



1-1-2014

# Redesigning Sentencing

W. David Ball  
*Santa Clara School of Law*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

 Part of the [Criminal Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

## Recommended Citation

W. D. Ball, *Redesigning Sentencing*, 46 MCGEORGE L. REV. 817 (2014).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol46/iss4/6>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Redesigning Sentencing

W. David Ball\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	818
II. DESIGN THINKING AND SENTENCING .....	821
III. WHAT ARE WE DESIGNING, AND FOR WHOM? .....	826
A. <i>How Is a Sentencing Commission Like a Clean Bathroom?</i> .....	826
B. <i>Who Is the Client?</i> .....	831
IV. CHANGING THE FEASIBILITY, VIABILITY, AND DESIRABILITY EQUATION..	834
A. <i>Changing the Feasibility and Viability of Sentencing Increases</i> .....	835
B. <i>The Prison Tax</i> .....	838
V. CONCLUSION.....	840

## ABSTRACT

*Design thinking purports to take the methods of industrial and product design and apply them to social and political problems. One particularly intractable problem in California is its bloated penal code, which has expanded almost continuously over the past forty years. Since 1983, more than a dozen bills have been introduced in the California Legislature to establish a sentencing commission. All have failed. In this paper I explore how design thinking might help frame our discussion of mass incarceration in general and sentencing commissions in particular: what kinds of changes are possible within the foreseeable future, how we can make any changes sustainable, and how we can make them appeal to a wider audience. I conclude that, without a broader base of support among policymakers, criminal justice officials, and the population at large, any sentencing commission, no matter how well it is designed, will fail. To build that support, then, I propose that California create a separate “prison tax” line item on state tax returns indicating the proportional amount a taxpayer must contribute to support the state prison system. Putting the cost of prisons in front of taxpayers right*

---

\* J.D. Stanford, B.A./M.A., Oxford. Assistant Professor, Santa Clara School of Law. I'd like to thank the editors of the *McGeorge Law Review* for inviting me to participate in the symposium. Thanks also to Brice Hamack, Tiffany Uhri Chu, Sabeena Bali-Dingra, Sam Kesten, and Tim Ng for their excellent research assistance. Thanks also to the students and instructors at the Stanford D.School for introducing me to design thinking.

*before they write their checks would distribute valuable information about the expense and overcrowding of prisons, as well as generate some fiscal impetus to control or reduce them.*

## I. INTRODUCTION

Design thinking purports to apply the principles of commercial and industrial design to problems and processes facing individuals and society.<sup>1</sup> It is “an approach for creative problem solving” that can help creative leaders “discover new alternatives for business and society as a whole.”<sup>2</sup> Though design thinking involves both procedural and substantive components, this Essay focuses primarily on the substantive components: the integration of “what is desirable from a human point of view with what is technologically feasible and economically viable.”<sup>3</sup>

California’s sentencing system is ripe for reform, and, according to the design thinking framework, changes to the penal code would be technically feasible, economically viable, and desirable. The changes would be feasible because twenty-one states<sup>4</sup> and the federal government<sup>5</sup> already have sentencing commissions. California could use a number of different examples as a template for its sentencing commission. The changes would be economically viable because a sentencing commission could help control costs, ensuring that prison use is efficient, rational, and justifiable.<sup>6</sup> The changes would be desirable because

---

1. In this essay, I will use a book by the CEO of leading design firm IDEO as a representative example of the design thinking movement. *See generally* TIM BROWN, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION (2009). The book was given to me as a result of my participation in a project at the Stanford d.school, *see infra* note 110 and accompanying text, but it is part of a larger literature on design thinking as applied to social problems. *See, e.g.*, Michael Howlett, *From the ‘Old’ to the ‘New’ Policy Design: Design Thinking Beyond Markets and Collaborative Governance*, 47 POL’Y SCIENCES 187, 190 (2014) (extrapolating design thinking to policy and government design). For a brief, accessible version of Brown’s ideas, see Tim Brown, *Design Thinking*, HARVARD BUS. REV. (June 2008), available at <https://hbr.org/2008/06/design-thinking> (on file with the *McGeorge Law Review*) (outlining the design thinking palette—inspiration, ideation, and implementation—and suggesting how the process may be integrated into daily business innovation to maximize customer benefit and business value).

2. BROWN, *supra* note 1, at inside jacket.

3. *Id.* at 4.

4. NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (2008), available at [http://www.ncsc.org/~media/Microsites/Files/CSI/State\\_Sentencing\\_Guidelines.ashx](http://www.ncsc.org/~media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx) (on file with the *McGeorge Law Review*).

5. *See About*, U.S. SENT’G COMM’N, <http://www.ussc.gov/about> (last visited Dec. 5, 2014) (on file with the *McGeorge Law Review*).

6. *See, e.g.*, LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT at vi (Jan. 2007), available at <http://www.lhc.ca.gov/lhc/185/Report185.pdf> [hereafter CORRECTIONS CRISIS] (on file with the *McGeorge Law Review*) (indicating a sentencing commission’s primary goals should be enhancing public safety and using “public resources wisely.”). *See also* LITTLE HOOVER COMM’N, SENSIBLE SENTENCING FOR A SAFER CALIFORNIA 9 (Feb. 2014), available at <http://www.lhc.ca.gov/studies/219/Report219.pdf> [hereafter SENSIBLE SENTENCING] (on file with the *McGeorge Law Review*) (“The state cannot afford to continue to build its way out of the crisis.”).

California sentencing is at the very least, incredibly complex, and today resembles a house with a thousand additions, each made without regard to how the parts relate to the whole.<sup>7</sup>

If a sentencing commission is such a good idea, though, why has it failed over and over again? Sentencing commissions have been proposed more than a dozen times in the last thirty years and failed each time.<sup>8</sup> Can design thinking help us figure out why? Are there substantive improvements that would make a sentencing commission more popular? Is there something about how sentencing commissions are packaged and marketed that explains why they have been proposed so many times without success? There are two preliminary answers to these questions, and both touch on the fact that California is not ready to have a micro-level discussion about implementing a sentencing commission without a broader discussion about the goals of such a commission—or criminal justice more widely.

The first answer to why sentencing commissions have failed has to do with the goals of a sentencing commission and for whom it is being designed. A sentencing commission is just a means to some end, but the ends of a sentencing commission can vary widely. There is no consensus, either actual or philosophical, about what a well-designed criminal justice system should accomplish. Incapacitation? Rehabilitation? Evidence-based practices?<sup>9</sup> It is equally unclear to whom these goals should be addressed. To the judges who sentence? The prosecutors who charge? The criminals who are presumably deterred? The general public? These problems are not (or at least not exclusively) examples of the limitations of design thinking but are, instead, inherent in the notion of a sentencing commission itself. A sentencing commission is just how we get there. A sentencing commission doesn't tell us where we are going or why we want to get there. California is not necessarily ready for a discussion about how until it has figured out where it wants to go and why. Design thinking, however, might offer some suggestions about how to figure out where we are going, why we want to get there, and how that can be achieved.

The second answer to the question is that part of what makes a policy feasible and sustainable is how legitimate it is, which comes, in part, from how much people have invested in it. Well-designed policies are not enough: those policies also have to be widely embraced, supported, and maintained. A

---

7. CORRECTIONS CRISIS, *supra* note 6, at 35 (describing the penal code as “a chaotic labyrinth of laws with no cohesive philosophy or strategy”).

8. For details on the failed bills, *see infra* note 44.

9. *See generally* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 5 (2006) (outlining the framework, primary functions, and ancillary functions of a well-designed sentencing commission that can reduce disparities, promote consistency, and reduce recidivism). *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (explaining that the goals of the 1987 Federal Sentencing Guidelines, while different than state guidelines, had the ubiquitous goals of imparting honesty into sentencing—judge and parole sentence congruity—and reducing vast sentencing disparities).

sentencing commission could not be imposed on the populace and remain effective (or even remain in force).<sup>10</sup> In other words, if you build a better mousetrap, the world might not beat a path to your door. People first have to be convinced that mice are a problem and that mousetraps are an effective solution, and this will not happen without significant education and mobilization. No law review article, no matter how incisive, will be enough.

The primary step, then, has to be educating the public about the nature of criminal justice and its massive footprint, but in a way that speaks to people where they are, not where we wish them to be. How might design thinking help make the case that change is necessary? Returning to the substantive framework, the challenge is to effectively communicate the ways in which California criminal justice is neither viable nor desirable, and to make the state's ability to maintain its bloated prison system less feasible. The California Senate Public Safety committee has already addressed part of the feasibility issue by imposing a moratorium on any sentence increases.<sup>11</sup> California could also foreground the economic costs of increased sentences by adopting a "pay as you go" policy, one which requires any statute that increases state prison usage to be paid for with explicit tax increases or itemized budget cuts to particular departments and programs. Finally, California could address desirability by making the expense and overcrowding of prison personal and financial, by adding a separate line item on its tax forms to isolate each taxpayer's financial share of the cost of prisons. I call this proposal the prison tax.

This Essay will proceed in three parts. In Part I, I give a brief overview of design thinking (as expressed in Tim Brown's book *Thinking by Design*) and sketch out how design thinking might be applied to criminal sentencing. In Part II, I ask whether a sentencing commission is the answer to a question no one is asking. In examining why sentencing commissions have failed, the problem may not lie in the design of various proposed sentencing commissions, but with the lack of demand for the product. Does anyone want a sentencing commission, and, if not, why not? In Part III, I offer a suggestion about how the case for a sentencing commission might be made more salient to a wider swath of the population. Returning to the three core principles of design thinking, I propose continuing and, in one case, initiating, policies that address the current California system's feasibility, viability, and desirability.

---

10. For an outline of the role of legitimacy in legal systems, *see generally* Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 856 (1998) (linking the need for legitimacy in the law with the effective functioning of the legal system because the system relies heavily on voluntary compliance).

11. SENSIBLE SENTENCING, *supra* note 6, at 15.

## II. DESIGN THINKING AND SENTENCING

Design thinking is a process for approaching complex problems that involves both procedural and substantive components. The process is not “a sequence of orderly steps”<sup>12</sup> akin to a recipe, however. Instead, there are a series of processes that overlap and recur: “*inspiration*, the problem or opportunity that motivates the search for solutions; *ideation*, the process of generating, developing, and testing ideas; and *implementation*, the path that leads from the project room to the market.”<sup>13</sup> Design thinking provides particular tools for investigating problems (such as shadowing those who work in the environment or with the product that is to be designed),<sup>14</sup> for conceptualizing problems,<sup>15</sup> and for exploring solutions (the general principle of failing early and often,<sup>16</sup> particular techniques such as crowdsourcing,<sup>17</sup> and the importance of prototyping—or, for more abstract ideas, storyboarding<sup>18</sup> and scenarios<sup>19</sup>). I will refer to these tools as procedural, and discuss them first, before I move on to the substantive parts of design thinking. Both of the discussions draw on the description of design thinking in Tim Brown’s book *Change by Design*, which is one of several works that takes design thinking and applies it to social problems.<sup>20</sup>

How might design thinking techniques map on to criminal justice priorities, and which should we use? To take one example, Tim Brown discusses how scenarios might help illuminate problems and potential solutions. A scenario is a vivid way of putting ourselves in someone else’s shoes. Brown gives the example of a divorced professional woman with two small kids whom we then “observe” in our imaginations in order to figure out the problems facing her and the ways in

12. BROWN, *supra* note 1, at 16.

13. *Id.* (emphasis in original)

14. *Id.* at 41. Although, in this context it is difficult to pin down who should be observed: prosecutors, legislators, judges, criminals, or simply people reading the news.

15. *Id.* at 53 (discussing cognitive conceptions of money as part of a project seeking to introduce online banking). Participants were asked to “draw their money.” *Id.* at 53–54.

16. *Id.* at 32.

17. *Id.* at 58. Crowdsourcing might tend to work better with fixing parts of an otherwise healthy system. Even Linux, the paragon of open source software, began with a single architect designing the operating system which was then improved by crowdsourcing. See Katherine Noyes, *Crowdsourcing in IT: A New FOSS Trend?* LINUX.COM (Nov. 16, 2012 11:33 AM), <http://www.linux.com/news/enterprise/systems-management/667981--crowdsourcing-in-it-a-new-foss-trend/> (on file with the *McGeorge Law Review*). The California penal system is not a well-designed system with a few bugs—individual code sections in an otherwise well-structured code where the problems are relatively trivial. The problems with sentencing are more deeply architectural, questions like how serious is rape relative to robbery, or how much money we should spend on crime relative to other social harms.

18. *Id.* at 92 (explaining that storyboarding involves laying out ideas in graphical, comic-book style format). We could represent criminal justice as involving certain taxonomies (sex offenses, drug offenses, violent offenses, property offenses) or by types of harm (economic harm, personal harm).

19. *Id.* at 93. To use an analogy perhaps more familiar to a law review readership, scenarios are just hypotheticals.

20. See *supra* note 1 for additional examples.

which proposed solutions to these problems might be implemented. Scenarios are powerful tools, but the problem with using them in a criminal justice context is that they may be too powerful. Criminal justice narratives are extremely salient and often drive sentencing enhancements.<sup>21</sup> As a result, criminal statutes focus too much on responding to the individual crime that gave rise to them and not enough on the systemic effects that might result.<sup>22</sup> Legislators tend not to discuss how spending money on criminal justice and incarceration necessarily involves spending less on other needs.<sup>23</sup> Without thinking carefully about which stories get told and how important or representative they are, criminal justice scenarios might distort more than they inform.<sup>24</sup>

By the same token, crime stories foreclose the possibility of using design thinking's technique of failing early and often. An underlying theme of zero tolerance (or "broken windows") policing is the idea that little mistakes can lead to large harms: "if only" we'd punished someone for a small offense, we could have avoided larger problems.<sup>25</sup> The assumption is almost always that we have

---

21. For a discussion of the ways in which media narratives shape policy, see, e.g., Sara S. 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, 49 (1997) (reviewing empirical work on agenda setting and concluding that "the media's focus on crime plays a role in determining issue salience."). Of course, victim-centric approaches will not necessarily result in more punishment in all cases. See, e.g., Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 964-65 (1985) ("Common assumptions about crime victims—that they are all "outraged" and want revenge and tougher law enforcement—underlie much of the current victims' rights rhetoric. But in light of the existing psychological evidence, these assumptions fails to address the experience and real needs of past victims."). In a separate article, Henderson has postulated that victims' stories were "expropriated" and that "advocates' paraded horror stories before legislators and the public; the need for counseling, support services, and understanding of the experience of victims of violent crime as perhaps the most appropriate response to the distress of crime victims was lost in the shuffle." Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1652 (1987).

22. William Stuntz provides the classic treatment on how penal codes grow ever larger. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("[L]egislatures regularly add to criminal codes, but rarely subtract from them. In a world like that, lists of crimes in statute books must bear only a slight relation to the conduct that leads to a stay in the local house of corrections.")

23. For a notable corrective to this trend in the academic literature, see Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 91 CAL. L. REV. 323, 340 (2004) (advocating cost-benefit analysis in criminal law as a means of reducing overcriminalization). See also Christian Henrichson, *Using Cost-Benefit Analysis for Justice Policymaking*, VERA INST. OF JUST. (Apr. 10, 2014), <http://www.vera.org/pubs/cost-benefit-analysis-justice-policymaking> (arguing that cost-benefit analysis can better inform criminal justice policies). For an excellent book-length treatment of the ways in which the costs of criminal justice might change policy, see Hadar Aviram, *Cheap on Crime: Recession-Era Politics and the Transformation of American Punishment* (2015).

24. See e.g., Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 850 (2010) (arguing that the focus on juveniles of color as "superpredators" in the media resulted in racial bias and disproportionate incarceration). See generally, Beale, *supra* note 21.

25. Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL'Y 165, 166 (1999) (reporting that New York City's mayor attributed its crime decline "to the City's adoption of a zero tolerance approach to seemingly minor crimes such as littering, panhandling, and defacing property"). For some of the many criticisms of Broken Windows policing, see, e.g., Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Concept of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, (1998) (arguing that the

failed to punish people enough, not that we have punished them too harshly.<sup>26</sup> Far from design thinking's ideas of trying and failing, the rule in criminal justice might more aptly be expressed as fail never—with failure characterized as any possible increase in crime resulting from anything other than maximum punitiveness.<sup>27</sup> This guarantees that the system will fail certain people—those who should have been released and are, instead, staying in prison because someone in their cohort might possibly commit a crime.<sup>28</sup>

Perhaps the problem with narratives is that they confuse the dramatic with the important. They focus only on the one attention-grabbing moment and not on the larger, slower, and perhaps more subtle stories. There are systemic stories that are less personal but perhaps of greater social impact. What happens to a community where incarceration is prevalent?<sup>29</sup> What happens to the children of the imprisoned over their lifetimes?<sup>30</sup> What happens to a life that has been successfully rehabilitated, where nothing happens to land the ex-offender in the newspaper? Narratives that have a wider context could potentially be useful and tell us more than merely confirm our worst fears.

---

purported efficacy of Broken Windows policing is unsubstantiated); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows Theory: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 483 (2000) (arguing that the empirical evidence shows stop and frisk policing in post-1994 New York City targeted citizens based on race, not on signs of disorder); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2248, 2256 (1998) (criticizing the broad police discretion granted in broken windows policing for fueling harassment and targeting of minority communities).

26. This ignores evidence that prison might be criminogenic. Francis T. Cullen, Cheryl Lero Johnson, & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRIS. J. 48S, 50–51 (2011). It also ignores evidence that the stigma of conviction may lead to increased criminality. W. David Ball, In re Winship, *Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 145–149 (2011) (discussing studies indicating that the stigma of conviction may lead to further offending).

27. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1966 (2011) (Alito, J., dissenting) (warning of a potential crime wave following the easing of massive overcrowding in California prisons).

28. Alternatively, one could adopt the fail early and often policy as an internal rule, allowing people to make design mistakes in the drafting phase. The point here, though, is that failure is something that is rigidly defined in criminal law. For more on this point, see, e.g., W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. LAW & POL'Y REV. 395 (2011).

29. For a summary of the spillover effects of incarceration on neighborhoods, see, e.g., Jeffrey Fagan, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1553 (2003) (“Incarceration potentially stigmatizes neighborhoods, complicating the ability of residents to access job hiring networks to enter and compete in labor markets, and deterring businesses from locating in those areas. These dynamics suggest that incarceration is not simply a consequence of neighborhood crime, but instead may transform into an intrinsic part of the ecological dynamics of neighborhoods that may actually elevate crime within neighborhoods.”) See also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1293 (2004) (“By denying felons the opportunity to participate in legal processes such as voting, jury service, and holding public office, moreover, mass incarceration reinforces internal social norms that treat these processes as illegitimate as well as the external perception of these communities as outside the national polity.”)

30. For an overview about the challenges children with incarcerated parents face, see Nancy G. La Vigne et al., *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents*, URB. INST. (Feb. 2008), available at [http://www.urban.org/UploadedPDF/411616\\_incarcerated\\_parents.pdf](http://www.urban.org/UploadedPDF/411616_incarcerated_parents.pdf) (on file with the *McGeorge Law Review*).

In addition to the procedural tools just mentioned, design thinking also has more substantive components that help focus decision making. Brown isolates three that will provide the framework for the remainder of this Essay: feasibility (what is technically possible), viability (what we can sustain), and desirability (what we really want).<sup>31</sup>

How might these substantive components map onto California sentencing? It might no longer be technically feasible to keep adding to the length and complexity of the California penal code. “[T]here are more than 1,000 felony sentencing laws and more than 100 felony sentence enhancements” in the California system.<sup>32</sup> Sentences are extremely difficult to keep track of.<sup>33</sup> California has built a system few truly understand.<sup>34</sup> As for viability, California’s prison system is difficult to sustain under present conditions. Our system is extremely expensive and overcrowded and has been for years.<sup>35</sup> The changes imposed on the state as a result of the *Plata* litigation have resulted in some relief of overcrowding, but the prison population is now stabilizing (though Prop 47 should result in greater decreases).<sup>36</sup> As for desirability, California prisons, described as a disgrace, have been subject to a state of emergency and caused well-documented human suffering.<sup>37</sup>

The opposite, however, could also be true: one could argue that the same prison system, evaluated according to the same criteria, is feasible, viable, and desirable. It must be feasible to build the freakishly large penal code California has, because the state has done it. Perhaps there is a limit to how complex the system can get, but we have yet to reach it. The system could also be considered viable, even if unwise. California stipulated that its prisons violated the Eighth Amendment in 2001,<sup>38</sup> yet it has only now met the population target assigned to it

---

31. BROWN, *supra* note 1, at 18.

32. SENSIBLE SENTENCING, *supra* note 6, at 12.

33. In 2007, the state admitted that up to 33,000 sentences were miscalculated due to changes in the rate at which good time credits could be granted. See Michael Rothfeld, *Some Kept in Prison Too Long*, L.A. TIMES (Dec. 13, 2007), <http://articles.latimes.com/2007/dec/13/local/me-prisons13> (on file with the *McGeorge Law Review*).

34. See generally J. Richard Couzens, *Reforming California Sentencing Laws: A Judicial Perspective*, 22 FED. SENT’G REP. 154 (Feb. 2010) (“California has an extraordinarily convoluted patchwork body of sentencing laws whose complexity serves as a trap for even the most experienced, diligent, and knowledgeable practitioner.”).

35. SENSIBLE SENTENCING, *supra* note 6, at 9.

36. *Id.* at 10 (noting that the system will remain overcrowded without fixes). For more on Prop 47, see Matt Ford, *Californians Vote to Weaken Mass Incarceration*, ATLANTIC (Nov. 5, 2014), <http://www.theatlantic.com/politics/archive/2014/11/california-prop-47-mass-incarceration/382372/> (“Almost 40,000 felony convictions are likely to be reduced to misdemeanors, and about 7,000 inmates will be able to petition the courts immediately for early release.”)

37. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. Needless suffering and death have been the well-documented result.”).

38. *Id.* at 1926.

by the Supreme Court in 2011.<sup>39</sup> For years, California played a game of chicken with the federal judiciary, continuing to miss deadlines and targets.<sup>40</sup> As for desirability, nobody has ever paid a political price for California's overcrowded prisons. Governor Brown was re-elected in 2014 after losing *Plata* and Governor Schwarzenegger was re-elected during a penal state of emergency.<sup>41</sup> There were earlier governors who presided over crowded systems and scores of legislators who continued to pass criminal statutes and build prisons. Recent work by Rebecca Hetey and Jennifer Eberhardt suggests that politicians might even gain support for punitive policies when prisons are perceived as holding greater percentages of black and brown people.<sup>42</sup>

If the system is broken, sentencing commissions do not seem like the solution—or at least it is politically feasible and viable (and, from the standpoint of re-election, not undesirable) to oppose them.<sup>43</sup> Fifteen times since 1983, sentencing commissions have been proposed and rejected (eleven were called sentencing commissions and the last four were re-branded as “public safety commissions,” but they amounted to the same thing).<sup>44</sup> *Plata* might have changed the equation, but it isn't as though California's prisons were uncrowded or its penal code diminutive in any of the years in which sentencing commissions were proposed and rejected. Most importantly, the pressure created by *Plata* could be

---

39. Defendants' February 2015 Status Report in Response to February 10, 2014 Order, *Coleman v. Brown* (No. 2:90-cv-00520 KJM DAD PC) (E.D. & N.D. Cal. Feb. 17, 2015), available at <http://www.cdcr.ca.gov/News/docs/3JP-Feb-2015/February-2015-Status-Report.pdf> (on file with the *McGeorge Law Review*).

40. SENSIBLE SENTENCING, *supra* note 6, at 2–3.

41. On October 4, 2006, then-governor Arnold Schwarzenegger signed a proclamation declaring a state of emergency because all thirty-three California Department of Corrections and Rehabilitation prisons were at or above maximum operational capacity. Arnold Schwarzenegger, Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), available at <http://gov.ca.gov/news.php?id=4278> (on file with the *McGeorge Law Review*). Schwarzenegger was elected with 55.9% of the vote. CAL. SEC'Y OF STATE, OFFICIAL DECLARATION OF THE RESULTS OF THE GENERAL ELECTION HELD ON TUESDAY, NOVEMBER 7, 2006 at xix (2006), available at [http://elections.cdn.sos.ca.gov/sov/2006-general/sum\\_amended.pdf](http://elections.cdn.sos.ca.gov/sov/2006-general/sum_amended.pdf) (on file with the *McGeorge Law Review*).

42. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL SCI. 1949 (Oct. 2014).

43. *But see* SENSIBLE SENTENCING, *supra* note 6, at 9 (noting that prisons will become overcrowded without change).

44. The attempts were SB 56, 1984 Leg., 1983–1984 Sess. (Cal. 1984) (vetoed by the governor); SB 25, 1992 Leg., 1991–1992 Reg. Sess. (Cal. 1992) (vetoed by the governor); AB X1 43, 1994 Leg., 1993–1994 Sess. (Cal. 1994) (as amended on Apr. 18, 1994, not enacted); AB 2944, 1994 Leg., 1993–1994 Sess. (Cal. 1994) (as amended on August 9, 1994, vetoed by the governor); SB 166, 1995 Leg., 1995–1996 Sess. (Cal. 1995) (as amended on May 31, 1995, but not enacted); AB 1036 1995 Leg., 1995–1996 Sess. (Cal. 1995) (as introduced on Feb. 23, 1995, but not enacted); SB 670, 1997 Leg., 1997–1998 Sess. (Cal. 1997) (as amended on Apr. 24, 1997, but not enacted); AB X2 14, 2006 Leg., 2005–2006 2nd Ext. Sess. (Cal. 2006) (as introduced on Aug. 24, 2006, but not enacted); AB 160, 2007 Leg., 2007–2008 Sess. (Cal. 2007) (as introduced Jan. 18, 2007, but not enacted); SB 110, 2007 Leg., 2007–2008 Reg. Sess. (Cal. 2007) (as amended Aug. 22, 2008, but not enacted); AB 1708, 2007 Leg., 2007–2008 Reg. Sess. (Cal. 2007) (as amended Sept. 6, 2007, but not enacted); AB X3 14, 2009 Leg., 2009–2010 Sess. (Cal. 2009) (as amended Aug. 20, 2009, but not enacted); AB 1376, 2010 Leg., 2009–2010 Sess. (Cal. 2010) (as amended on Apr. 13, 2009, but not enacted); AB 2258, 2010 Leg., 2009–2010 Reg. Sess. (Cal. 2010) (as amended June 1, 2010, but not enacted); and AB 84, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013) (as amended Sept. 12, 2013, but not enacted).

eliminated all at once. Once the state is in compliance with the orders of the three-judge panel, the panel will be dissolved.<sup>45</sup> At that point, the viability of overcrowded prisons will change dramatically—in favor of foot dragging. *Plata* took years to reach the Supreme Court and, even though the state lost, the state’s prisons are still overcrowded. Even if the state is sued shortly after the three-judge panel is dissolved, if the next round of litigation is anything like *Plata*, the state can buy at least another ten years of dithering before the Supreme Court issues an opinion.

### III. WHAT ARE WE DESIGNING, AND FOR WHOM?

California has been able to ignore repeated cries for a sentencing commission. If, indeed, a sentencing commission is a wise policy, then it is clear that wisdom alone is not sufficient to make a sentencing commission a reality. This Essay has thus far assumed that a sentencing commission is the answer to at least some of the problems with California criminal justice. But what if there is something wrong with a sentencing commission itself? This section argues that there are two problems with applying design thinking to sentencing commissions: that there is no agreement on what the goal is (and hence no product), and that there is no agreement on who the design client is (and hence no way to figure out what the goal is).

#### *A. How Is a Sentencing Commission Like a Clean Bathroom?*

In *Change by Design*, Tim Brown describes a case study involving a new product for a household goods company. The goal of the study was to “reinvent bathroom cleaning with an emphasis on what was enigmatically called ‘the everyday clean.’”<sup>46</sup> The resulting design solution was a one-brush cleaning tool that was convenient, effective, and lucrative for the company.<sup>47</sup> Could we do the same for criminal justice? My answer is a qualified no, not just because of the obvious differences between bathrooms and crime, but because we can’t agree on a goal, even one as vague as “the everyday clean.” There is no agreement on the criminal justice equivalent of clean and, perhaps, not even agreement on where the bathroom begins and ends. Is the goal of a sentencing commission (cleanliness) decreased recidivism? Decreased crime? Decreased cost? Should the sentencing commission (bathroom) encompass just the courtroom? The police station? Schools? Society? This is not meant as a criticism of business books, but is, instead, a deeper question about the nature of criminal justice. Even if we were to focus on another idea mentioned in the book, addressing childhood

---

45. 18 U.S.C. § 3626(b)(1)(A) (2012).

46. BROWN, *supra* note 1, at 24.

47. *Id.* at 25.

obesity,<sup>48</sup> the problems are the same. There is a way of defining children that everyone agrees on, and the same is true of obesity. There is agreement about how to measure obesity<sup>49</sup> as well as agreement that it is something that should be avoided. The only question with obesity is how to achieve the agreed-on goal.

In the context of a sentencing commission, the opposite is true—there might be agreement on the means but disagreement on the goals of a commission.<sup>50</sup> States with sentencing commissions use them to promote a wide variety of goals: uniformity, proportionality, flexibility/discretion, truth in sentencing/severity, deterrence, race neutrality, treatment/rehabilitation, reserving prison for the most violent, simplification of the penal code, alternative sentencing, decreasing future crime, incapacitation, minimizing cost, and vindicating the rights of victims.<sup>51</sup> Not every state purports to meet each of these goals, but it is clear that, say, if both uniformity and flexibility are goals, they are at odds with each other.<sup>52</sup> As Robert Weisberg has pointed out in a recent paper, even the consensus emerging about decreasing recidivism merely shifts the dissensus to how recidivism is defined.<sup>53</sup> Project HOPE, for example, has been lauded for reducing recidivism through immediate sanctions for probationers who fail drug tests, but it has been criticized for measuring much of its benefit in terms of desistance from drug use.<sup>54</sup> It is one thing to suggest that punishing people for using drugs is effective at getting people not to use drugs, but it is another thing to prove that getting people not to use drugs means that they have desisted from criminal activity in general or just drugs in particular.<sup>55</sup>

---

48. *Id.* at 7.

49. The Centers for Disease Control and Prevention defines obesity as “ranges of weight that are greater than what is generally considered healthy for a given height.” *Defining Overweight and Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/adult/defining.html> (last visited Mar. 19, 2015) (on file with the *McGeorge Law Review*).

50. See SENSIBLE SENTENCING, *supra* note 6, at 12 (suggesting goals for a California sentencing commission).

51. See Kauder & Ostrom, *supra* note 4 (highlighting the goals of various state sentencing commissions: uniformity (Alaska, p.8), proportionality (Arkansas, p.9), flexibility and truth-in-sentencing (Alabama, p.7), deterrence and rehabilitation (Washington, D.C., p.11), victims (Louisiana, p.13), race-neutrality (Massachusetts, p.15), incapacitation (Ohio, p.20), violent offenders (Minnesota, p.17), cost (Washington p.26)); *About Us*, N.Y. STATE PERMANENT COMM’N ON SENT’G, <http://www.courts.state.ny.us/ip/sentencing/index.shtml> (last visited on Apr. 25, 2015) (on file with the *McGeorge Law Review*) (simplification and alternative sentencing); ILL. SENT’G POL’Y ADVISORY COUNCIL, <http://www.icjia.state.il.us/spac> (decreased crime) (on file with the *McGeorge Law Review*).

52. *But see* 28 U.S.C. §991(b)(a)(B) (2012) (defining the purposes of the United States Sentencing Commission as promoting both avoidance of disparities and maintaining judicial flexibility).

53. Robert Weisberg, *Meanings and Measures of Recidivism* 87 S. CAL. L. REV. 785, 788 (2014). See also SENSIBLE SENTENCING, *supra* note 6, at 25 (noting that California has no statewide definition of recidivism).

54. See, e.g., Stephanie A. Duriez, Francis T. Cullen, & Sarah M. Manchak, *Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity*, 78 FED. PROBATION 57, 63–64 (Sep. 2014).

55. For a defense of Project HOPE and a subsequent rejoinder, see Mark A. R. Kleiman, Beau Kilmer, & Daniel T. Fisher, *Response to Stephanie A. Duriez, Francis T. Cullen, and Sarah M. Manchak: Theory and Evidence on the Swift-Certain-Fair Approach to Enforcing Conditions of Community Supervision*, 78 FED.

Sentencing, too, is a placeholder for a variety of considerations. The “bathroom” of sentencing might include locations beyond the criminal justice system.<sup>56</sup> Given that availability of local treatment can drive sentencing decisions in California,<sup>57</sup> does a sentencing commission need to take into account treatment beds for inmates with mental health issues or drug and alcohol addictions? Does it need to consider other rehabilitative measures like education and job training? Does it encompass specialized courts like drug courts, veterans’ courts, and mental health courts?<sup>58</sup> Does it address diversion from the criminal justice system into other governmental programs? Does it include school discipline or the juvenile justice system?<sup>59</sup>

How could California decide—or elide—the goals of a sentencing commission? What would be the framework for evaluating various goals of a sentencing commission? Tim Brown suggests that asking questions (such as ones beginning with the phrase “How might we?”<sup>60</sup>) helps to delineate the scope of the work.<sup>61</sup> California could ask questions that carve off pieces of the criminal justice system either in order to gain some traction on what might otherwise seem intractable or to create pockets of agreement. For example, we could ask how we might prevent juveniles from entering a life of crime<sup>62</sup> or how we might rehabilitate those who have been to prison.<sup>63</sup> We could ask how we might avoid sentencing policies that make offenders more likely to reoffend,<sup>64</sup> how we might

---

PROBATION 71 (Sept. 2014); see also Francis T. Cullen, Sarah M. Manchak, & Stephanie A. Duriez, *Before Adopting Project Hope, Read the Warning Label: A Rejoinder to Kleiman, Kilmer, and Fisher’s Comment*, 78 FED. PROBATION 12 (Sept. 2014).

56. Indeed, the very definition of what constitutes a sentencing commission can be difficult to figure out. See Kauder & Ostrom, *supra* note 4, at 4.

57. CORRECTIONAL CRISIS, *supra* note 6, at 36.

58. See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 832 (2000) (drug courts); Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 363 (2009) (veterans’ courts), Henry J. Steadman, Susan Davidson, & Collie Brown, *Law & Psychiatry: Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVS. 457, 458 (2001) (mental health courts).

59. For an argument that school discipline leads to imprisonment, see, e.g., Jody Owens, *How Prison Stints Replaced Study Hall*, POLITICO (Mar 15, 2015), <http://www.politico.com/magazine/story/2015/03/criminal-kids-juvenile-justice-sentencing-reform-incarceration-116065.html#.VRcPrvF-w0> (on file with the *McGeorge Law Review*). See also Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES (Oct. 8, 2009) <http://www.nytimes.com/2009/10/09/education/09dropout.html> (on file with the *McGeorge Law Review*) (“[A]bout one in every 10 young male high school dropouts is in jail or juvenile detention, compared with one in 35 young male high school graduates.”).

60. BROWN, *supra* note 1, at 184.

61. *Id.* at 168.

62. See generally JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK (2003).

63. See, e.g., JAMES MCGUIRE, WHAT WORKS: REDUCING REOFFENDING: GUIDELINES FROM RESEARCH AND PRACTICE (1995).

64. See, e.g., Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1391 (2008) (“Recidivism rates for offenders who receive probation and community treatment generally are low, unlike recidivism rates following prison, which are often

make sure that only the most dangerous people are getting our most intensive sanctions,<sup>65</sup> or how we might punish crime in a way that is effective but not disruptive, that avoids doing more harm than good. Going further, we could also ask how we might make victims feel whole,<sup>66</sup> how we might use prisons more sparingly without increasing crime, how we might create a system that doesn't incentivize overuse, that is oriented around treatment, not punishment, that rewards effective policies and punishes ineffective ones, that encourages experimentation, that balances individual punishments with their effects on the system's use of resources, or even that ensures that our time and effort are spent on the most harmful offenses and offenders, not on the most expedient ones (the ones that are less important but easier to solve). All of these are important and valid possibilities, but each would involve a different set of solutions.

If moving from a goal to a design proves too difficult, another way to approach sentencing might be to find a similar social issue and consider the approaches used to diagnose causes, design solutions, and implement them. Using the childhood obesity example as a springboard, perhaps we should think about prisons the way we think about our healthcare: how to make it less expensive and more effective.<sup>67</sup> How might we give incentives for people not to get unhealthy (offend) and avoid trips to the ER (prison)?<sup>68</sup> How might we give doctors (police) incentives to treat underlying conditions before they require such acute intervention?<sup>69</sup> Are individual incentives enough of a solution, or is there

two to three times that of probation.”).

65. Faye Taxman, *Assessment with a Flair: Offender Accountability in Supervision Plans*, 70 FED. PROBATION, no. 2, 2 (2006) (“High-risk offenders should be placed into appropriate treatment services, and that low- and moderate-risk offenders should not receive the same intensity of services.”). See also Pamela M. Casey et al., *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, NAT'L CTR. FOR STATE COURTS 4 (2011), available at <http://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx> (on file with the *McGeorge Law Review*) (“Though justices and criminal justice professionals may be tempted to focus intervention services on low-risk offenders in the hope of stopping further penetration into the system, this strategy has not been found effective in terms of recidivism reduction or system costs.”).

66. See, e.g., Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 964–65 (1985) (“Common assumptions about crime victims—that they are all “outraged” and want revenge and tougher law enforcement—underlie much of the current victim's rights rhetoric. But in light of the existing psychological evidence, these assumptions fails to address the experience and real needs of past victims.”).

67. See, e.g., Daniel Young, *Curing What Ails Us: How the Lessons of Behavioral Economics can Improve Health Care Markets*, 30 YALE L. & POL'Y REV. 461, 463 (2012) (“[A] wide range of empirical studies demonstrates that health care markets are vulnerable to a panoply of market failures. Behavioral economics can help explain some of these failures while suggesting more efficient structures for future health care markets.”).

68. Jane E. Brody, *Avoiding Emergency Rooms*, N.Y. TIMES (Apr. 15, 2013) (estimating that half of emergency room visits could be treated by alternatives to hospital-based care). See also Kevin Grumbach, *Primary Care and Public Emergency Department Overcrowding*, AM. J. OF PUB. HEALTH 372, 378 (1993) (indicating nearly half of patients used the emergency room because of access barriers to primary care and suggesting that if public emergency departments could coordinate with primary care services to increase access, it would have a positive effect on the rate and appropriateness of emergency department use).

69. Jonathan T. Kolstad, *The Impact of Health Care Reform on Hospital and Preventive Care: Evidence from Massachusetts* (Nat'l Bureau of Econ. Res., Working Paper No. 16012, 2010), available at <http://www.nber.org/papers/w16012> (on file with the *McGeorge Law Review*).

something in the environment, like the availability of fast food (or lead)<sup>70</sup> that leads to obesity (crime)? How might we implement the best science among doctors (law enforcement),<sup>71</sup> overcoming skepticism about novel techniques,<sup>72</sup> the limitations of what can be known definitively, and entrenched interests and organizational cultures?<sup>73</sup> How might we attract the support of people who don't think of themselves as affected by obesity (or crime) to invest in it anyway? Is the only way to remind them that they'll pay for it eventually, via more expensive interventions?

Once these goals are defined, there are still questions about the means—what one might call designing the brush.<sup>74</sup> Should the sentencing commission be made permanent or temporary? A permanent sentencing commission might be more effective in the long term, while a temporary sentencing commission might be less threatening (and hence more likely to be established) in the short term. Legislatures could also adopt some middle ground, such as a five-year sentencing commission with a sunset provision. Should the sentencing commission's findings be binding or advisory? Should the Legislature be required to vote up or down on the entire set of the commission's recommendations, and, if so, should this vote be by a simple majority or a super-majority?<sup>75</sup> Must judges state a reason for departing from the commission's recommendations?<sup>76</sup> These

---

70. See, e.g., Jessica Wolpaw Reyes, *Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime* (Nat'l Bureau of Econ Res., Working Paper No. 13097, May 2007), available at <http://www.nber.org/papers/w13097.pdf> (on file with the *McGeorge Law Review*) (finding "that the reduction in childhood lead exposure in the late 1970s and early 1980s is responsible for significant declines in violent crime in the 1990s").

71. See, e.g., Lawrence K. Altman, *Two Win Nobel Prize for Discovering Bacterium Tied to Stomach Ailments*, N.Y. TIMES (Oct. 4, 2005), <http://www.nytimes.com/2005/10/04/science/04nobe.html?page-wanted=all> (on file with the *McGeorge Law Review*) (reporting that the theory that bacteria caused ulcers "went so against medical thinking, which held that psychological stress caused stomach and duodenal ulcers, that it took many more years for an entrenched medical profession to accept it.").

72. *Id.* See also Pamela Weintraub, *The Dr. Who Drank Infectious Broth, Gave Himself an Ulcer, and Solved a Medical Mystery*, DISCOVER MAG. (Mar. 2010), available at <http://discovermagazine.com/2010/mar/07-dr-drank-broth-gave-ulcer-solved-medical-mystery> (on file with the *McGeorge Law Review*) (indicating that drug companies had no incentive to invest in real cure because they were making large profits from a partial cure). In the law enforcement context, see Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 COR. J. L. & PUB. POL'Y 319, 328 (2014) (indicating police demonstrated widespread resistance to New York's marijuana decriminalization efforts by the use of an exception to generate arrests for possession).

73. See, e.g., Elliot H. Schatmeier, *Reforming Police Use-Of-Force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539, 550 (discussing officers' hostility to reform based in a sense that it is a challenge to their professionalism, an unnecessary and ineffective form of oversight, and a penalty for honest police work).

74. There are several suggestions in SENSIBLE SENTENCING, *supra* note 6, at 14, and CORRECTIONS CRISIS, *supra* note 6, at vi–vii, many of which mirror the suggestions in the rest of this paragraph.

75. See, e.g., OR. REV. STAT. § 137.667 (2) (West, Westlaw current through Ch. 14 of the 2015 Reg. Sess.) (in order to make any modifications to the sentencing guidelines, the commission would need to submit the changes to the legislature to approve).

76. Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 14 (2010) ("[A]s a general matter, [federal] courts may vary from Guidelines ranges based solely on policy

considerations, while important, are not ends in themselves, however. They should be examined in terms of effectiveness towards a goal.

*B. Who Is the Client?*

Assume for a moment that California solves the problems of feasibility, viability, and desirability. This is, on some levels, a possibility. Delegation of sentencing authority is certainly feasible in that it is likely to be constitutional,<sup>77</sup> and a system without our current sentencing scheme could be administered.<sup>78</sup> A sentencing commission could do the job of rationalizing and reorganizing California statutes (if given enough time and staffing), as well as any other jobs that might be assigned to it (such as modeling populations, estimating costs of new proposals, and the like).<sup>79</sup> It could be made viable in a variety of ways, such as making the commission permanent (though not all are) or by making its recommendations presumptive (and/or subject to legislative override by simple majority or super-majority).<sup>80</sup> The case could also be made that it is also desirable: criminal justice is simply too important, too costly, and too extensive not to have a rational, programmatic approach to it. But to whom would the case be made—that is, who is the ultimate client? The Legislature, where the statutes are made, the judiciary, which imposes sentences, the executive, which carries them out (determining conditions of confinement and, for indeterminate sentences and good-time credits, actually determining the length of time served), or the citizens of California? How we answer that question depends on the criterion (or criteria) used: who has the power, who has the responsibility, and who has the legitimacy.

The Legislature has the power to create a sentencing commission (subject to a gubernatorial veto). The Legislature controls the purse and is ultimately responsible for the cost of prisons. To approach the Legislature, designers would need to know what feasibility, viability, and desirability mean to elected officials, and how those answers might change according to a given official's party affiliation, demographics of his or her district, and the like. Is feasibility a question of how much law-making power would be delegated to a sentencing commission? Is viability about freeing up time for individual legislators to spend

---

considerations, including disagreements with the guidelines . . . [In *Kimbrough*], the Court left little doubt that judges now enjoy the freedom to categorically reject the Commission's judgments about sentencing policy.”).

77. In the federal context, *Mistretta v. United States*, 488 U.S. 361, 374 (1989), held that the Sentencing Reform Act (which created the U.S. Sentencing Commission) neither improperly delegated legislative power nor violated separation of powers.

78. In fact, the three-judge panel waived all laws that interfered with *Plata* compliance and California agreed that it would consider a sentencing commission. SENSIBLE SENTENCING, *supra* note 6, at 4.

79. *See id.* at 14.

80. *Id.*

time on matters besides criminal justice? Does desirability collapse into political popularity?

If the client is the executive, meaning all law enforcement officials including district attorneys (DAs), prison guards, and administrators, our answers will change. Feasibility concerns would have more to do with changing established policing and charging practices,<sup>81</sup> recalculating sentences (as necessary), and reallocating (or increasing) resources available for non-criminal sanctions, where applicable. Viability might include economic incentives—such as replacing the gains from civil asset forfeiture<sup>82</sup> or changing the criteria for Justice Assistance Grants.<sup>83</sup> Desirability for police officers, guards, and DAs might be different from each other. Police officers might desire codes that aid in investigation, codes with charges that, via probable cause or arrest, get the camel's nose under the tent for more serious crimes.<sup>84</sup> DAs might want a code that ensures the greatest ease of

---

81. One study suggests that the prosecutors' increased willingness to file charges has driven prison admissions while crime rates and the total number of arrests fell during the 1990s and 2000s. John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237 (2011). See also Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL'Y 48, 103 (2014) ("American prosecutors and their organizations have even lobbied lawmakers in favor of new crimes and tougher sentences . . . . More crimes and harsher punishments allow for quicker and cheaper convictions via plea bargaining.").

82. In California, a total of 3,293 forfeiture cases under state law were completed during 2013 (including cases initiated in 2013 and prior years) and the total value of the disbursed assets was \$28,130,455. CAL. DEP'T JUST., ASSET FORFEITURE REPORT 2013 1–2 (2014), available at [http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/asset\\_forf/2013\\_af/af.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/asset_forf/2013_af/af.pdf) (on file with the *McGeorge Law Review*). Seizures made pursuant to federal law (including those in which California law enforcement may have shared) are not included in this figure. For an estimate of the amount the state gains from equitable sharing proceeds, see *Asset Forfeiture Report: California*, INST. FOR JUST., <https://www.ij.org/asset-forfeiture-report-california> (last visited Mar. 28, 2015) (on file with the *McGeorge Law Review*) (reporting that California gained \$305,947,952 (\$33,994,217 per year) from equitable sharing proceeds from the asset forfeiture fund from 2000 to 2008).

83. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2014 at 1 (Aug. 2014), available at <http://www.bjs.gov/content/pub/pdf/jagp14.pdf> (on file with the *McGeorge Law Review*) ("JAG awards may be used for the following seven purposes—[1] law enforcement, [2] prosecution and courts, [3] prevention and education, [4] corrections and community corrections, [5] drug treatment, [6] planning, evaluation, and technology improvement, [7] crime victim and witness programs). California received \$32,200,000 for financial year 2014. *Id.* Awards are calculated by "computing an initial allocation for each state and territory, based on its share of the nation's violent crime and population (equally weighted). Reviewing the initial allocation amount to determine if it is less than the minimum (de minimus) award amount defined in the JAG legislation (0.25% of the total). . . . Dividing each state's final amount at a rate of 60% for state governments and 40% for local governments. Determining local award allocations, which are based on a jurisdiction's proportion of the state's 3-year violent crime average." *Id.* at 2.

84. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 404 (2001) ("[T]oday, American police enjoy historically unprecedented powers to arrest—and hence search—individuals. In the current era of "zero tolerance" policing . . . if police wish to search, on the basis of major and minor offenses alike, they must "arrest" suspects, logically increasing the likelihood of arrests."). Wayne R. LaFave, "Seizures" *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J. L. REFORM 417, 441 (1984) ("[Belton and Robinson] create an incentive for police to make custodial arrests for extremely minor crimes whenever, because of a whim or some suspicion, they would like to be able to make a full search of a person or the passenger compartment of the vehicle in which he was riding . . . . A need exists for limits upon the power of police to resort to the custodial arrest alternative."). Paul J. Larkin Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013) (stating that overcriminalization can be remedied

conviction, particularly by inducing plea bargaining.<sup>85</sup> In that sense, a sentencing commission might be undesirable to a DA if it threatens to reduce the number of penalties or their severity, even if society as a whole might view those changes as desirable. Guards might prefer good-time credits and/or indeterminate sentencing to promote good behavior in prison.<sup>86</sup> Desirability on the part of the executive might also bleed into the feasibility and desirability of the system as a whole—a sentencing commission “imposed” on the executive without some internal support (or external pressure) might lack legitimacy and lead to various attempts to circumvent it.<sup>87</sup>

If the client is the judiciary, feasibility would involve ease of administration, but this would also make a system more viable and desirable. The judiciary wants a code that is predictable and easy to calculate, but also one that preserves flexibility and tailoring to individual offenses.

To the extent that we believe in the communicative power of statutes, including deterrence, we might imagine the client being criminals (and those at a marginal risk of becoming criminals). A desirable sentencing commission would make offenses—and their attendant penalties—much clearer. We could also measure the effectiveness of statutes in terms of what they communicate and how much they deter.<sup>88</sup>

The bottom line is that there are many potential clients. Each will bring particular perspectives to the table. These perspectives might conflict with others or even contradict them. In design thinking, market segmentation is an opportunity to be exploited. A successful product need only find a *particular* market—it need not capture the *entire* market. A market with many niches and product differentiation is generally seen as preferable to one in which a single product dominates, but that is not necessarily the case when it comes to criminal justice: whoever makes the rules (sets the market) makes them for everyone else.

---

but needs the general public to be persuaded and motivated to stop it; currently the people with the most to gain from overcriminalization—legislators, police, prosecutors—are benefiting and thus unwilling to endorse change).

85. Robert Weisberg, *California's De Facto Sentencing Commissions*, 64 STAN. L. REV. ONLINE 1, 2 (Nov. 11, 2011), <http://www.stanfordlawreview.org/online/californias-de-facto-sentencing-commissions> (on file with the *McGeorge Law Review*) (identifying state prosecutors as key opponents of sentencing commissions, because more expansive codes allow for greater strategic advantage).

86. Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777, 782 (2009) (“[G]ood time can provide an incentive for participation in educational, work, drug, or other types of programs. Correction Officials have stated that ‘prisons are safer, more orderly, and more productive when inmates participate in programs.’”).

87. CORRECTIONS CRISIS, *supra* note 6, at 42.

88. For a study that tests the effects of harsher punishments on deterring driving under the influence, see Benjamin Hansen, *Punishment and Deterrence: Evidence from Drunk Driving*, AM. ECON. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1956180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956180) (on file with the *McGeorge Law Review*). But see Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 175 (2004) (arguing that criminal laws generally do not deter because potential offenders lack the knowledge or understanding of the law, the understanding of the law bears no weight on their conduct, or the benefit of the criminal action outweighs the cost).

In the context of a sentencing commission, we might ask questions about key concepts—e.g. what is prison, what is punishment, what is crime—but we ultimately operationalize one answer, not many. Everyone has to drink Pepsi, or everyone has to drink Coke—we cannot live with more than one set of rules. Of course, differentiation takes place in other ways (through the discretion of police, prosecutors, the judiciary, and parole boards, as well as the existence of multiple overlapping state and local jurisdictions) despite the fact that there is just one set of criminal statutes in a state. Yet to justify any of the retributive rationales, for example, a given polity as a whole has to agree both on the general principles of recidivism and on the individual size of the punishment that is just for a given offense.

Perhaps the best answer is that the ultimate client is the general public. After all, the principle of government in the United States is that it is of the people, for the people, and by the people.<sup>89</sup> Legislators are the elected representatives of the people, the executive is there to execute the laws the Legislature makes, and the judiciary evaluates cases, controversies, and statutes that run afoul of constitutional limits. Finding consensus among an entire populace would be difficult, if not impossible. But this might be because in some sense the problem is further upstream—that our governing structure doesn't permit reasonable discussion and policy, or that something about the politics of crime does not allow it.<sup>90</sup> Sentencing commissions might be just an example that there is something about sentencing—or the contemporary system of state government—that results in irrationality. If that is the case, perhaps the goals of sentencing commissions (and other issues) might best be solved by improving the quality of our democracy, or, at the least, ensuring that individual citizens are sufficiently informed and motivated to make the issue more salient.

#### IV. CHANGING THE FEASIBILITY, VIABILITY, AND DESIRABILITY EQUATION

The prior section provided examples of how difficult it might be to design a sentencing commission. The larger problem, though, is that there is not enough demand for one now, no matter how well-designed it might be.<sup>91</sup> In this section

---

89. Interestingly, there are five different versions of the Gettysburg Address that have been recorded. However, all five versions are in agreement that Abraham Lincoln said “Of the people, by the people, for the people.” GABOR BORITT, *THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS* 265 (2006).

90. See, e.g., W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060 (2014); STUART SCHEINGOLD, *THE POLITICS OF LAW AND ORDER* (1984), LISA L. MILLER, *THE PERILS OF FEDERALISM* (2010), Nicola Lacey & David Soskice, *Why are the Truly Disadvantaged American, when the UK is Bad Enough?* (LSE L., Soc’y & Econ. Working Paper, Nov. 2013), available at [http://www.lse.ac.uk/collections/law/wps/WPS2013-11\\_Lacey.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2013-11_Lacey.pdf) (on file with the *McGeorge Law Review*).

91. A poll taken in 2001 show that 45% of Americans prefer judicial discretion, while only 38% prefer mandatory sentences. Furthermore, 66% of Americans agree that rehabilitating prisoners with education and job training is the best way to reduce crime, while 28% believe that using prison sentences to keep criminals off the street would be more effective. PETER D. HART RESEARCH ASSOCS. INC., OPEN SOCIETY INST., *CHANGING*

the conversation will be pushed back a bit, to generating interest in criminal justice more generally and perhaps a sentencing commission in particular. How might we change the surrounding conversations about criminal justice to generate interest in and support for changes to sentencing? How might we help excavate the possible misconceptions about sentencing commissions and potentially build a consensus (or at least a large and motivated segment of the population) around the issue? As a part of this discussion, I consider some proposals about how we might rethink the ways in which we talk about prisons to make the costs of prisons and the causes of overcrowding more transparent. But I will go further in suggesting that we not just be satisfied with limiting prison growth or keeping populations where they are, but will instead propose that we reverse the growth of the past forty years and reduce incarceration rates down to where they were during Governor Ronald Reagan's last term.<sup>92</sup> To do that, California needs to go beyond stopping prison growth: it needs to make prisons shrink. California should begin with a full account of its prison capacity now and then plan to reduce that capacity (and the need for that capacity) over time. The state should focus its efforts on identifying and preparing the best candidates for release, allowing it to manage the population more programmatically. For reasons I have explained elsewhere,<sup>93</sup> parole release is ill-suited to this task without reconfiguring the incentives given to parole boards. The proposals in this section should help generate the will to reconfigure those incentives.

The discussion will again use the three questions from design thinking: how might we make change feasible, how might changes remain viable, and how might we make change desirable? I will address the first two together, since there are current frameworks already in place. I will then propose a new policy to help increase support for prison reduction amongst the general public: the prison tax.

#### *A. Changing the Feasibility and Viability of Sentencing Increases*

California has policies in place that already address the feasibility of increasing sentences; other states have already proposed ways of ensuring that increased sentences are economically viable. I discuss each in turn.

---

PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 4–5 (Feb. 2002), available at <http://www.prisonpolicy.org/scans/CJI-Poll.pdf> (on file with the *McGeorge Law Review*).

92. The prison population in 1970 was 22,339. CORRECTIONS CRISIS, *supra* note 6, at 18. California's population then was 19,971,069. U.S. CENSUS BUREAU, RESIDENT POPULATION AND APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES: CALIFORNIA 1, available at <https://www.census.gov/dmd/www/resapport/states/california.pdf> (on file with the *McGeorge Law Review*). In 1970, the rate per 100,000 residents was 111.8; in 2010, that figure was 439. PAUL GUERINO, PAIGE M. HARRISON, & WILLIAM J. SABOL, BUREAU OF JUST. STAT., PRISONERS IN 2010 at 22 (Dec. 2011), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf> (on file with the *McGeorge Law Review*).

93. W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. LAW & POL'Y REV. 395 (2011).

Since 2007, the California Legislature has operated under the Receivership/Overcrowding Crisis Aggravation (ROCA) policy.<sup>94</sup> The ROCA was enacted in response to the *Plata* litigation. Because the state prisons were already under federal control, ROCA sought to prevent the problem from getting worse. ROCA was originally proposed by Gloria Romero and prevented “any legislation that might increase prison sentences from passing out of the policy committee.”<sup>95</sup> Though Romero has left the assembly, the policy remains in force.<sup>96</sup> From a political perspective, it is unclear why the ROCA became politically feasible. Obviously the threat of sanctions from the judiciary played some role, but the state had, as explained earlier, already stipulated to the Eighth Amendment violation.<sup>97</sup> The ROCA has not decreased overcrowding, nor was it designed to, but it has, at least, attempted to make overcrowding no worse than it already is. I note, however, that even after the ROCA, jail populations have increased locally<sup>98</sup> and prison population declines have stabilized,<sup>99</sup> illustrating that prison populations are driven not just by statute, but by how those statutes are enforced and executed.<sup>100</sup> But at least the Legislature is not adding additional crimes and penalties.

The Legislature could move further in this direction by attaching sunset provisions on all future crime-related bills.<sup>101</sup> Statutes are easier to enact than repeal, and statutes might remain on the books due to apathy rather than continued commitment. Sunset provisions would ensure that current sentencing structures are based on current concerns, and sensible and popular policies would be unaffected. California would, however, no longer be saddled with permanent changes based on a popular sentiment that has passed. The Legislature could also change the calculation by relying on medium-term contracts for leased prison bed space, rather than committing to the construction of new facilities. That way there would be no excess capacity at the end of the lease, and it would not distort the marginal cost of each prisoner. Cost-per-prisoner actually decreases up to the

---

94. SENSIBLE SENTENCING, *supra* note 6, at 15.

95. *Id.*

96. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2357, at 3 (June 12, 2012), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_2351-2400/ab\\_2357\\_cfa\\_20120611\\_123513\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2351-2400/ab_2357_cfa_20120611_123513_sen_comm.html) (on file with the *McGeorge Law Review*) (“[S]ince early 2007 it has been the policy . . . to hold legislative proposals which could further aggravate prison overcrowding through new or expanded felony prosecutions,” also noting that “ROCA will continue until prison overcrowding is resolved.”).

97. *Brown v. Plata*, 131 S. Ct. 1910, 1926 (2011).

98. MAGNUS LOFSTROM & STEPHEN RAPHAEL, PUB. POL’ S INST. OF CAL. IMPACT OF REALIGNMENT ON COUNTY JAIL POPULATIONS 2 (June 2013), available at [http://www.ppic.org/content/pubs/report/R\\_613MLR.pdf](http://www.ppic.org/content/pubs/report/R_613MLR.pdf) (on file with the *McGeorge Law Review*).

99. SENSIBLE SENTENCING, *supra* note 6, at 10.

100. See, e.g., W. David Ball, *Tough on Crime (on the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates—And Why it Should*, 28 GA. ST. L. REV. 987 (2012); see also W. David Ball, *Why State Prisons?* YALE L. & POL’Y REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871274](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871274) (on file with the *McGeorge Law Review*).

101. CORRECTIONS CRISIS, *supra* note 6, at 38.

capacity of a prison the state owns, but cost-per-prisoner stays the same for a lease agreement. Of course, the state would need to ensure that there weren't other distortions in a lease agreement, such as occupancy guarantees.

The issue of viability has also changed as a result of realignment. Before realignment, the state paid for the prison usage of localities without limitation; since realignment, the state has rationed access to its prisons and accepts only offenders convicted of violent crimes, serious crimes, or sex offenses. Some of the savings has been passed on to counties for its criminal justice needs, and it is unclear whether local strategies will be viable in the long term.

Overall, however, California's prisons are not economically viable. Prison spending has increased dramatically, as has overall criminal justice spending that includes county expenditures.<sup>102</sup> Legislators should be considering cost when they enact sentencing legislation—it is part of responsible government—but the discussion of cost is largely absent from criminal justice decision-making.<sup>103</sup>

Two states have implemented both a fiscal impact study and appropriations requirement before any bill increasing prison usage can be passed: Kentucky and Virginia. A Kentucky statute requires that bills affecting the corrections population shall include a "corrections impact statement" with "the estimated costs, estimated savings, and necessary appropriations . . . ."<sup>104</sup> Virginia requires a fiscal impact statement and necessary appropriations for proposed legislation affecting county jail or state prison populations.<sup>105</sup> In Virginia, the "Criminal Sentencing Commission shall prepare a fiscal impact statement reflecting the operating costs attributable to and necessary appropriations for any bill which would result in a net increase in periods of imprisonment in state adult correctional facilities."<sup>106</sup> This requirement also applies to the Department of Juvenile Justice "for any bill that would result in a net increase in periods of commitment to [its] custody . . . ."<sup>107</sup> In 2007, the Little Hoover Commission noted that it was "relatively easy" for California lawmakers "to cast a vote for measures that appear tough on crime when they are not also required to allocate money to pay for the costs of those measures."<sup>108</sup> In order to implement "pay as you go" sentencing<sup>109</sup> in California, the state would have to have a better model of

---

102. SENSIBLE SENTENCING, *supra* note 6, at 9.

103. *But see, e.g., Prisons*, RIGHT ON CRIME, <http://rightoncrime.com/category/priority-issues/prisons/> (last visited Mar. 28, 2015) (on file with the *McGeorge Law Review*) ("Americans are paying dearly—between \$18,000 and \$50,000 per prisoner per year depending upon the state . . . . These figures are not markers of success. Americans do not measure the success of welfare programs by maximizing the number of people who collect welfare checks. Instead success is evaluated by counting how many people are able to get off welfare. Why not apply the same evaluation to prisons?").

104. KY. REV. STAT. ANN. § 6.949(4) (West, Westlaw current through 2014 leg.).

105. *See* VA. CODE ANN. § 30-19.1:4 (West, Westlaw current through 2014 Reg. & Spec. Sess.).

106. *Id.* § 30-19.1:4(A).

107. *Id.* § 30-19.1:4(B).

108. CORRECTIONS CRISIS, *supra* note 6, at 38.

109. IRIS J. LAV, CTR. ON BUDGET AND POL'Y PRIORITIES, PAYGO: IMPROVING STATE BUDGET

prison population dynamics and better information about who is in prison under what sentences (and enhancements), but it would certainly force the Legislature to account for the economic drain of policies, increasing the likelihood that they were a wise—or at least justifiable—use of resources.

The problem with both of these policies is that they simply lock us into high rates of incarceration. It would be like saying a childhood obesity program would be successful if children remained obese but simply didn't get any fatter. The goal should be to reduce obesity. California prisons are morbidly obese now. The state needs to slim them down. Merely maintaining their obese state is not enough.

### B. The Prison Tax

I first became aware of design thinking in the spring of 2011, when I participated in a health project at Stanford's D.School.<sup>110</sup> The project aimed to help men with what they called “pre-conditions”—that is, conditions that could develop into serious chronic health problems if left untreated—by studying them and then proposing novel solutions.<sup>111</sup> For me, the project mostly served as a way of heightening my awareness of my health: I had to keep a food and exercise journal, which made me understand what I was (and wasn't) doing. This, more than any of the solutions proposed, was most beneficial to me.

This next proposal is along the same lines: not a prescription, but a means of generating some awareness of the size and scope of the prison system and, with it, some impetus for reform.<sup>112</sup> The proposal is simply to create one item on individual and business tax forms. After a taxpayer has calculated her total income tax and entered it on a line marked “total tax liability,” a separate add-on item—like a tip—would be added to the total. It would be labeled “Share of state prison expenses” and it would visually highlight the proportional amount the

---

DISCIPLINE WHILE RETAINING FLEXIBILITY (Sept. 22, 2011), available at <http://www.cbpp.org/files/9-22-11sfp.pdf> (on file with the *McGeorge Law Review*).

110. Email from Dennis Boyle, Consulting Professor Stanford University D.School, to W. David Ball, Assistant Professor, Santa Clara School of Law (Mar. 15, 2011) (on file with the *McGeorge Law Review*).

111. *Id.*

112. Some of this might be getting at least somewhat better over time. See, e.g., Jessica Pishko, *The Price of Sentencing People to Prison*, AL JAZEERA AM (July 19, 2014), <http://america.aljazeera.com/opinions/2014/7/prison-juries-incarcerationcostbenefit.html> (on file with the *McGeorge Law Review*) (“Why the judicial system needs a better cost-benefit analysis for sentencing.”); Marc Santora, *City's Annual Cost Per Inmate is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), [http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?\\_r=0](http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?_r=0) (on file with the *McGeorge Law Review*); Aaron Sankin, *California Spending More on Prisons Than Colleges, Report Says*, HUFFINGTON POST (Sept. 6, 2012), [http://www.huffingtonpost.com/2012/09/06/california-prisons-colleges\\_n\\_1863101.html](http://www.huffingtonpost.com/2012/09/06/california-prisons-colleges_n_1863101.html) (on file with the *McGeorge Law Review*); Elizabeth Prann, *States Spend Almost Four Times More Per Capita on Incarcerating Prisoners Than Educating Students, Studies Say*, FOX NEWS (Apr. 14, 2011), <http://www.foxnews.com/politics/2011/03/14/states-spend-times-incarcerating-educating-studies-say-464156987/> (on file with the *McGeorge Law Review*).

taxpayer was contributing to the expenses of the state's prison system. The reason for framing the expense this way comes from studies which show that people view losses differently than they do foregone gains; imposing the prison tax on top of a total makes it much more salient than simply explaining that prison expenses were a given percentage of what you were already going to pay.<sup>113</sup>

Prisons would be a good place to start because, in California, the costs of prisons come from general revenue.<sup>114</sup> Of course, the prison system is not the only expense involved in criminal justice: this proposal excludes the costs of jails, police, DAs, and the judiciary. Going further, even these additional costs do not include the losses—economic and hedonic—to victims, prisoners and their families, as well as more inchoate losses like faith in the system due to extreme racial differences, etc.<sup>115</sup> Taxpayers would be able to calculate whether the benefits of the prison system—their individual estimation of the value of deterrence (if any), their individual estimation of the value of the vindication of victims, or their estimation of the effects (or efficiency) of current policies on crime (if any)—were worth the cost of the prison tax. The prison tax proposal is not the end of the discussion, nor is it complete as an estimate of the cost. It is a means of getting our foot in the door of talking about whether our current use of prison—which is, as a nation, unprecedented at any time in human history—is worth it.

A prison tax alone would not be enough to roll back the huge increases in imprisonment since the 1970s, and the goal I have in mind is not simply to prevent California's prison system from getting bigger: it is to make it smaller. Thus, I propose that the prison tax be followed by an additional line on the tax form asking whether the taxpayer would like his or her prison tax to decrease, even if this means reducing current inmates' sentences. Taxpayers could choose a desired percentage decrease in their tax (say 15%): an aggregate of individual preferences, perhaps weighted by the amount of tax payment, could then provide

---

113. Prisons account for 9 percent of California's budget. SENSIBLE SENTENCING, *supra* note 6, at 9. As for the research about salience, see Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 456 (Jan 30, 1981) ("Because losses loom larger than gains, consumers are less willing to accept a surcharge than to forego a discount."). See also Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 1 J. OF ECON. PERSPECTIVES, no. 5, 1991 at 194, available at [http://www.princeton.edu/~kahneman/docs/Publications/Anomalies\\_DK\\_JLK\\_RHT\\_1991.pdf](http://www.princeton.edu/~kahneman/docs/Publications/Anomalies_DK_JLK_RHT_1991.pdf) (on file with the *McGeorge Law Review*).

114. CAL. PENAL CODE § 5031 (West 2014) (stating that the Dep't of Corrections and Rehabilitations shall submit its expenditures for inclusion in the Governor's Budget). See also Cal. Dep't of Finance, *Governor's Budget 2015-2016: Proposed Budget Detail* (Jan. 9, 2015), <http://www.ebudget.ca.gov/2015-16/agencies.html> (on file with the *McGeorge Law Review*) (detailing the proposed allocation of State funds to agencies, including \$12,676,778,000 for the Corrections and Rehabilitation budget).

115. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004) (citing the statistics of the gross disproportionality of African Americans in prisons before describing nonmonetary "theories of community harm" including distrust of the law and effects on families).

a population reduction target for corrections officials to meet. They could choose how best to implement the mandate for, say, a 15% reduction in prison usage. They could pick the best people to release and also operate in the knowledge that they would need to do a better job from that point forward of identifying and preparing prisoners for release in order to meet popularly-mandated population cuts.<sup>116</sup>

The political calculus may already be changing in California. Prop 47, known as the “Safe Neighborhoods and Schools Act,” raised the dollar amounts necessary to charge certain property crimes as felonies and also made simple drug possession a misdemeanor.<sup>117</sup> The proposition passed handily.<sup>118</sup> The ballot argument in favor of it framed the conversation in financial terms, that it would “focus[] law enforcement dollars on violent and serious crime while providing new funding for education and crime prevention programs” and would “save hundreds of millions of dollars” every year.<sup>119</sup> Voters were asked whether they wanted to spend money on imprisonment or on the (perceived) causes of crime such as substance abuse. More strikingly, Prop 47 applied retroactively and could affect thousands of prisoners, meaning that it wasn’t about arresting the rates of future growth but actually decreasing the existing population.<sup>120</sup>

#### IV. CONCLUSION

California criminal justice is a subject about which fresh thought is needed. California prisons have reduced overcrowding in recent years, but the state is not yet out of the woods. Design thinking might help the state begin to work its way out of its problems, but first it has to acknowledge those problems. That will involve hard work—not quick and easy fixes.

Having said that, there are suggestions for changing citizens’ perceptions and awareness of the problem. California’s citizens currently are not honest with

---

116. This proposal is, ultimately, akin to a proposal on climate change that Tim Brown discusses in *Change by Design*. Brown suggests that the complexity of climate change can be addressed through design thinking in three ways: by informing citizens “about what is at stake and making visible the true costs of the choices we make,” by fundamentally reassessing “the systems and processes we use to create new things,” and by “encourag[ing] individuals to move toward more sustainable behaviors.” BROWN, *supra* note 1, at 194–95. For the idea that parole officers could be forced to pick a given percentage of the population to release and focus their efforts on ordinal ranking prisoners in terms of suitability, see W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. LAW & POL’Y REV. 395 (2011).

117. CALIFORNIA SEC’Y OF STATE, OFFICIAL VOTER GUIDE, available at <http://www.voterguide.sos.ca.gov/en/propositions/47/> (last visited on Apr. 24, 2015) (on file with the *McGeorge Law Review*).

118. Matt Ford, *Californians Vote to Weaken Mass Incarceration*, ATLANTIC (Nov. 5, 2014), <http://www.theatlantic.com/politics/archive/2014/11/california-prop-47-mass-incarceration/382372/> (on file with the *McGeorge Law Review*).

119. CALIFORNIA SEC’Y OF STATE, OFFICIAL VOTER GUIDE, available at <http://www.voterguide.sos.ca.gov/en/propositions/47/arguments-rebuttals.htm> (last visited on Apr. 24, 2015) (on file with the *McGeorge Law Review*).

120. See Ford, *supra* note 118.

themselves about the system we have—costs and complexity are hidden, and prison is treated as an inexhaustible resource. By proposing a means to highlight just one aspect of these costs, I hope to engender further discussion and generate the impetus for change.

\* \* \*