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Essay

The Categorical Imperative as a Decarceral Agenda

Jessica M. Eaglin[†]

INTRODUCTION

In his forthcoming book, *The Insidious Momentum of Mass Incarceration*, Frank Zimring proposes two alternative methods to decarcerate: states can adopt a categorical imperative to reduce prison populations or states can reform the governance of sentencing. This symposium Essay focuses on the first of these options, as proposed in his tentative Chapter Six, wherein Zimring calls for categorically removing drug-addicted offenders from eligibility for prison sanctions and expanding use of jails for categories of offenses or offenders.¹

These methods, I suggest, exist in tension with numerous popular sentencing reforms being implemented in the states right now. Popular reforms, including the expansion of drug courts and the institutionalization of actuarial risk assessment instruments (RAIs or tools), directly or indirectly contradict the pragmatic, structural methods that Zimring proposes in his book to incentivize reductions in state prison populations. By exploring the tensions between reform trends in practice and Zimring's proscription, this Essay illuminates a deeper concern within sentencing reform policies adopted in the era of mass incarceration. I argue that reforms focused on identifying categories of offenders for diversion from prison sentences may undermine the call to decarcerate by obscuring the ways that policymakers continue to use the carceral state as the preferred method to respond to

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1. FRANKLIN ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (forthcoming 2020) (manuscript ch. 6) (on file with author).

sociopolitical problems in society. Recognizing this shortcoming upfront has important implications for scholars and policymakers alike when contemplating the contours of reform agendas going forward. Practically, it requires strategic engagement with the broad scope of pragmatic reforms, a point that Zimring urges with his categorical imperative. Theoretically, it requires reflection on the methodologies implemented to shape a decarceral agenda more broadly. I thank the *Minnesota Law Review* for the opportunity to think about these issues as part of this timely symposium.

The Essay unfolds in three Parts. Part I introduces Zimring's categorical imperative and juxtaposes it against common sentencing reforms in the states, including drug courts. Part II explains the tension between the categorical imperative and the institutionalization of actuarial risk assessments at sentencing in particular. It highlights how Zimring's suggested method and RAIs at sentencing invoke different meanings of "categorical" reform and maintain diverging capacities to raise broader critiques of the carceral state. Part III considers what strategic and methodological insights the categorical imperative offers for sentencing reform efforts going forward.

I. "ACTIVE" DECARCERAL REFORMS AND ZIMRING'S CATEGORICAL IMPERATIVE

Zimring proposes a provocative decarceral sentencing reform agenda for the next twenty-five years: remove categories of offenders from prison eligibility and/or shift responsibility for some categories of offenders from state to local administrators.² These reforms generate from two radical empirical conclusions about historical trends in the states since 2007. First, decarceration aims should be much more modest than many reformers are willing to admit.³ Second, California is the only state to undergo serious decarceration in the decade after the 2007 peak in the U.S. prison admission rate.⁴ Zimring encourages reformers to learn from California's approach and apply it in other states.⁵ Rather than aspire toward an end to mass incarceration, this intervention suggests a way to sustain lower incarceration levels

2. *Id.*

3. *Id.* (manuscript ch. 5).

4. *Id.*

5. *Id.*

over a longer period of time.⁶ This Part briefly describes the categorical imperative and situates this agenda in the context of recent trends in state sentencing reform efforts.

Zimring's "categorical imperative" approach to prison alternatives has two parts. First, Zimring proposes that states should remove categories of offenders from prison eligibility, and possibly from criminal responsibility entirely.⁷ In particular, he focuses on drug-addicted offenders.⁸ As he explains, much of the increase in prison populations across the country can be attributed to the War on Drugs in the 1980s through 1990s.⁹ As Zimring emphasizes, "[the] penal policy toward drugs [in 2006] is producing twice as many prison convicts, many more than twice as many ex-prisoners and twice as many families of prisoners as homicides each year."¹⁰ Even though prison sentences increased for all types of offenses, reducing the occurrence of incarceration for this subpopulation in particular could effectively reduce the impact of mass incarceration.¹¹

Second, Zimring proposes a broader "realignment" of criminal financial incentives to reduce incarceration.¹² He rightly identifies the "correctional free lunch" problem wherein the county implements criminal enforcement, but the state incurs the cost of incarceration.¹³ That is, local prosecutors and judges play an outsized role in determining how much punishment a defendant will serve and where.¹⁴ From the litany of options, however, prison is the cheapest *for these local actors*.¹⁵ The state pays to maintain state prisons, while counties pay for local jails.¹⁶ With the buildup of the carceral state, prison admissions increased exponentially.¹⁷ If counties, rather than jails, incur the brunt of the cost of enforcing sentences by redistributing punishment for certain categories of offenders to jail or incarceration alternatives, then use of incarceration as an option will likely

6. *Id.*

7. *Id.* (manuscript ch. 6).

8. *Id.*

9. *Id.* (manuscript ch. 3).

10. *Id.* (manuscript ch. 3 at 7–9).

11. *Id.* (manuscript ch. 6).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* (manuscript ch. 3).

decrease in frequency and severity, while access to families and resources could increase, given jails' geographic locations compared to prisons.¹⁸

In a sense, Zimring's call for reform aligns with a broader trend in criminal justice right now. Since 1989, "drug courts" that allow local actors to divert defendants convicted of low-level offenses into treatment programs as punishment rather than long prison sentences have grown in popularity.¹⁹ Numerous local jurisdictions and even the federal government have adopted or considered expanding this reform through legislation or judicial fiat in the last three decades.²⁰ Since the 2000s, a variety of specialty courts have emerged and grown in popularity in the states as well.²¹ Like drug courts, these programs are meant to connect defendants with treatment for underlying problems like addiction and mental illness to more effectively respond to the

18. *Id.* (manuscript ch. 6).

19. See Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 603–06 (2016) (describing the expansion of drug courts and other specialized courts in response to the pressures of mass incarceration). This Essay uses the term "diversion" in the narrow sense that it diverts defendants from long prison sentences. A decreasing number of specialty courts divert defendants from the criminal justice system entirely, without a conviction for the offense upon completion of the program. Because this model of specialty court is increasingly rare, this Essay does not discuss the distinction in detail. See U.S. SENTENCING COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 5–6 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf [https://perma.cc/4QT5-8H9V].

20. Eaglin, *supra* note 19, at 610 (noting the expansion of specialty courts through Justice Reinvestment Initiative (JRI) reforms); see also U.S. SENTENCING COMM'N, *supra* note 19, at 14–17 (describing the expansion of diversionary courts in the federal system through the Department of Justice "Smart on Crime" initiative announced in 2013); Jessica M. Eaglin, *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 874 (2013) (discussing Indiana legislation enabling specialty courts); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1643 n.227 (2012) (discussing Idaho legislation enabling drug courts). For an interesting take on the "judge-led" nature of these courts, see Erin R. Collins, *The Problem of Problem-Solving Courts* (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492003.

21. These include domestic violence courts, mental health courts, truancy courts, homeless courts, veteran courts, and human trafficking intervention courts. See Eaglin, *supra* note 19, at 607–09 (collecting examples of specialty courts); see also Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1483–84 (2017) (distinguishing between "problem-solving courts" and the development of "status courts" that celebrate an offender's association with a specific characteristic).

occurrence of crime with strategies other than severe terms of incarceration in prisons.²² Both drug courts and other diversionary programs often rely heavily on “flash incarceration” in local jails as an alternative form of penal sanction.²³ Whether these interventions actually reduce lengthy terms of incarceration, the combination of treatment and local incarceration appear to reduce reliance on prison sentences for these sympathetic subsets of criminal defendants.²⁴ Additionally, several states have modestly revised drug legislation for the lowest level of drug offenders to encourage diversion from prison for first-time offenders.²⁵ Some states have expanded their legislative revisions to permit or encourage the diversion of low-level property offenders from incarceration as well.²⁶ Thus, a trend toward diverting low-level offenders from prison, in particular drug offenders, is already

22. Eaglin, *supra* note 19, at 605–07.

23. See, e.g., McLeod, *supra* note 20, at 1621, 1624–25 (explaining how some specialty criminal courts like domestic violence courts and sex offense courts operating on a judicial monitoring model may “increase periods of at least short-term incarceration”); *Chief Justice O’Connor Cites Catastrophic Effects If State Issue 1 Passes This Fall*, COURT NEWS OHIO (Aug. 30, 2018), http://www.courtnewsOhio.gov/bench/2018/issueOne_083018.asp#.XffPZmXhi8U [<https://perma.cc/MG89-26WV>] (suggesting that jail time is an important component to effectively running drug courts).

24. See, e.g., DONALD J. FAROLE, JR. & AMANDA B. CISSNER, CTR. FOR CT. INNOVATION, *SEEING EYE TO EYE?: PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS 1* (2005) (“[D]rug courts have been somewhat less successful in reducing incarceration time. Although those who complete the program spend substantially less time in prison than traditionally prosecuted cases, the relatively lengthy sentences for those who do not complete, combined with programs’ use of short term incarceration as a sanction for noncompliant participant behavior, render the overall time incarcerated only slightly lower than that of comparable non-drug court defendants.” (internal citation omitted)); Collins, *supra* note 21, at 1485 (detailing the problem with removing sympathetic populations from conventional court systems); Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 212–13 (2013) (critiquing neorehabilitation programs for imposing longer sentences for those who fail and for expanding net of people entering justice system); see also Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 669–70 (2017) (describing how a Texas reform for drug offenders and probation and parole violators reduced prison population numbers but expanded incarceration in “fully secured facilities . . . [that] look and operate like prisons” but are not counted in prison population statistics).

25. See, e.g., The Omnibus Crime Reduction and Sentencing Reform Act, S. 1154, 118th Gen. Assemb., Reg. Sess. §§ 38, 48 (S.C. 2010); Eaglin, *supra* note 19, at 607–09 (describing state reforms aimed at reducing incarceration of low-level offenders and first-time drug offenders in particular).

26. Eaglin, *supra* note 19, at 609–11.

underway.²⁷ These reforms aim to reduce the economic and social pressures of mass incarceration by making a bloated system more efficient—that is, by reducing recidivism, increasing public safety, and saving states' money.²⁸

But in an important respect, Zimring's intervention is at odds with these popular criminal justice reforms in the states. Whereas Zimring suggests diversion as a low discretionary action for local actors, the larger movement to shift defendants to decarceral alternatives is *highly* discretionary for local actors.²⁹ That is, local actors currently choose which defendants to divert from the traditional, punitive sentencing apparatus that legislatures leave largely intact.³⁰ For example, drug courts and other specialty courts have developed alongside the creation of increasingly punitive sentencing laws.³¹ While state legislatures or judicial counsels may impose stringent eligibility requirements for entry into these diversionary programs,³² layered on top of those eligibility requirements is a significant amount of discretion allocated to local actors like prosecutors, public defenders, and

27. See generally *id.* (exploring the broader effects of the drug court movement aimed at managing overflowing prison populations).

28. Eaglin, *supra* note 24, at 192; Eaglin, *supra* note 19, at 605–07.

29. This Essay uses the term “discretion” in line with Kevin Reitz’s definition of “sentencing discretion,” which “exists whenever a participant in the design or operation of the criminal justice system can exercise choice in a way that dictates, places limits upon, or contributes to the sentencing outcome of a particular criminal case or whole categories of cases.” Kevin R. Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POL’Y 389, 391 (1998). Importantly, this definition of sentencing discretion “does not emphasize a distinction between the promulgation of a ‘rule’ and an act of ‘discretion,’ so long as either form of decision-making exerts influence over the punishment outcome of at least one case.” *Id.* at 391–92.

30. Thus, this Essay is mostly concerned with a subset of what Reitz refers to as “disabling sentencing discretion.” See *id.* at 394. That is, it concerns the choices that have the effect of eliminating case outcomes from possible prison sentences, even if it does not eliminate the cases from the criminal justice system writ large. See *id.* (emphasizing that disabling discretion concerns eliminate cases from the criminal justice system).

31. See Eaglin, *supra* note 19, at 635.

32. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1490–91 (2004) (stating that based on National Association of Drug Court Professionals guidelines, most states and Congress mandate eligibility requirements for entry to a drug court program); see also U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf> [<https://perma.cc/XE48-VHWF>].

judges.³³ These local actors select which defendants can enter diversionary programs even if, on their face, such defendants would qualify for diversion from sentences to incarceration.³⁴ Thus, the expansion of diversionary programs at the state level gives local actors the option to use their discretionary power to further decarceral ends.³⁵ Nowhere in the current structure of reform is there an imperative to do so.³⁶

Contrary to recent reforms, Zimring's categorical imperative demands flipping the structure of current efforts from high to low discretion for local actors. Specifically, Zimring urges reducing local prosecutors' ability to choose which defendants should be diverted from prison on an individual basis.³⁷ Rather, he suggests categorical exclusion for a broader category of people as defined by the state legislature.³⁸ Zimring draws this conclusion from the experience in California.³⁹ In response to federal court orders for the state to reduce its prison population in order to offer adequate medical and mental health care in state prisons,⁴⁰ state legislators passed and local actors implemented the Public Safety Realignment Act in 2011.⁴¹ This legislation shifted responsibility to punish and supervise non-serious, non-violent,

33. Eaglin, *supra* note 19, at 604–05.

34. GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 86 (2005) (explaining how traditional adversaries like prosecutors and defenders “work[] together to design guidelines, eligibility criteria, and sanctioning schemes [in drug courts]”); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 798 (2008) (asserting that local prosecutors decide whether defendants have access to drug court treatment programs); Collins, *supra* note 21, at 1504–05 (explaining that veterans courts exclude those who are dishonorably discharged); Eaglin, *supra* note 24, at 211 (discussing the disconnect between empirical studies of risk and those entering treatment programs generally).

35. For example, Allegra McLeod describes what a decarceral model of specialty courts would look like *if local actors chose to pursue that route*. See McLeod, *supra* note 20, at 1630. Whether states “give” or judges “take” discretion to create these alternative treatment programs is unclear. See Collins, *supra* note 21. It matters little, however, since most legislation encourages judges to continue developing courts as part of an agenda to reduce prison populations and corrections costs. See *id.* at 30; see also Eaglin, *supra* note 19, at 604–06.

36. See, e.g., McLeod, *supra* note 20.

37. Zimring, *supra* note 1 (manuscript ch. 6).

38. *Id.*

39. *Id.* (manuscript ch. 5).

40. *Brown v. Plata*, 563 U.S. 493 (2011) *declined to extend by* *Irvin v. Thomas*, No. 7:14-cv-00660-MMH-JEO, 2016 WL 4247880 (N.D. Ala. 2016).

41. Assemb. B. 109, 2011–2012 Sess., (Cal. 2011).

and non-sex offenders (with no history of serious convictions) from the state to the county of conviction.⁴² In California, where every person released from state prison was subject to at least three years of supervised parole, this reform had the effect of reducing those going to prison and those returning to prison for “technical parole violations” that did not amount to a new crime.⁴³

California’s legislation makes diversion from prison a low discretionary action for local actors. It does not eliminate local discretion entirely. Each of the state’s fifty-eight counties decides how to deal with this subset of offenders, including those whose parole has been revoked.⁴⁴ Predictably, some counties have expanded the use of jails, though because jail sentences tend to be shorter than prison sentences, this does not necessarily undermine a larger decarceral agenda.⁴⁵ In addition to expanding the use of jail, most counties provide local actors with a variety of alternative sanctions like drug courts, community service, and electronic or GPS monitoring to address the occurrence of crime.⁴⁶ Incarceration in prison, however, is not an option for these “non-non-non” offenders.⁴⁷ Californians expanded this model with the passage of Proposition 47, an aggressive ballot initiative that passed in 2014.⁴⁸ The Proposition reclassified some “wobblers,” meaning offenses that local prosecutors could charge as misdemeanors (limiting punishment to jail time) or

42. *Id.*; see Eaglin, *supra* note 19, at 614–15 (describing AB 109).

43. For more on the significance of this shift, see MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 103–04 (2015).

44. Eaglin, *supra* note 19, at 615.

45. Compare Anat Rubin, *California’s Jail-Building Boom*, MARSHALL PROJECT (July 2, 2015), <https://www.themarshallproject.org/2015/07/02/california-s-jail-building-boom> [<https://perma.cc/8BLD-8KTN>] (asserting that the shift to county jail has not meaningfully decreased incarceration), with MAGNUS LOFSTROM & BRANDON MARTIN, PUBLIC POL’Y INST. OF CA, PUBLIC SAFETY REALIGNMENT: IMPACTS SO FAR (2015), <https://www.ppic.org/publication/public-safety-realignment-impacts-so-far/> [<https://perma.cc/A7TD-M29A>] (finding that realignment “significantly reduced the prison population”).

46. Eaglin, *supra* note 19, at 615.

47. *Id.* at 618.

48. Matt Ford, *Californians Vote To Weaken Mass Incarceration*, ATLANTIC (Nov. 5, 2014), <https://www.theatlantic.com/politics/archive/2014/11/California-prop-47-mass-incarceration/382372/> [<https://perma.cc/MW98-8KFN>].

felonies (allowing defendants to face prison time) to misdemeanors exclusively.⁴⁹ The Proposition thus forced local actors to use alternative measures than prison when sentencing defendants convicted of petty theft and drug possession.⁵⁰ Again, it did not eliminate local discretion, but the Proposition did reduce it by eliminating certain carceral options for local criminal administrators.⁵¹

Zimring's manuscript avoids discussing specific reforms in detail, instead focusing on their structural design. This structural design, however, is critical to a decarceral agenda. The categorical imperative as a decarceral method avoids allowing the same people to make the same decisions all over again.⁵² Like in California, other state-level legislative commands would reduce local prosecutors' ability to selectively pick among individual offenders when considering non-prison sanctions. Thus, the method demands proactively identifying "categories" of offenders for diversion and shifting that disabling discretion from local to state actors.⁵³ Zimring suggests that this categorical imperative is a promising route to realistic and meaningful decarceration.⁵⁴ With it, the United States may move from "mass incarceration" to "mass incarceration light."⁵⁵ While states will not return to the incarceration levels of the 1970s, they may move toward a significant reduction in the rate of incarceration to a level similar to that of the 1990s.⁵⁶

49. HON. RICHARD COUZENS & JUDICIAL COUNCIL CRIMINAL JUSTICE SERVICES STAFF, FREQUENTLY ASKED QUESTIONS 4–5 (2015), <https://www.courts.ca.gov/documents/Prop47FAQs.pdf> [<https://perma.cc/MM3T-ZBZ8>] (identifying revised offenses which were formerly wobblers).

50. *Id.* at 1 (asserting that Proposition 47 intended to limit prison spending to "violent and serious offenses" rather than crimes reclassified as misdemeanors).

51. See Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 335 (2014) (noting that Realignment is "[b]uilt upon the principle of increased local control").

52. See Zimring, *supra* note 1 (manuscript ch. 6 at 27–28) (explaining that the categorical imperative is different from "encouraging the same persons and levels of government to choose non-prison alternatives").

53. See *supra* note 30 (defining "disabling" discretion).

54. Zimring, *supra* note 1 (manuscript ch. 6).

55. See *id.* (manuscript ch. 5 at 23) ("California may be close to a new stability in rates of secure confinement. If so, the scale of California's best in the nation for a big state performance still predicts a long-term level of confinement that would retain two-thirds of the increases in rate that happened after 1970, perhaps a transition from 'mass incarceration' to 'mass incarceration light?').

56. *Id.*

II. THE CATEGORICAL IMPERATIVE VERSUS RAIs?

Perhaps because Zimring avoids engaging with specific reforms proliferating in the states, he does not reference the introduction of RAIs as sentencing reform.⁵⁷ This Part suggests his categorical imperative method exists in tension with this popular sentencing reform as well. After introducing this reform in more detail, the remainder of this Part explains its tensions with Zimring's proscription to illuminate how the search for a category of offenders suitable for diversion from prison sentences may be an incomplete method to address mass incarceration.

RAIs are meant to standardize assessments of an individual defendant's future risk of recidivating based on statistical analyses of data collected about prior offenders' past behavior.⁵⁸ Most tools predict future behavior based on predetermined, objective factors that are empirically correlated with the occurrence of recidivism, like criminal history, age, gender, employment history, and education.⁵⁹ The tools rank defendants and divide them into categories of offenders based on the statistical likelihood that people sharing such characteristics will engage in specified behavior again in the future.⁶⁰ Thus, a tool will classify a defendant as low, medium, or high risk.⁶¹

Introduction of the tools is a popular, but controversial, intervention proliferating in the states as sentencing reform.⁶² Advocates suggest that tools will improve decision making by introducing consistent, objective information that could encourage courts to issue less punitive or perhaps alternative sanctions other than prison for low-risk offenders.⁶³ As the American Law Institute recently suggested, RAIs further improve the administration of criminal sentencing more broadly by avoiding victim-

57. *See generally id.* (manuscript Pt. II).

58. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 68–70 (2017) (describing RAIs and the stakeholders currently developing the tools used at sentencing).

59. *Id.* at 79.

60. *Id.* at 85.

61. *Id.* at 87.

62. Claire Botnick, *Evidence-Based Practice and Sentencing in State Courts: A Critique of the Missouri System*, WASH. U. J.L. & POL'Y 159, 174 (2015) (noting the increasing popularity in “the use of risk assessments in sentencing” within the United States).

63. MODEL PENAL CODE: SENTENCING § 6B.09(3) cmt. d (AM. LAW INST. 2017) (urging sentencing courts to use RAIs to identify low risk defendants for sentencing to alternative sanctions other than a prison term).

ization of other, unidentified potential victims because it encourages more supervision of high-risk defendants.⁶⁴ Moreover, advocates suggest this information could shape decision making in ways that save money for the state by reducing incarceration without increasing crime.⁶⁵

Critics oppose actuarial risk assessments as sentencing reform for a variety of reasons as well. Because tools rely on data collected in the era of mass incarceration, predictions of future behavior replicate problematic enforcement realities about the carceral state.⁶⁶ Tools often predict rearrest and use arrest as a predictive factor.⁶⁷ The history of arrest practices disproportionately affects the poor and minorities, or, as Zimring may say, “the usual suspects.”⁶⁸ Thus, the tools may be overinclusive in identifying people who would not recidivate and underinclusive in identifying those who would.⁶⁹ Most importantly, using the tools threatens to replicate structural problems in criminal law enforcement while eroding normative limits on punishment practices. This includes its potential to exacerbate racial disparities,⁷⁰ punishing individuals for future behavior that has not yet

64. *Id.* at cmt. e (arguing that declining to use accurate RAIs results in preventable victimization).

65. *Id.* at cmt. d (“If used as a tool to encourage sentencing judges to divert low-risk offenders from prisons to community sanctions, risk assessments conserve scarce prison resources for the most dangerous offenders, reduce the overall costs of the corrections system, and avoid the human costs of unneeded confinement to offenders, offenders’ families, and communities.”).

66. See Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 91–93, 105–06 (2018) (explaining how using RAIs at sentencing may lead to more, not less, incarceration while exacerbating existing flaws in the criminal justice system).

67. See Eaglin, *supra* note 58, at 82.

68. See *id.* at 94–96; see also Zimring, *supra* note 1 (manuscript ch. 6 at 20).

69. E.g., Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/9T4W-7LLF>] (finding that an actuarial risk assessment used in Florida was “particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants”). For insight to different ways to understand this study, see Eaglin, *supra* note 58, at 96–99. See generally Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019).

70. See, e.g., Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237 (2015) (arguing that using actuarial risk assessment tools may exacerbate existing racial disparities in the criminal justice system).

occurred or characteristics for which individuals are not responsible,⁷¹ and possibly increasing incarceration for some defendants rather than decreasing it.⁷² Despite these critiques from policymakers and scholars alike, tools continue to proliferate.⁷³

Though Zimring does not reference these tools directly as a possible sentencing reform, there are many ways that the tools can be and already are used in contexts that he suggests. For example, RAIs have been a popular tool for local administrators in California to use post-Realignment.⁷⁴ Many local administrators running drug courts and other diversionary treatment programs use RAIs as a gateway to select defendants for enrollment.⁷⁵ Nevertheless, expanding the use of RAIs at sentencing

71. See, e.g., Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 675 (2015) (asserting that RAIs “premise punishment on . . . characteristics which the individual possesses by accident of birth or cannot otherwise meaningfully change”).

72. See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 837 (2014) (suggesting that RAIs may encourage judges to reduce incarceration for some offenders while increasing it for others).

73. Botnick, *supra* note 62, at 173–77.

74. See Collins, *supra* note 66, at 71–72 (explaining how California courts use actuarial risk assessments in the post-conviction sentencing context after Realignment); see also HEATHER M. HARRIS ET AL., PUBLIC POL’Y INST. OF CAL., PRETRIAL RISK ASSESSMENT IN CALIFORNIA 4–5 (2019), <https://www.ppic.org/wp-content/uploads/pretrial-risk-assessment-in-california.pdf> [<https://perma.cc/V9JK-9BRB>] (explaining how, as part of judicial reform and in response to the pressures of Realignment, California counties expanded use of RAIs in pretrial bail determinations). Zimring focuses on bail reform to a limited extent because that is the origin of most defendants in jails, however this Essay limits its critique of actuarial risk tools to “sentencing” in the post-conviction context. For interesting critiques of actuarial risk assessments in the bail context, see, for example, Lauryn Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 683–84 (2018), which describes current RAIs as being ineffective in measuring various risks concerning a defendant’s failure to appear for trial, and Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018), which questions the theoretical basis for singling out defendants as subjects of RAI before adjudication.

75. See, e.g., NAT’L ASS’N OF DRUG COURT PROF., ADULT DRUG COURT BEST PRACTICE STANDARDS 5 (2018), <https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018-1.pdf> [<https://perma.cc/D56D-U5BK>] (recommending that candidates for a drug court are “assessed for eligibility using validated risk-assessment and clinical-assessment tools”); Eaglin, *supra* note 24, at 216–17 (discussing the shortcomings in using actuarial risk assessments as a “barrier to entry into rehabilitative programming” like drug courts).

may conflict with the thrust of Zimring's decarceral agenda. The remainder of this Part explains the tensions.

A. DEFINING "CATEGORICAL"

Zimring calls for categorizing offenders, and RAIs do put defendants into categories. However, these are different uses of the idea of "categories." Zimring's call for categories suggests removing an entire class of events—like prison eligibility—from prosecutorial discretion once inclusion in the category is determined.⁷⁶ This is the logic underlying Public Safety Realignment, but more expressly underlying Proposition 47. By reclassifying several low-level, nonviolent offenses as misdemeanors, the Proposition prevents prosecutors from selecting to charge the offenses as felonies based on the specifics of the case.⁷⁷ Instead, it requires that all charges for these specific offenses cannot be treated as felonies unless the offender had a prior conviction for certain enumerated serious offenses.⁷⁸ Thus, the Proposition made counties responsible for broader categories of offenders' punishment as defined at the state level.⁷⁹

That "categorical" reform is not the same as using a tool that selects individual defendants for different sentences based on administrative categories of recidivism risk. Actuarial risk assessments identify individual defendants who, because of their similarities to others in the criminal system, are not likely to be identified for criminal behavior in the future.⁸⁰ It places defend-

76. See Zimring, *supra* note 1 (manuscript ch. 6 at 2) (defining categorical reform efforts as "attempts to replace frequent uses of prison sentences with use of non-imprisonment alternatives for an entire category of offenses or offenders").

77. CAL. PENAL CODE § 17 (West 2018) (distinguishing sentencing for felonies and misdemeanors).

78. Eaglin, *supra* note 19, at 618.

79. Zimring, *supra* note 1 (manuscript ch. 6).

80. See Brandon Garrett & John Monahan, *Assessing Risk: The Use of Risk Assessment in Sentencing*, JUDICATURE (2019), <https://judicature.duke.edu/articles/assessing-risk-the-use-of-risk-assessment-in-sentencing/> [https://perma.cc/2SK6-K6CE].

ants into “categories” based on recidivism risk to improve judicial decision making.⁸¹ These categories cut across different offenses.⁸² For example, defendants convicted of homicide would often be characterized as low risk of recidivism because such defendants rarely find themselves in the specific situations that lead to that kind of violence twice.⁸³ Oppositely, a defendant convicted of a drug crime may have a high risk of recidivating because addiction underlies their drive to commit crime.⁸⁴ The risk measure cuts across different criminal outcomes as well.⁸⁵ For example, a defendant may be at a high risk of being rearrested but a low risk of being reconvicted for a crime.⁸⁶ Reforms based on this technical, managerial tool create new categories independent from traditional criminal justice indicators like criminal history and criminal offense.

On the one hand, reforms that embrace actuarial risk assessment categories appear more progressive than Zimring’s proposal because any defendant may fit into the category of “low risk.” Zimring’s categorical imperative, while somewhat agnostic to the definition of a category, resigns to the possibility that only some kinds of sympathetic offenders will be affected by his approach.⁸⁷ California, for its part, implemented Realignment for only the “non-non-nons”—non-violent, non-serious, non-sex offenders.⁸⁸ Conversely, RAIs create categories that have the potential to reach a far less sympathetic group of offenders. For example, actuarial risk assessments could play an important

81. See *In Brief: Understanding Risk and Needs Assessment*, COUNCIL OF STATE GOV'TS JUSTICE CTR. (Jan. 13, 2017), <https://csgjusticecenter.org/jr/in-brief-understanding-risk-and-needs-assessment/> [https://perma.cc/DS8V-LFDS].

82. See *id.*

83. See Eaglin, *supra* note 20, at 211–12.

84. Bowers, *supra* note 34, at 805–06; Eaglin, *supra* note 20, at 201.

85. See Garrett & Monahan, *supra* note 80.

86. Most often, the tools predict rearrest for any offense, but they can predict other outcomes like reconviction or rearrest for a violent crime as well. See Eaglin, *supra* note 58, at 75–76 (describing various recidivism measures in RAIs). Recent tools measure responsivity to rehabilitative interventions as well. See Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 498 (2019) (explaining the significance of evolving measurements of recidivism risk for sentencing).

87. See Zimring, *supra* note 1 (manuscript ch. 6).

88. See Petersilia, *supra* note 51, at 336 (explaining who qualifies as a “non-non-non” offender under California’s Public Safety Realignment legislation).

role in providing assurances for the release of individuals convicted of violent and sexual offenses on parole.⁸⁹ By expanding RAIs to sentencing determinations more broadly, perhaps RAIs present the kind of “categorical” reform that could have a broader impact on the prison population.⁹⁰

Yet that presumption elides a deeper distinction implicit within Zimring’s notion of a categorical imperative. Zimring uses “categorical” as a means to reach structural change in the administration of criminal law by removing a broad class of people from prison eligibility. RAIs invoke “categorical” as a means to shape individual decision making by identifying narrow subsections of the existing offender population that should not be incarcerated independent of what brings them to the criminal justice system now. This RAI categorization invites cherry-picking based on the discretion of individual actors. As Zimring well describes in the book, there are structural reasons why individual

89. Numerous states have incorporated actuarial risk assessments into their parole processes. *See, e.g.*, Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protections for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 245 n.201–05 (2017) (describing a trend toward increasing use of actuarial risk assessments in parole determinations within the states). As several scholars have noted, “[a]n optimist might hope that discretionary prison release will be a critical tool in the nation’s ‘decarceration’ agenda in coming decades.” Edward Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 280 (2017). If so, such scholars suggest that use of actuarial risk assessments will be central to that prison release agenda. *See id.* at 283, 297–301; *see also* MODEL PENAL CODE § 9.08 reporters’ note a (AM. LAW INST. 2017) (“If we’re interested in undoing mass incarceration without a surge in crime, we’ll have to use risk-assessment technology.” (citing Jennifer Skeem, Statement at the Joint Meeting of Parole Advisory Council & Probation Advisory Bd., Robina Inst. of Criminal Law & Criminal Justice, Minneapolis, Minn. (May 11, 2017))).

90. Partly, this reduces to an empirical question that Zimring takes up in the first part of his book—what drives mass incarceration and, in turn, what categories of defendants could drive decarceration. *See* Zimring, *supra* note 1 (manuscript ch. 6) (explaining the decision to focus on drug offenders). Others would suggest that focusing on drug offenders is in error as the volume of prisoners entering for violent crimes rose as well. *See* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 220–22 (2017) (urging inclusion of more than just drug offenders in criminal justice reform initiatives as a normative matter); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 185 (2017) (urging inclusion of more than just drug offenders in criminal justice reform initiatives as an empirical matter). For a summary of the debate amongst policymakers rather than scholars, see Jamiles Lartey, *Can We Fix Mass Incarceration Without Including Violent Offenders?*, MARSHALL PROJECT (Dec. 12, 2019), <https://www.themarshallproject.org/2019/12/12/can-we-fix-mass-incarceration-without-including-violent-offenders> [<https://perma.cc/7EPP-E9XA>].

local actors will adhere to “business as usual.”⁹¹ Critically, structural change circumvents resistance from local administrators by reducing their discretion to select among individual offenders for lesser sentences.⁹² That is, the structural nature of categorical reforms is imperative when shifting away from incarceration.

RAIs, even if implemented to encourage diversion, support a “business-as-usual” approach to reform. Because the structure of incentives remains the same, introducing these tools as a sentencing reform lacks the necessarily strong push for a downward tendency in incarceration overall. Perhaps such a reform will produce a redistribution of prisoners, but it may do so without the significant reduction in prison sentences over the long term.⁹³ That business-as-usual approach is not likely to work as a decarceral agenda. Empirically, Zimring demonstrates this in his analysis of other states’ trends in prison admissions and total prison populations since 2007 in comparison to California.⁹⁴ In this same time period, RAIs as sentencing reform have expanded greatly.⁹⁵ This suggests that categorization for the sake of categorization—as RAIs do—without the structural design component inherent to Zimring’s approach may not further a decarceral agenda.

B. CRITIQUING THE CARCERAL STATE

Let us assume, for a moment, that actuarial tools were implemented in a way that reduced local actors’ discretion and mandated diversion from prison for low-risk offenders.⁹⁶ Even

91. See Zimring, *supra* note 1 (manuscript ch. 5 at 6–7).

92. See *id.* (manuscript ch. 6) (explaining that the categorical imperative is different from “encouraging the same persons and levels of government to choose non-prison alternatives”).

93. See Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans* (Nov. 18, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489440 (demonstrating how the introduction of actuarial risk assessments at sentencing in Virginia shifted prison population but incarceration rate remains high).

94. See Zimring, *supra* note 1 (manuscript ch. 6) (describing state trends as reflecting a business-as-usual approach to reform).

95. See Eaglin, *supra* note 86, at 484. This is not a causal point, but rather adds to the earlier observation in Part I that RAIs are not significantly different from other popular reforms to trigger a significant downturn in incarceration levels.

96. Scholars and policymakers have encouraged this approach. The American Law Institute suggests restraint to this kind of use. MODEL PENAL CODE: SENTENCING § 9.08 (AM. LAW INST., Proposed Final Draft 2017). In a recent

then, RAIs as reform would exist in tension with the categorical imperative as a modest decarceral method. This is so because Zimring's categorical imperative sustains a critique of the carceral state; the proliferation of RAIs at sentencing does not.

Like other reforms that encourage selectivity by local administrators, RAIs encourage a kind of profiling of the offender pool for those deemed most appropriate for diversion.⁹⁷ Profiling in the carceral state has an inherent limit in efficacy, even if used for benevolent purposes. Here is the problem: certain people are "visible" in the data and others are not, given the existing enforcement practices upon which actuarial tools rely to profile defendants. If enforcement resources are directed toward a certain geographic and socioeconomic area, it creates more opportunity for a subpopulation in another geographic and socioeconomic area to increase criminal activity with impunity.⁹⁸ It produces what Bernard Harcourt has referred to as a potential "ratchet effect."⁹⁹ The concern is this: the prison population may stop reflecting the distribution of criminal behavior in society because resources remain focused on a particular subpopulation that is "predictable."¹⁰⁰ At the same time, crime may proliferate in different subpopulations because it is undetected.¹⁰¹

Zimring's critique of current drug policy and practice actually supports this concern. Zimring makes much of the opioid crisis as a reason for adopting the categorical imperative at sentencing. This crisis, he suggests, evidences larger shortcomings in criminal enforcement. As he notes, "[t]he volume of opioid

article, Brandon Garrett and John Monahan encourage possible procedural limits to ensure this kind of use. Brandon Garrett & John Monahan, *Judging Risk*, 108 CAL. L. REV. (forthcoming 2020) (manuscript at 42). For discussion of procedural constraints on RAIs more broadly, see Jessica M. Eaglin, *Beyond Equality: Procedural Constraints on Actuarial Risk Assessments at Sentencing*, 105 CORNELL L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190403.

97. See Eaglin, *supra* note 24, at 202 (critiquing reforms like RAIs and drug courts that encourage selectivity); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 633–34 (2012) (celebrating the selectivity of reforms that profile defendants for diversion).

98. For a much more detailed explanation of this idea, see BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 168–69 (2007).

99. See *id.* at 160–67.

100. *Id.* at 168–69.

101. *Id.* at 156–57 (emphasizing that the "distortive effect" occurs "whenever law enforcement relies on the evidence of correctional traces—arrests or convictions—in order to reallocate future law enforcement resources").

deaths per 100,000 expands tenfold in New Hampshire and twentyfold in Ohio and West Virginia” between 1999 and 2016, but this “spectacular expansion . . . produces no strong evidence of impact in the average to below average concentration of drug offenders in state prisons in the three epidemic states.”¹⁰² Note the metrics that Zimring uses to assess the opioid crisis: death from overdose. He does not use typical risk factors like age, gender, and criminal history because this epidemic touches an entirely different subset of the population. Those addicted to painkillers that turn to opioids and heroin tend to come from middle America, are white, and are older than typical criminal defendants.¹⁰³ Thus, traditional criminal justice data is not responsive to the crisis because it affects a different sector of the population *not often swept up in the carceral state*. Where the harm is, the criminal legal apparatus is not.

One way to resolve this dilemma is to expand the capacity of the carceral state to incapacitate more people so as to capture those not already in its net. Indeed, this is exactly how most reforms designed in the fashion of drug courts operate.¹⁰⁴ But Zimring does not suggest pursuing this route. Rather, he identifies the problem of opioid users as one of structure and perception: “The only major avoidable error of the criminal drug enforcement leadership has been its failure to loudly proclaim its irrelevance to effective harm reduction programs to counter the current epidemic.”¹⁰⁵ Said differently, the only “failure of government” on this front is its refusal to acknowledge that criminal law is incapable of reigning in this public health crisis.¹⁰⁶ For Zimring, illuminating this shortcoming has long-term expressive potential. If criminal law enforcement cannot handle one kind of drug addiction problem, perhaps it is not qualified to handle others. At the very least, it begs restructuring criminal law enforcement of drugs at the center of the first War on Drugs (crack cocaine) so that, for drug-addicted offenders, the preferred form of punishment is treatment and possibly decriminalization.¹⁰⁷ As Zimring suggests, applying this categorical method of reform in other states and in the federal system could remove

102. See Zimring, *supra* note 1 (manuscript ch. 6 at 16 fig.6.4).

103. *Id.*

104. See Eaglin, *supra* note 19, at 631–34 (noting limits to efficiency arguments as the basis of sentencing reforms like those modeled after drug courts).

105. See Zimring, *supra* note 1 (manuscript ch. 6 at 17).

106. *Id.* (manuscript ch. 6).

107. *Id.*

100,000 prisoners from the total population *if* the reform includes not just opioid users, but “street drug abusers” as well.¹⁰⁸

This is a structural critique of the carceral state. That is, it suggests that expanding the carceral arm of government to cope with another social problem is simply not an effective response. Rather than increasing drug enforcement resources or enhancing punitive sentencing practices for opioid users, Zimring’s decarceral method implicitly identifies a limit to carceral expansion. Structural transformations can improve current practices. In part, this requires removing criminal regulation as a primary response to emerging social crises. The other option—to expand resources and enhance punitive practices—would contradict the method’s higher calling to decarcerate. In this sense, the method diverges from the trend in reforms toward managing more sympathetic defendants without using prisons while persistently framing social issues as carceral state problems.¹⁰⁹ It opens space to question how society chooses to respond to social crises. It maintains decarceration as the guidepost to reform, not treatment or profiling or some other interest.¹¹⁰ In so framing the method, it offers a potential basis for contraction of the carceral state.

RAIs do not sustain structural critiques of the carceral state. To be sure, they sustain critiques of punishment practices. For example, these tools may demonstrate that some people are being incarcerated for too long without a very good reason.¹¹¹ They may be used to suggest that local administrators are not using alternatives to incarceration to the full extent possible.¹¹² They may even be used to suggest that incarceration is not the best

108. *Id.*

109. To the contrary, local actors are developing diversionary treatment programs similar to drug courts to capture more social issues. *See, e.g.,* Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1336 (2016) (describing creation of human trafficking intervention courts); Collins, *supra* note 20, at 12–13 (describing development of opioid intervention courts).

110. *See* Zimring, *supra* note 1 (manuscript ch. 6) (warning that the alternative to abandoning prison as a policy priority would be the radical increase in the flow of new drug prisoners).

111. *See, e.g.,* JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 7–10 (2016) (urging reevaluating sentences based on science of risk and rehabilitation).

112. *See, e.g.,* Garrett & Monahan, *supra* note 80, at 7–25 (examining how courts use risk information in local decision making).

response for punishment.¹¹³ But they do not suggest that the carceral state is too expansive or so deeply flawed that a cursory redistribution of punishment cannot satisfy the concerns raised by mass incarceration critiques most broadly defined.¹¹⁴ This is part of their appeal as a sentencing reform.¹¹⁵ To the extent that Zimring's proscription opens the door to the possibility that the criminal apparatus is not the right place to deal with a particular social problem, the expansion of RAIs as a sentencing reform exists in tension with that method. Thus, proliferation of the tools could frustrate a larger decarceral agenda.

III. REFLECTIONS ON A DICHOTOMOUS DECARCERAL AGENDA

The above exploration of the tensions between Zimring's proscription and popular sentencing reforms highlights a deeper tension within the reform policies being adopted in response to the economic and social pressures of mass incarceration. Whereas current popular interventions like specialty courts and actuarial risk assessments resist placing reduction in the use of incarceration as the central aim of reform, Zimring's structural method encourages states to place decarceration as a primary aim and incentivize local actors to accord with this aim through categorization.¹¹⁶ At the same time, the above discussion illuminates how Zimring's proscription remains incomplete as a decarceral agenda because it only implicitly confronts a fuller scope of intersecting shortcomings persistent in current sentencing reforms. Where sentencing reforms may focus on categorization as a means to achieve other aims like efficiency and cost-savings, they can also sustain policymakers' tendency to frame social issues as matters of crime and punishment.¹¹⁷ It is the combination of these features in sentencing reforms—the resistance to

113. See *supra* notes 19–24 and accompanying text (discussing RAIs as an indicator for diversion to treatment programs within the carceral state).

114. See Eaglin, *supra* note 86, at 543 (noting the “fundamental tension between the rise of actuarial risk tools at sentencing and the broader effort to dismantle the sociohistorical phenomenon of mass incarceration in the United States”).

115. See *id.* at 535 (analyzing the appeal of actuarial risk assessments in relation to the shift toward neorehabilitative reforms).

116. Compare *supra* notes 19–28 (describing current reforms tendency to focus on efficiency and cost), with *supra* notes 109–10 and accompanying text (framing Zimring's proscription as a structural critique of the carceral state).

117. See *supra* Part II.B; see also, Eaglin, *supra* note 19, at 631–34 (discuss-

thinking beyond the carceral state, the instance on searching for the “right” categorization of people as subjects for reform in the criminal justice system, and the overarching emphasis on efficiency and costs rather than decarceration—that threatens to expand the carceral state in the long run even if reforms stabilize or modestly decrease state prison populations in the short term. Because Zimring’s proscription only implicitly recognizes the intersection of these three features, it offers valuable insights but not a cohesive path forward for scholars and policymakers interested in decarceration.

This Essay concludes by highlighting three takeaways for those thinking about how to approach sentencing reforms with a decarceral agenda in mind. Though not the central takeaways of Zimring’s methodological proscription, it draws upon features of his categorical imperative to highlight useful practical and theoretical insights.

First, look to the intersections. The promise of Zimring’s categorical imperative exists at the intersection of different criminal justice reforms that together created conditions to achieve decarceral aims. Would shifting the categories of offenders eligible for prison sentence *or* increasing local criminal justice actors’ reliance on jails, alone, be sufficient to move toward decarceration? Probably not. Despite some ambiguity in his current manuscript, I want to suggest that Zimring sets forth only one option—California’s experience teaches that these methods *in tandem* can produce a significant decarceral effect. Public Safety Realignment allowed counties to use actuarial risk assessments to shape sentencing practices from the beginning, and many embraced the tools as a means to shape judicial discretion.¹¹⁸ It is notable, then, that the reform did not really “work” by Zimring’s standards until after Proposition 47 went into effect.¹¹⁹ That is, significant decarceration of prison *and* jail populations did not start until after Proposition 47 went into effect in 2014. As Zimring notes, from 2011 to 2012, the prison population in California

ing limits to efficiency-framed reforms implemented in response to mass incarceration); Gruber et al., *supra* note 109, at 1393–95 (critiquing sex trafficking courts as part of a problematic trend toward “penal welfarism”).

118. Zimring, *supra* note 1 (manuscript ch. 5).

119. Zimring makes the case that incarceration should be measured by reductions in both prisons and jails. *Id.* Currently, most critics discuss the United States prison population while minimalizing or disregarding its significant jail population. *Id.*; see also FAROLE & CISSNER, *supra* note 24, at 1 (noting how drug courts rely on jails to reduce incarceration time).

declined but the jail population increased.¹²⁰ In the year after Proposition 47 was implemented, the state's prison population decreased by almost four percent while the statewide jail population decreased by almost twelve percent.¹²¹ Realignment alone may not have been enough, and drug reform alone may not have had its expansive effect without the structural transformation.

Evidence from other states bears this out as well. For example, North Carolina is a state that suffers high rates of technical violations of parole like California.¹²² It similarly implemented a "realignment" reform to reduce technical violators returning to prison.¹²³ That reform did not adhere to the categorical imperative set up by Zimring—the state allowed counties to "opt in" to a structure where misdemeanor offenders became the responsibility of local counties rather than the state corrections department.¹²⁴ Counties were, in essence, offering up extra jail space for the state corrections department to send prisoners in return for money.¹²⁵ Though half the state's counties were participating by 2014,¹²⁶ that state-level reform did not result in significant reductions in sentences to incarceration more broadly.¹²⁷ Other

120. See Zimring, *supra* note 1 (manuscript ch. 6).

121. Cindy Chang et al., *Unintended Consequences of Proposition 47 Pose Challenge for Criminal Justice System*, L.A. TIMES (Nov. 6, 2015), <https://www.latimes.com/local/crime/la-me-prop47-anniversary-20151106-story.html> [<https://perma.cc/KU73-HKFD>].

122. See GOTTSCHALK, *supra* note 43, at 103–04 (discussing a 2011 Pew report detailing a state-by-state study of recidivism).

123. See H.B. 642, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011); *Statewide Misdemeanant Confinement Program*, N.C. SHERIFF'S ASS'N, <https://ncsheriffs.org/services/statewide-misdemeanant-confinement-program> [<https://perma.cc/9DBU-VD54>]. Notably, the North Carolina Sheriff's Association, a conglomerate of local government officials, managed this reform. *Statewide Misdemeanant Confinement Program*, *supra*. Zimring's categorical imperative requires state-level discretion. Zimring, *supra* note 1 (manuscript ch. 6).

124. See *supra* note 123.

125. See Tia Nanjappan, *The Profit Motive Behind Overcrowded NC Jails*, CHARLOTTE POST (Jan. 24, 2018), <http://www.thecharlottepost.com/news/2018/01/24/local-state/the-profit-motive-behind-overcrowded-nc-8200-jails/> [<https://perma.cc/LL7E-N7JQ>] (discussing money incentives being offered to rural and small counties).

126. See THE COUNCIL OF STATE GOV'TS JUSTICE CTR., JUSTICE REINVESTMENT IN NORTH CAROLINA: THREE YEARS LATER (2014), <https://csgjusticecenter.org/wp-content/uploads/2020/02/JRinNCThreeYearsLater.pdf> [<https://perma.cc/KL32-TE9B>] (noting how reforms had been implemented by half of counties).

127. PRISON POLICY INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH (2017), <https://www.prisonpolicy.org/>

states tried their hands at modestly reclassifying low-level drug offenses like California. In South Carolina, for example, the legislature reclassified several offenses as “violent” even as it reduced prison eligibility for drug possession offenses.¹²⁸ In Texas, legislation encouraged treatment in communities rather than long prison terms for select offenders.¹²⁹ The reform had the long-term effect of increasing carceral supervision and at best stabilizing the state’s incarcerated population.¹³⁰ These experiences suggest that perhaps states need both categorical removal of prison eligibility and financial realignment if they choose to pursue the categorical imperative as a route to decarcerate. But even if states choose a different route, the possibility of meaningful decarceration may lie at the intersection of seemingly independent criminal justice reforms rather than singular agendas.

Second, beware the consolidation of power. Zimring’s book urges the accumulation of discretion at the state level to avoid resistance to decarceration at the local level.¹³¹ Yet Zimring may be underestimating the federal government’s outsized role at the national level and the role of non-criminal justice actors at the local level in shaping any decarceral agenda. For example, Zimring defends his use of national statistics to analyze a decarceral agenda, but he avoids examining the role of national initiatives to shape state reform agendas.¹³² For example, the Justice Reinvestment Initiative (JRI) is a joint public-private coalition that enters states to study their criminal justice system and provide state-level policymakers with ways to reduce prison populations while maintaining public safety.¹³³ Though JRI reforms are targeted at the state level first and foremost, it receives significant

reports/jailovertime.html [https://perma.cc/Z4EX-DQWT] (demonstrating a graphical overview of incarceration trends in North Carolina).

128. Eaglin, *supra* note 19, at 631–32.

129. Eaglin, *supra* note 24, at 206 (“[Texas reforms] included assigning non-violent offenders to mental health and drug treatment programs instead of prison, placing those serving less than two years in short term jails, and engaging in early prevention . . .”).

130. For further explanation, see McLeod, *supra* note 24, at 666–76 (critiquing criminal justice reforms in Texas as part of an “anti-tax, antiregulatory reform agenda” that neither reduced incarceration nor facilitated decarceration).

131. See generally Zimring, *supra* note 1.

132. *Id.* (manuscript ch. 2).

133. See Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 539 (2015) (providing an overview of the JRI).

funding from the federal government to assist states in shaping their reform agenda.¹³⁴ Similarly, the federal government heavily subsidizes drug courts, and that funding is accompanied by conditions that shape the structure of drug courts in a state.¹³⁵ So, to the extent that states are funding active criminal justice reforms that appear to further a decarceral agenda, most are drawing from the pot of money incentivized by the federal government. That those reforms are inherently cautious has been critiqued.¹³⁶ Here, I want to highlight the overlap with the buildup of the carceral state. Every state increased incarceration, but the course was sustained by the federal government's incentives as well.¹³⁷ If states are going to decarcerate, then law and policymakers need to grapple not only with state policy, but

134. See Eaglin, *supra* note 19, at 609–10 (highlighting types of funding granted by the federal government for JRI).

135. See *id.* at 619; Miller, *supra* note 32, at 1488–1503 (providing an overview on drug court infrastructure).

136. See, e.g., GOTTSCHALK, *supra* note 43, at 100 (“[Justice reinvestment] may be thwarting the emergence of a broad-based political movement with power, resources, wherewithal, and vision to mount a sustained attack on the carceral state that will result in sizable reductions in the prison population and its retrenchment in other areas.”); see also Eaglin, *supra* note 19, at 597 (noting that the “drug court paradigm” has “surface appeal” but “may actually perpetuate overreliance on incarceration in the status quo and exacerbate flaws in the criminal justice system”).

137. See, e.g., ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 134–79 (2016) (discussing financial incentives to expand the carceral arm of the state in the 1960s, largely through federal initiatives); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 34 U.S.C. § 12102 (2018)) (authorizing “grants to individual States and to States organized as multi-State compacts to construct, develop, expand, modify, operate, or improve correctional facilities”); Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 78 (1999) (“To alleviate some of the pressure placed upon state budgets due to the increased incarceration of violent offenders, states have received funding from the federal government for construction—‘bricks and mortar’—of prison cells.”); Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> [https://perma.cc/G7TJ-KE66] (“[T]hese series of grants reflect the federal government’s role in spurring states towards more punitive criminal justice measures. The funding encouraged states and cities to increase arrests, prosecutions, and incarceration, playing a tremendously powerful part in growing the size and scope of our correctional system.”).

with national agendas. In that sense, the accumulation of discretion at the state level is fraught because it, too, may be shaped by often-invisible commands at the national level.

At the same time, more thought should be dedicated to the role of local non-criminal administrators (aka the public) in shaping a decarceral agenda as well. California's significant reforms generated from two directions. First, the federal courts produced external pressures on the state from litigation-related court orders to reduce the prison population.¹³⁸ Second, the public created direct pressure through popular ballot initiatives advanced by national and local policymakers in conjunction with community activists.¹³⁹ Zimring's proscription largely carves the public out of the decarceral equation. In so doing, his intervention backdoors its way into a larger debate about expertise and the role of lay people in dismantling the phenomenon of mass incarceration.¹⁴⁰ Yet meaningful distinctions exist between penal populism on the one hand and bottom-up criminal justice reforms on the other. Sensitivity to this ongoing intellectual and practical debate is critical to developing a decarceral agenda going forward.

Finally, beware of simplification. Zimring's pragmatic reform agenda at best would bring the United States from a point of crisis to what he describes as "mass incarceration light."¹⁴¹ What does it mean to be satisfied with an incarcerated population that stabilizes at a rate far larger than that of the 1970s? Zimring suggests it means changing the focus of reform going forward to understand how to make a society with high rates of incarceration more bearable.¹⁴² This means, for example, shifting reform efforts toward collateral consequences of incarceration.¹⁴³ That is one route. Another route, I might suggest, is to think about what mass incarceration means more broadly. Mass

138. Zimring, *supra* note 1 (manuscript ch. 5).

139. *Id.* (manuscript ch. 6).

140. Compare Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) (advocating for "adversarial, contestatory forms of [lay] participation and resistance" in criminal justice to "build power and push for transformation"), with RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 165–86 (2019) (urging expansion in the role of experts to shape criminal justice and punishment).

141. Zimring, *supra* note 1 (manuscript ch. 5).

142. *Id.* (manuscript ch. 10).

143. *See id.*

incarceration refers to more than our excessive reliance on incarceration; it also describes a transformation in conceptions of legitimate government support and intervention that sustain this phenomenon. If we cannot expand the question beyond just how to reduce incarceration to deeper questions of punishment and society, then perhaps we should be satisfied with a world where criminal justice reforms are driven by cost savings and maintenance. But for those that feel a deep sense of unease with that conclusion, perhaps it is time to start engaging with punitive policies from a sociohistorical rather than simply an empirical framework.¹⁴⁴ Zimring's book takes a significant step in that direction by using empirical criminology and history in tandem to construct a decarceral agenda. His conclusions only demonstrate the need for more humanist methodologies when discussing mass incarceration as an ideology going forward.

144. See Eaglin, *supra* note 86, at 537–38 (noting shortcomings in adopting technical reforms to address the sociohistorical phenomenon of mass incarceration (citing Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 268–71 (2018))); see also Amna Akbar, *Toward a Radical Imagination of Law*, 93 NYU L. REV. 405, 465–70 (2019) (critiquing police reforms that undercut the larger debate surrounding punishment and society).