICE POLICY CTR., TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO DRUG-INVOLVED OFFENDERS 7 (2008), available at http://www.urban.org/UploadedPDF/411645_treatment_offenders.pdf ("A survey of adult drug courts in 2005 . . . found that only 12% of drug courts accept clients with any prior violent convictions.").

and victim costs.¹³⁶ Moreover, the public and policy makers are becoming increasingly receptive to the concept of drug courts as an appropriate means to manage low-level criminal offenders with drug addictions.¹³⁷ Thus, drug courts have emerged as an appealing judicial response to dissatisfaction with the incarceration-focused national drug policies.¹³⁸

IV. THE LIMITATIONS OF NEOREHABILITATION TO DOWNSIZE STATE PRISON POPULATIONS

Neorehabilitation is an appealing theory of reform, particularly because many scholars and policy makers embrace the expanded use of evidence-based programs and actuarial tools to inform various criminal justice policies.¹³⁹ If the United States faces an overincarceration problem today, then why not return to the guiding theory of reform that existed when the United States had a stable prison population? And if this new rehabilitative model is proven by its measureable success, then where is the harm in embracing this shift? This Part addresses these questions by setting forth three potential limitations in shifting to the neorehabilitative theory and its focus on evidence-based programming and predictive tools.

It should be noted that this Article does not condemn the above-mentioned reform efforts in total. Indeed, it is unclear whether these reforms are so detrimental that they do more harm than good, given the dire straits of overincarcerated state prisons and strapped state budgets. However, this Article does assert that there is a high political cost in adopting the neorehabilitative model to address the larger problem of overincarceration in the United States. If the emergency efforts discussed above do transition from short-term reform to long-term policy—as the institutionalization of drug courts suggests they might—then the potential costs to society should be as much a part of the conversation as the economic

136. See Kreit, *supra* note 128, at 309–10 (reporting that drug courts cost only \$3,000 per offender, as opposed to \$14,000 per incarcerated offender).

137. PRINCETON SURVEY RESEARCH ASSOCS. INT'L FOR THE NAT'L CTR. FOR STATE COURTS, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 2 (2006), available at http://www.ncsconline.org/D_Research/Documents/NCSC_Sentencing-Survey_Report_Final060720.pdf (finding “[h]igh levels of public support . . . for alternatives to a prison sentence like probation, restitution, and mandatory participation in job training, counseling or treatment programs, at least for non-violent offenders”); see also PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (noting in 2008 that “policy makers are becoming increasingly aware of research-backed strategies for community corrections . . . [including] more effective supervision and treatment programs” that encourage policy makers to “diversify their states’ array of criminal sanctions with alternative options for low-risk offenders” in particular); Savage, *supra* note 3 (describing policy makers’ “broad rethinking of alternatives to incarceration,” including increased diversion into drug treatment programs).

138. Miller, *supra* note 24, at 420–24.

139. Fan, *supra* note 8, at 639–40 (noting its appeal to conservatives and liberals, as well as the general public); see, e.g., Oleson, *supra* note 21, at 1394 (endorsing sentencing reform from a scholarly perspective); Warren, *supra* note 20, at 277 (describing judges’ endorsement of the expansion of actuarial tools in sentencing reform from a practical perspective).

savings that states hope to achieve through these reforms. This Article, and in particular this Part, is a step towards opening this dialogue. Thus, it demonstrates that while neorehabilitation may offer a short-term solution to mass incarceration, it will institutionalize three key perversions into the criminal justice system. These perversions, in turn, may prevent the long-term shift away from overreliance on incarceration in our criminal justice system.

A. LOW-HANGING FRUITS: REHABILITATING THE WRONG OFFENDERS

Neorehabilitation focuses on identifying the least risky offenders to divert from prison, either through early release or rehabilitative treatment. Evidence-based practices are “policies, procedures, programs, and practices” that help reduce the risk of recidivism, as demonstrated by scientific research.¹⁴⁰ Actuarial tools help correctional officers and lawmakers identify which offenders are best suited for the programs because their characteristics suggest that they are less likely to recidivate in the first place.¹⁴¹ The ultimate goal of such rehabilitative efforts, then, is to identify the low-hanging fruits in prison and apply rehabilitative programming to these individuals, thus leaving the more risky offenders to languish in prison for longer periods of time.

This goal is flawed because it focuses on the wrong offenders. Empirical studies indicate that the most risky offenders benefit most from rehabilitative treatment.¹⁴² For example, a 2000 study found that there were larger treatment effects for higher risk cases of violent offenders.¹⁴³ Several additional studies have found similar results concerning treatment for sex offenders and drug offenders.¹⁴⁴ A particularly revealing 2006 study found “larger effects for treatment groups with greater overall proportions of high-risk participants.”¹⁴⁵ These results are unsurprising, con-

140. See, e.g., CAL. PENAL CODE § 3450(b)(9) (West 2011) (defining evidence-based practices).

141. See Wolff, *supra* note 21, at 1405 (“Risk-assessment factors are designed to ‘predict[] who will or will not behave criminally in the future.’”) (citation omitted).

142. This subsection uses empirical studies to contradict the publicly perceived and generally accepted findings of evidence-based programming, specifically that low-risk and nonviolent offenders are most capable of rehabilitation. It may seem odd to rely upon evidence-based studies to support the finding that evidence-based studies are focusing on the wrong offenders. However, the underlying point in using such information is to suggest that policy makers are *choosing* to use evidence-based programming in a particular way that advances neorehabilitation. Underlying the evidence of efficacy is a judgment about which offenders deserve to be rehabilitated and which offenders should not be released or rehabilitated.

143. Craig Dowden & D.A. Andrews, *Effective Correctional Treatment and Violent Re-offending: A Meta-Analysis*, 42 CANADIAN J. CRIMINOLOGY 449, 460 (2000); Lipsey & Cullen, *supra* note 35, at 312 (summarizing the study and others asserting similar results); see D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 377, 384 (1990).

144. Lipsey & Cullen, *supra* note 35, at 312 (collecting studies).

145. *Id.* (summarizing study); Christopher T. Lowenkamp et al., *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs?*, 51 CRIME & DELINQ. 1, 12 (2006).

sidering that “higher-risk offenders have a greater need for treatment [than others] and [therefore] also have more room for improvement.”¹⁴⁶

Despite this reality, neorehabilitation stands to institutionalize the misguided focus on diverting only low-level, low-risk offenders into rehabilitation programs. Frequently, proponents of these programs justify the narrow focus because of its financial viability in this economic environment.¹⁴⁷ Bipartisan calls for reform in particular emphasize evidence that rehabilitation is cheaper than incarceration.¹⁴⁸ Where the funding for programs depends on proven success, there is less room for additional expenses. And yet the most effective rehabilitation programs are those that admit participants for longer periods of time and provide more services.¹⁴⁹

Drug courts provide an excellent example of institutionalizing the rehabilitation of the wrong offenders. Drug courts have been highly criticized since their creation, and two main criticisms are relevant to the critique of neorehabilitation.¹⁵⁰ First, drug courts are typically over-inclusive. They frequently admit offenders who are not actually serious drug addicts in need of rehabilitative intervention.¹⁵¹ One study indicates that “55 percent of [all offenders] . . . referred to treatment by a court program had used their primary drug of abuse less than three times in the month before they entered into treatment.”¹⁵² Second, drug courts are typically under-inclusive because those individuals most in need of the drug treatment programs are not being diverted to drug courts.¹⁵³ They may be excluded formally as a result of a prior conviction,¹⁵⁴ informally because a prosecutor in his or her discretion refuses to recommend diversion,¹⁵⁵ or purposefully by their defense attorneys who advise against the offenders’ entrance into the program for fear that they will fail and subse-

146. Lipsey & Cullen, *supra* note 35, at 312.

147. *See, e.g.*, RIGHT ON CRIME, *supra* note 5; AUSTIN TALKS, *supra* note 110 (“We need to begin to use risk assessment tools and well-calculated criminal justice policy to make certain we utilize our corrections resources wisely.”).

148. RIGHT ON CRIME, *supra* note 5; *see, e.g.*, Fan, *supra* note 8, at 636 (discussing the economic motivations that led to Texas’s emergency sentencing reform efforts).

149. Lowenkamp et al., *supra* note 145, at 9–10.

150. Bowers, *supra* note 132; Kreit, *supra* note 128, at 305–24; Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004); O’Hear, *supra* note 128, at 465–66. This Article does not attempt to launch an in-depth attack on drug courts. Numerous other scholars have surveyed that issue. *See, e.g.*, JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 13–14 (2001).

151. Bowers, *supra* note 132, at 797–98.

152. Kreit, *supra* note 128, at 316.

153. BHATI ET AL., *supra* note 135, at 7 (“Despite the pervasiveness of the drug treatment court model, drug courts routinely exclude most of the eligible population.”).

154. O’Hear, *supra* note 128, at 478 (“[Drug courts] typically have eligibility requirements that exclude defendants who face ancillary nondrug charges or who have prior convictions for violent felonies.”).

155. Bowers, *supra* note 132, at 798.

quently receive harsher punishment.¹⁵⁶ Consequently, drug courts frequently fail to address the offender populations most in need of treatment.

The underlying forces that drive the over- and under-inclusiveness of drug courts are not coincidental; rather, they are the result of reforms guided by neorehabilitation's theoretical framework. Drug courts have a strong interest in accepting large numbers of nonaddicted clients because "drug courts rely on funding that is contingent, implicitly or explicitly, upon demonstrating results and treating a sufficient number of defendants."¹⁵⁷ Evidence indicates that drug courts "cherry pick" low-risk offenders and "skim" high-risk clients to boost their success rates.¹⁵⁸ Additionally, low-risk offenders cost less to treat than truly addicted offenders.¹⁵⁹ Thus, where programs are designed with a focus on cost-effectiveness and evidence-based results—as they would be if states adopted neorehabilitation as the guiding theory of reform—these inefficiencies are likely to be institutionalized and expanded.

Similar issues of rehabilitating the wrong offenders are evident in recent efforts to expand early release programs. Studies demonstrate that "lifers" have lower rates of recidivism among prisoners,¹⁶⁰ yet they are not even considered among those eligible for reconsideration under even the most expansive of proposed early release plans. In fact, government officials are going out of their way to ensure that "lifers" are off the table for any type of prison term reduction. For example, in 2005, a loophole was discovered that would have permitted early release for nearly 120 North Carolina state prisoners sentenced to life: if they gained sufficient good-time credit, these "lifers" needed to serve only half their sentence.¹⁶¹ When this fact came to the public's attention, the legislature,

156. See *id.* at 792–94 ("[S]tudies found that the sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants"); Kreit, *supra* note 128, at 323.

157. Kreit, *supra* note 128, at 314.

158. Bowers, *supra* note 132, at 800 & nn.69–72 (anecdotal evidence); O'Hear, *supra* note 128, 479–80 (reasoning).

159. See Kreit, *supra* note 128, at 320; see also, e.g., KRISTIN WHITE ET AL., IOWA CONSORTIUM FOR SUBSTANCE ABUSE RESEARCH & EVALUATION, CULTURALLY COMPETENT SUBSTANCE ABUSE TREATMENT PROJECT: ANNUAL REPORT, at i (2009), available at <http://iconsortium.subst-abuse.uiowa.edu/downloads/IDPH/Culturally%20Competent%20Substance%20Abuse%20Treatment%20Project%20Evaluation%20Report%20FY09.pdf>.

160. Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 28 (2010) ("Lifers" have lower rates of recidivism on release because of "the duration of their imprisonment, the maturity they are likely to gain in prison, and their age upon reentry into the community."); see also MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 23–24 (2004); Dolovich, *supra* note 53, at 112.

161. See *State v. Bowden*, 668 S.E.2d 107, 109 (N.C. Ct. App. 2008) (reciting that N.C. GEN. STAT. § 14-2 (1974) defined "life imprisonment" as an eighty-year sentence); Dolovich, *supra* note 53, at 113–14. In 1981, the North Carolina legislature passed a law permitting up to a 50% reduction in sentences for good behavior, which, in 1983, was applied retroactively to prisoners sentenced before 1981. Dolovich, *supra* note 53, at 113. Though the legislature redefined "life imprisonment" as life without parole in 1978, this small "loophole" allowed prisoners sentenced between 1974 and 1978 to obtain release with sufficient good-time credits after forty years of imprisonment. *Id.* at 113–14.

Governor Perdue, and a victims rights' association advocated ardently against their release.¹⁶² Although Bobby Bowden, the habeas petitioner whose case brought this loophole to light, managed to obtain his freedom,¹⁶³ the state prevailed in a subsequent suit alleging the same loophole, which ultimately produced a state supreme court opinion that prevented any future claims.¹⁶⁴ Meanwhile, offenders sentenced to life without parole (LWOP) are one of the largest growing incarcerated populations in the country.¹⁶⁵ Moreover, these long-term, high-risk offenders face the possibility of losing funding for rehabilitation programs as the funding is shifted towards those offenders most likely to be released.¹⁶⁶ This funding shift may create a division within the prisoners' rights dialogue,¹⁶⁷ but it also reflects the "cherry-picking" mentality evident in the context of drug courts. Thus, neorehabilitation guides states to address the "low-hanging fruits" of criminal offenders, but as with drug courts, many of the reforms envisioned by such programs fail to address the class of prisoners at the root of the mass incarceration problem.

B. EXACERBATING RACIAL DISPARITIES

Neorehabilitation will potentially exacerbate racial disparities that already exist in state prison populations. These disparities are stark and growing. For example, while Blacks make up twelve percent of the general population, they constitute more than forty percent of all state prison populations.¹⁶⁸ This racial disparity has grown over the past forty years as the rate of incarceration has also increased.¹⁶⁹ Large disparities in rates of incarceration also exist between other racial and ethnic groups, including Hispanics and Native Americans, but none are as glaring as the disparate rates of incarceration between Blacks and Whites.¹⁷⁰

162. Dolovich, *supra* note 53, at 114.

163. *Bowden*, 668 S.E.2d at 110.

164. *Jones v. Keller*, 698 S.E.2d 49, 57 (N.C. 2010).

165. LIFE WITHOUT PAROLE, *supra* note 41, at 2-3 & figs.I.1 & I.2 ("Between 1992 and 2008, the LWOP population in the United States increased 230%, so that today more prisoners are serving life terms than ever before."); MAUER ET AL., *supra* note 160, at 3; Nellis, *supra* note 160, at 27 (reporting that in 1992, 12,453 individuals were serving LWOP sentences and that number has subsequently tripled).

166. See *Barkow*, *supra* note 67, at 209-10. Note that the term "lifers" does not necessarily connote murderers and violent offenders. *Id.* A widening range of offenders receives life sentences as a result of habitual offender laws and increasingly punitive sentence ranges. See Nellis, *supra* note 160, at 27 ("In at least 37 states, LWOP is available for nonhomicide convictions, including convictions for kidnapping, burglary, robbery, carjacking, and battery."). Additionally, several states, including Florida, require LWOP for conviction under serious habitual offender laws. *Id.* at 27-28.

167. See Michael Velardo, *Prison Programs that Help Inmates Being Cut by States*, EXAMINER.COM (Apr. 16, 2010), <http://www.examiner.com/article/prison-programs-that-help-inmates-being-cut-by-states>.

168. See GUERINO ET AL., *supra* note 37, at 28 tbl.16B; O'Hear, *supra* note 128, at 466-67.

169. See O'Hear, *supra* note 128, at 466.

170. See GUERINO ET AL., *supra* note 37, at 27 tbl.15 (the black rate of incarceration was more than twice the Hispanic rate of incarceration in 2010); MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY

Actuarial tools potentially exacerbate racial disparities because the typical risk factors used to screen offenders for rehabilitative programming are often proxies for structural inequities disproportionately plaguing historically disadvantaged populations. Actuarial tools as a predictor of recidivism have existed since 1928, when Ernest Burgess developed a parole prediction instrument in Illinois based on “twenty-two different variables, ranging from father’s nationality to psychiatric prognosis.”¹⁷¹ Different models of prediction emerged in the following forty years, and by the time rehabilitation declined in the 1970s, there were four different models in use, all of which depended on several of the same factors.¹⁷² While predictive tools explicitly used race as a risk factor as late as 1979,¹⁷³ this factor disappeared due to constitutional infirmity.¹⁷⁴ Today, the use of actuarial tools has expanded to various areas of criminal justice reform, including sentencing,¹⁷⁵ prison placement,¹⁷⁶ parole release,¹⁷⁷ and now diversionary programs as well.¹⁷⁸ The factors typically include a range of six different characteristics about the offender: criminal history, drug and alcohol use, employment history and education, connection to others with criminal histories, mental health, and financial situation.¹⁷⁹ The most consistent factor among the predictive tools—and frequently the most heavily weighted factor—is criminal history.¹⁸⁰ This factor oper-

RACE AND ETHNICITY 1–2 (2007) (recognizing the increasing rate of incarceration among Hispanics since 1990).

171. HARCOURT, *supra* note 1, at 56–59; Oleson, *supra* note 21, at 1348.

172. Notable models include the Burgess model (1928), which depended on twenty-two variables, including race; the Glueck model (1950), which depended on seven factors with a heavy emphasis on criminal history; the Federal Salient Score (1974), which used nine factors; and the Greenwood scale (1982), which was designed specifically to facilitate selective incapacitation and used seven factors. See HARCOURT, *supra* note 1, at 73–75 (tbl.2.3); see also Oleson, *supra* note 21, at 1348 & n.117.

173. Bernard E. Harcourt, *Risk as a Proxy for Race 5 & App’x* (Law Sch., Univ. of Chi., John M. Olin Law & Economics Working Paper No. 535 (2d series)), available at <http://www.law.uchicago.edu/files/file/535-323-bh-race.pdf> (stating that “[t]he table reveals a continued use of race until at least the late 1960s” and that California’s model, developed in the 1970s, relied on race as one of only four factors to predict recidivism); see JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* 172–75 (1993) (showing that California’s predictive tool used race until 1979).

174. See Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1158 (2011) (“Under American constitutional law, demographic traits other than race can probably be predicates for prediction.”). But see Oleson, *supra* note 21, at 1380–88 (arguing that considering race as a predictive factor of recidivism should be constitutional given the *Grutter* exception to strict scrutiny).

175. PEW CTR. ON THE STATES, *supra* note 4, at 23; Wolff, *supra* note 21, at 1406–08.

176. Petersilia, *supra* note 20, at 219–20 (describing California’s risk assessment process to determine prison classification, then comparing classification levels with other large states that compute similar assessments).

177. See *id.* at 254.

178. See *supra* Part III.A.

179. See Oleson, *supra* note 21, at 1367.

180. Harcourt, *supra* note 173, at 7 (“Practically all of the prediction studies converged on prior correctional contacts (arrests, convictions, and incarcerations) as one of the stronger predictors of recidivism. What developed, as a result, were more simplistic but easier to administer sentencing schemes that relied predominately on prior criminal history . . .”).

ates to disproportionately exclude the minority populations most overrepresented in the prison population today, in particular poor black men.¹⁸¹ As Harcourt explains, “the continuously increasing racial disproportionality in the prison population necessarily entails that the narrower prediction instruments, focused as they are on prior criminality, are going to hit hardest the African-American communities” already persistently overrepresented in the prison population.¹⁸² For this reason, criminal history disparities cannot be “regarded as an entirely trustworthy indicator of relative recidivism risk.”¹⁸³

Neorehabilitation potentially exacerbates racial disparities because of the overreliance on predictive tools. Though race is no longer an explicit factor considered in prediction tools, other factors, particularly criminal history, are likely to create a prison population composed of the historically disadvantaged populations already overrepresented in state prison populations.¹⁸⁴ Where the barriers to entry into rehabilitative programming are based on factors dependent on structural inequities that already exist in society—such as education, employment, and socioeconomic status¹⁸⁵—the use of these tools will only have a surface effect on the population most in need of diversion. Although use of race as an explicit factor to predict recidivism is likely troubling to many,¹⁸⁶ depending on these other factors may not offend anyone. Professor Bernard Harcourt explains that predictive factors tend to fall along a spectrum from those loosely related to the offender’s character to those narrowly tailored to the actual criminal activity.¹⁸⁷ For example, an offender’s criminal activity is a factor that no one would object to using to determine risk of recidivism, but at the other end of the spectrum, those broader factors like race, ethnicity, or gender may leave people feeling uncomfortable and may even be found unconstitutional.¹⁸⁸ Depending on employment, education, and other similar factors falls somewhere in the middle of this

181. *Id.* at 8.

182. *Id.*

183. See O’Hear, *supra* note 128, at 471 (“The more serious criminal records of black drug defendants are at least in part a byproduct of law enforcement policies and practices that systematically result in higher arrest risks for black drug offenders than white, for instance, the tendency to focus on open-air drug markets and crack.”); see also HARCOURT, *supra* note 1, at 126–32 (on elasticities).

184. Harcourt, *supra* note 173, at 6–8.

185. See HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 48 n.88 (2008) (noting that the black poverty rate is 25.6%, while the white poverty rate is 10.4%); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence, and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 188 (2008) (stating that “[t]he overwhelmingly poor communities in which many poor African Americans live are marked by unemployment, family disruption, and residential instability” and that such conditions of concentrated poverty and unemployment “predict the breakdown of community social processes, which in turn produce[s] crime”).

186. *But see* Oleson, *supra* note 21, at 1380–82 (arguing that race is one of the predictors of recidivism in the United States and thus should be used in sentencing determinations).

187. HARCOURT, *supra* note 1, at 220–21.

188. *Id.*

spectrum.¹⁸⁹ As a result, they are unlikely to be excluded from predictive tools.¹⁹⁰

Some scholars may argue for the adoption of culturally sensitive predictive tools and evidence-based programming,¹⁹¹ but these suggestions are unlikely to avoid the inherent potential for racially disparate results in diversionary programs for two reasons. First, as explained above, the factors leading to disparate results are race neutral. Second, and more important to the critique of neorehabilitation, predictive tools and evidence-based programming are used to achieve cost-effective—i.e., cheaper—results. Evidence shows that rehabilitating racially neutral, socially underprivileged populations takes more time and more money. For example, Iowa adopted a culturally competent rehabilitation program in two jurisdictions in 2010.¹⁹² These programs have experienced results similar to traditional rehabilitation programs, but they stand to cost the state significantly more per offender because the offenders often stay in the programs much longer to reach the same results.¹⁹³

In the context of drug courts, the use of predictive tools to select and divert those who are least violent and least likely to recidivate will in turn create a prison population that does not reflect the general criminal offending population. If poor black men and middle class white men are equally likely to be addicted to drugs, but the criminal justice system diverts middle class white males at a higher rate than poor black males, the prison population will eventually become more black and more poor. Professor Harcourt describes this as the “ratchet effect.”¹⁹⁴ Again, because minorities (particularly African Americans) disproportionately suffer from the high-risk factors on which most predictive tools are based, they are most likely to either fail the rehabilitative programs or not be diverted into the programs in the first place.¹⁹⁵

189. *Id.*

190. *Id.*

191. Fan, *supra* note 8, at 640–45.

192. See *Culturally Competent Substance Abuse Treatment*, IOWA DEP’T PUB. HEALTH, http://www.idph.state.ia.us/bh/culturally_competent.asp (last visited Sept. 16, 2012) (noting that treatment providers were awarded a grant to provide services through June 30, 2012); WHITE ET AL., *supra* note 159, at i.

193. The culturally competent pilot programs in 2009 successfully discharged 39.8% of their participants, as compared to the 46.0% successful discharge rate in the traditional program. WHITE ET AL., *supra* note 159, at ii. However, “[t]he median length of stay for clients in the Cultural Competency group was one-hundred twelve days while the median length of stay for clients in the Comparison group was sixty-four.” *Id.* This evidence makes clear that it is “cheaper” to rehabilitate the traditional [white] offenders admitted into the statewide comparison group.

194. HARCOURT, *supra* note 1, at 147 (defining the ratchet effect as a disproportionality between the composition of the offending population and the carceral population that grows over time).

195. See Bowers, *supra* note 132, at 807 (“Because drug courts are embedded within a society where inequalities exist and onto a justice system that traditionally arrests and punishes minorities and the poor more frequently and harshly than others, coerced treatment that uses conventional justice as a backstop leads to ultimate sentences that are informed by the same social, economic, and institutional pressure points that historically have led to disparate punishment under the conventional (incarceration-focused) war on drugs. Conse-

But the use of predictive tools to downsize the prison population through neorehabilitation suffers from an even greater threat than simply exacerbating the racial disparities in the prison population: It stands to further reinforce the perverse connection between blackness and criminality,¹⁹⁶ while under the perceived “rational” justification of science. Turning again to drug courts as an example, if these courts treat and rehabilitate white middle-class men while diverting poor black men as unworthy or incapable of rehabilitation, race will conflate with the many high-risk characteristics that connote dangerousness and criminality. Further, engaging this argument in the context of drug courts shows the particular weakness of a “culturally sensitive” proscription to potential racial disparity problems. Some may perceive the fact that racial minorities are not qualifying for rehabilitative diversionary programs or are unsuccessfully failing out of such programs as a result of racially insensitive programming,¹⁹⁷ but to many it may suggest that racial minorities are more dangerous, less willing or deserving of being rehabilitated, and ultimately intertwined with the criminal justice system.¹⁹⁸ Recent incidents in the public media suggest that the perceived link between race and crime in America is only deepening.¹⁹⁹ The likelihood that voters will be willing to fund dual programs to rehabilitate minority offenders during economically troubled times is low, given that it is contrary to the basic premise of neorehabilitation and the message that such results could spawn.

C. DISTORTION OF JUSTICE

Applying neorehabilitation as a framework to guide state sentencing reforms will distort the perception of justice in the criminal justice system in two ways. First, this framework not only potentially increases punishment for those offenders viewed as undeserving of rehabilitation because they are not low-level offenders; it also stands to increase punishment for

quently, addicts, minorities, and the underprivileged are terminated more frequently from drug courts, even perhaps in circumstances where they are doing just as well (or as badly) as their white and affluent counterparts.”); O’Hear, *supra* note 128, at 477 (“[E]vidence now suggests that white drug offenders are more likely to benefit from this ‘pathway out’ than black drug offenders. This means that [drug courts] are apt to exacerbate, not ameliorate, overall racial disparities.”).

196. See ALEXANDER, *supra* note 53, at 192–95 (describing the stigma of conflating racial identity and crime); KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 14 (2d ed. 2009) (describing the conflation of the black man with crime as the “criminal Blackman”).

197. See Fan, *supra* note 8, at 642.

198. See, e.g., Oleson, *supra* note 21, at 1356–59.

199. In 2012, seventeen-year-old Trayvon Martin was shot and killed in a gated community in Sanford, Florida. The assailant, George Zimmerman, called 911 to report that Martin—a tall, black male—looked “real suspicious” in the neighborhood before pursuing Martin and ultimately shooting the boy to death. The tragedy has subsequently opened a litany of dialogues surrounding race, guns, and the regulation of space in both the media and legal scholarship. See Charles M. Blow, *The Curious Case of Trayvon Martin*, N.Y. TIMES, Mar. 17, 2012, at A21(L) (“This case has reignited a furor about vigilante justice, racial-profiling and equitable treatment under the law, and it has stirred the pot of racial strife.”). The tragedy undeniably raises questions of the implicit connection between blackness and criminality when considering what made Martin look “real suspicious.”

those offenders perceived as less deserving because they failed to rehabilitate themselves during their “second chance” opportunities from the courts. In the context of drug courts, ample evidence demonstrates that criminal offenders who have participated in drug courts and failed, for whatever reason, receive much harsher punishments.²⁰⁰ For example, two studies in New York City found that the sentences for failing participants in the city’s drug courts were typically two to five times longer than the sentences for conventionally adjudicated defendants.²⁰¹

Although drug courts provide the most salient example of this limitation, the prevalence and expansion of life without parole (LWOP) sentences also demonstrate the way that neorehabilitation, emphasizing merit and efficiency, may distort our perception of justice into one that is decidedly more punitive. For example, in *Graham v. Florida*, the Florida judge who sentenced Terrance Jamar Graham to life without parole only did so after the sixteen-year-old boy had received a diversionary sentence.²⁰² Graham and an accomplice were previously arrested in 2003 after attempting to rob a restaurant owner.²⁰³ Graham was charged as an adult and ultimately pleaded guilty to armed burglary with assault and attempted armed robbery.²⁰⁴ He faced up to life in prison without parole, but the trial judge accepted a plea agreement and withheld adjudication of guilt on both charges, instead sentencing him to one year at a pre-trial juvenile detention facility and, thereafter, to three years of probation.²⁰⁵ Within six months of his release, Graham again attempted robbery and found himself before a different judge for a probation revocation hearing.²⁰⁶ This time, the judge showed no mercy and sentenced Graham to the maximum statutory sentence for his offenses: life without parole.²⁰⁷ During the colloquy with Graham, the judge made several statements to illustrate that this sentence was harsh in response to Graham’s inability to capitalize on his second chance.²⁰⁸ Indeed, the average prison sentence for both adults and juveniles in Florida for armed burglary is under nine

200. Bowers, *supra* note 132, at 792–93 & n.33 (anecdotal evidence); Kreit, *supra* note 128, at 314–20 (statistical evidence); O’Hear, *supra* note 128, at 480–81 (reasoning).

201. Bowers, *supra* note 132, at 792–94.

202. *Graham v. Florida*, 130 S. Ct. 2011, 2018–20 (2010).

203. *Id.* at 2018.

204. *Id.*

205. *Id.*; see also Brief for Petitioner at 13–14, *Graham*, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2159655, at *13–14.

206. *Graham*, 130 S. Ct. at 2018–19.

207. *Id.* at 2020 (citing FLA. STAT. § 921.002(1)(e) (2003)).

208. For example, the judge said,

I don’t understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . [W]e can’t help you any further. . . . I don’t see where I can do anything to help you any further. You’ve evidently decided this is the direction you’re going to take in life, and it’s unfortunate that you made that choice.

Id.

years.²⁰⁹ The punishment Graham received after failing his rehabilitative opportunity was harsher than his likely punishment had he not been diverted in the first place. And while the Supreme Court intervened to create a categorical ban on sentences of life without parole for juvenile offenders in nonhomicide cases,²¹⁰ the facts of this case continue to illustrate the danger of neorehabilitation. That is, justice ultimately becomes tied to an offender's ability to rehabilitate, and the inability to do so may result in harsher sentences for the same criminal offense.

Additionally, as early-release legislation is being passed by state legislatures, it frequently is accompanied by measures increasing punishments for other, more serious offenders. For example, South Carolina recently passed legislation eliminating mandatory minimum sentences for simple drug possession,²¹¹ expanding parole eligibility for offenders convicted of several felonies,²¹² and enacting early release plans for nonviolent offenders after two years of imprisonment.²¹³ At the same time, the state added twenty-four new crimes to the list of violent crimes,²¹⁴ and it enacted a new "Two Strikes/Three Strikes" law, subjecting more offenses to LWOP sentences in the state.²¹⁵ These reforms will likely have the long-term effect of negating the release of several groups of low-level offenders by increasing the number of offenders serving LWOP sentences and reducing the number of persons who qualify for "nonviolent" crimes.²¹⁶

Reforms that appear to focus on rehabilitation while ratcheting up punitive sentences for many offenders are not coincidental. As one survey indicates, seventy-two percent of the public believed that "keeping those convicted of violent crimes in prison [for] longer is 'very' important," even as sixty-one percent of the public simultaneously called for expanding treatment programs for nonviolent offenders.²¹⁷ Justice, then, becomes rehabilitation for few and greater punishment for most. This is consistent with neorehabilitation's origin within the new penology. Populist punitiveness intensifies under this new framework because the managerial language used by the penal community lacks resonance in the public and political discourse on crime.²¹⁸ Thus, the populist punitive-

209. Brief for Petitioner, *supra* note 205, at *57.

210. *Graham*, 130 S. Ct. at 2034.

211. Omnibus Crime Reduction and Sentencing Reform Act, 2010 S.C. Acts 2004.

212. *Id.* at 1976 (including voluntary manslaughter, kidnapping, carjacking, burglary in the second degree, armed robbery, and attempted armed robbery).

213. *Id.* at 2018 (allowing inmates who have been incarcerated for a minimum of two years to be released to reentry supervision 180 days early).

214. *Id.* at 1984.

215. *Id.*

216. In February 2011, the South Carolina State Budget and Control Board found that the law had thus far reduced the prison population by 600 people, even though the provisions had not been put into effect at that point. ACLU, *supra* note 5, at 39. Still, the long-term increase in prison sentence length for those offenders now disqualified from parole eligibility and subject to habitual offender enhancements will not likely be seen for several years, as was the case with the implementation of California's three-strikes law in the 1990s.

217. Warren, *supra* note 20, at 281 tbl.1.

218. See Simon, *supra* note 38, at 455.

ness—rooted in normative judgments about aberrational evil and the zero-tolerance sanctions for the criminal offender “other”—at times exists in tension with the new language of management and moderation.²¹⁹ The result, demonstrated by the expansion of punitive punishment for the most “evil” and undeserving offenders, is the sometimes incoherent policy practice of implementing rehabilitative-focused punishment for some but more punitive policies for most.²²⁰

In addition, neorehabilitation potentially distorts our perception of criminal justice by valuing a goal that can conflict with the criminal justice system. The neorehabilitative model values cost-efficiency, proven results, and “sure bet” investments to reduce the number of persons incarcerated. The criminal justice system, on the other hand, has only one goal: to reduce crime.²²¹ Neorehabilitation does not necessarily reach that same goal because incapacitating those who cannot be rehabilitated cheaply does not necessarily reduce the incidence of crime.²²² Professor Bernard Harcourt has demonstrated through mathematical analysis that the use of predictive tools to focus criminal justice reforms does not reduce the commission of crime under rational actor theory.²²³ The efficiencies purportedly achieved by policing and punishing through predictive models incorrectly focus on identifying offenders rather than on costs or effects to society as a whole.²²⁴ For example, the use of predictive tools to punish recidivists longer, by both giving longer sentences and denying parole release, adds more deterrent effects to particular offenders: recidivists.²²⁵ Presuming that recidivists respond to deterrence similarly to non-recidivist citizens, at some point the focus on the identified subgroup will be sufficient to discourage even the recidivist from reoffending.²²⁶ However, the use of predictive tools does not take into account the comparative elasticity of different offending groups and cannot be curtailed once the likelihood of offending is reduced.²²⁷ Thus one subpopulation receives more punitive resources at the expense of the

219. *Id.*

220. Simon predicted that “when the public learns that a new penology-minded bureaucracy often moderates its punitive mandates, the response is generally one of falling back on punitiveness.” *Id.* The wrinkle with neorehabilitation, versus simply the new penology, is that this distinction is being drawn along lines of merit and not the total sum of criminal offenders. Hyper-punitiveness is appropriate for some, but for all. Low-level drug offenders find themselves falling on the sympathetic side of deservedness in a way that was unimaginable twenty years ago. Compare Miller, *supra* note 24, at 421 (describing how the “severity revolution” in penal policy originated by targeting drug dealers and drug users), with, e.g., Editorial, *Unjust Mandatory Minimums*, N.Y. TIMES, at A22 (Feb. 19, 2013) (criticizing excessive punishment of low-level drug offenders). The movement of this line appears to come from a normative shift in societal perceptions of evil in society.

221. Oleson, *supra* note 21, at 1332.

222. See HARCOURT, *supra* note 1, at 129–32 (illustrating the inefficiency of maximizing hit rates in police enforcement rather than focusing on reducing crime generally).

223. *Id.* at 142.

224. See *id.* at 139, 141.

225. See *id.* at 141–42.

226. See *id.*

227. See *id.* at 143.

broader public, whose relative capacity for crime may increase unchecked.²²⁸ What this means, for purposes of this argument, is that statistical tools focus on the wrong information as they endeavor to create efficiencies. Rather than commission of crimes in society, the tools focus on the likely commission of crimes by a subpopulation.²²⁹ Though this may reduce crime to a point, overreliance on this method paradoxically creates the perversion of actually increasing overall crime.²³⁰ Thus, institutionalizing dependence upon predictive tools to improve sentencing policies may unintentionally change the very purpose of punishment and criminal justice by valuing efficiency over reducing crime.

V. NEOREHABILITATION AND TOTAL INCAPACITATION: TWO SIDES OF THE SAME COIN

The limitations of the neorehabilitative model are inherent because this particular form of rehabilitation, over-emphasizing evidence-based programming and predictive tools, has its origin in the same theory that created total incapacitation. Both neorehabilitation and total incapacitation desire the same result: to identify and exclude the criminal.²³¹ This desire, present since the decline of the old rehabilitative idea in the 1970s, requires mass incarceration to keep offenders out of society. Thus, scholars recognize that the end of mass incarceration is intricately intertwined with the theory of rehabilitation.²³² But this Article demonstrates that the return to rehabilitation, alone, does not necessarily signify an end to the overreliance on incarceration in the United States. Unless the return to rehabilitation embraces inclusion—as opposed to exclusion of the offender—neorehabilitation will be nothing more than a rhetorical shift in sentencing policies. In fact, as evidenced by some of the limitations discussed above, neorehabilitation potentially becomes a wolf in sheep's clothing—more dangerous because it is cloaked in compassionate rhetoric that is more appealing to the public.

Neorehabilitation and total incapacitation build on efforts to identify the criminal that were first expressed through selective incapacitation theory.²³³ The old rehabilitative model declined in the 1970s as policy makers and the public lost faith in the ability for offenders to be success-

228. See *id.* at 145–56.

229. See *id.*

230. *Id.* at 143 (model demonstrating the increase in overall crime over time with the use of parole prediction).

231. Neorehabilitation identifies the offender through prediction and enables elongated exclusion of those offenders not identified as capable of rehabilitation. Total incapacitation identifies all criminal offenders and excludes them all through incarceration.

232. See Barkow, *supra* note 67, at 198 (finding that the fate of life without parole, and the abolition of this sentence, “is tied to views on rehabilitation”); Simon, *supra* note 41, at 292 (“Until the end of the 20th century, incapacitation mainly functioned as the dark and presumptively minor side of the dominant rehabilitative penology (in the sense that most prisoners were presumed capable of rehabilitation).”).

233. See Note, *Selective Incapitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 512 (1982).

fully rehabilitated. Selective incapacitation emerged in its wake during the 1980s to 90s.²³⁴ This theory sought to *predict* which offenders were capable of rehabilitation.²³⁵ The belief was that if policy makers could somehow distinguish between high-rate offenders and low-rate offenders—and incapacitate high-rate offenders earlier in their careers and for longer periods of time—then street crime would decline.²³⁶ In 1982, the RAND Corporation launched its Habitual Offender Project in California, which focused on identifying career criminals for harsher punishment once convicted.²³⁷ As states began reforming their sentencing policies, they incorporated predictive factors, which punished repeat offenders more heavily. The federal sentencing system, for example, specifically acknowledged that the criminal history categories, designed to increase punishment based on prior convictions, were an attempt to identify the most dangerous offenders and provide them with greater punishment, a result of the desire to incapacitate them longer.²³⁸

Total incapacitation and neorehabilitation derive from selective incapacitation. As discussed above, total incapacitation endeavors to eliminate through incarceration those criminal offenders posing any risk to public safety.²³⁹ While selective incapacitation attempts to identify the few criminal offenders most likely to pose the greatest risk of recidivism, total incapacitation incarcerates anyone who poses any risk at all. Neorehabilitation, on the other hand, attempts to identify the criminal, but in this case the end goal is to identify those few low-risk offenders who do not deserve or require complete elimination from society through incarceration. Like selective incapacitation, neorehabilitation depends on the ability of advancements in technology to further characterize the criminal, if that is in fact possible. Furthermore, neorehabilitation similarly depends on exclusion of the criminal through total incapacitation. Thus, selective incapacitation, total incapacitation, and neorehabilitation are

234. ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1402 (David Levinson ed., 2002).

235. HARCOURT, *supra* note 1, at 88.

236. *Id.* (“Selective incapacitation is based on the central insight that a small subset of repeat offenders is responsible for the majority of crime and that incapacitating that small group would have exponential benefits for the overall crime rate.”); PETER W. GREENWOOD, RAND CORP., SELECTIVE INCAPACITATION, at vii (1982) (“Selective incapacitation is a strategy that attempts to use objective actuarial evidence to improve the ability of the current system to identify and confine offenders who represent the most serious risk to the community.”); Note, *supra* note 233, at 512.

237. HARCOURT, *supra* note 1, at 89.

238. See U.S. SENTENCING COMM’N, GUIDELINES MANUAL 380 (2011) (“A defendant’s record of past criminal conduct is directly relevant to [the four purposes of sentencing]. . . . To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation. [The criminal history categories] are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior.”); see also HARCOURT, *supra* note 1, at 99–100 (“It is important to note that most of the state guidelines and sentencing mechanisms also use two-dimensional grids that focus primarily on prior criminal history as well as, naturally, the severity of the crime.”). *But see* Reitz, *supra* note 65, at 1105 (arguing that no state guidelines system shared the architecture of the federal structure).

239. See discussion *supra* Part II.

different theories along the same spectrum of risk aversion and exclusionism.

Neorehabilitation, through heavy reliance on evidence-based programs and actuarial tools, finds its roots in a major shift in conceptualizing crime and the management of crime first identified by Professors Malcolm Feeley and Jonathan Simon. In their article *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, the two professors described a broad shift in criminal justice technique and discourse away from the “old penology,” which focused on moral sensibility, responsibility, individual fault, diagnosis, and intervention, towards a “new penology.”²⁴⁰ The new penology focuses on “techniques to identify, classify, and manage group[s of criminal offenders] sorted by dangerousness” as determined by statistical prediction.²⁴¹ The basis of the new penology emphasizes managing levels of deviance in a permanent high-risk group, rather than intervening or responding to individual deviance or social malformations.²⁴² In many ways, neorehabilitation captures the shifting trend that troubled Professors Feeley and Simon. Indeed, their article speculated that “drug treatment and rehabilitation [would] become increasingly attractive as the cost of long-term custody increase[d],” but it questioned “whether these innovations [would] embrace the long-term perspective of earlier successful treatment programs.”²⁴³ Ultimately, they speculated that despite the “lingering language of rehabilitation and reintegration,” this new penology would at best manage costs and control dangerous populations rather than invest in social or personal transformations.²⁴⁴ Though Professors Feeley and Simon refrained from thinking of this shift as a theory or program,²⁴⁵ they recognized its origins in the shift towards selective incapacitation.²⁴⁶ This Article identifies the framework that has grown from this new ideology that these scholars first suggested ten years ago. Though neorehabilitation does not suffer from some of the specific weaknesses Professors Feeley and Simon predicted,²⁴⁷ their critique illustrates the main shortcoming of neorehabilitation: cost-efficiency and predictive tools are used to manage prison populations within the same framework of exclusion captured by the theory of total incapacitation, even though the new framework uses a rhetoric of rehabilitation.²⁴⁸

240. Feeley & Simon, *supra* note 21, at 452.

241. *Id.*

242. *Id.*

243. *Id.* at 465.

244. *Id.*

245. *Id.* at 459–60 (suggesting that someday the new penology may be identified as “a theory or program conceived in full by any particular actors in the system,” but refusing to interpret the shift in such manner at that juncture because it was only starting to take shape.).

246. *See id.* at 458.

247. Feeley and Simon specifically speculated that this new framework would shift focus away from reducing recidivism. *Id.* at 450. Neorehabilitation focuses very heavily on reducing recidivism. *See supra* Part II.

248. *See* Feeley & Simon, *supra* note 21, at 465.

Neorehabilitation does not have to continue along the same theoretical lines of total incapacitation. Rehabilitation theory was once a reintegrationist theory of punishment.²⁴⁹ Prior to the 1970s, the old rehabilitative model arguably centered on reintroducing and reintegrating prisoners into the social fabric upon release from prison.²⁵⁰ And though that theory had its own weaknesses, the United States existed with a stable rate of incarceration for the majority of the twentieth century under this model.²⁵¹ Neorehabilitation may provide some stability in the prison population, but it will perpetuate a much higher level of incarceration, consistent with the disproportionate level of punitiveness sustained in the United States since the 1980s. But, to resolve the problem of mass incarceration, states need to do more than simply stabilize their prison populations—they need to decarcerate.²⁵² Given that the costs of maintaining a prison, even without increasing the number of prisoners, still continue to rise each year, states cannot hope to decrease costs without decreasing prisoners.²⁵³ This requires reducing both the number of prisoners sent to prison *and* the length of prison sentences.²⁵⁴ Neorehabilitation does not reach this result; thus, it will not lead states away from mass incarceration, regardless of the change in rhetoric.

VI. CONCLUSION

The United States finds itself lost in the darkness of mass incarceration, in search of a theory of reform that will be the key to managing this sociological phenomenon. Hope seems to exist in the theory of neorehabilitation, which is identifiable in various emergency sentencing policy reforms implemented by states to manage their prison populations in the face of converging pressures. This hope, however, is false. This Article concludes that neorehabilitation will not guide states away from the overreliance on incarceration; rather, the theory maintains the current goal of total inca-

249. Dolovich, *supra* note 40, at 291–92.

250. Dolovich recognizes that the pre-1980s concept of rehabilitation was focused on reinterpretation. Dolovich, *supra* note 53, at 102. But she also acknowledges that the extent of reintegration on the spectrum from exclusion to reintegration should not be exaggerated. *Id.* To this end, she recognizes Mona Lynch's influential conclusion that the rehabilitative model was not a widespread national theory of reform prior to the 1980s but rather a regional theory of reform most prevalent in the Northeast and Midwest regions of the United States. See MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* 212 (Markus D. Dubber ed., 2010). The Sunbelt, according to Lynch, never fully subscribed to this theory of reform. *Id.* Nevertheless, there was a general acknowledgement by the 1960s that rehabilitation was a focus of state correctional facilities because there was some recognition that criminal offenders would at some point reenter society. Dolovich, *supra* note 53, at 101.

251. See *supra* notes 54–56.

252. 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.”).

253. Gottschalk, *supra* note 8, 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.”).

254. See *id.*

pacitation, though in a different rhetorical form. Moreover, it stands to focus on the wrong offenders, exacerbate racial disparities, and distort our very perception of justice. The adoption of the neorehabilitative model as the new framework within which to manage prison populations is similar to the analogy of the man searching for his keys under the street lamp far from his car. Rather than using a penal theory that truly differs from the theory that led us to mass incarceration, neorehabilitation is the light of what is known. It is not, however, the key to resolving this problem.²⁵⁵ As this Article has demonstrated, the new rehabilitative model fails to move beyond the old incapacitation model. Accordingly, the problem of mass incarceration remains unscathed, like a car locked in the darkness.

255. As stated earlier, neorehabilitation alone cannot solve the problem of mass incarceration. The challenge lies in changing the way society thinks about punishment for all offenders, not just low-level offenders identified as easiest to rehabilitate. Scholars diverge on possible ways to cabin the punitive appetite of the U.S. public. In future works, I intend to explore the ways that emergency reforms implemented within the neorehabilitative framework can transform into long-term policy changes.