

Book Review

Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, Princeton, NJ: Princeton University Press, 2015, pp. 474, \$35.00 Cloth; \$24.95 Paper.

Reviewed by Shon Hopwood

Introduction

The American criminal justice system is a mess. It criminalizes too much conduct, disproportionately targets the poor and people of color, and overly relies on incarceration. It has become so immense that millions of Americans are starting to feel its squeeze as its grip fails every demographic of America from crime victims and taxpayers to those it convicts. The system desperately needs to be reexamined before an even larger segment of Americans comes to view the rule of criminal law as a rule of oppression.

To their credit, academics can lay claim to being among the first to highlight the carceral state and its causes. A deep body of literature now exists on the mass incarceration crisis,¹ and Professor Marie Gottschalk has made an important contribution with her book *Caught*. Whereas others focused on discrete parts of the carceral state, Gottschalk has meticulously detailed all of it—from the political factors that created the American carceral state to those who have profited from it. No stone is unturned in her quest to comprehensively strip our criminal justice problems bare, and she consistently reminds us of their enormity.

Her thesis: The carceral state has grown so massive that it has cut off millions from the American Dream, which Gottschalk defines as “the faith that everyone has an inalienable right to freedom, justice, and equal opportunities to get ahead, and that everyone stands equal before the law” (2). This metastasizing of the carceral state has altered how public services and benefits operate, and its reach is “potentially explosive because the American Dream arguably has

Shon Hopwood is Teaching Fellow at Georgetown University Law Center, Appellate Litigation Program. Many thanks to Ann Marie Hopwood (J.D. expected 2018 from the Catholic University of America, Columbus School of Law) for her helpful comments.

1. See, e.g., JAMES FORMAN, *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); ROBERT JOHNSON, ANN MARIE ROCHELEAU, & ALISON B. MARTIN, *HARD TIME: A FRESH LOOK AT UNDERSTANDING AND REFORMING THE PRISON* (4th ed., 2016); WILLIAM R. KELLY, *CRIMINAL JUSTICE AT THE CROSSROADS: TRANSFORMING CRIME AND PUNISHMENT* (2015); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2007).

been the country's central ideology, serving as a kind of societal glue holding otherwise disparate groups together" (2).

Gottschalk's thesis is as timely as it is correct. Whether it's the Black Lives Matter movement or the 2016 presidential race, current events have, if anything, illustrated that the societal glue holding us together is decaying rapidly. And as the criminal justice system condemns many to civil death and denies civil liberties to those with convictions, the question is whether our political system is up to the task of changing the status quo. Gottschalk's outlook for meaningful reform is bleak. Why? The answer is that she views incremental change as insufficient. But despite her pessimism, glimmers of change, slow as they might be, are on the horizon.

The Criminal Injustice System

Although the United States makes up only five percent of the world's population, it now holds approximately twenty-five percent of the world's prisoners.² The U.S. now holds more than 2.3 million people in state and federal prisons, jails, and juvenile correctional facilities.³ And the incarceration rate for women is even more depressing. As the Prison Policy Initiative recently noted, measured globally, "the 25 jurisdictions with the highest rates of incarcerating women are all American states."⁴ But these statistics don't even measure the full impact of our criminal justice system. As Professor Gottschalk notes, more than 8 million people are under some form of state control from probation to jail (1).

The devastation caused by our criminal justice system isn't limited to just those who have served time. Gottschalk points to an estimated 8 million children who have had an incarcerated parent (1). The incarceration of so many parents creates a vortex, pulling whole neighborhoods into intergenerational imprisonment.⁵

2. JEREMY TRAVIS, BRUCE WESTERN & STEVE REDBURN, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2* (2014).
3. Peter Wagner & Bernadette Raduy, *Mass Incarceration: The Whole Pie 2016*, PRISON POLICY INITIATIVE (Mar. 14, 2016), <http://www.prisonpolicy.org/reports/pie2016.html>.
4. Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, PRISON POLICY INITIATIVE, <http://www.prisonpolicy.org/global/women> (last visited Nov. 3, 2016).
5. I have witnessed firsthand the effects of incarcerated parents on their children. See generally SHON HOPWOOD WITH DENNIS BURKE, *LAW MAN: MY STORY OF ROBBING BANKS, WINNING SUPREME COURT CASES, AND FINDING REDEMPTION* (2012) (my memoir explaining how I served almost eleven years in the Federal Bureau of Prisons' custody for my role in five bank robberies I committed as a young man). At the beginning of my prison sentence, I met a group of guys who were neighbors in prison just as they were neighbors on the streets of Milwaukee. When I entered the system, they were about halfway through their twenty-year mandatory minimum sentences for nonviolent drug offenses. Ten years later when I was about to be released, they were also. One would think their release to be a joyful occasion, but it wasn't. During their last few years of incarceration, their sons trickled into the prison and they too were sentenced to lengthy terms of imprisonment. When you take all the

Part of the problem is that the criminal justice system was not meant to serve as a panacea for our country's problems.⁶ Whether it's drug addiction, mental illness, or some national tragedy, our first response is to criminalize conduct. Consequently, we have literally thousands of federal and state statutes criminalizing conduct that was previously thought to be addressed by civil law⁷—a phenomenon that scholars have labeled “overcriminalization.”⁸ We also fail to adequately fund indigent defense.⁹ When an inadequate defense meets the prosecution possessing an arsenal of thousands of criminal statutes carrying quite severe punishments, the end result is a country of countless plea bargains,¹⁰ where even innocent people plead guilty and the right to a jury trial is imperiled.¹¹

The criminal justice system also continues to operate on antiquated notions of human behavior, like general sentencing deterrence: the belief that

fathers out of a neighborhood, intergenerational incarceration is the logical and inevitable result.

6. Gottschalk lays the blame for mass incarceration on neoliberal politics. But it wasn't solely neoliberal politics that created the crisis; it was just politics. Both parties were guilty in creating some of the worst criminal justice practices (although conservatives in the 1990s led the way to mass incarceration). A Democratic-led House passed the 1984 crime bill, and President Clinton signed both the Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act. See Prison Litigation Reform Act of 1995, § 101, 42 U.S.C.A. § 1997e(a) (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-32, 110 Stat. 1214 (1996).
7. More than 4500 statutes are in the federal criminal justice system alone, and from 2000 to 2007 Congress created 452 new crimes. See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. L. MEMO., June 16, 2008, at 1.
8. See, e.g., Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1194 (2015) (defining overcriminalization as “the proliferation of criminal statutes and overlapping regulations that impose harsh penalties for unremarkable conduct (i.e., conduct that should be governed by civil statute or no statute at all)” and noting that overcriminalization might be “the most pressing problem in criminal law today”); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005) (signifying overcriminalization to “cover laws imposing penal sanctions on conduct that should be solely a matter of individual morality” or law criminalizing “relatively trivial conduct”).
9. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 64 (1999) (“At least every five years since Gideon was decided, a major study has been released finding that indigent defense is inadequate.”); McKenzie Romero, *ACLU Sues the State Over Inadequate Legal Defense for Poor Utahns*, KSL.COM (June 21, 2016, 6:31 PM), <https://www.ksl.com/?sid=40314087&nid=148&title=aclu-sues-the-state-over-inadequate-legal-defense-for-poor-utahns>; Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES, Mar. 20, 2016, at A-1.
10. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1119 (2011) (“The judicial system had grown addicted to plea bargaining, relying on guilty pleas to resolve the vast majority of criminal cases, and could not afford to stifle this trade.”).
11. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20, 2014, <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty>.

imposing longer sentences on defendants will somehow deter others from committing similar crimes. But most people who commit crimes don't consider the potential length of their sentence.¹² They commit crimes because they are impulsive, not because they are rational actors engaged in some sort of cost-benefit analysis. Even if people did consider sentencing length, they would still need to find one of the many thousands of federal and state criminal statutes that applies to their conduct and then read the many thousands of pages of sentencing provisions to determine their potential sentence—a process that baffles seasoned attorneys. General deterrence thus provides little reason for continuing to impose long sentences.¹³ Still, even today it is often listed as a primary reason to continue imposing decades-long sentences.¹⁴

When people are sentenced, they face many perils in American prisons. Our prisons are incredibly violent, and sexual assault is ubiquitous.¹⁵ Because our federal and state governments have cut back on educational and rehabilitative programs (82),¹⁶ prisons too often do little more than warehouse prisoners. But storing prisoners is not synonymous with solving crime. Unfortunately, that lesson has escaped us.

12. I met nary a single federal prisoner who knew the sentence they faced for the crime they committed.
13. See, e.g., Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, SENT'G PROJ., at 1 (Nov. 19, 2010), <http://www.sentencingproject.org/publications/deterrence-in-criminal-justice-evaluating-certainty-vs-severity-of-punishment/> (“Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits.”).
14. See, e.g., Sen. Jeff Sessions press release, *Sessions Comments on Revised Criminal Sentencing Bill* (Apr. 28, 2016), <http://www.sessions.senate.gov/public/index.cfm?p=news-releases&id=53A4F324-C107-48AC-9D20-5443E9A5FA4A>.
15. See *Nearly 10 Percent of Former State Prisoners Reported Being Sexually Victimized During Confinement*, BUREAU JUST. STAT. (May 17, 2012), <http://www.bjs.gov/content/pub/press/svrfspo8pr.cfm>. See also Christopher, *Survivor Testimony*, JUST DETENTION INT'L, <http://justdetention.org/story/christopher> (last visited Nov. 3, 2016) (Christopher is a former prisoner who was raped while in custody. He writes: “Getting raped destroys you from the inside out, and it takes a part of you and puts it where you can't reach it. My momma quit writing me because she found out I was married to another man in here. She told me I was sick and she did not want to write anymore. And she stopped. See, she knows I got raped, but she doesn't understand how I'm surviving now. I ran to another man and married him so I wouldn't get raped again. My thoughts are so crazy on this; at times I do not understand them. The fear is so great in my heart.”).
16. Gottschalk writes: “Participation in prison-based academic programs, including GED programs, college classes, and adult basic education has been falling since the early 1990s. Recently, some states have been disbanding or shrinking the handful of prison-based post-secondary and liberal arts education programs that were able to soldier on in the wake of the 1994 congressional decision to begin denying Pell grants to inmates to fund higher education.” But see Danielle Douglas-Gabriel, *12,000 Inmates to Receive Pell Grants to Take College Classes*, WASH. POST (Jun. 24, 2016) (noting that the Obama Administration has authorized 12,000 prison inmates to receive Pell grants to finance college classes, “despite a 22-year congressional ban on providing financial aid to prisoners.”).

Gottschalk explains that “medical and mental health care is grossly deficient and grossly underfunded in many U.S. prisons and jails” (44). Prisoners frequently perish from lack of medical care because they are at the mercy of prison officials.¹⁷ In fact, the stories of prisoners dying from utterly inadequate medical care are legion.¹⁸ It is also no secret that many prisoners suffer from mental illness and, over the past two decades, states have routinely closed mental health facilities while opening new jail and prison facilities.¹⁹ In Chicago jails, “some prisoners sit on their beds all day long, lost in their delusions, oblivious to their surroundings, hearing voices, sometimes talking back to them. The first person to say that this system is barbaric is their jailer.”²⁰

Prisons are so appalling in part because they lack any meaningful oversight (44).²¹ The Department of Justice’s Civil Rights Division monitors state prisons but has grossly insufficient resources. Nor can prisoners run to the courts for protection. Gottschalk notes that in 1996 Congress passed the Prison Litigation Reform Act, a bill that has “made it extremely difficult to hold state officials and prison administrators accountable for the unsafe and degrading conceptions of their facilities As a consequence, putting one’s

17. For example, California’s overcrowding and lack of medical treatment to prisoners created “needless suffering and death,” and ultimately led to the Supreme Court ordering a reduction in the prison population due to the “serious constitutional violations.” See *Brown v. Plata*, 563 U.S. 493, 501 (2011).
18. At the Federal Correctional Institution in Pekin, Ill., I watched a man three cells down from me die from cancer because prison medical officials refused to adequately treat him, and another man whose treatment was delayed by several months even though he had a hernia the size of a softball protruding from his belly. For other examples, see David Mercer, *Ill Inmate Died in Agony While Pleading for Help*, Associated Press (June 27, 2010), PRISON WATCH NETWORK, <https://prisonwatchnetwork.org/2010/06/28/ill-inmate-died-in-agony-while-pleading-for-help> (staff at FCI Pekin ignored a man who pleaded for pain medication as he died from cancer and hepatitis, “causing his spleen to burst”); *Parsons v. Ryan*, 754 F.3d 657, 663 (9th Cir. 2014) (prisoner class action against the Arizona Department of Corrections) (“The plaintiffs support these general allegations with detailed references to nearly a dozen specific ADC policies and practices, including inadequate staffing, outright denials of care, lack of emergency treatment, failure to stock and provide critical medication, grossly substandard dental care, and failure to provide therapy and psychiatric medication to mentally ill inmates.”).
19. See Matt Ford, *America’s Largest Mental Hospital Is a Jail*, THE ATLANTIC ONLINE (June 8, 2015), <http://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/> (explaining how at Cook County Jail more than a third of the inmates have “some form of mental illness”); Deanna Pan, *TIMELINE: Deinstitutionalization and Its Consequences*, MOTHER JONES (Apr. 29, 2013), <http://www.motherjones.com/politics/2013/04/timeline-mental-health-america> (explaining how deinstitutionalization moved thousands of mentally ill people out of hospitals and into jails and prisons).
20. Nicholas Kristof, Opinion, *Inside a Mental Hospital Called Jail*, N.Y. TIMES SUNDAY REV., Feb. 8, 2014, at SR1.
21. “As the courts have retreated, states, municipalities, and the federal government generally have resisted establishing independent, adequately financed government bodies,” Gottschalk writes, “with real administrative teeth to monitor and rectify penal conditions and to report their findings to lawmakers and the general public.”

health at serious risk has become a routine part of doing time in many U.S. penal facilities” (44).

Many have profited from mass incarceration. Gottschalk argues that this trend has empowered new economic interests with a large stake in maintaining the status quo. “Prison guards’ union, private prison companies, public bond dealers, and the suppliers of everything from telephone services to Taser stun guns compose a ‘motley group of perversely motivated interests’ that has coalesced ‘to sustain and profit from mass imprisonment’” (47).²² She explains how the privatization of prisons has not led to great savings for taxpayers (70). That is especially true when the back end of private prisons is considered: Private prisons treat prisoners badly and provide little to no programming, and they are thus likely to lead to high recidivism rates.²³ As Gottschalk points out there is some evidence suggesting that “guards at privately run facilities also are more likely to issue disciplinary infractions, thus jeopardizing inmates’ ‘good time’ credits and lengthening the time they must serve before release. This should not be so surprising since the private prison industry is in the business of making money by keeping its beds filled (70).”

Most of those who serve time in prison will one day be released. When that happens the formerly incarcerated face a different type of punishment—what Gottschalk labels “civil death” (2). This prison beyond the prison includes bans on voting, serving on juries, and working in many professions (including the profession most needing a dose of real-world criminal justice experience—the law). “These lifetime bans remain largely intact despite recent findings that the future offending risk of people who have gone several years without an arrest is nearly indistinguishable from people who have never been caught up in the criminal justice system” (242).²⁴ Many formerly incarcerated are also ineligible for the public benefits—such as public housing, food stamps, or student loans—that could get them on their feet and out of the criminal justice system permanently.²⁵

Then there is the invisible prison “pushing more people not only to the political and social margins of U.S. society but also to the economic margins” (251). A prison sentence considerably reduces the “lifetime wages, employment, and annual income of former inmates, who tend to be disproportionately poor, African American, and Latino” (251). Those who serve sentences are also less likely to marry or stay married, yet another indicator of recidivism generally.

22. Quoting Tara Herivel, “Introduction,” in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* ix (Tara J. Herivel & Paul Wright eds., 2007).

23. For an account of how performance-based contracts could change the quality of privately run prisons, see generally Alexander Volokh, *Prison Accountability and Performance Measures*, 63 *EMORY L.J.* 339 (2013).

24. See also Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6(4) *CRIMINOLOGY & PUB. POL’Y* 697,700 (2007); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47(2) *CRIMINOLOGY & PUB. POL’Y* 327 (2009).

25. See generally MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2003).

In sum, Professor Gottschalk makes a compelling argument that the current criminal justice system applies too broadly and unequally, while punishing too severely long after people serve their sentence.

A Different Narrative

Beyond documenting the worst aspects of the American criminal justice system, Gottschalk contends that opposition to the current system has “tended to gravitate toward two different poles, both of them inadequate in the face of current challenges” (3). One side identifies institutional racism and racial disparities as the key and main challenge to reducing incarceration. The other side dismisses racial causes and seeks a bipartisan path out of the carceral state by emphasizing the financial burden caused by mass incarceration.²⁶

Gottschalk finds that while neither narrative is wrong, they are both inadequate for making the substantial changes necessary to change the carceral state. To be sure, “the carceral state has disproportionately hurt African American men,” but, Gottschalk contends, it also targets “a rising number of people from other historically disadvantaged groups,” such as women and Hispanics (4). She also notes that even if African-Americans were incarcerated at “only” the rate of whites, the U.S. would still have an incarceration crisis (4). Focusing on economic conditions alone, Gottschalk argues, could spur new rounds of law-and-order policies once the economy rebuilds and, more important, framing solutions to the carceral state in financial terms cedes important political ground (8).

Professor Gottschalk also dispels the prevalent myth that the war on drugs is singularly responsible for mass incarceration, a notion that many, including President Obama, have propagated.²⁷ She notes that half of all state inmates are incarcerated for violent offenses, and even if we released all drug offenders from prison, the U.S. “would continue to be the world’s warden, and a stint

26. Gottschalk’s usual precision is missing in her portrayal of the political right’s motivations for criminal justice reform. To be sure, many of the conservatives pushing for criminal justice reform do so based on financial concerns—the contention that the country is spending too much money on corrections and other criminal justice-related expenditures. But many conservatives and libertarians have urged criminal justice reform based on fairness, views about personal redemption, religious leanings, and the role of limited government. For a sampling, see Sen. Mike Lee, *The Conservative Case for Criminal Justice Reform*, WASH. EXAMINER (Oct. 2, 2015, 10:38AM), <http://www.washingtonexaminer.com/the-conservative-case-for-criminal-justice-reform/article/2573283>; Richard A. Viguerie, *A Conservative Case for Prison Reform*, N.Y. TIMES, June 9, 2013, http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html?_r=0; Vikrant P. Reddy, *Criminal Justice: The Real Reasons for Reform*, NAT’L REV. (May 18, 2016, 12:34PM), <http://www.nationalreview.com/article/435556/criminal-justice-reform-facts>; *The Conservative Case for Reform*, RIGHT ON CRIME, <http://rightoncrime.com/the-conservative-case-for-reform> (noting public safety, right-sizing government, victim support, personal responsibility, government accountability, family preservation, and free enterprise, in addition to fiscal discipline, as reasons for reform).

27. See *President Obama Remarks on the Criminal Justice System*, C-SPAN (July 14, 2015), <http://www.c-span.org/video/?327099-4/president-obama-remarks-naacp>.

in prison or jail would continue to be a rite of passage for many African Americans” (5).

So far, penal reform has been directed at what Gottschalk calls the “non, non, nons” (the nonserious, nonviolent, and nonsexual offenders). And she is absolutely correct in her belief that current reform efforts, directed solely at nonviolent offenses, are unlikely to lead to a major retrenchment of American mass incarceration, given the number of people incarcerated for violent crimes. Because reducing the incarceration of people who commit violence is politically dicey, Gottschalk is pessimistic about meaningful reductions in the carceral state.

Creating a Social Movement or Incremental Reform?

The paradox of our current approach to prisons and prisoners is that its proponents have sold it as a cost-effective approach to a fundamental and growing problem, when in reality it is an arbitrary, unjust, retributive, and expensive failure. — Glenn C. Altschuler²⁸

Although Gottschalk is spot on in her description of our criminal justice problems, she sometimes veers off course in criticizing what she calls “small-bore” solutions, including the recent bipartisan reform coalition (263). She contends that the “three R reforms”—reentry, justice reinvestment, and reducing recidivism rates—will not reduce mass incarceration because “criminal justice is fundamentally a political problem, not a crime and punishment or a dollar and cents problem” (22). Recasting the problem of mass incarceration in evidence-based language “does little to challenge the excessively punitive rhetoric that has left such a pernicious mark on penal policy over the last half century,” and it is “no match for the considerable economic interests that are now deeply invested in the perpetuation of the carceral state” (17). Moreover, Gottschalk contends, an evidence-based approach “constricts the political space to challenge penal policies and practices on social justice or human rights grounds” (17).

Gottschalk argues that even comprehensive sentencing reform “will not be enough on its own to reverse the prison boom because the criminal justice system is highly adaptive” (268). To make lasting cuts to the number of people incarcerated, our prison culture must change. In significant part, that means that prosecutors must change their sensibilities and their charging practices.

Instead of gradual and evidence-based reform, Gottschalk calls for a new social political movement constructed from a “network of state-level political coalitions that have ties to citizen-based groups spanning many localities” (100). This new political movement must develop a new vision of democracy and must address both inequality and concentrated poverty head-on; it must call for an infusion of resources to fund the revival of social programs, such as “government intervention to bring down the unemployment rate

28. Glenn C. Altschuler, *No Holds Barred*, THE HUFFINGTON POST (Dec. 9, 2014, 4:42PM), http://www.huffingtonpost.com/glenn-c-altshuler/no-holds-barred_t_b_6276128.html.

and revitalization of organized labor and collective bargaining” (278). In a statement reminiscent of Sen. Bernie Sanders’ campaign,²⁹ Gottschalk writes that “[i]n the face of the enormous political chasm between the 99 percent and the 1 percent, a strategy of elite-level, bipartisan deal cutting premised on calls for ‘shared sacrifice’ leaves this grossly inequitable economic and politic fabric intact. As such, the 99 percent are caught in the vise of small-bore policies from their supposed friends and allies while their opponents encircle them with scorched-earth politics” (280).

If bipartisan, evidence-based, and incremental reform will not end mass incarceration, then neither will grandiose visions of an American social-justice awakening. To be sure, incremental and evidence-based changes made through compromise are not sufficient; more work needs to be done. But until we convince our fellow citizens that major criminal justice reform is needed, it is all we can expect from our polarized politics. And there is little proof that a majority of the country is ready to commit significant resources to new social programs (let alone new social programs aimed at reducing prison sizes).

Framing the problem in terms of financial benefit (albeit a credible one) can be a good device leading to meaningful but incremental reform.³⁰ Using financial arguments also provides politicians with political cover in making the criminal justice system less punitive.³¹

Even incremental change can have a huge effect on those who receive the benefit—say, a prisoner in California who, under the Supreme Court’s *Brown v. Plata*³² decision, was released from an overcrowded prison to a less dangerous county jail. Or those released from prison altogether when Congress reduced the penalties associated with crack cocaine offenses.³³ For those who are incarcerated or about to be released, these small-bore changes can have large and life-changing effects.

And some bipartisan bills touting justice reinvestment and evidence-based programs have the potential to make major changes. In Maryland, for example,

29. *Bernie Sanders on Economic Inequality*, FEELTHEBERN.ORG, <http://feelthebern.org/bernie-sanders-on-economic-inequality/> (last visited Nov. 3, 2016).

30. See, e.g., *The Right Investment? Corrections Spending in Baltimore*, JUSTICEPOLICY.ORG (February 2015), http://www.justicepolicy.org/uploads/justicepolicy/documents/executive_summary_rightinvestment_2.23.15_final.pdf (“With more than 20,000 people in prison and at a cost of almost one billion dollars a year, Maryland’s corrections system consumes significant public resources. Knowing more about the impact incarceration has on communities would help state policymakers and residents make more informed choices on better ways to invest taxpayer resources in more effective public safety strategies and opportunities to help people succeed.”).

31. See John F. Plaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 960 (2016) (noting that empirical studies “suggest that the financial crisis can lead to real reform not because of the fiscal pressure it creates but because of the political cover it provides.”).

32. 563 U.S. 493 (2011).

33. See Fair Sentencing Act of 2010, Pub.L. No. 111-220 § 2(a), 124 Stat. 2372, 2372 (codified as amended in scattered sections of 21 U.S.C. and 28 U.S.C.).

Republican Gov. Larry Hogan recently signed the Justice Reinvestment Act, which places more low-level drug offenders into treatment, creates a path for some inmates to be released, removes some mandatory minimum sentences, and permits people to expunge prior criminal convictions.³⁴ But, as with most compromises, the Act also creates some tougher sentences for murder and child abuse resulting in death.³⁵ On the whole, these reforms will lead to less incarceration, not more, and they represent important steps in the process of important social change.

Sure, pragmatism has its pitfalls. It does not inspire us the way an idealist's call to action does. It moves gradually. It trades in compromise. It demands less while crusaders demand more. Still, it has its place in progressive reform in America. If it starts with the feasible, it does so in the hope that the ideal may someday be realized, at least in some measure. If it is modest, it does so with the knowledge that by aiming lower it increases the chances of hitting its target. Pragmatism is not always a panacea but, then again, neither is it a path to nowhere.

Successes such as those in Maryland don't cede important political ground. They simply reveal that more work needs to be done to convince Americans that our system of lockdown justice is a failure—morally, economically, and pragmatically speaking. The voting public, along with lawmakers, prosecutors, and jurists, must understand that a more humane and fair criminal justice system is a more effective one, and a more effective criminal justice system benefits us all.

34. Pamela Wood, *Maryland Lawmakers Agree on How to Reform Criminal Justice System*, THE BALTIMORE SUN (Apr. 9, 2016, 11:32PM), <http://www.baltimoresun.com/news/maryland/politics/bal-as-time-runs-short-lawmakers-continue-work-on-justice-reinvestment-20160409-story.html>.

35. See Justice Reinvestment Act, S.B. 1005, 436th Gen. Assemb., Reg. Sess. (Md. 2016).