



1-1-2014

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Franklin E. Zimring  
*University of California, Berkeley*

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## Recommended Citation

Franklin E. Zimring, *Substance and Procedure in the Reform of Criminal Sentencing*, 46 MCGEORGE L. REV. 735 (2014).  
Available at: <https://scholarlycommons.pacific.edu/mlr/vol46/iss4/3>

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## Substance and Procedure in the Reform of Criminal Sentencing

Franklin E. Zimring\*

There are three installments to this short essay. The first section creates a classification of types of reform.<sup>1</sup> The second section outlines two recent changes in California sentencing.<sup>2</sup> The third section discusses four lessons about the proper evaluation of changes in punishment that are derived from recent experience in California.<sup>3</sup> In the first section, I distinguish between the means used to change the rules of sentencing and the substantive objectives that reforms attempt to achieve.<sup>4</sup> The ends of sentencing reform are why changes are made; the means of sentencing reform are how the rules are changed. The how of sentencing changes is an objective reality that is usually not difficult to determine. The authority to set prison terms is shifted from parole board to sentencing judge, or from judge to jury.<sup>5</sup> The objectives of sentencing reforms are the consequences intended by the people who designed or authorized changes in the rules. These are motives that may not be easy to determine and also may not be shared by all those persons who design and authorize a particular change.<sup>6</sup> Some of those who shifted power from parole boards to judges may have intended that the average length of prison terms might be reduced<sup>7</sup> while others intended that the uncertainty and disparity in sentences might be reduced but without any change in average length.<sup>8</sup> While reform objectives are more difficult

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\* Franklin E. Zimring is the William G. Simon Professor of Law at the University of California, Berkeley. His prior work on sentencing includes *The Scale of Imprisonment* (1991) and *Prison Population and Criminal Justice Policy in California* (1992), both with Gordon Hawkins, and *Reform and Punishment: Essays on Criminal Sentencing* (1983) edited with Michael Tonry,

1. See *infra* Part I.

2. See *infra* Part II.

3. See *infra* Part III.

4. See *infra* Part I.

5. See Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1132 (2005) (stating that the five common decision makers in criminal sentencing are “judges, juries, legislatures, sentencing commissions, and parole boards”).

6. See *In re Lynch*, 503 P.2d 921, 924 (1972) (stating that the goal of indeterminate sentencing is to use shorter sentences and reform the offender). But see CAL. PENAL CODE § 1170(a)(1) (West 2015) (declaring the Legislature’s purpose for sentencing is punishment and terms should be determined by seriousness of the offense). See also CAL. R. CT. 4.410 (combining the goal of deterring future offenses along with aim to punish defendant as “general objectives in sentencing”).

7. See Erin Ann O’Hara, *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1989–90*, 79 GEO. L.J. 1162, 1165 (1991) (explaining that the sentencing judge may have discretion to release prisoners early to parole, which generally issues early release).

8. See 18 U.S.C. § 3583(c) (2008) (allowing a judge to consider factors in determining what terms to impose in supervised release). See also O’Hara, *supra* note 7, at 1163–64 (stating that under the Sentencing Reform Act a prisoner must serve his sentence, but the judge can use discretion in determining post-release requirements on the prisoner).

to determine and often not uniformly intended by those who supported changes,<sup>9</sup> we must determine both the ends and the means employed to achieve them to effectively evaluate whether reforms succeed. I. Definitions and Categories in Sentencing Reform

The key terms in this essay are substance and procedure in criminal sentencing. The substantive content of a criminal sentencing scheme are the types and amounts of punishment the system attaches to criminal convictions.<sup>10</sup> The procedures of sentencing concern how punishment decisions are made and reviewed.<sup>11</sup>

One important threshold question is whether the distinction between substance and procedure is simply a repetition of the earlier distinction between the ends and the means of sentencing reform. Are not procedures simply the means used to produce punishment decisions rather than legal arrangements with independent substantive value?<sup>12</sup> The correct answer to this question is no, because often the choice of procedures is a matter of importance to judgments about justice in punishment and also frequently procedures are a central target of reform efforts.<sup>13</sup> If better or less arbitrary procedures are frequent objectives of reform, then procedural features of punishment policy are often both the means and the ends of the reform. There are also a large number of cases in which a substantive legal change is the means selected to achieve a substantive reform.<sup>14</sup> The method used to end the death penalty, for example, is simply to remove state killing from the list of authorized legal punishments.<sup>15</sup>

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9. See Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006) (stating there is little agreement about definition of uniformity in sentencing or how to attain it).

10. See *United States v. Granda*, 555 F.2d 922, 926 (5th Cir. 1978) (stating the purpose of criminal law is to "conform conduct to the norms expressed in that law").

11. See CAL. PENAL CODE § 1170(c) (West Supp. 2015) (requiring courts to state the reason for its sentence choice at the time of sentencing). See also *People v. Jackson*, 242 Cal. Rptr. 1, 4 (Cal. Ct. App. 1987) (explaining that trial courts needed to state the reasons for sentence terms to allow appellate courts to ensure lower courts not misusing facts while imposing a sentence).

12. See Shannon Broderick, *Blakely v. Washington Confuses Federal Courts: A Look into the Constitutionality of Federal Sentencing Guidelines*, 32 W. ST. U. L. REV. 243, 244 (2005) (detailing how prior criminal sentences were based on a system created by the legislature, disparately enforced by judges, and time determined by a parole commission).

13. See *id.* at 244–45 (describing how federal sentencing reform that established guidelines designed to institute fair sentences that evaluated the criminal not just the crime charged).

14. See CAL. PENAL CODE § 1170.12(c) (West 2012) (increasing sentencing terms based on the criminal history and type of crime committed). *But see* Michael Vitiello & Clark Kelso, *A Proposal for Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 907–08 (2004) (highlighting that studies show lack of support for claim that Three Strikes law has reduced crime in California).

15. See *Furman v. Georgia*, 408 U.S. 238, 239–240 (1972) (holding the death penalty unconstitutional as applied, leading to defacto a five year moratorium on capital punishment in the United States). See also William Claiborne, *Ill. Governor, Citing Errors, Will Block Executions*, WASH. POST (Jan. 31, 2000), <http://www.washingtonpost.com/wp-srv/WPcap/2000-01/31/079r-013100-idx.html> (on file with the *McGeorge Law Review*) (reporting the Illinois governor imposed a death penalty moratorium to allow inquiry into why more death row inmates have "been exonerated than executed").

Table 1 provides a two-by-two scheme that identifies four distinct modes of sentencing reform.

**Table 1. Four Types of Sentencing Reform**

		Ends	
		Procedure	Substance
Means	Procedure	1	2
	Substance	3	4

The four varieties of sentencing reforms differ in the type of method for reform and the type of objective. Type 1 is the use of procedural methods of reform to produce a procedural objective of reform. The federal sentencing commission which was established in the 1980s to reduce disparate sentences produced when individual federal district court judges sentenced offenders convicted in their courts is a prominent recent example of Type 1 reform.<sup>16</sup> Type 2 reform changes the procedures of sentencing with the objective of altering the distribution of punishments that the system will generate. One example is requiring a unanimous jury verdict of death in a penalty trial, or judge and jury concurrence, or both, before a death sentence can be imposed.<sup>17</sup> This procedural shift is usually an attempt to reduce the number and proportion of death sentences.<sup>18</sup> A second example of Type 2 reform is so-called “truth in sentencing” provisions, which require a minimum proportion of a nominal sentence to be served before the prisoner can be released through parole power.<sup>19</sup> The usual

16. 28 U.S.C. § 991(b)(1)(B) (2012).

17. See *People v. Miranda*, 744 P.2d 1127, 1152 (Cal. 1987) (requiring that jury unanimously agree before imposing the death penalty); *State v. Taylor*, 771 S.W.2d 387, 399 (Tenn. 1989) (stating that “jury verdict on punishment must be unanimous”); *State v. Leonard*, 818 N.E.2d 229, 262 (Ohio 2004) (holding that a “verdict of life imprisonment is required to be unanimous”).

18. See *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring) (agreeing that jury unanimity promotes full deliberation and decision “will reflect the conscience of the community”). See also *State v. Daniels*, 542 A.2d 306, 389 (Conn. 1988) (finding that requiring a unanimous verdicts induces thorough jury deliberations); *State v. McCarver*, 462 S.E.2d 25, 39 (N.C. 1995) (requiring a unanimous decision “prevents the jury from evading its duty”).

19. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 1–3 (JAN. 1999).

objective here is to lengthen the imprisonment term served by the offenders who are targets of these provisions.<sup>20</sup>

There are also a large number of what I call Type 4 reforms in the history of sentencing reform.<sup>21</sup> The removal of particular forms of punishment regarded as too harsh—death, whipping, life without possibility of parole—are one group of Type 4 reforms. Type 4 reforms also include requiring punishments that are not grossly disproportionate to the offender’s culpability.

But are there real-world examples of Type 3 reforms, where a substantive change in the punishments available in the law is the method of reform and yet the objective of the reform is procedural? Probably yes. The U.S. Supreme Court decision in *Furman v. Georgia* prohibited death sentences in 35 states that gave the power to juries without standards to govern the choice.<sup>22</sup> To remove the problematic procedures, the possibility of the death sentence was eliminated.<sup>23</sup> If this characterization of *Furman* rationale is accepted, then the majority rule would constitute a Type 3 reform.<sup>24</sup> But if the real motive of those who joined the majority was eliminating the death penalty, then both the means and the ends of decision would be substantive and *Furman* would be a Type 4 reform.<sup>25</sup>

A similar issue was generated by the condemned prisoner’s argument before the Supreme Court in *McGautha v. California* in 1970.<sup>26</sup> The prisoner argued that jury discretion to choose between prison and death was fundamentally lawless, and sought to remedy the procedural problem by eliminating the possible choice of death.<sup>27</sup> But the clear motive of those pressing the argument was eliminating the death penalty, so from their perspective, the attempt was a Type 4 reform.<sup>28</sup>

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20. *Id.* at 3–4.

21. Andrew H. Malcolm, *More and More, Prison is America’s Answer to Crime*, N.Y. TIMES (Nov. 26, 1989), <http://www.nytimes.com/1989/11/26/weekinreview/the-nation-more-and-more-prison-is-america-s-answer-to-crime.html> (on file with the *McGeorge Law Review*); See generally Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 68 (1992) (discussing the evolution of proportionality in criminal punishment over time).

22. *Furman v. Georgia*, 408 U.S. 238, 239–240 (1972).

23. *Id.*

24. See *id.* at 257 (Douglas, J., concurring) (finding that the statutes allowing complete jury discretion in death penalty sentencing to be “unconstitutional in their operation” but leaving open the possibility of mandatory death penalty sentences). Each of the Justices forming the majority wrote their own concurring opinion. Two justices joined on the procedural basis that the discretion afforded to the jury was unconstitutional, two justices felt that the death penalty as a whole was “cruel and unusual punishment,” and Douglas’ concurring opinion is on the fence. *Id.* at 291.

25. See *id.* at 291 (Brennan, J., concurring) (“I would not hesitate to hold . . . that death is today a ‘cruel and unusual’ punishment, were it not that death is a punishment of longstanding usage and acceptance in this country”).

26. *McGautha v. California*, 402 U.S. 183, 185 (1971).

27. *Id.* at 196.

28. See *id.* Although the prisoners were arguing against the procedural aspects of capital punishment sentencing, namely the complete discretion afforded to juries in imposing such sentences, the procedure argued against was so jurisdictionally widespread that the argument was one against the death penalty on the whole. *Id.* at 203.

## I. THE CLASSIFICATION OF DISPARITY REDUCTIONS

One frequent objective of changes in sentencing procedure is to reduce the extent to which similar crimes and offenders receive different criminal punishments.<sup>29</sup> The reduction of disparate punishments was a prominent objective of the creation of federal and state sentencing commissions,<sup>30</sup> of appellate review of sentencing,<sup>31</sup> and of devices like parole guidelines.<sup>32</sup> Is the reduction of disparity better regarded as a procedural or a substantive objective? In its pure form, that is to say, as an attempt to reduce only the variance in punishments but not the total or average penalty, I would characterize the objective of disparity reduction as a procedural rather than substantive goal, but the issue has no obviously correct solution.

## II. A TALE OF TWO CALIFORNIA “REALIGNMENTS”

The recent history of incarceration policy in California provides two case studies in why the correct classification of the goals of sentencing reform is necessary, and also why it is frequently difficult.

The most famous shift in correctional policy in California is also the most recent.<sup>33</sup> Faced with a federal court demand to reduce crowding in the state prisons, the executive branch of California government designed a program in 2011 to shift persons who had been previously committed for nonviolent felonies and parolees who had previously been returned to the state prisons to the jurisdiction and the facilities of county governments.<sup>34</sup>

While the prisoners and attorneys who brought the original lawsuit desired both better conditions of confinement in all custodial settings and reduction in levels of confinement,<sup>35</sup> neither of these goals were an explicit statewide element

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29. Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550 (1978).

30. See e.g., 28 U.S.C. § 991 (2012) (“The purposes of the United States Sentencing Commission are to establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . .”).

31. Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 4–5 (2008).

32. Dhammika Dharmapala et. al, *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1040, 1044 (2010).

33. DEAN MISCZYNSKI, PUB. POL’Y INST. OF CAL, RETHINKING THE STATE-LOCAL RELATIONSHIP: CORRECTIONS 5 (Aug. 2011), available at [http://www.ppic.org/content/pubs/report/R\\_811DMR.pdf](http://www.ppic.org/content/pubs/report/R_811DMR.pdf) (on file with the *McGeorge Law Review*); *Coleman v. Schwarzenegger*, No. Civ. S-90-0520 LKK JFM P, 2010 WL 99000, at \*4 (E.D. & N.D. Cal. 2010).

34. MISCZYNSKI, *supra* note 33, at 5.

35. See *Coleman*, 2010 WL 99000, at \*1–2 (E.D. & N.D. Cal. 2010).

in the realignment plan.<sup>36</sup> Instead, the plan proponents advertised it as an attempt to reduce the population of the state facilities by shifting responsibilities to local levels of government.<sup>37</sup> If this is taken at face value, is it an attempt to change the setting for confinement, but not the terms of confinement served by individual offenders nor the aggregate number of persons behind bars in the state. This would seem to be what Table 1 would call a “Type 1” reform, where procedures are the means of change and where the objectives of the reform are also procedural. One cannot even argue that the objective of the reform is to improve the conditions of confinement for all incarcerated offenders, since only crowding and conditions in the state level facilities were prioritized in the state plan.<sup>38</sup>

There were, however, two aspects of the design of the adult system realignment that are consistent with a theory that those who designed the program anticipated and probably desired a reduction in overall levels of secure confinement in California.<sup>39</sup> While local governments were given additional responsibility for offenders previously incarcerated in state prisons, the counties were not required to hold these offenders in secure confinement and the financial support the state provides under the program gives counties some incentive to pocket the money rather than expand their facilities and lengthen stays.<sup>40</sup> So while the program was announced as a Type 1 reform, it may well have been designed as a Type 2 reform, where lower total combined populations were anticipated and desired. Clearly, one major issue in measuring the impact of the prison realignment program will be its effect on total confinement, and this will require a detailed profile of the mix of types and lengths of confinement for felons, parole failures, and misdemeanants in California’s prisons and jails.<sup>41</sup>

The mixed signals and ambiguous incentives of the 2011 program make it hazardous to paste a clear Type 1 or Type 2 label on the statewide program. It is

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36. See CAL. PENAL CODE § 1230.1 (enacted by 2011-12 Stat. Ch. 15) (requiring counties to submit a realignment plan that addresses various programs but does not specifically address prison conditions).

37. *Id.*

38. CAL. BUDGET PROJECT, STEADY CLIMB: STATE CORRECTIONS SPENDING IN CALIFORNIA 1, 2 (Sept. 2011), available at [http://www.cbpp.org/pdfs/2011/110914\\_Corrections\\_Spending\\_BB.pdf](http://www.cbpp.org/pdfs/2011/110914_Corrections_Spending_BB.pdf). But see CAL. PENAL CODE § 17.5(b) (enacted by 2011-12 Stat. Ch. 15) (stating that provisions to reduce recidivism “are not intended to alleviate state prison overcrowding”).

39. See CAL. PENAL CODE § 17.5(a)(2) (enacted by 2011-12 Stat. Ch. 15) (finding that despite increased prison spending, reincarnation rates increased); CAL. PENAL CODE § 17.5(a)(3) (enacted by 2011-12 Stat. Ch. 15) (stating that policies to build more prisons will not provide better public safety).

40. CAL. PENAL CODE § 4016.5(a)(2) (amended by 2011-12 Stat. Ch. 15)

41. See CAL. DEP’T OF CORR. & REHAB., FACT SHEET: 2011 PUBLIC SAFETY REALIGNMENT: THE CORNERSTONE OF CALIFORNIA’S SOLUTION TO REDUCE PRISON OVERCROWDING, COSTS AND RECIDIVISM 3 (Dec. 19, 2013), available at <http://www.cdcr.ca.gov/realignment/docs/realignment-fact-sheet.pdf> (on file with the *McGeorge Law Review*) (determining which prisoners would be sent to county jail and which would not based on their sentenced offenses). See also MAGNUS LOFSTROM, ET AL., EVALUATING THE EFFECTS OF CALIFORNIA’S CORRECTIONS ON REALIGNMENT PUBLIC SAFETY, PUB. POL’Y INST. OF CAL. 10–11 (Aug. 2012), available at [http://www.ppic.org/content/pubs/report/R\\_812MLR.pdf](http://www.ppic.org/content/pubs/report/R_812MLR.pdf) (on file with the *McGeorge Law Review*) (assessing realignment’s impact on county jail populations by looking at length of time inmates are kept in county jails).

likely that different counties will produce different patterns of how much increased custody at the county level offsets the net reduction in the county's state prisoners. So the effective level of government for determining whether the program is best viewed as a Type 1 or Type 2 reform might well be the county level.

It is too early to provide anything but projections on the impact of realignment on total incarceration.

Petersilia and Snyder comment on the current projections in a 2013 analysis:

... will we simply have substituted jail for prisons? According to CDCR, the prison population is projected to level out at around 128,000 by June 2013, reaching 131,000 by 2018. The jail population is now at about 78,000 inmates and is projected to reach 108,000 by 2017 ... the total population for prison and jail combined is projected to increase to 231,756 by 2015. This is nearly the same number of offenders in prison and jail in June 2010, right before realignment passed.<sup>42</sup>

#### A. *The Juvenile Realignment of 1996*

The second California “realignment” is less well known but is also an important reform.<sup>43</sup> While there are substantial similarities between the state's 2011 adult realignment and the legal and financial strategies used 15 years earlier to alter patterns of juvenile incarceration,<sup>44</sup> the juvenile program was both designed and intended to reduce the secure confinement of juvenile offenders statewide.<sup>45</sup> Prior to 1996, the juvenile courts in California counties had short-term custodial facilities to detain juveniles either before or after adjudication and usually also “camps” or other secure residential facilities for post-adjudication confinement.<sup>46</sup> The duration of a juvenile's stay in these county facilities was under the control of county government, either judges or probation staff. A juvenile court judge could also commit an adjudicated delinquent to the California Youth Authority (CYA), a state government agency that maintained secure facilities and also determined how long a committed offender would stay

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42. Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype: Ten Questions Everyone Should Ask about California Prison Realignment*, 5 CAL. J. OF POLITICS & POL'Y 266, 305–306 (2013).

43. BARRY KRISBERG, ET AL., BERKELEY CTR. FOR CRIMINAL JUSTICE, A NEW ERA IN CALIFORNIA JUVENILE JUSTICE: DOWNSIZING THE STATE YOUTH CORRECTIONS SYSTEM 2, (Oct. 2010), available at [http://www.law.berkeley.edu/files/bccj/New\\_Era.pdf](http://www.law.berkeley.edu/files/bccj/New_Era.pdf) (on file with the *McGeorge Law Review*).

44. *Compare* 2011 Realignment Legislation Addressing Public Safety, § 636, 5 Stat. 327 (2011-12) (stating there must be a “community corrections grant program to help implement the act”), with CAL. WELF. & INST. CODE § 912 (amended by 1996 Stat. Ch. 6) (requiring counties to pay per juvenile incarcerated with the Department of Youth Authority).

45. See Krisberg, et al., *supra* note 43, at 12.

46. DAVID STEINHART & JEFFREY A. BUTTS, URBAN INST. JUSTICE POL'Y CTR., YOUTH CORRECTIONS IN CALIFORNIA 2 (2002), available at [http://www.urban.org/UploadedPDF/410529\\_cayouthcorrections.Pdf?q=costeffective-youth-corrections](http://www.urban.org/UploadedPDF/410529_cayouthcorrections.Pdf?q=costeffective-youth-corrections) (on file with the *McGeorge Law Review*).

before release.<sup>47</sup> The terms of confinement in the California Youth Authority were much longer than stays in county facilities, and there were no major financial disincentives to high rates of CYA commitment prior to 1996.<sup>48</sup>

The 1996 realignment was an attempt to shift correctional responsibility from state level to county level facilities and also to reduce total juvenile confinement.<sup>49</sup> The mix of financial carrots and sticks in the juvenile realignment was a visible attempt to reduce incarceration.<sup>50</sup> Counties that sent non-dangerous offenders to the CYA had to pay for this policy, while county efforts to find both custodial and noncustodial programs in-county were eligible for state financial assistance.<sup>51</sup> While the shift from state to county responsibility in the 2011 realignment could be advertised as neutral on the issue of total custodial confinement in the state, the juvenile realignment was clearly focused on reducing the number of juveniles confined and the length of their confinement.<sup>52</sup> So this was a textbook case of Type 2 sentencing reform, changing the financial consequences of state and local custody in an attempt to reduce incarceration.<sup>53</sup>

The impact of the 1996 and subsequent efforts in the juvenile system was dramatic.<sup>54</sup> The number of persons confined in the California Youth Authority fell by over 90% in 15 years, from slightly more than 10,000 to fewer than 800.<sup>55</sup> And this massive shift away from the CYA did not have any visible impact on county-level custodial confinement.<sup>56</sup>

Figure 1 shows the decline in CYA population, an aggregate total of 9,000.<sup>57</sup> Figure 2 shows levels of county-level custody and this is stable in the aggregate.<sup>58</sup> Both figures are taken from Aurélie Ouss' draft *Financing Structures and Criminal Justice Organization*, where they were Figures 7 and 6 respectively.<sup>59</sup>

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47. *Id.* at 15.

48. KRISBERG, ET AL., *supra* note 43, at 6–7

49. JEFFREY A. BUTTS & DOUGLAS N. EVANS, JOHN JAY COLL. OF CRIMINAL JUSTICE, CITY UNIV. OF N.Y., RESOLUTION, REINVESTMENT, AND REALIGNMENT: THREE STRATEGIES FOR CHANGING JUVENILE JUSTICE 22 (2011).

50. KRISBERG, ET AL., *supra* note 43, at 12.

51. *Id.*

52. BUTTS & EVANS, *supra* note 49, at 22.

53. *See supra* Part I for a definition of Type 2 Reform. In this case, financial incentives and disincentives were used to spur sentencing of juvenile offenders at the shorter-term local level. *See supra* text accompanying note 51.

54. KRISBERG, ET AL., *supra* note 43, at 17.

55. *Id.* at 6.

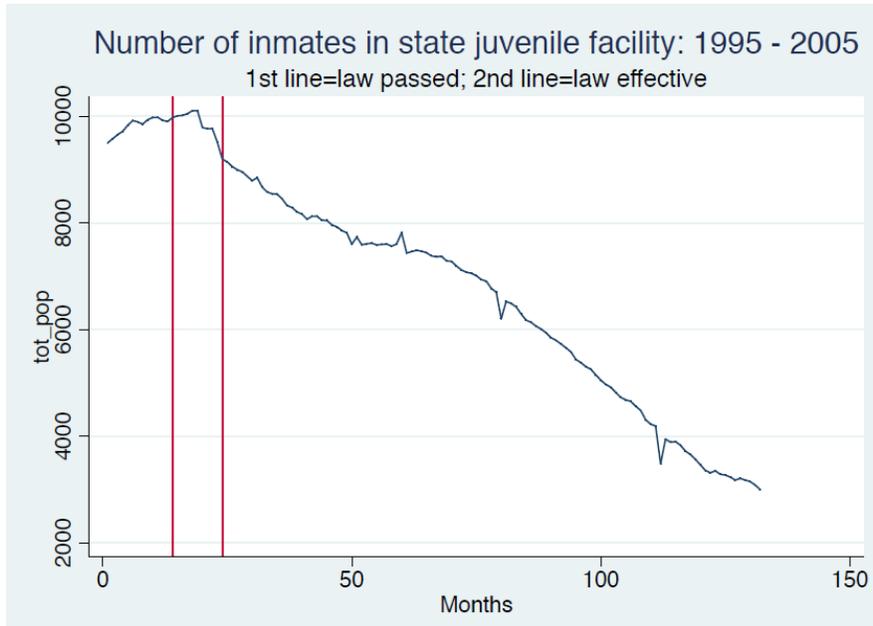
56. *Id.* at 17.

57. Aurélie Ouss, *Financing Structures and Criminal Justice Organization* 24 (Feb. 2014) (unpublished manuscript) (on file with *McGeorge Law Review*).

58. *Id.*

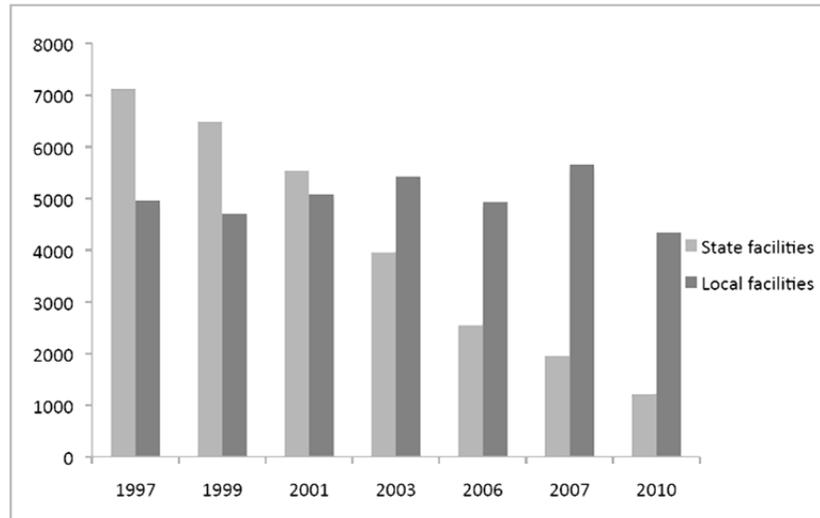
59. *Id.*

**Figure 1. Number of Inmates in California's State Juvenile Facilities, 1995–2005.**



*Source: Monthly reports of number of inmates in California juvenile facilities; from Ouss, 2014.*

**Figure 2. One-Day Count of Juveniles in State and Local Facilities, 1997–2010.**



*Source: Census of Juveniles in Residential Placement; from Ouss, 2014.*

Does this mean the entire reduction in CYA population was translated into a net reduction in statewide confinement?

Not quite. First, after the turn of the 21<sup>st</sup> century there was a national reduction in rates of juvenile confinement,<sup>60</sup> so that the relatively stable county level numbers from California might have been declines but for the population absorbed from the CYA. Second, the aggregate county-level commitments reported statewide in Figure 2 might be masking real differences in different counties.<sup>61</sup> It is unlikely that there are counties in California that maintained their pre-1996 levels of total commitment, but there are probably very substantial differences between counties in the extent of total declines.

The radical downsizing of the CYA is a clear example of Type 2 reforms with statewide impact, but the detailed assessment of the extent of changes in different types of county facilities awaits more detailed study.

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60. BUTTS & EVANS, *supra* note 49, at 2.

61. Compare VENTURA COUNTY GRAND JURY, FINAL REPORT, THE JUVENILE JUSTICE SYSTEM OF VENTURA CNTY. 125, 127 (1997), available at [http://vcportal.ventura.org/GDJ/docs/reports/1997-98/report\\_ljps\\_juvenileJusticeSystem.pdf](http://vcportal.ventura.org/GDJ/docs/reports/1997-98/report_ljps_juvenileJusticeSystem.pdf) (on file with the *McGeorge Law Review*), with ORANGE CNTY. PROB. DEP'T, DEPARTMENTAL MEMO ON JUVENILE DET. 2 (2009), available at [www.cpoc.org/assets/General/jdaiocprob.doc](http://www.cpoc.org/assets/General/jdaiocprob.doc) (on file with the *McGeorge Law Review*) (reporting an 18% drop in the Juvenile Hall detention rate and closure of two units in Juvenile Hall but a two times increase in the number of juveniles monitored under home supervision).

### III. FOUR LESSONS FROM TWO CASE STUDIES

What can California's recent adventures teach us about how to evaluate sentencing reform? Here are four lessons:

1. The aims of sentencing reform are not always obvious and not universally shared by all who support the change. The most recent change in California was eventually supported by a mix of advocates, some of whom wished to reduce incarceration and many of whom did not.<sup>62</sup> This is far from the only instance of mixed motives in sentencing reform and should be anticipated in any evaluation of effects.<sup>63</sup> No evaluation of any sentencing reform can be adequate under these circumstances without careful analysis of the impact on the amount of incarceration and how it is distributed.

2. Intergovernmental distributions of authority are an important and neglected aspect of how problems arise in punishment policy and how they can be resolved. The economic and power relations between state and county governments were an important reason why prison overcrowding was uncontrolled in California and an important aspect of the design of a remedy.<sup>64</sup> For decades, California criminal justice was the home of what I called "the correctional free lunch." The central government paid 100% of the cost of prisons, but county level government officials, prosecutors, and judges, had almost total power to decide who went to prison and how long they stayed.<sup>65</sup> Prior to the determinate sentencing reforms of the mid-1970s, the central government did have power to determine when prisoners were to be released, but this was eliminated for the new determined terms, which were determined by county prosecutors and judges.<sup>66</sup> Since the additional years in prison did not cost the counties anything, there was no incentive for them to reduce

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62. *Compare What We Do*, NAT'L INST. ON CRIME & DELINQUENCY, <http://www.nccdglobal.org/what-we-do/major-projects/california-realignment-partnership> (last visited Apr. 23, 2015) (on file with the *McGeorge Law Review*) (discussing goals to reduce prison populations), with Heather MacDonald, *California's Prison-Litigation Nightmare*, CITY J. (Autumn 2013), available at [http://www.city-journal.org/2013/23\\_4\\_california-prisons.html](http://www.city-journal.org/2013/23_4_california-prisons.html) (on file with the *McGeorge Law Review*) (discussing why prisoners should not be released).

63. See, e.g., *id.*

64. See JASMINE L. TYLER, ET AL., COST EFFECTIVE YOUTH CORRECTION: RATIONALIZING THE FISCAL ARCHITECTURE OF JUVENILE JUSTICE SYSTEMS, JUSTICE POL'Y INST., 8 (2006), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03\\_rep\\_costeffective\\_jj.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03_rep_costeffective_jj.pdf) (reporting that when state levels of incarcerated juveniles peaked, the solution was to reduce the number of inmates counties sent to state facilities).

65. See, e.g., KRISBERG ET AL., *supra* note 43, at 5.

66. Cf. DAVID STEINHART AND JEFFREY A. BUTTS, URBAN INST. JUSTICE POL'Y CTR., YOUTH CORRECTIONS IN CALIFORNIA 15 (2002), available at [http://www.urban.org/uploadedpdf/410529\\_cayouth\\_corrections.pdf](http://www.urban.org/uploadedpdf/410529_cayouth_corrections.pdf) (on file with the *McGeorge Law Review*).

imprisonment. And the central government was almost helpless to control either the number of persons sent to prison or the length of time they served when determinate sentences were used.<sup>67</sup>

When population reduction became necessary in 2011, the state government created new county responsibilities for nonviolent offenders and many parole violators and paid the counties to accept these responsibilities.<sup>68</sup> What impact these funds will have on aggregate incarceration at all levels of government has yet to be determined.

The financial strategy used in 1996 to reduce CYA commitments was to create a monetary price the committing county would have to pay for many types of juvenile offenders.<sup>69</sup> And the impact of this on CYA commitments was substantial.<sup>70</sup> Because terms of confinement in the CYA were much longer than in county facilities, the impact of these charges on total confinement of youth was also substantial.

3. Money talks in intergovernmental relations. The CYA story strongly suggests that the demand of county government for state confinement is highly elastic. When long terms in the CYA were a free good, the counties sent large numbers of offenders to the CYA.<sup>71</sup> When a price was charged demand went down to a small fraction of prior levels.<sup>72</sup> That imposing costs reduces the demand for CYA is no surprise, but the extent to which imposing a price reduced commitments is an important and not obvious lesson in the political economy of punishment. If putting a price on commitment can reduce the CYA population by more than 90%, it is probably not wise to imagine that demand for punishment is relatively fixed and difficult to modify.

4. There is substantial overlap between the factors and incentives that determine the amount and distribution of penal confinement and the incentives and power relations that influence many other public goods.<sup>73</sup> For all the ways that criminal punishment stands apart from the other

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67. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 170 (1991) (finding that the “decline of indeterminacy” meant that parole boards could not reduce sentences as a way to control prison populations); FRANKLIN E. ZIMRING & GORDON HAWKINS, *PRISON POPULATION AND CRIMINAL JUSTICE POLICY IN CALIFORNIA* 10 (1992) (surmising that California officials’ late responses to pressures that increase prison populations lead to a sharp growth in prisoners incarcerated in state facilities).

68. CAL. BUDGET PROJECT, *STEADY CLIMB: STATE CORRECTIONS SPENDING IN CALIFORNIA* 1 (Sept. 2011), available at [http://www.cbj.org/pdfs/2011/110914\\_Corrections\\_Spending\\_BB.pdf](http://www.cbj.org/pdfs/2011/110914_Corrections_Spending_BB.pdf) (on file with the *McGeorge Law Review*).

69. Ouss, *supra* note 57, at 6–7.

70. *Id.* at 21.

71. *Id.* at 16.

72. *Id.* at 21.

73. *Id.* at 4.

goods and services provided by government, the variables that change governmental behavior and the magnitude of changes that can be produced seem to be in the normal range for public goods.

