

Foreword

*Kamala D. Harris**

I am honored to introduce this volume of the *Harvard Law & Policy Review*, the subject of which is *Smart on Crime*. The contributors to this volume explore innovative legal and policy solutions to the criminal justice problems facing our nation. Among the issues addressed are white-collar crime, national security and cybercrime, the legalization of marijuana, and the realignment of California's prisons and jails. While the subject matter is diverse, each author approaches his or her respective topic from a fresh perspective and applies that perspective to see how the criminal justice system could be improved.

As a daughter of a scientist, I believe that a scientific approach—one in which decision-making is informed by testing hypotheses and analyzing causes and effects—can open our eyes to new ways of thinking. I am also a former student of economics at Howard University, and therefore believe the theories of supply and demand, investment and return, and productive efficiency can—and should—be applied to our criminal justice system. We live in a nation that spends more than \$260 billion¹ each year responding to crime—more than any other country in the world. In this time of limited economic resources, it is imperative that we ask ourselves whether this enormous investment in public safety is delivering a sufficient return. By many measures, the answer to that question is “no.” One such measure is recidivism.²

The sad truth is that 43% of offenders released from our nation's prisons and jails are reincarcerated within three years.³ In California, where spending on adult and juvenile corrections totaled \$5 billion in 2010–11⁴ and law enforcement spending tops \$14 billion each year,⁵ the figure is a staggering

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¹ Iniami M. Chettiar, *A Funding Model to Tip the Scales of Justice: Success Oriented Funding*, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCH. L. (March 3, 2014), <http://www.brennancenter.org/analysis/funding-model-tip-scales-justice-success-oriented-funding>.

² The definition of recidivism varies, but the California Department of Corrections and Rehabilitation measures recidivism by including convicted and incarcerated felons who subsequently return to prison after a discharge period. See CAL. DEP'T OF CORR. & REHAB., 2013 OUTCOME EVALUATION REPORT, v (2014).

³ PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 9 (2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolutioning_Door_America_Prisons%20.pdf.

⁴ MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S CRIMINAL JUSTICE SYSTEM: A PRIMER, 41 (2013), available at <http://www.lao.ca.gov/reports/2013/crim/criminal-justice-primer/criminal-justice-primer-011713.pdf>.

⁵ *Id.* at 28.

61%.⁶ From my perspective as a career prosecutor and currently as the “top cop” in the nation’s largest state, that means our criminal justice system is failing us—not just the law enforcement community, but society as a whole—six out of every ten times.

For police officers, prosecutors, public defenders, judges, and jailers, recidivism is a frustrating, yet almost universally accepted, reality. The cycle is all too familiar: arrest, convict, incarcerate, release, and repeat. However, repeat offenders are far more than an occupational nuisance for those charged with upholding the law. Recidivism drains our public coffers of the already scant resources we need to protect victims and serve our communities. In California alone, a 10% reduction in recidivism would result in \$233 million in annual savings.⁷ That is to say nothing of the societal toll that recidivism exacts. With each stay in jail or prison, offenders become more skilled and more hardened criminals, with many eventually graduating to more serious offenses.⁸ As a result, our communities are not made any safer, and victims of crime receive little reassurance that the injustices visited upon them will not be repeated. Meanwhile, the families of offenders participating in this cycle of criminal activity and reincarceration are directly impacted by the loss of a spouse, a parental figure, a caretaker, or a breadwinner.

The issues plaguing California’s criminal justice system—specifically, our prisons—came into sharp focus in 2011 with the United States Supreme Court’s ruling in *Brown v. Plata*. There, the Supreme Court affirmed a lower court ruling that overcrowding was the primary cause of unconstitutional medical and mental-health care in the prisons and required that California decrease the number of inmates in the state’s thirty-three prisons to 137.5% of original design capacity.⁹ In other words, the State was forced to reduce its in-state adult prison population from approximately 156,000 inmates to 110,000 inmates.¹⁰

In response to the Supreme Court’s order, the California legislature passed, and Governor Edmund G. Brown signed, the Public Safety Realignment Act (AB 109). AB 109 transferred principal responsibility for monitoring and incarcerating non-violent offenders from the state to counties.¹¹ Under realignment, newly convicted low-level offenders without current or prior serious or violent offenses serve their sentences in county jail rather than state prison.¹² AB 109 also provided counties with a dedicated revenue stream to handle this increased burden.¹³

⁶ CAL. DEP’T OF CORR. & REHAB., 2013 OUTCOME EVALUATION REPORT, vi (2014).

⁷ PEW CTR. ON THE STATES, *supra* note 3, at 26.

⁸ See KATRI K. SIEBERG, CRIMINAL DILEMMAS: UNDERSTANDING AND PREVENTING CRIME 10 (C.D. Aliprantis, 2001).

⁹ See *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011).

¹⁰ See *id.* at 1923.

¹¹ Public Safety Realignment Act of 2011, ch. 15, A.B. 109, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

¹² *Id.*

¹³ *Id.*

Realignment has presented significant challenges to counties, whose already strained jails have been forced to accommodate thousands more offenders. But it has also created opportunities—most notably in the areas of combating recidivism and facilitating re-entry. The impact of realignment is explored in this Volume by Joan Petersilia in *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*. Professor Petersilia looks at realignment from the perspective of a wide range of stakeholders, including district attorneys, public defenders, judges, probation officers, police, and victims. In her conclusion, she urges that we give “serious thought to how communities will deal with all the offenders who are released.”¹⁴

Professor Petersilia’s article is a reminder that the status quo is falling short of many of our goals for public safety. The good news is that there is something we—policymakers, academics, law enforcement professionals, and community members—can do about it. There are innovative, pioneering approaches to criminal justice that have proven to be successful in short-circuiting the criminal careers of offenders at the early stages and increasing their chances of becoming productive members of society.

I have long argued that public safety has little to do with the false dichotomy of being “tough” or “soft” on crime, and everything to do with being *smart on crime*. This requires exposing and discarding the irrational beliefs that have bound us to an ineffective, inefficient criminal justice agenda that does little to deter crime—and in some cases, fosters it. One such belief is that all crime is monolithic, which is a persistent and harmful myth.

To understand the “smart on crime” approach, it helps to think of the sprawling universe of criminal offenses as a pyramid. At the top of the pyramid are the most heinous crimes—the murders, rapes, and violent assaults. These offenses are at the top of our pyramid not just because of the severity of the damage the perpetrators inflict upon their victims, but because they constitute the minority of all crimes committed.¹⁵ Over the course of my career, I have prosecuted many of these offenders, some of them so abhorrent that my first and only priority was to remove them from free society for a long time—sometimes, forever.

While most people imagine top-of-the-pyramid behavior when they think of the word “crime,” it is the non-serious, nonviolent, and non-sexual offenses—known in California as “triple-nons”—that make up the majority of crimes committed in the United States each year.¹⁶ Only a quarter of all those admitted to federal prison, for example, are violent offenders.¹⁷ In

¹⁴ Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL’Y REV. 831 (2014).

¹⁵ See *Crime in the United States 2012*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatacoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls (last visited Apr. 27, 2014).

¹⁶ *Id.*

¹⁷ See SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1 (2006), available at http://www.sentencingproject.org/doc/publications/sl_fedprisonpop-

California, three-quarters of all felony arrests are for nonviolent offenses.¹⁸ It is these non-violent, non-serious offenses—and the outdated, misguided way in which our criminal justice system handles them—that are eating away at the resources needed to fight more serious crimes.

Let me be clear: I am not suggesting that because these offenses are less serious, they are less important. There must be consequences and accountability for all crimes. Nonviolent crime can have a devastating impact, both economic and societal, and it must be addressed swiftly and surely. There must be accountability for breaking the law, but these offenses must be addressed *effectively*. Being smart on crime means using the resources we spend on offenders more productively to reduce the odds of reoffending. Nonviolent offenders frequently have little in the way of job skills or education,¹⁹ suffer from mental illness,²⁰ or struggle with addiction.²¹ While the odds are stacked against them, one thing is certain: they will eventually be released from jail or prison.²² Our society has a profound stake in working to make sure that the perpetrators of nonviolent crime do not escalate their criminal behavior. Otherwise, we are simply perpetuating the never-ending cycle of prison terms and releases.

As District Attorney of San Francisco, I took my role as guardian of public safety very seriously, starting with a determined focus on the prosecution of violent criminals. In fact, I made improving felony conviction rates my highest priority. From 2003 to 2008, our felony conviction rates increased from 52 to 71%, we more than doubled conviction rates for gun crimes to over 92%,²³ and we created units to address child sexual assaults and public integrity crimes.

But my approach to San Francisco's crime problem was not one-dimensional. I knew from experience that when it comes to first-time, non-violent offenders, a "one size fits all" approach only makes things worse, at an enormous financial and societal cost. I was also aware of innovative programs across the country that successfully addressed the practical realities of recidivism and produced better outcomes. Some of these programs, like the

ulation.pdf ("Overall, nearly three-fourths (72.1%) of the population are non-violent offenders with no history of violence.").

¹⁸ See MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S CRIMINAL JUSTICE SYSTEM: A PRIMER 24 (2013), available at <http://www.lao.ca.gov/reports/2013/crim/criminal-justice-primer/criminal-justice-primer-011713.pdf>.

¹⁹ See CAL. DEP'T OF JUSTICE, IN SCHOOL AND ON TRACK: ATTORNEY GENERAL'S 2013 REPORT ON CALIFORNIA'S ELEMENTARY SCHOOL TRUANCY AND ABSENTEEISM CRISIS 7 (2013), available at https://oag.ca.gov/sites/all/files/agweb/pdfs/tr/truancy_2013.pdf.

²⁰ See DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006) ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem.").

²¹ See CASACOLUMBIA, BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 1 (2010), available at <http://www.casacolumbia.org/addiction-research/reports/substance-abuse-prison-system-2010> ("65% [of inmates]—1.5 million—meet the DSM-IV medical criteria for alcohol or other drug abuse and addiction.").

²² See generally JEREMY TRAVIS, BUT THEY ALL COME BACK RETHINKING PRISONER RE-ENTRY (2005).

²³ See KAMALA D. HARRIS, SMART ON CRIME 41 (2009).

pioneering “Drug Treatment Alternative-to-Prison” (DTAP) initiative implemented by the Kings County, New York District Attorney’s Office in 1990, focus on treatment diversion for drug-addicted offenders.²⁴ Other programs, recognizing that crime is often a last resort for those with little in the way of education or job skills, focus on vocational training and partnerships with labor and business. All share the basic precept that in order to increase public safety, we must address the unacceptably high rates of recidivism plaguing our communities.

It was with this in mind that, during my tenure as DA, my office established Back on Track, a prosecutor-led, comprehensive re-entry initiative for first-time, nonviolent offenders. The participants—low-level dealers who had not crossed over into violent crime—served a probationary period, during which they performed 100 to 200 hours of community service. If successful, they pled guilty to their crime, and their sentencing was deferred for a year. During that period, they were required to appear before a judge every two weeks and, if necessary, undergo drug testing. They received educational opportunities such as G.E.D. classes, life-skills workshops—including parenting classes—and access to apprenticeship programs and job training. Since active employment is a critical ingredient of re-entry efforts, the program partnered with the San Francisco Chamber of Commerce, businesses, and labor unions to provide participants with specific job training and pre-apprenticeship programs.

Back on Track was not developed out of sympathy or pity for offenders but to prevent participants from continuing their criminal behavior and escalating the severity of their offenses. More than anything else, Back on Track was designed to protect the communities into which these low level offenders were being released. And it was successful: the re-offense rate for Back on Track participants was 10%, compared with 50% for all other similar types of offenders.²⁵ The county received financial benefits as well: taxpayer savings for local jail costs alone were estimated at \$1 million per year.²⁶ When taking into account the added expenses of police costs, court costs, and what might otherwise be state prison time, the savings approached \$100,000 per participant.²⁷ It cost \$43,000 to warehouse an offender in county jail for a year, while Back on Track cost less than \$5000 per participant.²⁸

Using lessons learned from Back on Track, I have continued my efforts to fight recidivism at the statewide level. In November 2013, my office created and launched the Division of Recidivism Reduction and Re-Entry (DR3), a new division within the California Department of Justice. The pri-

²⁴ See CASACOLUMBIA, CROSSING THE BRIDGE: AN EVALUATION OF THE DRUG TREATMENT ALTERNATIVE-TO-PRISON (DTAP) PROGRAM 3 (2003), available at <http://www.casacolumbia.org/addiction-research/reports/crossing-bridge-evaluation-drug-treatment-alternative-prison-dtap-program> (click “Download This Report”).

²⁵ HARRIS, *supra* note 23, at 46.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

mary objective of DR3 is to help district attorneys and counties implement effective alternatives to incarceration, such as diversion, split-sentencing, and community-based solutions.²⁹ The division will also identify resources to support county recidivism reduction and re-entry efforts, as well as promote the use of data technology and analysis to measure success and identify best practices. This is part of a broader effort by my office to ensure that government adopts the latest technology in ways that will make law enforcement more efficient and effective at protecting the public. It is my intention that DR3 will play a significant role in reducing crime and easing the burden on California's strained jail and prison system.

As evidenced by the success of many anti-recidivism efforts, being smart on crime means moving beyond one-dimensional solutions for three-dimensional problems and exploring the root causes of crime to determine how we can best tackle them. While the early stages of an individual's criminal career are a reasonable place to begin intervention, a truly innovative approach to crime fighting would look back even further—as far back as early childhood.

With this in mind, in September 2013, my office released the first annual report on elementary school truancy in California: *In School and On Track*.³⁰ The data is bleak: almost one million elementary school students in California were truant in the 2011–12 school year. Of those students, 250,000 missed 10% or more of the school year. These children—who are as young as five years old—are already falling behind and being edged further away from the social skills and responsibilities that lay the foundation for a productive life. Indeed, multiple studies show that truant elementary students are far less likely to graduate from high school.³¹ In one study from Maryland, first graders with nine or more absences were twice as likely to drop out of high school than peers with better attendance records.³²

²⁹ Kamala D. Harris, Attorney Gen., *Attorney General Kamala D. Harris Launches Initiative to Reduce Recidivism in California* (Nov. 20, 2013), <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-launches-initiative-reduce-recidivism>.

³⁰ CAL. DEP'T OF JUSTICE, *supra* note 19, at 1 (In California, truancy is defined as follows: “[A] student is truant if he/she is absent or tardy by more than 30 minutes without a valid excuse on 3 occasions in a school year.”).

³¹ See HEDY N. CHANG & MARIAJOSÉ ROMERO, NAT'L CTR. FOR CHILDREN IN POVERTY, *PRESENT, ENGAGED, AND ACCOUNTED FOR: THE CRITICAL IMPORTANCE OF ADDRESSING CHRONIC ABSENCE IN THE EARLY GRADES* (2008), available at http://www.nccp.org/publications/pdf/text_837.pdf; Byron L. Barrington & Bryan Hendricks, *Differentiating Characteristics of High School Graduates, Dropouts, and Nongraduates*, 89 J. EDUC. RES. 309–19 (1989) (dropouts could be predicted with 66% accuracy based on attendance records in the third grade); Suh-Ruu Ou & Arthur J. Reynolds, *Predictors of Educational Attainment in the Chicago Longitudinal Study*, 23 SCH. PSYCHOL. Q. 199 (2008) (each additional school day missed decreased a student's chance of graduating by 7% for elementary students who had already missed five days of school).

³² See THOMAS C. WEST, MONTGOMERY CNTY. PUB. SCH. DEP'T OF POLICY, RECORDS, & REPORTING, *JUST THE RIGHT MIX: IDENTIFYING POTENTIAL DROPOUTS IN MONTGOMERY COUNTY PUBLIC SCHOOLS USING AN EARLY WARNING INDICATORS APPROACH 8* (2013), available at http://montgomeryschoolsmd.org/departments/sharedaccountability/reports/2013/Just%20the%20Right%20Mix_MCPS_West2013.pdf.

The connection between truancy and crime is well documented. Experts have found that early investments in education can lead to increased high school graduation rates and a reduction in criminal activity later in life.³³ Nationwide, a disproportionate percentage of prisoners are high school dropouts, and risk of death or imprisonment by ages thirty to thirty-four nearly triples for men without a high school diploma.³⁴ It is a trajectory that police officers, prosecutors, teachers, and social workers across the country are all too familiar with: the chronically truant child becomes the young drug runner, who becomes the young gang member, who becomes the drive-by shooter. In fact, it is estimated that a 10% increase in graduation rates in males would decrease violent crime by about 20%.³⁵ Given that poor investment in early education helps lead to truancy in elementary school, which can trigger a pattern of delinquency in high school and an increased risk of criminal behavior, our failure to invest in the early education of our most at-risk children means that we begin building a school-to-prison pipeline as early as elementary school—and arguably earlier.

When I took office as District Attorney, San Francisco had one of the highest truancy rates in California. In a move that invoked a fair amount of skepticism, I made elementary school truancy one of my top priorities. My office sent a letter to every single San Francisco household with a child in public elementary school announcing that we would begin prosecuting the parents of truant students. But that was only one part of a more comprehensive effort that called upon the support of the entire community. While a few parents were not doing their part in ensuring that their children were in class, there were many more who simply needed help. We worked with our school district child welfare and attendance liaisons, as well as community and faith-based organizations, to provide wraparound services for parents having difficulty getting their children to school due to illness, transportation issues, or other barriers. We developed a partnership with the YMCA to create a Truancy Assessment and Resource Center (TARC)—a one-stop portal to make resources available to students and families from city agencies, departments, and other organizations. We also encouraged local businesses to support school attendance by providing incentives and awards to recognize student attendance. These efforts were successful—truancy dropped 32% in San Francisco public schools,³⁶ with some schools seeing as much as a 50% increase in attendance.³⁷

³³ See SENTENCING PROJECT, Policy Brief: Ending Mass Incarceration: Social Interventions That Work 1 (2013), available at http://www.sentencingproject.org/doc/publications/publications/inc_Ending%20Mass%20Incarceration.pdf.

³⁴ Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in US Incarceration*, 69 AM. SOC. REV. 151, 162 (2004).

³⁵ See BILL DEBAUN & MARTENS ROC, ALLIANCE FOR EXCELLENT EDUC., SAVING FUTURES, SAVING DOLLARS: THE IMPACT OF EDUCATION ON CRIME REDUCTION AND EARNINGS 5 (2013), available at <http://all4ed.org/wp-content/uploads/2013/09/SavingFutures.pdf>.

³⁶ HARRIS, *supra* note 23, at 135.

³⁷ *Id.* at 132.

As demonstrated above, combating elementary school truancy is going to require a coordinated, comprehensive effort that calls on the support of parents, teachers, school districts, social workers, and law enforcement. We can no longer afford to categorize truancy as only an educational issue; it is a public safety issue and should be treated as such. The economic impact is also devastating: California school districts lose \$1.4 billion each year by failing to get students to school, because school funding is based on student attendance rates. Factoring in the costs of incarceration, lost economic productivity, and tax revenues, dropouts cost California an estimated \$46 billion per year.³⁸

I have made it a priority to keep students in school and out of our criminal justice system. *In School and On Track* identified a number of recommendations to reduce truancy and absenteeism, including the use of technology on a local and statewide basis to facilitate record collection and analysis; the identification of early warning signs that serve as predictors for future truancy; and collaboration with local agencies and organizations to engage hard-to-reach students and families.

In order to support truancy reduction efforts, my office has been working with partners in the state Assembly and Senate to introduce legislation that will help local school districts and communities address California's elementary school truancy crisis. These bills are designed to help the state, counties, and school districts evaluate the success of truancy reduction programs and work with educators, parents, and community organizations to implement best practices. Recognizing that truancy is a key public safety issue, the bills also require the participation of a prosecutor on county school attendance review boards and call for information sharing between district attorneys' offices and the agencies from which truancy cases are referred.

Being smart on crime means taking a fresh eye to the evolving threats to public safety and welfare and asking ourselves how our justice system can address them, both efficiently and effectively. The articles in this Symposium do just that. In *National Security Whistleblower Protection in an Indefinite State of Emergency*, Harvard Law School Professor Yochai Benkler addresses whistleblowing and the prosecution of leaks in the context of national security and cybercrime. Benkler suggests the introduction of a public accountability defense that would protect sources "who inform the public of significant violations of human and civil rights" and similar matters.³⁹ The article makes observations about the ongoing national and global debate about the degree to which principles of transparency and public accountability are in tension with national security, and how we can resolve that tension.

In *Corporate Headhunting*, Daniel C. Richman, Professor at Columbia University Law School, writes about the challenges faced by the U.S. Justice Department in prosecuting white-collar crime—as well as the adequacy of

³⁸ CAL. DEP'T OF JUSTICE, *supra* note 19, at 23.

³⁹ Yochai Benkler, *National Security Whistleblower Protection in an Indefinite State of Emergency*, 8 HARV. L. & POL'Y REV. 345 (2014).

such prosecution—in the wake of the financial collapse of 2008. Richman warns against focusing solely on the prosecution of white-collar wrongdoers at the expense of larger “conversations about institutional design and regulatory enforcement policy.”⁴⁰ As the chief law enforcement officer of California, I have pursued a two-pronged approach of individual accountability (through enforcement) along with systemic reform (through legislation) for those who prey on our most vulnerable citizens. In 2012, my office secured \$20 billion in relief for California homeowners as part of a multistate settlement with the country’s five largest mortgage servicers for robo-signing and other foreclosure misconduct. I have continued to investigate and prosecute misconduct at all stages of the mortgage process through the Mortgage Fraud Strike Force, a team I created in May 2011. And to pursue systemic reform, I sponsored the California Homeowner Bill of Rights, a landmark package of legislation designed to protect homeowners from unfair practices by banks and mortgage companies.

Finally, Jack Finlaw, Chief Legal Counsel to the Governor of Colorado, and David Blake, Deputy Attorney General of Colorado, discuss the legal and policy implications of Amendment 64, which allowed for the legalization and regulation of marijuana in that state despite federal illegality. In their article, *Marijuana Legalization in Colorado: Learned Lessons*, Finlaw and Blake explore the challenges posed by the creation of an entirely new highly regulated commodity and an attendant marketplace.⁴¹ The long-term impact of Amendment 64 remains to be seen, but Finlaw and Blake’s analysis will undoubtedly serve as a valuable tool—or cautionary tale—for any states looking to follow in Colorado’s footsteps.

From white-collar crime to realignment, the articles in this symposium provide a window into some of the most pressing criminal justice issues facing our country today. It is my hope that the ideas presented by these authors provoke discussion among public policymakers, prosecutors, law enforcement agencies, and all those working to create a safer, more prosperous society.

⁴⁰ Daniel Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 916 (2014).

⁴¹ Jack Finlaw & David Blake, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL’Y REV. (2014).

