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Guide to Preparing Manuscripts

Editorial Policy—*Criminology & Public Policy* (CPP) is a peer-reviewed journal devoted to the study of criminal justice policy and practice. The central objective of the journal is to strengthen the role of research findings in the formulation of crime and justice policy by publishing empirically based, policy-focused articles. Authors are encouraged to submit papers that contribute to a more informed dialogue about policies and their empirical bases. Papers suitable for CPP not only present their findings, but also explore the policy-relevant implications of those findings. Specifically, appropriate papers for CPP do one or more of the following:

- Strengthen the role of research in the development of criminal justice policy and practice
- Empirically assess criminal justice policy or practice, and provide evidence-based support for new, modified, or alternative policies and practices
- Provide more informed dialogue about criminal justice policies and practices and the empirical evidence related to these policies and practices
- Advance the relationship between criminological research and criminal justice policy and practice

The policy focus of the journal requires articles with a slightly different emphasis than is found in most peer-reviewed academic journals. Most academic journals look for papers that have comprehensive literature reviews, provide detailed descriptions of methodology, and draw implications for future research. In contrast, CPP seeks papers that offer literature reviews more targeted to the problem at hand, provide efficient data descriptions, and include a more lengthy discussion of the implications for policy and practice. The preferred paper describes the policy or practice at issue, the significance of the problem being investigated, and the associated policy implications. This introduction is followed by a description and critique of pertinent previous research specific to the question at hand. The methodology is described briefly, referring the reader to other sources if available. The presentation of the results includes only those tables and graphs necessary to make central points (additional descriptive statistics and equations are provided in appendices). The paper concludes with a full discussion of how the study either provides or fails to provide empirical support for current, modified, or new policies or practices. The journal is interdisciplinary, devoted to the study of crime, deviant behavior, and related phenomena, as found in the social and behavioral sciences and in the fields of law, criminal justice, and history. The major emphases are theory; research; historical issues; policy evaluation; and current controversies concerning crime, law, and justice.

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EDITORIAL INTRODUCTION

REMODELING AMERICAN SENTENCING

Reinventing Sentencing in the United States

Daniel S. Nagin

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For four decades spanning the early 1970s through the first decade of the 21st century, the imprisonment rate in the United States increased by a factor of five. Taking into account jail populations, approximately 1% of the adult population in the United States is behind bars. Although other countries have also increased their prison populations over at least part of this period, the United States stands out as an outlier—with 5% of the world’s population, the United States accounts for 25% of the world’s prison population. These statistics are well known to students of U.S. crime policy but until recently were little known or attended to by the general public and, particularly importantly, by persons responsible for the U.S. criminal justice policy.

That has changed in recent years. Attorney General Holder has been an outspoken critic of the over-use of prison in the United States. In a fall 2013 speech to the American Bar Association, he stated: “Too many Americans go to too many prisons for too long and for no truly good law enforcement reason.”¹ Just as important to the politics of criminal justice policy, criticism of prison policy is not only a political agenda item of Democrats but also of Republicans. Prominent Republicans have formed the *Right on Crime* advocacy group that openly advocates for scaling back the reliance on incarceration as the policy response to all crime problems.

Has the recent attention to the overuse of prisons paid dividends in terms of a material reduction in the rate of incarceration? The answer is “not yet.” In 2009, the total U.S. prison population peaked. By year-end 2013, the latest year for which data are available, the prison population had declined by approximately 3%; a large share of the decline is attributable to population reductions in California that were mandated by a court order—not by voluntarily enacted policy changes. Furthermore, increases in the jail population resulting from diversions of would-be state prisoners to local jails are further muting the overall reduction in the rate of incarceration.

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1. cnn.com/2013/08/12/politics/holder-mandatory-minimums/.

For this reason, William Bales and I in our role as co-editors of *Criminology & Public Policy* (CPP) commissioned Michael Tonry to write the lead article of this special issue of CPP. Tonry is a long-time student and critic of U.S. criminal justice policy especially as it relates to sentencing and imprisonment. In this regard, he does not stand alone. What sets Tonry apart is his encyclopedic knowledge of criminal justice policies outside of the United States and his deep insights into the policy implications for criminal justice policy of normative theories of punishment and social science research on the causes and consequences of sanction policy. All of this knowledge and insight is marshalled in “Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration” (2014, this issue). Tonry lays out an action plan that the 50 states and the federal government should adopt for the purpose of achieving a 50% reduction in the U.S. imprisonment rate by 2020. The blueprint is ambitious and wide ranging. It includes changes in sentencing statutes, parole reforms, and the establishment of sentencing commissions to promulgate presumptive sentencing guidelines.

Accompanying Tonry’s (2014) article are five thoughtful commentaries. All endorse Tonry’s blueprint but point out several obstacles to its implementation as well as some gaps in his policy suggestions.

Although he is supportive of Tonry’s (2014) proposals, Steven Raphael (2014, this issue) is circumspect about whether a 50% reduction in prison population can be achieved without a material impact on crime rates. He goes on to describe how reinvesting the savings from reductions in prison population in other more effective crime prevention methods such as policing could blunt or even avert an increase in crime. I concur with Raphael’s assessment. Indeed, I advocated the approach that he describes in an earlier special issue of CPP (Durlauf and Nagin, 2011). Raphael also outlines a novel proposal for creating financial incentives for counties to impose community-based sanctions on residents convicted of less serious crime as a device for curtailing state prison admissions.

Cassia Spohn, like Tonry, is a long-time student of the sentencing reform movement. She (2014, this issue) cautions that Tonry’s (2014) proposal that every state adopt a sentencing commission to promulgate sentencing guidelines might have just the reverse of its intended effect—increasing rather than reducing sentence severity. Although she acknowledges that presumptive sentencing commissions in some states have been effective in reducing sentence severity, in other states they have not. She points to counterexamples in which presumptive guidelines led to increased severity because the guidelines prohibited judges from considering the offender’s personal circumstances.

Gerard E. Lynch (2014, this issue), who is a sitting judge on the Federal 2nd Court of appeals, echoes Spohn’s concern that presumptive sentencing commissions might not necessarily function as intended. The presumptive guidelines promulgated by the U.S. Sentencing Commission is a prime example. He points out that the distinction between voluntary guidelines, which Tonry (2014) argues are ineffective, and presumptive guidelines,

which he argues are generally effective, is blurry. Judge Lynch goes on to describe two important issues that are not addressed in Tonry's blueprint. One is a plan for reducing jail populations. Jails house a population that is distinct from prisons both in terms of their criminal status, convicted or not, and for those who are convicted the seriousness of their crime. Tonry's blueprint is not designed to address reductions in this population, which Lynch believes is also unnecessarily large. Tonry would undoubtedly agree with this observation. Lynch closes by highlighting an ongoing consequence of the deinstitutionalization of the mentally ill that dates back to the 1960s and 1970s. U.S. prisons and jails, not mental institutions, now house the largest share of the institutionalized mentally ill. Lynch suggests that this is partly a consequence of underfunding of community mental health services. His commentary on the implications of the failure to provide adequate mental health funding for policies to reduce prison populations might be prophetic.

All five commentators make mention of the political obstacles to implementation of Tonry's (2014) blueprint. Two essays make it their central focus but from very different perspectives. Anthony N. Doob and Cheryl Marie Webster (2014, this issue), two Canadian observers, give an international perspective. Doob and Webster provide instructive accounts of two places outside of the United States that successfully achieved substantial reductions in their imprisonment rate: Finland and the Canadian province of Alberta. One conclusion they reach is encouraging for Tonry's proposal—that "money talks." The main impetus for the Alberta reduction was saving money to spend for other governmental services. This condition seems to hold in the United States. The other conclusions are more discouraging. It took Finland 40 years to achieve its two-thirds reduction. They also point out there is no single policy governing U.S. imprisonment. Instead, 51 policies exist—one for each of the states plus the federal system. Doob and Webster present a statistical analysis that is intended to make the case that prison policies across the 50 states are reflective of cultural values and therefore are not easily changed.

Jeremy Travis (2014, this issue) provides an astute domestic perspective on the problem of political mobilization. The dimensions of the mobilization problem that he lays out are daunting—but in my judgment not impossible, just challenging. Governors and legislators must be mobilized to act. Travis reminds us that the small steps thus far taken might be prerequisites for the bolder action that Tonry (2014) advocates. He points out that the set of relevant political actors is larger than just governors and legislators. It includes both elected prosecutors and judges. His observation about the power of prosecutors in the policy process is particularly important. He also reminds us that elected officials are just that, and thus, the realistic possibility of large policy changes requires a change in public attitudes about effective and sensible crime policy. Travis offers interesting campaign themes for building public support for policies aimed at reducing the numbers of people sent to prison and reducing the sentence lengths of those who are sent.

I close with an observation that was not picked up on in any of the commentaries perhaps because it seemed too obvious. Tonry (2014) justifies each item in his blueprint with

an appeal to five longstanding principles for designing a just and effective system of sanctions. They are individualization, humanity, parsimony, proportionality, and regularity. For four decades, U.S. policy makers ignored these principles in making criminal justice policy. The result was an accumulation of incremental policy changes that inflicted cruel injustices, disrupted families and communities, and were extraordinarily inefficient in preventing crimes. Thus, Tonry not only provides a framework for unraveling poor policy choices of the past but also provides a framework for making good policy choices in the future. For this, he deserves the thank you of all residents of the United States.

References

- Doob, Anthony N. and Cheryl Marie Webster. 2014. Creating the will to change: The challenges of decarceration in the United States. *Criminology & Public Policy*, 13:547–559.
- Durlauf, Steven N. and Daniel S. Nagin. 2011. Imprisonment and crime: Can both be reduced? *Criminology & Public Policy*, 10:9–54.
- Lynch, Gerard E. 2014. Ending mass incarceration: Some observations and responses to Professor Tonry. *Criminology & Public Policy*, 13:561–566.
- Raphael, Steven. 2014. How do we reduce incarceration rates while maintaining public safety? *Criminology & Public Policy*, 13:579–597.
- Spohn, Cassia. 2014. Twentieth-century sentencing reform movement: Looking backward, moving forward. *Criminology & Public Policy*, 13:535–545.
- Tonry, Michael. 2014. Remodeling American sentencing: A ten-step blueprint for moving past mass incarceration. *Criminology & Public Policy*, 13:503–533.
- Travis, Jeremy. 2014. Assessing the state of mass incarceration: Tipping point or the new normal? *Criminology & Public Policy*, 13:567–577.

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Remodeling American Sentencing

A Ten-Step Blueprint for Moving Past Mass Incarceration

Michael Tonry

University of Minnesota

Summary

When and if the will to roll back mass incarceration and to create just, fair, and effective sentencing systems becomes manifest, the way forward is clear.

First, three-strikes, mandatory minimum sentence, and comparable laws should be repealed.

Second, any three-strikes, mandatory minimum sentence, and comparable laws that are not repealed should be substantially narrowed in scope and severity.

Third, any three-strikes, mandatory minimum sentence, and comparable laws that are not repealed should be amended to include provisions authorizing judges to impose some other sentence “in the interest of justice.”

Fourth, life-without-possibility-of-parole laws should be repealed or substantially narrowed.

Fifth, truth-in-sentencing laws should be repealed.

Sixth, criminal codes should be amended to set substantially lower maximum sentences scaled to the seriousness of crimes.

Seventh, every state that does not already have one should establish a sentencing commission and promulgate presumptive sentencing guidelines.

Eighth, every state that does not already have one should establish a parole board and every state should establish a parole guidelines system.

Ninth, every state and the federal government should reduce its combined rate of jail and prison confinement to half its 2014 level by 2020.

Tenth, every state should enact legislation making all prisoners serving fixed terms longer than 5 years, or indeterminate terms, eligible for consideration for release at the expiration of 5 years, and making all prisoners 35 years of age or older eligible for consideration for release after serving 3 years.

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These proposals are evidence-based and mostly technocratic. Those calling for prison population targets and reducing the lengths of sentences being served may seem bold to some. Relative to the problems they address, they are modest and partial. Decreasing rates of imprisonment by half in the United States, a country with comparatively low crime rates, to a level that will remain 3 to 3.5 times those of other developed Western countries, can hardly be considered overly ambitious.

Keywords

sentencing reform, mass incarceration, principled sentencing, evidence-based sentencing

It is difficult to believe that anyone, even in their most moralistic, politically motivated, socially fraught moments, foresaw or would have chosen the criminal justice systems Americans have in 2014. No one who remembers being a teenager, or being the parent of one, can really want to send 17-, 18-, or 19-year-old drug sellers to prison for decades for being stupid, impulsive, greedy, or unduly swayed by peers. No one can really believe it was right that 1 in 13 young Black men spent the night in a state or federal prison on the day these words were written; many others were in county jails. No one can really believe that anyone except, possibly, people who have committed horrific murders should be serving prison sentences of life without the possibility of parole. No one can really believe it is a Good Thing that time in prison became a predictable part of the life cycle for several generations of disadvantaged minority men, that the United States locks up seven to ten times more of its citizens than do other Western countries, or that many states spend more on prisons than on higher education.

Most of those things happened because American policy makers in the 1980s and early 1990s stopped thinking much about the criminal law as an institution primarily aimed at reinforcing fundamental social norms and responding responsibly, proportionately, and parsimoniously to their breach. The criminal law and sentencing became means to other ends such as winning elections, fighting cultural wars, and refusing to accept that the United States had become a multiethnic and multiracial country. Evidence and mainstream normative ideas about just punishments have been conspicuously absent from policy making about sentencing since the mid-1980s. Something else has been driving policy making.

A number of stories have been offered to explain what that something was. One focuses on steep rises in crime rates, usually emphasizing homicide, which started in the 1960s and, after intermediate fluctuations, began to fall steadily only in 1991. Americans became angry, frightened, and insecure, creating an atmosphere of “populist punitivism” (Bottoms, 1995) or “penal populism” (Pratt, 2007). The rest, it is said, is obvious. Policy makers and practitioners responded to public demands that something be done (Bennett, DiIulio, and Walters, 1996; Ruth and Reitz, 2003; Zimring and Hawkins, 1999).

A second story is that existential agonies of contemporary society or, as some would say, “late modernity,” were the drivers of sentencing policy. In all Western countries, the final third of the 20th century was a period of globalization, economic restructuring, instability, rapid social change, and rising crime rates. Politicians responded opportunistically. On one influential account, crime and criminals were convenient symbols of the forces of instability. Politicians promoted punitive, expressive legislation in order to acknowledge public anxieties, protect the legitimacy of the state, and promote political self-interest (Garland, 2001). The important thing was not that policies be effective or even be believed to be effective, but that the public see that something was being done. In another influential version of that story, politicians manipulated public anxieties about crime in order to gain or preserve power that could be used to pursue other ends (Simon, 2007). In still another account, public anxieties, exacerbated by global mass media, fostered a climate of risk aversion to which politicians responded, harsh anti-crime policies being but one of many exaggerated responses to heightened perceptions of many kinds of risk (Bauman, 2008; Beck, 1992, 2008; Douglas, 1992).

A third story is that the tough-on-crime period in the United States and similar developments since the early 1990s in England and Wales and in New Zealand were consequences of the growing influence of neoliberalism and its political emanations. Declining social welfare expenditure, it is said, reduced governmental capacity to build human capital and shelter citizens from adversity. Increasing emphasis on personal responsibility for economic and social disadvantage, what former English British Prime Minister Tony Blair called “responsibilization,” has exposed many individuals to more extreme disadvantage than in earlier times and heightened other people’s judgmental inclinations to react harshly to criminal and other irresponsible behavior (Cavadino and Dignan, 2005; Lacey, 2008).

None of those stories provides an adequate explanation for American developments. The unsettling social and economic changes of recent decades affected all wealthy developed countries. All except Japan experienced steep rises in crime rates, including for homicide, from the 1960s to the 1990s. Only a handful adopted harshly punitive criminal justice policies—the United States primarily between 1984 and 1996 (Tonry, 2013), England and Wales between 1993 and 2003 (Downes and Morgan, 2012), and New Zealand since the late 1990s (Pratt and Clark, 2005). Most other developed Western countries, including Germany, Australia, Belgium, Canada, France, Switzerland, and the Scandinavian countries except Finland, had stable or only slightly rising imprisonment rates during the period of sharply rising crime rates in all Western countries. Finland’s imprisonment rate fell by two thirds (Lappi-Seppälä, 2008).

Countries have different criminal justice policies and practices for reasons of political culture and history, not because of crime levels, crime trends, or global social and economic forces. Anglo-Saxon countries have higher imprisonment rates than Scandinavian ones. French, Italian, and some other European governments regularly reduce their prison populations by use of large-scale collective pardons and amnesties (Lévy, 2007). The United

States responded to rising crime rates by enacting harsher laws and building more and larger prisons. Most European countries responded to comparable crime rate rises, usually an overall tripling and a doubling for homicide, with prosecutorial diversion programs, new alternatives to imprisonment, and reductions in the length of prison terms (Tonry, 2007).

Countries and, within the United States, states, have the policies and prison populations they choose. Between 1965 and 1990, during which overall and violent crime rates tripled in Germany, Finland, and the United States, German politicians chose to hold the imprisonment rate flat, Finnish politicians chose radically to reduce theirs, and American politicians enacted policies intended to increase use of imprisonment substantially (Tonry, 2001). All American states experienced large crime rate increases in the 1970s through the early 1990s, but their responses were substantially different. Politicians in states like Maine, Vermont, and Minnesota by and large resisted calls for enactment of the harshest laws. Politicians in states like California, Oklahoma, Florida, and Georgia responded with enthusiasm.

Political liberals in the 1970s and early 1980s, mostly Democrats but also some Republicans, believed that the best way to address rising crime rates was to adopt social policies that addressed underlying social and economic problems associated with criminality. It soon became clear that they could seldom win head-to-head electoral contests in which conservatives of either party made crime a major issue unless they too became “tough on crime.” Most Democrats did, most famously when soon-to-become-president Bill Clinton and his Democratic Leadership Council decided never to let the Republicans get to their right on crime (Gest, 2001; Windlesham, 1998).

American criminal justice policy making from the mid-1980s through the mid-1990s as a result was a one-way ratchet. Sentencing laws only became harsher, and prison populations larger. Once the political stalemate was firmly in place, relatively few major new punitive laws were enacted, almost none after 1996. In 2014, nearly all the harshest laws enacted from 1984 through 1996 remain in place. No state has repealed a three-strikes, truth-in-sentencing, or life-without-possibility-of-parole (LWOP) law, and most changes to mandatory minimum sentence laws have only nibbled at their edges by creating exceptions that slightly narrow their scope or provide earlier eligibility for parole release for nonviolent first offenders (Austin et al., 2013).

The sentencing policy developments of the 1980s and 1990s in retrospect are explainable, even if regrettable. Some reform initiatives of the 1970s and early 1980s—parole and presumptive sentencing guidelines—achieved their goals of improving predictability and consistency, reducing racial and other disparities, making the process more transparent and officials more accountable, and providing tools that helped corrections officials manage their budgets and plan their needs for facilities (Tonry, 1996; Travis and Western, 2014: ch. 3). Those initiatives, however, fell from favor because their achievements ceased being strategically important to politicians. Reducing racial and other unwarranted disparities and enhancing consistency and predictability ceased to be major policy aims.

Once crime became a galvanizing issue in partisan politics, evidence about the likely effects of alternative policy choices ceased to matter. Policy makers had other things on their minds. The main cautionary findings of research on mandatory minimum sentences, deterrence, and incapacitation were known in the mid-1980s before lengthy mandatory minimum sentence, three-strikes, LWOP, and truth-in-sentencing laws proliferated. Such laws have few, if any, discernible deterrent effects. The most authoritative surveys of research on the subject, even when observing that some studies have shown modest deterrent effects, conclude that the effects are so small and uncertain, and so dependent on conditions that are seldom met, that they cannot serve as adequate bases for policy making (Nagin, 1978, 1998, 2013; Travis and Western, 2014: ch. 5). Such laws are sometimes but not always circumvented, often result in sentences that everyone immediately involved believes to be unjustly severe, and are used by prosecutors—because of their severity—as threats to coerce defendants to waive their right to a trial and plead guilty to lesser offenses (Tonry, 2009). Incapacitation by means of lengthy prison sentences is largely ineffective, wasteful, and expensive (Cohen, 1983; Travis and Western, 2014: ch. 5).

None of the empirical assertions in the preceding two paragraphs is especially controversial. A series of National Academy of Science reports three decades ago endorsed them (Blumstein, Cohen, Martin, and Tonry, 1983 [sentencing]; Blumstein, Cohen, and Nagin, 1978 [deterrence and incapacitation]; Blumstein, Cohen, Roth, and Visher, 1986 [criminal careers]), as have subsequent ones (Nagin and Pepper, 2012 [deterrent effects of capital punishment]; Reiss and Roth, 1993 [understanding and controlling violence]). The 2014 National Academy of Sciences report on causes and consequences of high rates of incarceration reviewed the state of the evidence through 2013 and confirmed all the earlier conclusions (Travis and Western, 2014). What we know in 2014 is what we knew in the mid-1980s. The proponents of the tough-on-crime laws enacted from 1984 through 1996 aimed to send messages, win elections, and gain or retain political power. They didn't let evidence, or its absence, get in the way.

For the first time in a third of a century, however, circumstances may be auspicious for remaking American sentencing into something that is fairer, more effective, and more just; that reinforces basic social norms; and that deserves respect. A broad-based political consensus is emerging that fundamental changes are needed. Liberal politicians and reform groups have long argued that sentencing laws are too harsh and too rigid, that too many minor offenders are sent to prison, and that people too often exit prison more likely to commit crimes than when they entered. U.S. Attorney General Eric Holder recently reiterated all these assertions, directing U.S. attorneys to think long and deeply before prosecuting people under mandatory minimum sentence laws and announcing a thorough-going initiative to review federal prisoners' records in order to identify people who should receive presidential clemency (Apuzzo, 2014a, 2014b).

Many well-known conservatives say similar things, even though in earlier times they often supported and called for the laws that produced those results. "There is an urgent

need to address the astronomical growth in the prison population, with its huge costs in dollars and lost human potential,” wrote Republicans Newt Gingrich and Pat Nolan (2011, para. 7), announcing the formation of Right on Crime, a justice reform group. “We can no longer afford business as usual with prisons. The criminal justice system is broken, and conservatives must lead the way in fixing it.”

The web page of Right on Crime, under the heading “What Conservatives Are Saying,” contains a long list of criticisms. U.S. Senator Rand Paul (Kentucky):

Our federal mandatory minimum sentences are simply heavy handed and arbitrary. They can affect anyone at any time, though they disproportionately affect those without the means to fight them. We should stand and loudly proclaim enough is enough. We should not have laws that ruin the lives of young men and women who have committed no violence. (Right on Crime, 2014: para. 3)

Grover Norquist, head of Americans for Tax Reform:

It appears that mandatory minimums have become a sort of poor man’s Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself. Viewed through the skeptical eye I train on all other government programs, I have concluded that mandatory minimum sentencing policies are not worth the high cost to America’s taxpayers. (Right on Crime, 2014: para. 26)

Texas Governor Rick Perry:

I believe we can take an approach to crime that is both tough and smart . . . [T]here are thousands of non-violent offenders in the system whose future we cannot ignore. Let’s focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again. (Right on Crime, 2014: para. 5)

U.S. Congressman Chris Cannon (Utah):

In this whole thing, nobody is being soft on crime. . . . The system has a very strong tendency to change [offenders] for the worse. Everybody knows that, I think. Our current system is fundamentally immoral. (Right on Crime, 2014: para. 31)

The same kind of emotive language about lost human potential, ruined lives, heavy-handed and arbitrary laws, simplistic and ineffectual policies, and immorality has appeared regularly over the past 20 years in statements by representatives of the American Civil Liberties Union and other liberal law reform groups. That they are offered by high-profile

conservative Republicans suggests the possibility of a fundamental shift away from the tough-on-crime attitudes of recent decades and that the time may be ripe for major changes.

Major changes are underway. Voters and courts have acted boldly, but so far legislators and executive branch officials have not. They have made only minor, marginal changes to laws that sent so many people to prison for so long.

For a dozen years, voters by contrast have often supported major changes. In 2014, Gallup Poll results showed that less than 2% of Americans considered crime and violence America's most serious problem; drug abuse ranked lower. Sixty-one percent of California voters in 2000 supported Proposition 36, requiring that people convicted of a first or second nonviolent drug offense be offered probation with drug treatment instead of a prison sentence. Sixty-nine percent of California voters in 2012 passed another Proposition 36, this time sharply narrowing the scope of the state's three-strikes law and making the changes retrospective. Colorado and Washington voters in 2012 voted to legalize the sale of marijuana. By 2013, the medical use of marijuana was legal in 20 states, in many as a result of referendums enacted by voters. These states include Alaska, Arizona, and Montana, "red" states that typically elect conservative Republicans to statewide offices.

Judges have acted boldly. In *People v. Superior Court (Romero)* (1996), a California Supreme Court composed entirely of members appointed by conservative Republican governors, using tortured reasoning, empowered judges to disregard the three-strikes law. In a long series of decisions beginning in the 1990s, the U.S. Supreme Court, dominated by conservatives since the 1970s, reduced the severity of federal and state sentencing laws and guidelines. In *Koon v. United States* (1996), the court weakened the strict and severe federal guidelines by broadening judges' discretion to depart from them. In *United States v. Booker* (2005), the court decided that "mandatory" federal guidelines were unconstitutional and made them advisory. In *Blakely v. Washington* (2004), the court forbade state judges to impose sentences more severe than presumptive sentencing guidelines authorized unless the defendant pled guilty to a more serious offense or a jury found that he or she had committed one. A series of cases, including *Kimbrough v. United States* (2007), fundamentally weakened a federal "100-to-1" law punishing crack cocaine offenses much more severely than offenses involving pharmacologically indistinguishable powder cocaine, and made the decision retroactive. In *Graham v. Florida* (2010) and *Miller v. Alabama* (2012), the court declared mandatory sentences of life without the possibility of parole for juveniles unconstitutional. It is difficult not to conclude, even in this era of "strict construction" of judicial authority, that conservative courts recognized that the laws were fundamentally unjust and that legislatures were politically incapable of making needed changes.

Legislatures, by contrast, have made only modest changes. Reports issued by the National Conference of State Legislatures have listed many hundreds of changes to sentencing

laws since 2000, but almost all are minor (Austin et al., 2013).¹ They typically have carved out exceptions to mandatory minimum sentence laws for some first offenders, narrowed the grounds for parole revocations for breach of technical conditions, or broadened grounds for parole release of people convicted of minor property and drug crimes. Those changes are, of course, important to people whose lives they affect and their families, but they have not fundamentally altered American sentencing systems. No state has repealed a three-strikes, truth-in-sentencing, or LWOP law. The two best known recent changes to severe sentencing laws are, despite major publicity, modest. The U.S. Congress in 2010 amended the 100-to-1 crack cocaine sentencing law to reduce the differential to a still indefensible 18-to-1, which continues to produce unjustifiable racial disparities. The New York Legislature in 2004 and 2009 amended the Rockefeller Drug Laws but left many of their severest provisions in place.

The size of the prison population is the clear, unambiguous evidence that nothing fundamental has changed. Despite a steady and substantial decline in American crime rates since 1991, the number of people locked up increased continuously until 2011 and the imprisonment rate until 2007. Prisons and jails in 1991 held 1,219,014 inmates. The rate was 481 per 100,000 population. By 2008, the number of inmates had nearly doubled to 2,308,390. The total imprisonment rate in both 2007 and 2008 was 756 per 100,000. By 2013, the absolute numbers of state and federal prisoners had fallen by 3% and the rate, because the overall U.S. population has been growing faster than the confined population, by a bit more (Carson and Golinelli, 2013). However, both the numbers of people admitted to federal and state prisons, and confined in them, increased in 2013 (Carson, 2014)

No statutory changes have fundamentally altered the laws and policies that created the existing American sentencing system, mass incarceration, and the human, social, and economic costs they engendered. Almost everyone now agrees that those costs are too high. In this article, I lay out the changes that need to be made. The goal, in a sentence, is to re-create approaches and norms for sentencing and punishment of offenders that existed in the United States and elsewhere before the mid-1980s and endured in almost all Western countries throughout the decades of rising crime rates. The core ideas are simple: Sentences should be set by judges taking account of the circumstances of crimes and the characteristics of offenders, should be proportionate to the offender's crime and culpability, and should be no more severe or intrusive than is necessary to achieve the objectives of the sentence. The first section of this article addresses sentencing laws for the future. The second section discusses changes that need to be made to reduce the number of people now held behind bars.

1. The National Conference of State Legislatures for many years compiled and published annual summaries (of uncertain comprehensiveness) and maintains a searchable database beginning with developments in 2010 (nclsl.org/issues-research/justice/state-sentencing-and-corrections-legislation.aspx).

Sentencing Laws for the Future

A just system of American sentencing would incorporate the best features of the indeterminate systems that existed in all 50 states and the federal system from the 1930s to the mid-1970s and of the short-lived sentencing reform period that immediately followed it. Indeterminate sentencing, exemplified by the original *Model Penal Code* (American Law Institute, 1962), had three admirable premises:

1. Individualization. To be just, sentences should be individualized to take account of the circumstances of the crimes for which they are imposed and the characteristics of offenders.
2. Humanity. Sentences should be tailored to address the needs of offenders and the deficits in their lives that contributed to their offending. Everyone has an interest in offenders becoming law-abiding citizens who live conventional lives and play positive roles in their families and communities. Everyone, their fellow citizens and offenders alike, has an interest in reducing reoffending. Being convicted and spending time in prison, however, makes many offenders more, not less, likely to commit new crimes (Nagin, Cullen, and Lero-Jonson, 2009). As proponents of the burgeoning prisoner reentry movement constantly reiterate, most prisoners will be released. The subject of their successful or unsuccessful reintegration into the mainstream of everyday life cannot be burked.
3. Parsimony. Sentences should be no more severe, intrusive, or damaging to an offender's ability later to live a law-abiding life than is minimally necessary to achieve valid purposes of the sentence he or she receives. In the 1950s and 1960s, the phrase "least restrictive alternative" was used to express this idea (Advisory Council of Judges, 1972). Jeremy Bentham (1770 [1789]) two centuries ago used the term "frugality." Imposition of a sentence more severe than is necessary is cruel—gratuitous suffering without need or justification. Such sentences are by definition unjust. They are also wasteful because they require expenditure of public funds for no good purpose.

Indeterminate sentencing, however, had major shortcomings. They can be summarized as lack of fairness (no established procedures), transparency (no established standards), and accountability (no appeals of judges' or parole boards' decisions). The authority given to judges and parole boards to individualize decisions in every case led to unacceptable risks of racial bias and stereotyping, capriciousness, idiosyncrasy, and inexplicable disparities (American Friends Service Committee, 1971; Davis, 1969; Rothman, 1971, 1980). Parole and sentencing guidelines initiatives of the 1970s and early 1980s addressed all these problems, effectively, by devising ways to address two additional fundamental goals:

1. Proportionality. Sentences should be proportioned in severity to the seriousness of the crimes for which they are imposed. This does not mean that sentences for comparable crimes should be identical; it does mean that there must be good reasons for substantial

differences and that the seriousness of the crime sets an absolute limit on the severity of the sentence that may be imposed for it.

2. Regularity. Sentencing should be guided by established, consistently applied standards or guidelines, thereby making the process more transparent, the procedures fairer, and judges more accountable. Requiring judges to sentence consistently with applicable standards or to explain why not provides bases for offenders to appeal decisions they believe to be unjust. For the same reasons, the decisions of parole boards, in jurisdictions that retain or establish them, should be guided by established standards or guidelines for release and revocation, and be subject to administrative appeals by prisoners and parolees.

Those five requirements for just sentencing systems match up nicely with widely shared public attitudes and opinions and with the thinking of leading theorists of punishment over the past two centuries. The sizable body of research on public opinion about sentencing has consistently shown that most people want offenders to be punished for their crimes; believe that much offending is attributable to drug and alcohol dependence, social disadvantage, or underemployment; and believe that tax dollars are better spent on rehabilitating offenders than on building more prisons (Roberts, Stalans, Indermaur, and Hough, 2003).

None of the five requirements of a just sentencing system is in principle controversial. Punishment theorists and philosophers, although they disagree about the premises that undergird their views, are in broad agreement about the conditions under which punishments should be imposed.² It is commonplace to distinguish between retributivists, who believe that the offender's blameworthiness or culpability should be the sole or primary consideration in setting punishments, and consequentialists, who believe the potential preventive effects of possible punishments should be the primary considerations.

Both sets of theorists, however, albeit sometimes for different reasons, support the five criteria of just sentencing. Both call for proportionality: retributivists because they believe that is just, and consequentialists because they believe would-be offenders should be given incentives to commit less rather than more serious crimes (e.g., theft rather than robbery). Consequentialists also believe that proportionate sentences are intuitively more credible in the eyes of citizens and therefore enhance the legitimacy of the legal system. Both call for parsimony; retributivists because they believe that any sentence more severe than can be justified by the seriousness of the crime is by definition unjust, and consequentialists because they believe that infliction of suffering on offenders can be justified only by equal or greater reduction of suffering by others. Both call for procedural regularity as a matter of basic fairness. Both call for humanity; retributivists because respect for human

2. Immanuel Kant (1965 [1787]) is the archetypal retributivist. Among modern writers, Norval Morris (1974) and Andrew von Hirsch (1976, 1998; von Hirsch and Ashworth 2005) have been among the most influential. Jeremy Bentham (1970 [1789]; 2008 [1830]) is the archetypal consequentialist. Among modern writers, H. L. A. Hart (1968) and John Braithwaite (2001) have been among the most influential.

beings' moral autonomy is a first principle, and consequentialists because respect for freedom and avoidance of unnecessary human suffering are governing principles.³ Both call for individualization; retributivists to assure proportionality, and consequentialists to assure effectiveness. Retributivists typically believe that all the circumstances of the crime and all the characteristics of the offender must be taken into account if a valid assessment is to be made of his or her blameworthiness or culpability; Nigel Walker (1991) called this the Recording Angel's perspective. Consequentialists believe it because the optimal preventive sanction or package of sanctions cannot be determined without taking into account the risks and needs presented by each sentenced offender.

The rest of this section sets out relatively simple proposals for creating new sentencing systems to replace those that produced high rates of imprisonment, massive unnecessary public spending, widespread injustice, unwanted collateral consequences, and wasted lives (e.g., Travis and Western, 2014). The proposals do not address fundamental structural problems that are distinctively American and have shaped American sentencing—election and partisan selection of judges and prosecutors and, in most states, outdated criminal laws that were designed to meet the needs of other eras.^{4,5} The proposals assume that policy makers do, or in time will, want to create systems that are just, fair, and effective, and that in doing so they will want to take account of the current state of the evidence on the likely effects of alternative policy choices. If those presuppositions prove unrealistic, the odds of meaningful change and substantially reduced use of imprisonment are exceedingly long.

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3. For consequentialists, this is self-evident. For retributivists, it is a collateral aspect of deserved punishment. Kant wrote: "Punishment can never be used *merely* as a means to promote some other good for the criminal himself or for civil society but instead it must in all cases be imposed on him *only* on the ground that he has committed a crime He must *first* be found to be deserving of punishment before any consideration is given to the utility of the punishment for himself or for his fellow citizens" (Kant 1965 [1798], emphasis added). A punishment thus should not be imposed for the purpose of benefitting the offender (or preventing crime); but if punishment must be imposed, then consideration can be given to ways in which it might benefit the offender.
 4. The election of judges and prosecutors dates from the 18th and early 19th centuries and was motivated in part to resist centralized political control, initially from the Crown (Ellis, 2012). No other developed Western country except Switzerland in several cantons elects justice system officials. Most try hard to insulate judges and prosecutors from influence by political considerations, public attitudes, and emotions. They are typically meritocratically selected career civil servants; in many European countries, prosecutors are a subset of judges and are bound by judicial ethics of autonomy (Tonry, 2012). Constitutional change required to shift from elections, however, is a bridge too far to aim for as part of an agenda to undo mass incarceration and prevent its reappearance.
 5. Many American criminal codes were consciously designed for the indeterminate sentencing era (Rothman, 1980). Criminal offenses were defined broadly because the important thing was not generally thought to be the crime but how best to respond to it. Maximum authorized sentences were designed for handing the worst possible cases on the parsimonious assumption that most prisoners would not be held long, and were thus often measured in decades. That is a major reason why American sentences today are extraordinarily long compared with those in other developed Western countries. Comprehensive overhauls of state criminal codes, however, might require many years, so in this article I do not propose either comprehensive overhaul or large-scale decriminalization, worthy though such ideas may be.

Changes to Criminal Codes

Two features of American criminal codes must be changed if American sentencing is to become just, fair, and effective, and if mass incarceration is to be prevented from becoming a chronic feature of American life. The severe sentencing laws enacted in the 1980s and 1990s must be repealed or greatly cut back. Meaningful limits, scaled to offense seriousness, must be placed on the lengths of lawful sentences.

Tough-on-crime laws. Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe “career criminal,” “dangerous offender,” and “sexual predator” laws (Tonry, 2013). These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment (Travis and Western, 2014: ch. 3). When these words were written, for example, not one person sentenced to imprisonment under California’s 1994 three-strikes law had yet been released because his or her sentence had been fully served.⁶

Some of these laws were not unprecedented in their nature but in their severity. Mandatory minimum sentence laws have long existed. Many states enacted “habitual offender” laws in the 1920s and 1930s, usually targeting chronic property offenders, but by the 1980s, prosecutors seldom sought to apply them (Tappan, 1949). “Sexual psychopath” laws were enacted in several waves before the 1980s, but they were typically narrowly defined, infrequently applied, and seldom mandated decades-long or life sentences (Jenkins, 1998; Sutherland, 1950a, 1950b). LWOPs and truth-in-sentencing laws by contrast are largely an invention of the 1980s and 1990s.

Three things make the modern laws unprecedented. The first is their severity. Every state but one had enacted a mandatory minimum sentence law in the 1970s and early 1980s, but they seldom required more than 1 or 2 years in prison (Shane-DuBow, Brown, and Olsen, 1985). LWOPs require lifetime imprisonment. Three-strikes laws require a 25-year minimum sentence and, often, life. Many mandatory minimum sentence laws for drug and violent offenses require 10, 20, or more years’ imprisonment and few require less than 5 years.

The second distinctive characteristic of modern laws is their breadth. California’s three-strikes law applied to any third felony, and to some gross misdemeanors, if the defendant had two previous felony convictions for any of a long list of drug and violent felonies. Many

6. Some people have, of course, been released because their sentences were overturned on appeal (but never because of their length), and others are beginning to be released under provisions of 2012’s Proposition 36. However, because 85% of the sentence must be served, no one has yet completed the 21 years, 3 months that must be served on a 25-year sentence.

TABLE 1

U.S. Sentencing Commission, Recommended Guidelines Sentences, 2013

Offense	Severity Level	Recommended Sentences
Assault, intent to kill	27	70–87 months
Sale of crack, 28 g	26	63–78 months
Robbery, firearm used	26	63–78 months
Theft, more than \$1,000,000	22	41–51 months
Robbery	20	33–41 months
Aggravated assault, firearm discharged	19	30–37 months
Stalking, domestic violence	18	27–33 months
Theft, more than \$200,000	18	27–33 months
Sexual abuse of a ward	14	15–21 months

states' LWOP laws apply to offenses other than homicide, and most applied to offenses committed by minors (Nellis, 2013).⁷ Many mandatory minimum sentence laws applied to relatively low-level offenses: The numerically most important example is the 5-, 10-, and 20-year minimum sentences often mandated for low-level, often addicted, drug dealers. Truth-in-sentencing laws apply to wide swathes of drug and violent offenses and usually forbid parole release before 85% of the sentence has been served.

The third distinctive characteristic is that modern laws flatly defy conventional notions of proportionality. California's three-strikes law required minimum 25-year sentences for property felonies and gross misdemeanors. Famous third strikes involved thefts of pizza slices, three golf clubs, and several blank compact disks. Drug laws often require longer sentences for trafficking in minor amounts than are required for offenses almost anyone would consider much more serious. Consider Table 1, which shows guidelines sentences prescribed in the 2013 edition of the U.S. Sentencing Commission's *Guidelines Manual*.

Sale of 28 grams of crack cocaine was a level 26 offense subject to a 63- to 78-month sentence. Most such sellers are young, minority, often drug-dependent, people. The recommended sentence is slightly less than for assault with intent to kill, and the same as for robbery involving use of firearms. It is greater than for theft of \$1,000,000, robbery, aggravated assault in which a firearm was discharged, stalking or domestic violence, or sexual abuse of a dependent minor. The crack cocaine sentence, unlike the others shown in Table 1, is mandatory. Although *United States v. Booker* (2005) made the federal guidelines "advisory," which means judges can impose other sentences, federal law mandates a minimum 60-month sentence for the crack seller. For all the other offenses shown in Table 1, judges have discretion to impose lesser sentences.

7. Until the U.S. Supreme Court in *Graham v. Florida* (2010) and *Miller v. Alabama* (2012) declared sentences of life without the possibility of parole unconstitutional for juveniles as cruel and unusual punishments under the 8th Amendment to the U.S. Constitution.

Go figure. Very few people consider a small, unadorned street-level drug sale to be a more serious crime than a robbery or a serious assault with a firearm. It is hard to argue persuasively that selling a small quantity of drugs is more serious than stealing \$1,000,000. Gross disproportionality like that is not reconcilable with any mainstream theory or principle of punishment. Moreover, as the recent National Academy of Sciences committee report shows, there is no credible evidence that existing tough-on-crime laws have had significant deterrent effects or that their enactment or existence significantly contributed to declining crime rates (Travis and Western, 2014: chs. 3 and 5).

Likewise for incapacitation. Little credible evidence shows that tough-on-crime laws and long sentences have contributed significantly to declining crime rates by incapacitating would-be offenders. For many kinds of offenses subject to mandatory minimums, such as drug trafficking, and for many kinds of offenders, such as drug dealers and gang members, a “replacement effect” almost assures that others will fill the slots opened up when people are sent to prison (Kleiman, 1997). Research on desistance from crime and “age–crime curves” shows that most young active offenders soon stop offending (Farrington, 1986; Sweeten, Piquero, and Steinberg, 2013). Research on “residual career lengths” shows that even persistent offenders usually desist by their early 30s and the most active almost always by their early 40s (Blumstein, Cohen, and Hsieh, 1982; Blumstein and Nakamura, 2009). Using lengthy mandatory prison terms as an incapacitative crime-control strategy is thus ineffective for young offenders because of the replacement effect and natural desistance from crime. Long-term confinement of older offenders costs an enormous amount of money for little preventive gain. Money spent on long-term confinement of those over 40 years is almost entirely wasted. The policy implications are clear.

First, three-strikes, mandatory minimum sentence, and comparable laws should be repealed. They often result in unjustly and disproportionately severe punishments to no significant crime-preventive effects. Their existence empowers prosecutors to make *in terrorem* threats to defendants that effectively coerce many to plead guilty, no doubt including some who are innocent or have valid defenses but conclude that pleading guilty is better than risking decades-long or life sentences. They result in widespread circumvention by judges and prosecutors who want to avoid imposing unjustly severe sentences. And, because circumvention is neither certain nor in some places common, they result in massive differences in the sentences received by otherwise comparable defendants who do and don't come before sympathetic judges and prosecutors.

Second, any three-strikes, mandatory minimum sentence, and comparable laws that are not repealed should be substantially narrowed in scope and severity. If any case can be made for such laws, they should apply only to very serious crimes. Acts of extreme violence or sexual depredation or highest level, high-volume drug trafficking or white-collar crime are about all that make normative sense. Applying them to property offenders, the vast majority of drug offenders, and lesser violent and sexual offenders is unjust and wasteful. The evidence

on deterrence and, especially, incapacitation suggests that such laws should never require prison sentences longer than 10 years.

Third, any three-strikes, mandatory minimum sentence, and comparable laws that are not repealed should be amended to include provisions authorizing judges to impose some other sentence “in the interest of justice.” Such laws are ham-fisted and inevitably sometimes apply literally to some defendants to whom they should not. In most other Western countries with which Americans would ordinarily want their country compared, there are no mandatory minimum sentence laws. Descriptions of Western European systems sometimes refer to “minimum sentences,” but they are never mandatory. Judges always have authority to impose less severe punishments when mitigating circumstances exist. Some other Common Law countries do have a few mandatory minimum sentence laws. Where they exist, in England, Australia, and South Africa, they invariably include an exception for offenders for whom the judge decides that, “in the interest of justice,” some other, lesser punishment should be imposed (Tonry, 2009).

Fourth, LWOP laws should be repealed or substantially narrowed. Insofar as life sentences remain lawful, judges will have authority to impose them on people who commit the most heinous offenses. Some people believe LWOPs are a necessary evil—to provide an alternative sentence for people who otherwise might be sentenced to death. That argument is hard to make with a straight face in a country that executes 50 people a year but holds 50,000 in prison serving LWOPs (Nellis, 2013). Few, if any, of them were spared death sentences. Even if a capital punishment alternative is believed to be strategically necessary to minimize executions, there can be no basis for making LWOPs applicable to other than death-eligible defendants. Such laws, if they are kept at all, should be amended to apply only to defendants charged with capital felonies for whom there is a realistic possibility of a death sentence, which as a constitutional matter means only first-degree murder cases.

Fifth, truth-in-sentencing laws should be repealed. The argument here is not one of principle but of practice. If American sentences were not as severe as they are, or if meaningful appellate review of sentencing operated in every jurisdiction, a plausible case could be made that concerns for transparency and consistency would be addressed by having sentences mean what they appear to mean when they are announced, perhaps with a known automatic or at least available discount (as 85% rules provide). In most Western European countries, prisoners receive an automatic one-third “remission” of sentence. In the United States, however, where many prison sentences are measured in decades, an 85% rule in concert with three-strikes, mandatory minimum, and similar laws means that many prisoners must serve extraordinarily long times before they are eligible for release. The California three-strikes example—that no one has yet been released because his or her minimum sentence has been fully served—is illustrative. Extraordinarily long sentences are cruel, costly, and ineffective. Mass incarceration will continue for as long as they remain common.

Reduce statutory maximum sentences. American criminal codes have a fly-in-amber problem that aggravates sentencing problems. Authorized maximum prison sentences are

much too long. Maximum sentences for most felonies are 10, 20, or 30 years and sometimes longer, up to life. In the indeterminate sentencing era, when decisions by judges and parole boards were meant to be individualized and when parole boards decided when prisoners were released, there was an intelligible logic behind long statutory maxima. Rehabilitation and incapacitation were meant to be the primary determinants of sentencing and release decisions. In theory, parole boards could decide that offenders deemed to be unacceptably dangerous could be held until their sentences expired. In the extreme cases in California and Washington, every imprisoned offender was for that reason sentenced to a term of “one year to the statutory maximum.” Few prisoners were held for very long times. In part this was because of belief in use of “the least restrictive alternative.” The *Model Penal Code* (American Law Institute, 1962), for example, contained a provision creating a presumption against imprisonment for all offenses including homicide, and another in favor of release on parole when a prisoner first became eligible. As a practical matter, despite the hypothetical risk of long sentences and rising prison populations long statutory maximums presented, the American imprisonment rate was stable at about 130 per 100,000 population from 1930 to 1973 (Blumstein and Cohen, 1973).⁸

When indeterminate sentencing fell from favor beginning in the 1970s, the fly-in-amber problem materialized: Laws designed to fit the needs of an earlier time endured long after those needs continued to be widely viewed as legitimate. The problem had four dimensions. First, literally, criminal codes authorized maximums measured in decades, often vastly longer than could be proportionate to the offenses they affected (Schwartz, 1983).

Second, judges were accustomed to announcing sentences measured in terms of years that had little practical significance; parole boards made the final decisions about when prisoners were released. Especially in the 1960s and early 1970s when crime rates began a 25-year rise and “crime in the streets” became a major political issue, some judges imposed entirely symbolic sentences measured in decades and sometimes centuries.

Third, as crime rates continued to rise in the 1970s and public attitudes harshened, judges, prosecutors, and parole boards became more severe and used the long sentences that were legally available (Blumstein and Beck, 1999).

Fourth, and critically, because of the individualization ethos of indeterminate sentencing, there were no rules or standards for individual sentencing decisions, which meant there was no tradition in the United States—unlike in most other Western countries—of appellate sentence review (Frankel, 1973). There were no standards appellate judges could consult or apply in determining whether a sentence was excessive (Zeisel and Diamond, 1977).

As the tough-on-crime period unfolded, legislators and judges alike seized onto and used the old “symbolic” literal terms in which sentences were expressed and statutory maximums

8. The 130 rate is for state and federal prisoners. Jail inmate numbers usually add 40% to 50% to that number.

meant for the worst possible cases. The lengths in which mandatory minimum and three-strikes laws are expressed, and mass incarceration, were the results. So are widespread sentencing disparities. Only a few American states have meaningful systems of appellate sentence review (Reitz, 1997). Judges setting sentence are often authorized in a given case to impose a fine, probation, or a prison term up to 10, 20, 30, or more years. Huge disparities, reflecting the judge's personality, beliefs, and idiosyncrasies as much or more than offense and offender circumstances, are inevitable. The solution is straightforward.

Sixth, criminal codes should be amended to set substantially lower maximum sentences scaled to the seriousness of crimes. Felony offenses might, for example, be classified into six categories with maximums of 1, 2, 4, 6, 8, and 10 years and, for a small number of carefully defined very serious cases, longer. The original 1962 *Model Penal Code* (American Law Institute, 1962) and the proposals of the National Commission on Reform of Federal Criminal Law (1971) urged development of comparable systems that authorized lengthy sentences only for truly serious cases. Such a system would assure much greater rationality, consistency, and proportionality in sentencing, and lesser disparities, than now characterize American jurisdictions.

A second method, however, sanctioned by the U.S. Supreme Court, is for states to create systems of presumptive sentencing guidelines that encompass within them maximum prescribed sentences well below formal statutory limits. As a constitutional matter, no more severe sentence can be imposed.

Presumptive Sentencing Guidelines

When widespread support for indeterminate sentencing collapsed in the 1970s, the initial efforts to address its deficiencies sought to create new sentencing systems that were just, fair, and effective. Many of the reform initiatives failed. Advisory (then called "voluntary") systems of sentencing guidelines were attempted at state or local levels in every state on the assumption that judges would want to become more consistent in the sentences they meted out. Evaluations soon showed, however, that such systems were not taken seriously by judges, had no discernible effects on sentencing patterns, and accordingly did not diminish racial or other unwarranted disparities. Statutory determinate sentencing schemes, initially in California, Arizona, Illinois, Indiana, and Colorado, set standards for aggravated, mitigated, and aggravated sentences for particular offenses. Evaluations showed that they likewise were ineffective. These experiences were documented in detail in the report of the National Academy of Sciences Panel on Sentencing Research (Blumstein et al., 1983: ch. 3).

However, some of the initial reform initiatives worked. Parole guidelines in the federal system and several states established standards for release decisions that were applied systematically, made examiners subject to rules, let prisoners know the criteria by which they would be assessed, and reduced disparities in time served (Arthur D. Little, Inc., 1981; Cohen and Tonry, 1983; Gottfredson, Wilkins, and Hoffman, 1978). Presumptive guidelines developed by sentencing commissions, on the basis of data on past sentencing

patterns and projections of their effects, also worked. Evaluations of the first system in Minnesota showed that presumptive guidelines made sentencing standards public, reduced racial and other disparities, and provided bases for America's first successful system of appellate sentence review. They also showed that adoption of a "capacity constraint" policy linking projected operation of guidelines with prison capacity made corrections spending and facilities needs predictable. The projections proved remarkably accurate (Frase, 2005). Evaluations of similar systems in Washington State (Lieb and Boerner, 2001), Oregon (Bogan and Factor, 1997), and North Carolina (Wright, 2002) reached the same results. Those experiences show the way forward, as the recently approved *Model Penal Code—Sentencing* proposed (American Law Institute, 2011).

Seventh, every state that does not already have one should establish a sentencing commission and promulgate presumptive sentencing guidelines. The overriding goal should be, as it always should have been, to create policies and institutions that conduce to just, fair, and effective sentencing of convicted offenders. Judge Marvin Frankel (1973) first proposed creation of presumptive sentencing guidelines as a way to overcome the shortcomings of indeterminate sentencing. His primary goal was substantive. He believed that American sentencing was "lawless" in the sense that, unlike in every civil law context assessing monetary and similar claims, no rules existed governing sentencing. He aimed to bring the rule of law to sentencing by establishing sentencing rules and thereby providing standards for appellate judges to apply in deciding appeals.

Frankel argued, rightly, the last 30 years of experience have demonstrated, that the task of developing, monitoring, and periodically revising guidelines should be given to a specialized administrative agency that he called a sentencing commission (Tonry, 1993). His reasoning was positive and negative. The positive part was that administrative agencies with rule-making authority are better suited than legislatures to promulgate and periodically revise fine-grained policies. They can develop plans and policies strategically over time, develop specialized expertise, and accumulate institutional memories. Unlike legislatures, they can be somewhat insulated from short-term emotions and raw political pressures. The negative part was that legislatures have short attention spans, little institutional memory, and little specialized expertise on technical subjects, but are subject to influence by sensational crimes, ideologically motivated activists, and partisan political considerations. Exhibit A for the prosecution in proving those charges is the huge body of tough-on-crime legislation enacted between 1984 and 1996 that precipitated current levels of incarceration, took no account of evidence on likely effects of policy choices, and paid little heed to concerns for justice, fairness, or effectiveness.

The strongest reason for adopting the sentencing commission/presumptive guidelines model in American jurisdictions is that it has been shown to be effective. Except for parole guidelines systems that, when well designed and implemented, were also shown to be effective, no other major sentencing law initiatives of the last 30 years have achieved their goals. No major independent evaluation of a voluntary sentencing guidelines system

has ever concluded that they can improve consistency and predictability in sentencing or reduce unwarranted racial and other disparities. A sizable number of evaluations showed that particular systems did not. The evidence on deterrence and incapacitation shows that mandatory minimum and similar laws passed in the 1980s and 1990s have been ineffective as crime preventatives. Anyone with first-hand experience of criminal courts knows that they have often resulted in unjustly severe punishments. Many required sentences that were disproportionately severe relative to sentences received by other, more serious crimes; these laws flunk proportionality and parsimony tests.

Establishing an effective commission and having it promulgate successful guidelines are not, of course, easy. Many people involved in complex systems instinctively resist change: Norval Morris liked, illustratively, to quote an unnamed Victorian civil servant: "Reform, reform! Don't speak to me of reform. Things are bad enough as it is!" And many people have or express personal or institutional self-interest in things as they are. Prosecutors, for example, often resist proposals for reform or repeal of mandatory minimum sentence and similar laws because their ability to use them to pressure defendants to plead guilty will be reduced. Judges often resent and resist efforts to narrow their discretion at sentencing though this is, as Judge Frankel observed, strange. Judges' decisions in almost every other legal realm are governed by and must be justified in terms of established rule and doctrines. The stakes involved in deprivation of liberty are at least as high as those in a suit for damages for breach of contract.

Presumptive sentencing guidelines have one great advantage that is usually not stressed. Under the Supreme Court's decision in *Blakely v. Washington* (2004), they establish meaningful upper limits on the severity of sentences even if statutes do not. Guidelines usually specify ranges within which sentences should normally be selected. The court held that the upper bound is equivalent to a statutory sentence maximum. A sentence exceeding a statutory maximum is *per se* unlawful; if the prosecution wants a defendant to be punished more severely, it must charge him or her with a more serious offense and either prove it in court or persuade the defendant to plead guilty to it. Accordingly, no sentence more severe than the top of the applicable guidelines range can be imposed unless a jury on a beyond-reasonable-doubt basis finds facts that might justify the harsher sentence, or unless the defendant knowingly waives his or her constitutional right to a trial.

Sentencing commissions invariably classify offenses based on their seriousness and relate severity of punishments to the relative seriousness of crimes. That is not surprising. It is inherent in any effort to devise a comprehensive approach to sentencing. We human beings seem instinctually to believe that punishments for wrongdoing should be apportioned to the seriousness of the wrongdoing for which they are imposed. For different reasons, all major retributive and consequentialist theories of punishment require proportionality as a necessary principle of justice.

Presumptive sentencing guidelines should be established in every state because, in summary:

- Sentencing commissions are much better suited than legislatures to develop, monitor, and over time revise sentencing standards.
- Well-designed, well-implemented presumptive guidelines can improve consistency and predictability and reduce racial and other unwarranted disparities.
- Well-designed, well-implemented presumptive guidelines improve transparency by making sentencing standards public, making sentencing decisions fairer, and making sentencing processes more regular.
- Well-designed, well-implemented presumptive guidelines improve accountability by requiring judges to explain why they impose sentences other than those specified in applicable guidelines and thereby providing bases for appellate review of the justifiability of their decisions.
- Well-designed, well-implemented presumptive guidelines that incorporate a “capacity constraint policy,” by making sentencing patterns predictable improve corrections planning and management by also making corrections spending and facilities needs predictable.
- Well-designed, well-implemented presumptive guidelines establish meaningful upper limits on sentences that may be imposed and thereby prevent the imposition of grossly disproportionate sentences in individual cases.

Prison Release Mechanisms

The third set of statutory changes required if American sentencing systems are to be made just, fair, and effective concern release from prison. This subject requires retrospective attention if mass incarceration is to be unwound, but it also requires prospective attention. Lengths of prison sentences in the United States are extraordinarily long compared with those in other Western countries. Sentences longer than 1 year are uncommon in most. Longer than 3 years is very uncommon, and longer than 5 years is rare. The maximum sentences that can be imposed for a single offense in many Western countries, no matter how serious, vary between 12 and 20 years.

American sentences are much longer. In 2009, the most recent year for which national estimates are available based on experience in the 75 largest urban counties, the mean maximum term for all offenders sentenced to prison was 52 months and the median was 30 months. The means for murder, rape, robbery, and burglary were 373, 142, 90, and 52 months, respectively. Ninety percent of murderers received sentences of 10 years or longer as did 42% of rapists and 20% of robbers. Sentences of 6 years or longer were received by 92% of murderers, 66% of rapists, 40% of robbers, and 17% of burglars (Reaves, 2013: Table 25). Some device is needed to provide a way to reexamine the appropriateness of and continuing need for lengthy prison sentences.

Eighth, every state that does not already have one should establish a parole board and every state should establish a parole guidelines system. The parole board's functions and the purposes of its guidelines would vary depending on the nature of the state's sentencing

system. For states operating well-designed systems of presumptive sentencing guidelines, the function of parole guidelines would be small in relation to future prisoners (although it could be large in relation to current prisoners; see below). If ranges of authorized guidelines sentences were, however, broad, for example 36–72 months, rather than narrow, say 36–42 months, prisoners might be authorized to petition for release when they have served the minimum authorized guidelines sentence. The principal function of parole release under presumptive guidelines would be to review the need for continued confinement of people serving especially long sentences imposed under the guidelines, resulting from imposition of consecutive sentences for multiple offenses, or resulting from sentences imposed for different crimes on different occasions.

For states operating other sentencing guidelines systems or no guidelines at all, the principal function of the parole board would be to create and operate a well-designed system of guidelines for release decisions. Well-developed, well-implemented presumptive sentencing guidelines have been a condition precedent in the United States for creation of robust systems of appellate sentence review (Reitz, 1997). States lacking such systems need some other way to prevent unwarranted disparities and unduly long sentences. The evaluations of parole guidelines systems in the 1970s and 1980s showed that well-run parole guidelines systems can implement consistent policies, reduce disparities, and provide meaningful administrative appeals for contested cases (Arthur D Little, Inc., 1981; Blumstein et al., 1983). Where presumptive or voluntary sentencing guidelines systems exist, one especially promising approach would be for the parole board to promulgate identical guidelines, thereby providing a powerful protection against unwarranted disparities.

Unwinding Mass Incarceration

The proposals made thus far concern prospective changes to American sentencing laws, policies, and institutions. If adopted, they would greatly reduce the number of people in prison in future years, but their adoption would not significantly reduce the scale of American imprisonment in 2015 or in 2020. Doing that will require enactment of new laws authorizing reconsideration of sentences now being served.

Something drastic needs to be done if imprisonment rates in the United States are to reach even the 300–350 per 100,000 rates that characterize the Baltic countries of Estonia, Latvia, and Lithuania. These countries are admirable in many ways, but would not ordinarily be chosen as targets for American emulation. The imprisonment rates in Western Europe, which average 100 per 100,000, or in the former Warsaw Pact nations of Eastern and Central Europe, which range between 150 and 250 per 100,000, however, seem to be unattainable by 2020. American crime rates have been falling since 1991. The imprisonment rate, however, continued to rise through 2007 and the number of people in state and federal prisons rose until 2011. There was a small decline in 2012, but that resulted mostly from prison population reductions in California that were required by federal court orders. In 2013, the rise resumed.

Ninth, every state should reduce its combined rate of jail and prison confinement to half its 2014 level by 2020. This level is not unthinkable. Half of the current national imprisonment rate of about 700 per 100,000 would be 350. The American rate of state and federal imprisonment from 1930 to 1973 fluctuated around 130 per 100,000 including during the 1960s when crime rates were comparable with today's, or higher (Blumstein and Cohen, 1973). The reduction could be done in any of several ways. One or more large-scale amnesties or mass pardons could be used, as happens regularly in France and Italy and irregularly elsewhere (Lévy, 2007). An Italian amnesty in 2006, an effort to deal with prison overcrowding, reduced that country's imprisonment rate by 40%. French collective pardons and amnesties often reduce the prison population by 20%. Amnesties and mass pardons need not be blanket: They can exclude certain categories of prisoners, for example, people convicted of especially violent or organized crime offenses. Or they can shorten all current sentences by a fixed period, for example, 3 years: Anyone with fewer than 3 years to serve would be released, and all other prisoners' release eligibility dates would be advanced by 3 years.

Alternatively, a new release system could authorize case-by-case reviews. Legislation could be enacted to empower a parole board, a specially constituted specialized agency, or an appellate court to review the need for continued confinement of every inmate over a designated age, say 35, who has served more than a specified period, say, 3 years, and of every inmate who has served more than 5 years. Decisions could be made according to rules but on a case-by-case basis, thereby allowing consideration of whether some individuals pose unacceptably high risks to public safety. The overriding criterion, however, for every case subject to review, should be whether a strong case can be made for continued confinement.

Tenth, every state should enact legislation making all prisoners serving fixed terms longer than 5 years, or indeterminate terms, eligible for consideration for release at the expiration of 5 years, and all prisoners aged 35 years or older eligible for consideration for release after serving 3 years. The reason for making every prisoner over 35, who has served 3 or more years, eligible for consideration for release is that little public benefit is gained from the confinement of older inmates. Criminal careers research has repeatedly shown that most offenders desist from crime by their mid-30s. Older offenders experience more health problems than people in the community and become much more expensive to care for.

A weak form of such legislation would merely make long-term prisoners eligible to apply for consideration for release. A stronger form would direct the appropriate authority to release any prisoner serving such a sentence on or after the release eligibility date unless an individualized finding was made of the existence of strong reasons for continued confinement.

Other executive branch possibilities exist. Parole boards with well-designed release guidelines created for prospective use, for example, could be directed to apply them retroactively to all current offenders. There is a tidiness to this proposal since it would result in the even-handed application of the same standards to current and future prisoners. Another

approach, recently proposed by U.S. Attorney General Eric Holder, would be for systematic reviews to be made of the need for continued confinement of designated categories of prisoners with a view to formulating recommendations to the president for commutation of sentence (Apuzzo, 2014b).

The *Model Penal Code—Sentencing* (American Law Institute, 2011) has proposed a judicial branch approach. It calls for creation of “second look” appeal rights entitling every prisoner who has served more than a fixed number of years to petition for release. The decision maker would decide whether strong reasons exist for continued confinement. If not, the prisoner’s release would be ordered.

The mechanisms chosen to review the need for continued confinement of particular prisoners or categories of prisoners are less important than the choice to create some system for shortening sentences of people now serving excessively long prison sentences. That latter choice will require decisions that are ultimately based on normative beliefs that too many people have been sent to prison for too long and that something should be done about it. If that choice is made, the mechanics will not simply take care of themselves, but the normative change of heart will lay necessary foundations for meaningful solutions.

Something similar happened with drug courts beginning in the early 1990s. A credible body of methodologically strong evidence showing that well-targeted and well-managed drug courts can reduce drug dependence and crime has accumulated only in recent years. Yet several thousand drug courts were established before the evidence was in (Mitchell, 2011; Mitchell, Wilson, Eggers, and MacKenzie, 2012). Drug courts proliferated because many judges came to believe them to be a better approach for dealing with drug-dependent offenders, and persuaded legislatures to provide the necessary funding.

Likewise for reentry programs. The term came into use only in the late 1990s (Travis, 2000). Like many or most community corrections programs, many reentry programs are underdeveloped and underfunded. They offer the same kinds of services to people released from prison as are offered in traditional probation and parole programs generally. Because a credible case can be made that many or most corrections programs are not adequately funded, especially well-managed, or conspicuously successful, there are same old, same old grounds for questioning the likely effectiveness of reentry programs. Yet thousands have since been established. Corrections officials and other policy makers believe them to be the right thing to do.

Moving Forward

It took less than 30 years, a surprisingly short time, for the total American imprisonment rate to increase fivefold, from 150 per 100,000 population in 1973, not then the highest among Western developed countries, to 750 in 2007, a level four times that of any other country with which the United States might ordinarily be compared and almost eight times the average European level. That happened because legislatures enacted sentencing laws of

historically unprecedented severity that were intended to send more people to prison for much longer periods than had previously been common in the United States.

The challenge now is to reverse America's extraordinary use of imprisonment. That will be vastly harder. During the period when rates rose, Americans generally supported calls for harsher punishments. Politicians were happy to oblige. Although in the 1970s many liberal politicians favored policies directed at the underlying causes of crime and aiming to develop better and stronger treatment and diversion programs, it became clear that few politicians could risk, or were willing to risk, the accusation of being soft on crime. By the late 1980s, a political stalemate had set in (Edsall and Edsall, 1991). The presidential election in 1988 was the last one in which crime was a major issue. Major tough-on-crime legislation was enacted federally and in all 50 states in 1984–1996, and almost none after that. However, despite declining crime rates since 1991 and negligible voter interest in the subject, prison populations remained in 2013 at all-time highs.

I rehearse that depressing story to point out that there was little powerful political or sizable public opposition to the tough-on-crime legislation of 1984–1996. Small wonder that it passed and became increasingly more severe over time. In the intervening years, there has been precious little powerful political support for repealing the laws that led to mass incarceration. It is not clear there is now. It is also likely that there will be major political opposition to measures meant to shorten sentences and substantially reduce the numbers in prison.

So far, initiatives undertaken by legislatures and executive branch officials have been meager, despite broad-based support for change among leading conservatives (e.g., the Right on Crime spokesmen quoted above) and liberals (e.g., the American Civil Liberties Union, the Sentencing Project, and many activist law reform organizations). None of the major tough-on-crime legislation has been repealed, and most amendments to existing legislation have merely nibbled at the edges. Even the few most ballyhooed changes have been modest. Attorney General Holder's announcement that federal prisoners' records will be reviewed for purposes of possible clemency recommendations is not trivial, but it is exceedingly modest; the target prisoners are low-level, nonviolent offenders who have no "significant criminal history" and no history of violence either before prison or while incarcerated *who have already served 10 years in prison* (Apuzzo, 2014b; my emphasis). Ten years is an extraordinary sentence for a nonviolent offense. That announcement might someday qualify Holder as an entry in a book on profiles in cowardice. The 2010 change to the federal 100-to-1 crack cocaine sentencing law to reduce the differential to 18-to-1 is comparably underwhelming.

The moral, I think, of the developments described in the preceding paragraph is that few politicians are yet willing to acknowledge publicly that many of the laws enacted in 1984–1996 were unjust and that many people now in prison were unjustly sentenced. The arguments to be made for major changes to reduce the scale of imprisonment must be moral ones, not politically risk-averse claims about minor and first-time offenders,

cost-savings, and recidivism reductions. Voters voted for referenda to unwind the war on drugs and narrow California's three-strikes laws because they were morally correct things to do. Judges weakened the federal sentencing guidelines and California's three-strikes law because the guidelines and the law were unjust. Initiatives to roll back mass incarceration must be explained in those terms.

Unwinding mass incarceration will be much harder than creating it was. Little will happen unless powerful political groups want it to happen and are willing to spend political capital to make it happen. Some signs show that support for toughness at all costs is waning. The actions of voters in referendums and judges striking down some sentencing laws offer one set of examples. The hundreds of legislative nibbles around the edges of tough-on-crime sentencing laws offer another set. Initiatives like the *Model Penal Code's* (American Law Institute, 1962) "second chance" proposals illustrate yet another set. All of those initiatives to date are small steps in the right direction. By themselves they cannot roll back mass incarceration. Bigger steps could.

This article set out a series of proposals for how legislators could begin to effect major changes when and if the will to do so becomes manifest. They are evidence based and mostly technocratic. Those calling for prison population targets and reducing the lengths of sentences being served may appear bold to some, but relative to the problems they address, they are modest and partial. Reducing levels of imprisonment in the United States, a country with comparatively low crime rates, to a level three to four times those of other developed Western countries, can hardly be considered overly ambitious. Whether it will happen remains to be seen.

References

- Advisory Council of Judges, National Council on Crime and Delinquency. 1972. *Model Sentencing Act*, 2nd Edition. Hackensack, NJ: National Council on Crime and Delinquency.
- American Friends Service Committee. 1971. *Struggle for Justice: A Report on Crime and Punishment in America*. New York: Hill and Wang.
- American Law Institute. 1962. *Model Penal Code—Proposed Official Draft*. Philadelphia, PA: American Law Institute.
- American Law Institute. 2011. *Model Penal Code—Sentencing*. Tentative Draft No. 2. Philadelphia, PA: American Law Institute.
- Apuzzo, Matt. 2014a. Holder endorses proposal to reduce drug sentences in latest sign of shift. *New York Times*. March 14, section A, 18.
- Apuzzo, Matt. 2014b. Justice Dept. expands eligibility for clemency. *New York Times*. April 24, section A, 16.
- Arthur D Little, Inc. 1981. *An Evaluation of Parole Guidelines in Four Jurisdictions* (with Goldfarb and Singer, Esqs.). Washington, DC: National Institute of Corrections.

- Austin, James, Eric Cadora, Todd R. Clear, Kara Dansky, Judith Greene, Vanita Gupta, et al. 2013. *Ending Mass Incarceration: Charting a New Justice Reinvestment*. Washington, DC: The Sentencing Project.
- Bauman, Zygmunt. 2008. *Liquid Times: Living in an Age of Uncertainty*. Cambridge, U.K.: Polity.
- Beck, Ulrich. 1992. *Risk Society: Towards a New Modernity*. London, U.K.: Sage
- Beck, Ulrich. 2008. *World at Risk*. Cambridge, U.K.: Polity.
- Bennett, William J., John J. DiIulio, and John P. Walters. 1996. *Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs*. New York: Simon & Schuster.
- Bentham, Jeremy. 1970 [1789]. The utilitarian theory of punishment. In (Jeremy Bentham, J. H. Burns, and H. L. A. Hart, eds.), *An Introduction to Principles of Morals and Legislation*. London, U.K.: Athlone.
- Bentham, Jeremy. 2008 [1830]. *The Rationale of Punishment*. Amherst, NY: Kessinger.
- Blumstein, Alfred and Allen J. Beck. 1999. Population growth in the U.S. prisons, 1980–1996. In (Michael Tonry and Joan Petersilia, eds.), *Crime and Justice: A Review of Research*, Volume 26. Chicago, IL: University of Chicago Press.
- Blumstein, Alfred and Jacqueline Cohen. 1973. A theory of the stability of punishment. *Journal of Criminal Law and Criminology* 64: 198–206.
- Blumstein, Alfred, Jacqueline Cohen, and P. Hsieh. 1982. *The Duration of Adult Criminal Careers*. Final report submitted to the National Institute of Justice, U.S. Department of Justice. Pittsburgh, PA: Carnegie-Mellon University.
- Blumstein, Alfred, Jacqueline Cohen, Susan E. Martin, and Michael Tonry, eds. 1983. *Research on Sentencing: The Search for Reform*, 2 vols. Washington, DC: National Academy Press.
- Blumstein, Alfred, Jacqueline Cohen, and Daniel Nagin, eds. 1978. *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*. Washington, DC: National Academy of Sciences.
- Blumstein, Alfred, Jacqueline Cohen, Jeffrey A. Roth, and Christy A. Visher, eds. 1986. *Criminal Careers and "Career Criminals."* Washington, DC: National Academies Press.
- Blumstein, Alfred and Kiminori Nakamura. 2009. Redemption in the presence of widespread criminal background checks. *Criminology*, 46: 327–359.
- Bogan, Kathleen and David Factor. 1997. Oregon guidelines, 1989–1994. In (Michael Tonry and Kathleen Hatlestad, eds.), *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.
- Bottoms, Anthony E. 1995. The philosophy and politics of punishment and sentencing. In (Chris Clarkson and Rod Morgan, eds.), *The Politics of Sentencing Reform*. Oxford, U.K.: Oxford University Press.
- Braithwaite, John. 2001. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.
- Carson, E. Ann. 2014. *Prisoners in 2013*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.

- Carson, E. Ann and Daniela Golinelli. 2013. *Prisoners in 2012—Trends in Admissions and Releases, 1991–2012*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
- Cavadino, Michael and James Dignan. 2005. *Penal Systems: A Comparative Approach*. London, U.K.: Sage.
- Cohen, Jacqueline. 1983. Incapacitation as a strategy for crime control: Possibilities and pitfalls. In (Norval Morris and Michael Tonry, eds.), *Crime and Justice: A Review of Research*, Volume 5. Chicago, IL: University of Chicago Press.
- Cohen, Jacqueline and Michael Tonry. 1983. Sentencing reforms and their impacts. In (Alfred Blumstein, Jacqueline Cohen, Susan E. Martin, and Michael Tonry, eds.), *Research on Sentencing: The Search for Reform*, Volume 2. Washington, DC: National Academy Press.
- Davis, Kenneth Culp. 1969. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press.
- Douglas, Mary. 1992. *Risk and Blame: Essays in Cultural Theory*. London, U.K.: Routledge.
- Downes, David and Rod Morgan. 2012. Overtaking on the Left: The politics of law and order in the “big society.” In (Mike Maguire, Rod Morgan, and David Downes, eds.), *The Oxford Handbook of Criminology*, 4th Edition. Oxford, U.K.: Oxford University Press.
- Ellis, Michael J. 2012. The origins of the elected prosecutor. *Yale Law Journal*, 121: 1528–1269.
- Edsall, Thomas and Mary Edsall. 1991. *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*. New York: Norton.
- Farrington, David P. 1986. Age and crime. In (Michael Tonry and Norval Morris, eds.), *Crime and Justice: A Review of Research*, Volume 7. Chicago, IL: University of Chicago Press.
- Frankel, Marvin. 1973. *Criminal Sentences—Law Without Order*. New York: Hill and Wang.
- Frase, Richard. 2005. Sentencing guidelines in Minnesota, 1978–2003. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 32. Chicago, IL: University of Chicago Press.
- Garland, David. 2001. *The Culture of Control*. Chicago, IL: University of Chicago Press.
- Gest, Ted. 2001. *Crime and Politics: Big Government’s Erratic Campaign for Law and Order*. New York: Oxford University Press.
- Gingrich, Newt and Pat Nolan. 2011. Prison reform: A smart way for states to save money and lives. *Washington Post*. January 7. Retrieved from washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html.
- Gottfredson, Don M., Leslie T. Wilkins, and Peter B. Hoffman 1978. *Guidelines for Parole and Sentencing*. Lanham, MD: Lexington.
- Hart, H. L. A. 1968. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford, U.K.: Oxford University Press.
- Jenkins, Philip. 1998. *Moral Panic: Changing Concepts of the Child Molester in Modern America*. New Haven, CT: Yale University Press.

- Kant, Immanuel. 1965 [1787]. The penal law and the law of pardon. *The Metaphysical Elements of Justice*. Translated by John Ladd. Indianapolis, IN: Liberal Arts Press/Bobbs-Merrill.
- Kleiman, Mark A. R. 1997. The problem of replacement and the logic of drug law enforcement. *Drug Policy Analysis Bulletin*, 3: 8–10.
- Lacey, Nicola. 2008. *The Prisoner's Dilemma—Political Economy and Punishment in Contemporary Democracies*. Cambridge, U.K.: Cambridge University Press.
- Lappi-Seppälä, Tapio. 2008. Trust, welfare, and political culture—explaining differences in national penal policies. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 37. Chicago, IL: The University of Chicago Press.
- Lévy, René. 2007. Pardons and amnesties as policy instruments in contemporary France. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research, Volume 36: Crime, Punishment, and Politics in a Comparative Perspective*. Chicago, IL: University of Chicago Press.
- Lieb, Roxanne and David Boerner. 2001. Sentencing reform in the other Washington. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 28. Chicago, IL: University of Chicago Press.
- Mitchell, Ojmarrh. 2011. Drug and other specialty courts. In (Michael Tonry, ed.), *The Oxford Handbook of Crime and Criminal Justice*. New York: Oxford University Press.
- Mitchell, Ojmarrh, David B. Wilson, Amy Eggers, and Doris L. MacKenzie. 2012. Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts. *Journal of Criminal Justice*, 40: 60–71.
- Morris, Norval. 1974. *The Future of Imprisonment*. Chicago, IL: University of Chicago Press.
- Nagin, Daniel S. 1978. General deterrence: A review of the empirical evidence. In (Alfred Blumenstein, Jacqueline Cohen, and Daniel S. Nagin, eds.), *Deterrence and Incapacitation*. Washington, DC: National Academy Press.
- Nagin, Daniel S. 1998. Criminal deterrence research at the outset of the twenty-first century. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 23. Chicago, IL: University of Chicago Press.
- Nagin, Daniel S. 2013. Deterrence in the twenty-first century: A review of evidence. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research, Volume 42: Crime and Justice in America, 1975–2025*. Chicago, IL: University of Chicago Press.
- Nagin, Daniel S., Francis Cullen, and Cheryl Lero-Jonson. 2009. Imprisonment and re-offending. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 38. Chicago, IL: University of Chicago Press.
- Nagin, Daniel S. and John V. Pepper, eds. 2012. *Deterrence and the Death Penalty*. Washington, DC: National Academies Press.
- National Commission on Reform of Federal Law. 1971. *Report*. Washington, DC: U.S. Government Printing Office.
- Nellis, Ashley. 2013. *Life Goes On: The Historic Rise in Life Sentences in America*. Washington, DC: The Sentencing Project.

- Piquero, Alex R., David P. Farrington, and Alfred Blumstein. 2003. The criminal career paradigm. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 30. Chicago, IL: University of Chicago Press.
- Pratt, John. 2007. *Penal Populism*. London, U.K.: Routledge.
- Pratt, John and Marie Clark. 2005. Penal populism in New Zealand. *Punishment & Society*, 7: 303–322.
- Reaves, Brian A. 2013. *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
- Reiss, Albert J. and Jeffrey A. Roth. 1993. *Understanding and Preventing Violence*, Volume 1. Washington, DC: National Academies Press.
- Reitz, Kevin. 1997. Sentencing guideline systems and sentence appeals: A comparison of federal and state experiences. *Northwestern University Law Review*, 91: 1441–1506.
- Right on Crime. 2014. *What Conservatives Are Saying*. Retrieved September 23, 2013 from rightoncrime.com/the-conservative-case-for-reform/what-conservatives-are-saying/.
- Roberts, Julian V., Loretta S. Stalans, David Indermaur, and Mike Hough. 2003. *Penal Populism and Public Opinion. Lessons from Five Countries*. Oxford, U.K.: Oxford University Press.
- Rothman, David. 1971. *The Discovery of Asylum: Social Order and Disorder in the New Republic*. Boston, MA: Little, Brown.
- Rothman, David. 1980. *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America*. Boston, MA: Little, Brown.
- Ruth, Henry S. and Kevin R. Reitz. 2003. *The Challenge of Crime: Rethinking Our Response*. Boston, MA: Harvard University Press.
- Schwartz, Louis B. 1983. Options in constructing a sentencing system: Sentencing guidelines under legislative or judicial hegemony. In (Michael Tonry and Franklin E. Zimring, eds.), *Reform and Punishment: Essays on Criminal Sentencing*. Chicago, IL: University of Chicago Press.
- Shane-DuBow, Sandra, Alice P. Brown, and Erik Olsen. 1985. *Sentencing Reform in the United States: History, Content, and Effect*. Washington, DC: U.S. Government Printing Office.
- Simon, Jonathan. 2007. *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York: Oxford University Press.
- Sutherland, Edwin H. J. 1950a. The diffusion of sexual psychopath laws. *American Journal of Sociology*, 56: 142–148.
- Sutherland, Edwin H. J. 1950b. The sexual psychopath laws. *Journal of Criminal Law & Criminology*, 40: 543–554.
- Sweeten, Gary, Alex R. Piquero, and Laurence Steinberg. 2013. Age and the explanation of crime, revisited. *Journal of Youth and Adolescence*, 42: 932–938.
- Tappan, Paul W. 1949. Habitual offender laws in the United States. *Federal Probation*, 13: 28–31.
- Tonry, Michael. 1993. The success of Judge Frankel's sentencing commission. *Colorado Law Review*, 64: 713–722.

- Tonry, Michael. 1996. *Sentencing Matters*. New York: Oxford University Press.
- Tonry, Michael. 2001. Punishment policies and patterns in Western countries. In (Michael Tonry and Richard S. Frase, eds.), *Sentencing and Sanctions in Western Countries*. New York: Oxford University Press.
- Tonry, Michael. 2007. Determinants of penal policies. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research, Volume 35: Crime, Punishment, and Politics in Comparative Perspective*. Chicago, IL: University of Chicago Press.
- Tonry, Michael. 2009. The mostly unintended effects of mandatory penalties: Two centuries of consistent findings. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research, Volume 38*. Chicago, IL: University of Chicago Press.
- Tonry, Michael. 2012. Prosecutors and politics in comparative perspective. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research, Volume 41: Prosecutors and Politics: A Comparative Perspective*. Chicago, IL: University of Chicago Press.
- Tonry, Michael. 2013. Sentencing in America, 1975–2025. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research, Volume 42: Crime and Justice in America, 1975–2025*. Chicago, IL: University of Chicago Press.
- Travis, Jeremy. 2000. *But They All Come Back: Rethinking Prisoner Reentry*. Papers from the Executive Sessions on Sentencing and Corrections. Washington, DC: U.S. Department of Justice, National Institute of Justice.
- Travis, Jeremy and Bruce Western, eds. 2014. *The Growth of Incarceration in the United States*. Washington, DC: National Academies Press.
- U.S. Sentencing Commission. 2013. *Guidelines Manual*. Washington, DC: Author.
- von Hirsch, Andrew. 1976. *Doing Justice*. New York: Hill and Wang.
- von Hirsch, Andrew. 1998. Proportionate sentences: A desert perspective. In (Andrew von Hirsch and Andrew Ashworth, eds.), *Principled Sentencing: Readings on Theory and Policy*, 2nd Edition. Oxford, U.K.: Hart.
- von Hirsch, Andrew and Andrew Ashworth. 2005. *Proportionate Sentencing: Exploring the Principles*. Oxford, U.K.: Oxford University Press.
- Walker, Nigel. 1991. *Why Punish?* Oxford, U.K.: Oxford University Press.
- Windlesham, Lord David. 1998. *Politics, Punishment, and Populism*. New York: Oxford University Press.
- Wright, Ronald. 2002. Counting the cost of sentencing in North Carolina, 1980–2000. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research, Volume 29*. Chicago, IL: University of Chicago Press.
- Zeisel, Hans and Shari Seidman Diamond. 1977. Search for sentencing equity: Sentence review in Massachusetts and Connecticut. *American Bar Foundation Research Journal*, 2: 881, 883–940.
- Zimring, Franklin E. and Gordon Hawkins. 1999. *Crime Is Not the Problem: Lethal Violence in America*. New York: Oxford University Press.

Court Cases Cited

Blakely v. Washington, 542 U.S. 296 (2004).

Graham v. Florida, 560 U.S. 48 (2010).

Kimbrough v. United States, 552 U.S. 85 (2007).

Koon v. United States, 518 U.S. 81 (1996).

Miller v. Alabama, 132 S. Ct. 2455 (2012).

People v. Superior Court (Romero), 13 Cal. 4th 497, 533 (1996).

United States v. Booker, 543 U.S. 220 (2005).

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Twentieth-Century Sentencing Reform Movement

Looking Backward, Moving Forward

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In 1971, David Rothman, one of the foremost authorities on the history and development of the prison system, wrote that “[w]e have been gradually emerging from institutional responses, and one can foresee the period when incarceration will be used still more rarely than it is today” (1971: 295). Two years later, the National Advisory Commission on Criminal Justice Standards and Goals, which concluded that “the prison, the reformatory, and the jail have achieved only a shocking record of failure” (1973: 597), recommended that there should be no new correctional institutions for adults and that existing institutions for juveniles should be shut down.

Four decades later, it is clear that Rothman’s (1971) prediction did not come true and that the commission’s recommendations were not followed. Their calls for reductions in the use of incarceration, which were voiced at a time when the inmate population was slightly more than 300,000, fell on deaf ears. Rather than declining, America’s imprisonment rate, which had fluctuated around a steady mean of 110 individuals per 100,000 population for most of the 20th century, increased every year from 1972 to 2008, when the rate peaked at 504 per 100,000 population. In terms of raw numbers, the prison population increased from approximately 300,000 to a little more than 1.6 million between 1972 and 2008. Since 2008, the imprisonment rate has declined slightly, driven primarily by changes in the California prison population mandated by the Public Safety Realignment policy implemented in that state (Bureau of Justice Statistics, 2013).

As these figures convincingly demonstrate, for the past 40 years, the United States has been in the midst of “an unprecedented imprisonment binge” (Austin and Irwin, 2011). These dramatic increases are not a result of increases in serious crime rates; in fact,

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the crime rate in the United States has declined steadily since 1991. Most criminologists and legal scholars—including Michael Tonry (2014, this issue)—contend that changes in sentencing policies and practices fueled the growing use of imprisonment in the United States (Blumstein and Beck, 1999; Garland, 2001; Mauer, 2001; National Research Council, 2014; Zimring, 2001). According to a recent comprehensive report on the growth of incarceration in the United States by the National Research Council (2014), the explosion in the prison population can be attributed primarily to growth in prison admission rates, especially for drug offenses, and to increases in time served, particularly for violent crimes. These changes, in turn, are largely attributable to sentencing reform initiatives aimed at achieving greater severity and certainty of punishment—mandatory minimum sentences, truth-in-sentencing statutes, three-strikes sentencing provisions, life-without-the-possibility-of-parole (LWOP) laws, and overly punitive sentencing guidelines in which the severity of the sentence is not proportionate to the seriousness of the crime.

Given that there is nearly universal agreement among sentencing experts and legal scholars that dramatic increases in imprisonment were the result not of equally dramatic increases in crime but of tough-on-crime sentencing “reforms” that led to a greater likelihood of incarceration and longer sentences, how are we to reverse the trend and reduce state and federal prison populations? Tonry’s (2014) insightful analysis offers a way forward. He contends that (a) mandatory minimum sentencing statutes and three-strikes, LWOP, and truth-in-sentencing laws should be repealed or radically narrowed; (b) judges should have discretion to circumvent these laws (if they are not repealed) in the interest of justice; (c) sentences should be proportionate to the seriousness of the crime and statutory maximum sentences should be shortened; (d) every state should either establish a sentencing commission that promulgates presumptive sentencing guidelines or establish a system of parole guidelines; and (e) every state and the federal government should reduce its rate of jail and prison confinement by half and should enact legislation making prisoners currently serving long terms eligible for release consideration if they meet certain conditions. Although some of these proposals are likely to be politically unpalatable, all of them are necessary if we are to extract ourselves from the untenable situation in which 1 of every 100 Americans—and 1 of every 15 Black men—is locked up in our nation’s prisons (Pew Center on the States, 2008). As Tonry (2014) correctly notes, the costs of our current policies are too high and the benefits are almost negligible.

In this essay, I examine the sentencing reform movement of the 20th century. I begin by looking backward, with a focus on the intended and unintended consequences of the changes in sentencing policies and practices implemented during the past four decades. I then discuss Tonry’s (2014) proposals for moving forward by remodeling American sentencing.

Sentencing Reforms of the Past Four Decades: Looking Backward

Four decades of experimentation and reform transformed sentencing policies and practices in the United States. Forty years ago, indeterminate sentencing based on the philosophy of

rehabilitation was the norm. Judges had substantial, not unlimited, discretion to determine the sentence range, and parole boards decided how long offenders would actually serve. Judges considered the facts and circumstances of the case as well as the characteristics of the offender to tailor sentences that fit both individuals and their crimes. With few exceptions, judges were not required to impose specific sentences on offenders convicted of particular types of crimes or with certain constellations of characteristics.

Concerns about disparity and discrimination in sentencing—coupled with widespread disillusionment with rehabilitation and a concomitant belief that more punitive sentences were both necessary and just—led to a series of incremental sentencing reforms that revolutionized the sentencing process in the United States. The result is that sentencing policies and practices are much more complex and substantially more fragmented than they were in the past. Some jurisdictions retained indeterminate sentencing; others replaced it with more tightly structured determinate sentencing or sentencing guidelines. Mandatory minimum sentences that eliminated judicial discretion and targeted violent offenders, drug offenders, and career criminals proliferated at both the state and federal levels. Other tough-on-crime reforms also proved popular. More than half of the states adopted “three-strikes-and-you’re-out” laws, and most jurisdictions enacted truth-in-sentencing laws designed to ensure that offenders served a larger portion of the sentence imposed by the judge. LWOP laws were designed to ensure that certain offenders would never be eligible for release.

These policy changes reflect diverse views of the purposes of punishment, the degree of discretion that should be afforded to judges and other criminal justice officials, and the extent to which crime and criminals can be controlled by harsh sentencing policies. Those who proposed the reforms and lobbied for their enactment believed that they would result in more (appropriately) punitive penalties that eventually would deter criminal behavior. They also believed that the sentencing reforms would produce more consistent, more transparent, and fairer sentence outcomes. Although persuasive evidence suggests that the policy changes did lead to a greater likelihood of incarceration and longer prison terms for those who were incarcerated (Boerner, 1993; Engen and Steen, 2000; Frase, 1997; Joint Committee on New York Drug Law Evaluation, 1978; Kramer and Lubitz, 1985; National Research Council, 2014; U.S. Sentencing Commission, 1991a, 2004; Vincent and Hofer, 1994), little—if any—evidence shows that this increase in punitiveness had the predicted effect on crime through either deterrence or incapacitation (for a comprehensive review of this research, see Nagin, 2013; National Research Council, 2014: ch. 5). The National Research Council (2014: 155) acknowledged that “[e]vidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates,” but nonetheless concluded that “the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure.”

Evidence regarding the degree to which sentences are more consistent, more transparent, and fairer in the postreform era is mixed. Persuasive evidence shows that state and federal sentencing guidelines reduced interjudge disparity—and thus led to more consistent

sentence outcomes that are coupled more tightly to the seriousness of the offense and the offender's criminal history (Anderson, Kling, and Stith, 1999; Ashford and Mosbaek, 1991; Hofer, Blackwell, and Ruback, 1999; Knapp, 1987; Kramer and Lubitz, 1985; Miethe and Moore, 1985; Stolzenberg and D'Alessio, 1994; U.S. Sentencing Commission, 1991a; for an alternative view, see Tonry, 1996; U.S. General Accounting Office, 1992). By contrast, critics of sentencing reform contend that judges and prosecutors have used their discretion to circumvent—or even sabotage—laws requiring disproportionately harsh sentences, severe mandatory penalties, and LWOP sentences (Cano and Spohn, 2012; Harris and Jesilow, 2000; Joint Committee on New York Drug Law Evaluation, 1978; Loftin and McDowall, 1981; U.S. Sentencing Commission, 1991b), especially for offenders deemed sympathetic or salvageable (Cano and Spohn, 2012; Nagel and Schulhofer, 1992). The problem, of course, is that these decisions—which are made by individual judges and prosecutors who might or might not use their discretion in a logically consistent way—have the potential to increase sentence disparity and reduce transparency. Critics also contend that the policy changes have not made the sentencing process fairer by eliminating unwarranted disparities based on the offender's race, ethnicity, sex, age, or social class (Albonetti, 2002; Kutateladze, Andiloru, Johnson, and Spohn, 2014; Spohn, 2000; Spohn and Sample, 2013; Steffensmeier, Ulmer, and Kramer, 1998; Wang, Mears, Spohn, and Dario, 2013). The sentencing reforms notwithstanding, racial minorities receive more severe sentences than Whites, and men, younger offenders, and poor offenders are sentenced more harshly than women, older offenders, and offenders who are not poor.

The question of racial disparities in sentencing merits further comment. Tonry (2014) alludes to, but does not discuss at length, the fact that the “lock ‘em up and throw away the key” sentencing policies enacted during the 1980s and 1990s exacerbated racial disparities in incarceration (see Tonry, 1995; Tonry and Melewski, 2008, for a detailed discussion of this issue). The proportion of Blacks locked up in state and federal prisons, which was 22% when the Bureau of the Census (U.S. Department of Commerce, Bureau of the Census, 1918) published its report on the “Negro Population” in 1918, increased steadily over the next 50 years, reaching 33% by 1960, 40% by 1970, and more than 50% by the mid-1990s. In 2012, the rate of incarceration (per 100,000 population) was 2,841 for Black males, 1,158 for Hispanic males, and 463 for White males; for females, the rates ranged from 49 (Whites) to 64 (Hispanics) to 115 (Blacks) (Bureau of Justice Statistics, 2014).

The explanation for these shockingly disparate rates of incarceration is complex. The results of studies conducted by Blumstein (1982, 1993) and by those who replicated and refined his approach indicate that *some portion* of the racial disproportionality in prison populations can be attributed to the fact that Blacks are more likely than Whites to be arrested for the serious violent crimes that merit imprisonment. However, studies have indicated that the proportion of the Black–White disparity in incarceration rates that can be attributed to racial differences in arrest rates for imprisonable crimes has declined over time (Tonry and Melewski, 2008; Western, 2006) and that the disparity results to some

extent from racial bias (whether explicit or implicit) at various stages in the criminal justice system and from the implementation of policing and sentencing policies and practices—particularly those associated with drug offenses—with racially disparate effects (Beckett, Nyrop, and Pfingst, 2006; Beckett, Nyrop, Pfingst, and Bowen, 2005; Belenko, Fagan, and Chin, 1991; Miller, 1996; Tonry, 1995; Tonry and Melewski, 2008). The fact that the proportion of Blacks arrested for serious violent crime declined during the 1980s and 1990s (Tonry and Melewski, 2008), coupled with the fact that the proportion of Blacks arrested for drug offenses skyrocketed and that increasingly large proportions of prisoners are incarcerated for drug offenses suggests that the extent to which racial disparity in imprisonment can be accounted for by racial differences in arrests for violent crimes might be declining. It also suggests that the source of the racial disparity in imprisonment is the war on drugs and the concomitant belief that incarceration is the appropriate penalty for drug offenses.

The research conducted by social scientists and legal scholars over the past four decades has provided compelling evidence that the changes in sentencing policies and practices filled our prisons to overflowing. The odds of incarceration, even for relatively minor offenses, increased, and judges imposed longer sentences on those deemed deserving of imprisonment. Although there is some evidence of enhanced sentence consistency in the postreform era, there is little evidence that the policy changes reduced crime or produced the predicted increases in transparency and fairness. In fact, an unintended consequence (but see Tonry, 1995, for an alternative view) of the sentencing reform movement was a worsening of the racial disparity in imprisonment.

Sentencing in the 21st Century: Moving Forward

Michael Tonry's (2014) proposals for "remodeling American sentencing" are principled, evidence-based, and feasible. They are essential if we are to reduce the number of men and women locked up in our nation's prisons and to decrease the collateral consequences that imprisonment has for them, their families, and their communities. Tonry proposes that we "re-create approaches and norms for the sentencing and punishment of offenders that existed in the United States and elsewhere before the mid-1980s and endured in almost all Western countries throughout the decades of increasing crime rates." Essentially, he proposes that we move forward by looking backward to a time when judges were allowed to tailor sentences to fit offenders and their crimes, when sentences were proportionate to the seriousness of the crime and the culpability of the offender, and when sentences were no more severe than necessary to achieve the goals of punishment.

Tonry (2014) is not recommending that we return to the era of indeterminate sentencing. He notes rightly that the indeterminate sentencing process, which Frankel (1972: 1) argued led to "lawlessness" in sentencing and to decision making by "essentially unregulated judges, keepers, and parole officials," had important shortcomings, including racial bias and arbitrary and capricious sentence and parole outcomes. Rather, he

recommends that the new American sentencing system couple the positive features of the indeterminate system—individualization, humanity, and parsimony—with the proportionality and regularity provided by sentencing and parole guidelines. Tonry (2014) argues that these are five essential requirements for a just sentencing system, and he lays out a series of proposals designed to create new sentencing policies to replace “those that produced high rates of imprisonment, massive unnecessary public spending, widespread injustice, unwanted collateral consequences, and wasted lives.”

If the United States is to create a just sentencing system and reduce the incarceration rate, according to Tonry (2014), the tough-on-crime laws (i.e., mandatory minimum sentences, LWOP, three-strikes, and truth-in-sentencing laws) must be repealed or dramatically scaled back, and statutory maximum sentences must be substantially reduced and must be proportionate to the seriousness of the crime. These proposals are reasonable given the research findings regarding the noncompliance with and the ineffectiveness of the tough-on-crime laws and the fact that little evidence shows that increasing the severity of punishment reduces crime or enhances public safety (National Research Council, 2014). There are no principled reasons for leaving these laws in place, and persuasive evidence supports dismantling them.

Tonry (2014) recommends that every state should establish a sentencing commission and promulgate presumptive sentencing guidelines. His recommendation is based on a conclusion that the sentencing commission/presumptive guidelines model “has been shown to be effective.” The problem with this proposal is that evidence shows that the implementation of presumptive guidelines, which generally are based only on the seriousness of the crime and the offender’s criminal history and prohibit judges from considering the offender’s personal circumstances, led to increases in sentence severity in Washington State (Boerner, 1993; Engen and Steen, 2000), Minnesota (Frase, 1997; Minnesota Sentencing Guidelines Commission, 2007), Pennsylvania (Kramer and Lubitz, 1985; Pennsylvania Commission on Sentencing, 1987), and in the federal courts (Lacasse and Payne, 1999; U.S. Sentencing Commission, 1991a, 2004). Although it would be inappropriate to conclude that a causal relationship exists between the adoption of sentencing guidelines and more punitive sentences, the fact that these evaluations consistently revealed that sentences in the post-guidelines era became more severe is worrisome. The key will be developing “well-designed and well-implemented” (Tonry, 2014) guidelines that are flexible enough to allow judges to consider relevant information about the offender and the crime as well as to use that information to fashion sentences that fit both offenders and their crimes.

Tonry (2014) argues that the policy changes he describes will slow the flow of people into state and federal prisons and will not significantly reduce the incarceration rate in the United States. As he and a coauthor noted in an earlier publication (Tonry and Melewski, 2008: 37), “To attempt to limit damage done to people now entangled in the arms of the criminal justice system, devices need to be created for reducing the lengths of current prison sentences and releasing hundreds of thousands of people from prison.” Arguing that

“something drastic needs to be done” if imprisonment rates in the United States are to be reduced substantially, Tonry (2014) suggests in this feature article that every state (and presumably the federal government as well) should reduce the jail and prison rate by half through amnesties and/or pardons and that jurisdictions also should enact policies that make prisoners who meet certain criteria eligible for release after serving a certain number of years. These are no doubt the most politically unpalatable of Tonry’s recommendations, as releasing a large number of offenders before they have served most of their sentences will inevitably trigger charges that those who advocate these solutions are “soft on crime” and unconcerned about public safety. Selling these proposals to risk-averse lawmakers and a public that continues to believe that the solution to crime is the imposition of long—some would say draconian—prison sentences will not be easy. As Tonry (2014) correctly notes, “Unwinding mass incarceration will be much more difficult than it was to create. Little will happen unless powerful political groups want it to happen and are willing to spend political capital to make it happen.”

Growing evidence shows that the time is right to pursue these policy changes. In 2006, Bruce Western predicted that “mass imprisonment is likely to be preserved by the political and economic forces that created it,” adding that “policy makers and voters appear to retain a keen appetite for punishment” (p. 195). As the second decade of the 21st century unfolds, this prediction, which seemed to be eminently reasonable just 9 years ago, seems less plausible. Evidence that Americans’ appetite for punishment may be shrinking and that the United States must chart a different course on sentencing comes from a variety of sources. For example, in a speech to the American Bar Foundation in August 2013, Attorney General Eric Holder unveiled the Department of Justice’s “Smart on Crime Initiative,” which called for major changes to federal sentencing practices and for a reassessment of the nation’s system of mass imprisonment (Bureau of Justice Statistics, 2013: 1). Also at the federal level, Congress in 2014 was considering legislation to reduce prison overcrowding and the skyrocketing costs of incarcerating low-level offenders by giving judges more discretion when sentencing offenders subject to mandatory minimum penalties. Several states also are rethinking their approach to sentencing nonviolent offenders and drug offenders; these states have passed laws designed to roll back or otherwise revise mandatory minimum sentences for these types of offenders (Subramanian and Delaney, 2014). Other states have tackled the drug offender problem by either decriminalizing or legalizing recreational use of marijuana. Although Tonry (2014) contends that these reform efforts are “meager” and represent little more than “nibbling at the edges” of the problem, the fact that they are supported by politicians from both sides of the political spectrum and by large majorities of American citizens suggests that the time is indeed ripe for major change in sentencing policies and practices. Michael Tonry’s proposals for “remodeling American sentencing” provide a way forward.

References

- Albonetti, Celesta. 2002. The joint conditioning effect of defendant's gender and ethnicity on length of imprisonment under the federal sentencing guidelines for drug trafficking/manufacturing offenders. *Journal of Gender, Race, and Justice*, 6: 39–60.
- Anderson, James M., Jeffrey R. Kling, and Kate Stith. 1999. Measuring inter-judge sentencing disparity: Before and after the federal sentencing guidelines. *Journal of Law and Economics*, 42: 271–307.
- Ashford, Kathryn and Craig Mosbaek. 1991. *First Year Report on Implementation of Sentencing Guidelines, November 19889 to January 1991*. Portland: Oregon Criminal Justice Council.
- Austin, James and John Irwin. 2011. *It's About Time: America's Imprisonment Binge*. Belmont, CA: Wadsworth.
- Beckett, Katharine, Kris Nyrop, and Lori Pflingst. 2006. Race, drugs and policing: Understanding disparities in drug delivery arrests. *Criminology*, 44: 105–137.
- Beckett, Katharine, Kris Nyrop, Lori Pflingst, and Melissa Bowen. 2005. Drug use, drug possession arrests and the question of race: Lessons from Seattle. *Social Problems*, 52: 419–441.
- Belenko, Steven, Jeffrey Fagan, and Ko-Lin Chin. 1991. Criminal justice system responses to crack. *Journal of Research in Crime and Delinquency*, 28: 55–74.
- Blumstein, Alfred. 1982. On the racial disproportionality of United States' prison populations. *Journal of Criminal Law and Criminology*, 73: 1259–1281.
- Blumstein, Alfred. 1993. Racial disproportionality of U.S. prison populations revisited. *University of Colorado Law Review*, 64: 743–760.
- Blumstein, Alfred and Allen J. Beck. 1999. Population growth in US prisons, 1980–1996. In (Michael Tonry and Joan Petersilia, eds.), *Prisons, Crime and Justice: A Review of Research*, Volume 26. Chicago, IL: University of Chicago Press.
- Boerner, David. 1993. The legislature's role in guideline sentencing in "the other Washington." *Wake Forest Law Review*, 28: 381–420.
- Bureau of Justice Statistics. 2013. *Prisoners in 2012*. Washington, DC: Author.
- Bureau of Justice Statistics. 2014. *Imprisonment Rate of Sentenced State and Federal Prisoners per 100,000 Residents by Sex, Race, Hispanic-Origin, and Age, December 31, 2012*. Generated using the Correctional Statistical Analysis Tool at www.bjs.gov.
- Cano, Mario and Cassia Spohn. 2012. Circumventing the penalty: Assessing the impact of substantial assistance departures on mandatory minimum sentencing. *Criminal Justice and Behavior*, 39: 308–332.
- Engen, Rodney L. and Sara Steen. 2000. The power to punish: Discretion and sentencing reform in the war on drugs. *American Journal of Sociology*, 105: 1357–1395.
- Frankel, Marvin. 1972. Lawlessness in sentencing. *University of Cincinnati Law Review*, 41: 1–54.
- Frase, Richard. 1997. Prison population growing under Minnesota guidelines. In (Michael Tonry and Kathleen Hatlestad, eds.), *Sentencing Reform in Overcrowded Times*. New York: Oxford University Press.

- Garland, David. 2001. Introduction: The meaning of mass imprisonment. *Punishment & Society*, 3: 5–7.
- Harris, John C. and Paul Jesilow. 2000. It's not the old ball game: Three strikes and the courtroom workgroup. *Justice Quarterly*, 17: 185–203.
- Hofer, Paul J., Keven R. Blackwell, and R. Barry Ruback. 1999. The effect of the federal sentencing guidelines on inter-judge sentencing disparity. *Journal of Criminal Law and Criminology*, 90: 239–321.
- Joint Committee on New York Drug Law Evaluation. 1978. *The Nation's Toughest Drug Law: Evaluating the New York Experience*. Washington, DC: U.S. Government Printing Office.
- Knapp, Kay A. 1987. Implementation of the Minnesota Guidelines: Can the innovative spirit be preserved? In (Andrew von Hirsch, Kay A. Knapp, and Michael Tonry, eds.), *The Sentencing Commission and Its Guidelines*. Boston, MA: Northeastern University Press.
- Kramer, John H. and Robin L. Lubitz. 1985. Pennsylvania's sentencing reform: The impact of commission-established guidelines. *Crime & Delinquency*, 31:481–500.
- Kutateladze, Besiki, Nancy Andiloro, Brian Johnson, and Cassia Spohn. 2014. Cumulative disadvantage: Examining racial and ethnic disparity in prosecution and sentencing. *Criminology*, 52: 514–551.
- Lacasse, Chantale and Abigail Payne. 1999. Federal sentencing guidelines and mandatory minimum sentences: Do defendants bargain in the shadow of the judge? *Journal of Law & Economics*, 42: 245–269.
- Loftin, Colin and David McDowall. 1981. One with a gun gets you two: Mandatory sentencing and firearms violence in Detroit. *The ANNALS of the Academy of Political and Social Science*, 455: 150–181.
- Mauer, Marc. 2001. The causes and consequences of prison growth in the USA. *Punishment & Society*, 3: 9–20.
- Miethe, Terence D. and Charles A. Moore. 1985. Socioeconomic disparities under determinate sentencing systems: A comparison of pre-guideline and post-guideline practices in Minnesota. *Criminology*, 23: 337–363.
- Miller, Jerome G. 1996. *Search and Destroy: African-American Males in the Criminal Justice System*. New York: Cambridge University Press.
- Minnesota Sentencing Guidelines Commission. 2007. *Sentencing Practices: Annual Summary Statistics for Offenders Sentenced in 2006*. St. Paul, MN: Author.
- Nagel, Ilene H. and Stephen J. Schulhofer. 1992. A tale of three cities: An empirical study of charging and bargaining practices under the federal sentencing guidelines. *Southern California Law Review*, 66: 501–566.
- Nagin, Daniel S. 2013. Deterrence in the 21st century: A review of the evidence. In (Michael Tonry, ed.,) *Crime and Justice: An Annual Review of Research*. Chicago: University of Chicago Press.
- National Advisory Commission on Criminal Justice Standards and Goals. 1973. *Task Force Report on Corrections*. Washington, DC: U.S. Government Printing Office.

- National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press.
- Pennsylvania Commission on Sentencing. 1987. *1986–1987 Report: Sentencing in Pennsylvania*. State College, PA: Author.
- Pew Center on the States. 2008. *One in 100: Behind Bars in America 2008*. Washington, DC: The Pew Charitable Trusts.
- Rothman, David. 1971. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Boston, MA: Little, Brown.
- Spohn, Cassia. 2000. *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*. Washington, DC: U.S. Department of Justice.
- Spohn, Cassia and Lisa Sample. 2013. The dangerous drug offender in federal court: Intersections of race, ethnicity and culpability. *Crime & Delinquency*, 59: 3–31.
- Steffensmeier, Darrell, Jeffery T. Ulmer, and John Kramer. 1998. The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male. *Criminology*, 56: 763–707.
- Stolzenberg, Lisa and Stewart J. D'Alessio. 1994. Sentencing and unwarranted disparity: An empirical assessment of the long-term impact of sentencing guidelines in Minnesota. *Criminology*, 32: 301–310.
- Subramanian, Ram and Ruth Delaney. 2014. *Playbook for Change? States Reconsider Mandatory Sentences*. New York: Vera Institute of Justice.
- Tonry, Michael 1995. *Malign Neglect: Race, Crime, and Punishment in America*. New York: Oxford University Press.
- Tonry, Michael 1996. *Sentencing Matters*. New York: Oxford University Press.
- Tonry, Michael 2014. Remodeling American sentencing: A ten-step blueprint for moving past mass incarceration. *Criminology & Public Policy*, 13:503–533.
- Tonry, Michael and Matthew Melewski. 2008. The malign effects of drug and crime control policies on black Americans. *Crime and Justice*, 37: 1–44.
- U.S. Department of Commerce, Bureau of the Census. 1918. *Negro Population: 1790–1915*. Washington, DC: Government Printing Office.
- U.S. General Accounting Office. 1992. *Sentencing Guidelines: Central Questions Remain Unanswered*. Washington, DC: Author.
- U.S. Sentencing Commission. 1991a. *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining*. Washington, DC: Author.
- U.S. Sentencing Commission. 1991b. *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, DC: Author.
- U.S. Sentencing Commission. 2004. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*. Washington, DC: Author.
- Vincent, Barbara S. and Paul J. Hofer. 1994. *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*. Washington, DC: Federal Judicial Center.

- Wang, Xia, Dan Mears, Cassia Spohn, and Lisa Dario. 2013. Assessing the effects of race and ethnicity on sentence outcomes in jurisdictions with different types of sentencing systems. *Crime & Delinquency*, 59: 87–114.
- Western, Bruce. 2006. *Punishment and Inequality in America*. New York: Russell Sage Foundation.
- Zimring, Franklin E. 2001. Imprisonment rates and the new politics of criminal punishment. *Punishment & Society*, 3: 161–166.
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Creating the Will to Change

The Challenges of Decarceration in the United States

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Where there's a will, there's a way.

—Old English Proverb

This commentary on Michael Tonry's (2014, this issue) provocative article on "Remodeling American Sentencing: A ten-step Blueprint for Moving Past Mass Incarceration" could have been very brief had we decided to focus exclusively on his ten steps. Indeed, his overarching goal to "recreate approaches and norms for the sentencing and punishment of offenders that existed in the United States and elsewhere before the mid-1980s and endured in almost all Western countries throughout the decades of increasing crime rates" (Tonry, 2014) whereby criminal sentences would be rendered more just, fair, and effective is laudatory. We doubt that many readers of this journal would not recognize the value in dramatically decreasing American levels of imprisonment whose current rate (as well as overall trend throughout the last four decades) is best not mentioned in polite company.

Furthermore, we have no suggestions to make regarding Tonry's (2014) detailed blueprints for remodeling American sentencing and corrections. His various proposals—if implemented—would almost certainly go a long way in bringing about the desired result of reversing the historically unprecedented recourse to incarceration in the United States

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since roughly the mid-1970s. In fact, if only a subset of his proposals were to be put into effect—or even if some of them were to be carried out in some of the 51 criminal justice jurisdictions—improvements in the lives of thousands of Americans could take place with essentially no net cost to public safety and substantial net savings for those who are incarcerated (or would be incarcerated under today’s policies) as well as for those paying for their punishment.

Our comments are focused elsewhere. Specifically, we examine what is *not* contained in Tonry’s (2014) article. As he recognizes, his proposals are “mostly technocratic” and are predicated on the willingness of American policy makers to draft, pass, and ensure their implementation. We argue that the most formidable challenge to Tonry’s blueprints lies in creating this political will. Within this context, our commentary proposes to address two separate issues rooted in this *sine qua non* condition for accomplishing the goal that Tonry has set for America.

On the one hand, we raise the possibility that his proposals for legislative change might be—in a certain sense—“placing the cart before the horse.” Although Tonry (2014) notes that “many changes are [already] underway,” which might help to persuade or pressure policy makers to reverse the tough-on-crime laws enacted in the last 40 years, the broader underlying factors necessary to bring about the drastic decarceration that he is proposing could constitute a formidable challenge that requires—in our opinion—more immediate attention.

On the other hand, we raise the possibility that “the United States” might not be particularly united in criminal justice policies. Within the context of decarceration, “local” variability might require multiple or diverse “blueprints” for moving past mass incarceration. Said differently, Americans might not be facing one challenge (for the country as a whole) but could, instead, be facing 51 separate (and sometimes distinct) challenges in creating the political will to dramatically reduce imprisonment rates.

Creating the Political Will for Change

Tonry (2014) certainly acknowledges that “[u]nwind[ing] mass incarceration [in the United States] will be much more difficult than it was to create.” However, this recognition might be an understatement, particularly in the context of his suggestion that the United States should aim to have roughly 350 adult prisoners per 100,000 people in the general population—a decrease of approximately half of its current imprisonment rate—by 2020. Although decarceration of this magnitude and within this short time span is theoretically possible, it is certainly a daunting task.

To illustrate the complexities of accomplishing dramatic reductions in a nation’s levels of imprisonment, we discuss two examples of jurisdictions that have achieved this feat. Our first example involves a small jurisdiction that is far away from the United States on many dimensions (Finland). For our second example, we selected a jurisdiction that borders on the United States and might seem, in certain ways, to be similar to parts of the United

States (Alberta, Canada). These two jurisdictions were chosen not on the claim that they are “representative” of decarcerations that have taken place elsewhere in the world. Rather, we picked them precisely because they—like a small number of other examples (e.g., the Netherlands: see Downes, 1998, 2012; Downes and van Swaaningen, 2007)—have been documented in detail and because they illustrate several diverse challenges to Tonry’s (2014) current decarceration project for the United States.

Between 1960 and the end of the century, Finland reduced its imprisonment rate from approximately 155 prisoners per 100,000 residents to approximately 55 (Lappi-Seppälä, 2000, 2007). This decrease represents a drop of roughly 65%. Prior to this reduction in imprisonment, Finland (perhaps like the United States) had adapted to having high prison populations. However, the decrease that took place during the latter half of the 20th century “was the result of a conscious, long-term, and systematic criminal justice policy strategy” (Lappi-Seppälä, 2007: 239).

As Finish criminologist Patrik Törnudd (quoted by Lappi-Seppälä, 2007: 240) explained:

[T]hose experts who were in charge of planning the reforms and research shared an almost unanimous conviction that Finland’s comparatively high prisoner rate was a disgrace and that it would be possible to significantly reduce the amount and length of prison sentences without serious repercussions on the crime situation.

Furthermore, Lappi-Seppälä (2007: 241) noted that Finnish criminal justice policy is “exceptionally expert-oriented,” which was reinforced by “close personal and professional contacts [of these experts] with senior politicians and with academic research.” Not surprisingly, then, the “conviction [that a reduction in imprisonment had to be accomplished] was shared by civil servants, the judiciary, prison authorities, and equally important, the politicians . . . at least to the extent that they did not oppose the reform proposals prepared by the Ministry of Justice” (p. 241). In addition, Finland’s relevant comparator countries (i.e., the other Nordic countries) all had imprisonment rates of approximately 40–80 per 100,000 residents throughout the period 1950 to 2000. Finland was the outlier.

It is also noteworthy that economic disparity in Finland decreased dramatically during the latter half of the 20th century and more people were covered by social insurance policies. In fact, “Finland [joined] the Scandinavian welfare family in terms of the level of economic prosperity, welfare provision, and income equality” (Lappi-Seppälä 2007: 242). Of equal note, this jurisdiction’s decrease in imprisonment occurred during a time (in Finland and the other Nordic countries) of *increasing* crime. However, it was well accepted in Finland at the time (at least by those responsible for criminal justice policy) that levels of incarceration had little to do with crime rates. Finally, the Finnish media “retained a sober and reasonable attitude toward issues of criminal policy,” sparing Finland from “low-level media populism” (p. 241).

Of course, there is no reason to believe that the conditions that existed in Finland in the latter half of the last century are *necessary* conditions for decarceration. Nonetheless, they seem to us—at least on the surface—to constitute factors that would tend to facilitate reductions in levels of incarceration. More importantly for our current purposes, the punch line to the Finnish story is that it took roughly 40 years to reduce the rate of imprisonment from approximately 155 (in 1960) to 55 prisoners per 100,000 residents (in 2000). Furthermore, 28 separate law reform efforts were made during this time. Lappi-Seppälä (2007: 234, Table 1) estimates that 23 of them were likely to reduce imprisonment. Clearly, change did not occur overnight, even in the long Nordic winter night.¹

In the context of this commentary, we suggest that the Finnish experience highlights at least four substantial challenges for America's mass decarceration project. First, the United States is not closely associated with countries in which high imprisonment rates are considered a failure rather than a success. Second, there does not seem currently to be a consensus in the United States on *any* public policy question, let alone crime. Although Tonry (2014) indicates that both voters and courts may be showing positive signs in support of reversing America's unprecedented recourse to incarceration, it would be hard to argue that there is widespread agreement (particularly at the political level) that imprisonment should be reduced dramatically.

Third, a long-term policy involving legislative changes in the United States would, necessarily, involve multiple governments ($n = 51$)—many of which are likely to have different orientations to social and punishment policies. Certainly, the welfare orientation of Finland and the underlying inclusionary philosophies regarding the nature of citizenship and the role of government would be foreign to many American states. Fourth, it might be unreasonable to expect U.S. jurisdictions to reduce their imprisonment rates by an average of 350 adult prisoners per 100,000 residents in 6 years. Indeed, one cannot ignore the long-term nature of the Finnish decarceration whereby it took roughly 40 years to reduce its imprisonment rate by 100 adult prisoners per 100,000 residents. As we have argued elsewhere (Webster and Doob, 2014), decarceration is a complex process that not only is multidimensional (in its mechanisms, players, objectives, and catalysts) but also involves the interaction of multiple factors in intricate and context-specific ways.

Our second example of successful decarceration (Webster and Doob, 2014) has some notable similarities with that of Finland, in addition to the fact that it, too, is known for its cold winters. Once again, this decarceration process took place in a single jurisdiction (Alberta, one of 10 Canadian provinces), although this one (like Finland) was embedded in a larger political culture—in this case a single country, Canada, rather than a region of Europe. Second, there was apparently consensus across key elected officials and the civil

1. Obviously the story is more complicated than our summary. Those interested in learning from it should read the accounts that are easily accessible (e.g., Lappi-Seppälä, 2000, 2007).

servants responsible for the implementation of the policy that the reduction in levels of incarceration was acceptable and desirable.

Third, a (national) political culture believed in restraint in the use of imprisonment and was unsurprisingly supportive of low rates of incarceration. This skepticism about the value of high levels of imprisonment was made easier by the fact that the reduction in incarceration was focused on the less serious offenders (i.e., those serving sentences of less than 2 years as well as those in pretrial custody). The decarceration that took place reduced the rate of imprisonment of these offenders from 102 adult prisoners per 100,000 residents in 1993 to 69 in 1997—a decrease of approximately 32% (Webster and Doob, 2014: 11).²

Perhaps what is most notable in the context of the United States is that Alberta's decarceration occurred without any changes in the criminal law. Criminal law in Canada is solely a federal responsibility. Prosecutorial policies and correctional responsibility for most prisoners (i.e., all but those serving relatively long sentences) lie with the provinces. As such, when officials in Alberta decided to close correctional institutions, increase the early release of provincial prisoners into the community, and freeze the hiring of prosecutors, they were able to do it without any change in the criminal law.

The impetus for these changes in policy was financial, but it was broadly financial and had little, if anything, to do directly with criminal justice. Simply put, the government decided to balance its budget by cutting expenditures in all departments rather than by raising taxes. Other government responsibilities, notably education and health, were driving government expenditures. Justice expenditures (and all other provincial government expenditures) were reduced so that the government could be seen to be treating all areas of government responsibility in the same manner. Nevertheless, even after the financial targets were met (a few years later), the reduction in imprisonment remained.

Indeed, the most recent data suggest that Alberta's rate of provincial imprisonment remained—in 2011/2012—lower than it had been 20 years earlier. Although politico-economic imperatives may have opened up the space for change, the choice to reduce prison populations dramatically (versus adopt more repressive or austere measures related to a prisoner's quality of life, for instance) as well as the long-term sustainability of the decarceration are rooted in Canadian "criminal justice culture," which has never unambiguously supported the view that high imprisonment policies were effective ways of dealing with crime. Hence, a reduction in provincial imprisonment was not seen to be controversial.

One Political Will or 51 Political Wills?

Tonry (2014) focuses primarily on the *United States* as a whole. Looking only at state imprisonment rates (because jail rates were not reliably available before approximately

2. In Canada, provinces are responsible only for those sentenced to less than 2 years in prison (as well as the remand population). These prisoners constitute, on average, approximately 60% of the total national incarcerated population.

T A B L E 1

Top 10 List of Lowest and Highest 2006–2010 State Prison Imprisonment Rates per 100,000 Residents

States with Lowest 2006–2010 State Prison Rates			States with Highest 2006–2010 State Prison Rates		
State	State Prison Rate 1971–1975	State Prison Rate 2006–2010	State	State Prison Rate 1971–1975	State Prison Rate 2006–2010
Maine	49	150	Arkansas	90	514
Minnesota	38	182	South Carolina	145	515
New Hampshire	30	213	Georgia	178	533
Rhode Island	42	217	Florida	146	543
North Dakota	25	223	Arizona	89	556
Massachusetts	37	225	Alabama	110	628
Utah	50	237	Texas	144	657
Nebraska	69	243	Oklahoma	125	660
Vermont	44	265	Mississippi	87	703
Washington	84	271	Louisiana	113	862

1980) and ignoring federal rates (in part because federal prisoner counts cannot readily be attributed to individual states), arguably the most sobering observation is that *every* one of the 50 states’ imprisonment rates increased dramatically. In this narrow sense, the states were, indeed, united. Within this context, it might make sense to conceptualize the need for one master blueprint for moving past mass incarceration that could be adopted by all states.

However, it is equally well known that U.S. imprisonment rates themselves vary enormously across states. Notably, there was already considerable variation in rates in the early 1970s before “the great American imprisonment increase” began. Simply as an illustration, one can compare the states with the lowest and highest average state prison rates for the period 1971–1975. Using the average of the state imprisonment rates for this period, North Dakota and New Hampshire had the lowest rates (25 and 30 prisoners per 100,000 residents, respectively), whereas Georgia and North Carolina had the highest rates (178 and 183, respectively).³

This same striking variation in rates is evident in the late 2000s at the peak of American mass imprisonment. Table 1 shows the top 10 states with the lowest and highest average state prison rates for the period 2006–2010. Using the average of the state imprisonment rates for this period, Maine and Minnesota had the lowest rates (150 and 182 prisoners per

3. These figures (as well as the data in Tables 1–3) are drawn, in part, from Doob and Webster (2013). As indicated, we calculated the average of each state’s imprisonment rates for each period of interest. Specifically, we compared the average state increases in the period 1971–1975 (before “the great increase”) with those in the period 2006–2010 (at the peak of “the great increase”).

TABLE 2

Top 10 List of States with the Lowest and the Highest *Increases* in State Prison Rates per 100,000 Residents Between 1971–1975 and 2006–2010

States with Smallest Increases: 1971–1975 to 2006–2010 (State Prison Rates)			States with Largest Increases: 1971–1975 to 2006–2010 (State Prison Rates)		
State	State Prison Rate 1971–1975	Change: (2006–2010) minus (1971–1975)	State	State Prison Rate 1971–1975	Change: (2006–2010) minus (1971–1975)
Maine	49	100	Delaware	63	401
Minnesota	38	144	Idaho	58	419
Nebraska	69	174	Arkansas	90	425
Rhode Island	42	175	Missouri	82	427
New Hampshire	30	182	Arizona	89	467
North Carolina	183	183	Texas	144	514
Washington	84	187	Alabama	110	519
Utah	50	188	Oklahoma	125	535
Massachusetts	37	188	Mississippi	87	616
North Dakota	25	198	Louisiana	113	749

100,000 residents, respectively), whereas Mississippi and Louisiana had the highest rates (703 and 862, respectively).

Even when one examines the size of the increase that occurred since the early 1970s, significant variability continues to exist. Table 2 presents the top 10 states with the lowest and highest *increases* in state prison rates between 1971–1975 and 2006–2010. Judged by absolute numbers, the smallest increases are found in Maine and Minnesota. They increased by “only” 100 and 144 prisoners per 100,000 residents, respectively. In dramatic contrast, Mississippi and Louisiana *increased* by 616 and 749 *additional* prisoners on an average day per 100,000 residents, respectively.

Our point is simple: Whether one looks at current rates or at increases since the early 1970s, one cannot escape the conclusion that there is huge variation across states. For our current purposes, this variability is important for two reasons. On the one hand, it is clear that the contributions of the states to America’s prison binge are uneven. Within the context of Tonry’s (2014) proposal that “every state and the federal government should reduce its combined rate of jail and prison confinement to half its 2014 level by 2020,” one can imagine that, on the face of it, it would be easier (or even potentially more persuasive) to argue for a reduction by half in the state prison rates of Oklahoma (2006–2010 rate = 660), Mississippi (703), and Louisiana (862) than it would be to argue that Maine (150), Minnesota (182), and New Hampshire (213) needed to treat decarceration as an urgent priority. Interestingly, even if one were to prefer a different logic whereby those states that have contributed the most to the *buildup* of imprisonment should be expected to reduce their rates by a higher percentage than those with the smallest increases during this 35-year

period, the same jurisdictions would be targeted (i.e., 1971–1975 to 2006–2010 increase: Oklahoma = 535; Mississippi = 616; and Louisiana = 749).

On the other hand, this significant variability across states calls attention to another—arguably more fundamental—reality for the purposes of this commentary. One does not need to be an American to look at the 10 states with the highest “late” state imprisonment rates (2006–2010) and the 10 lowest “late” rates (Table 1)—or, for that matter, the 10 states with the highest increases in state imprisonment rates between 1971–1975 and 2006–2010 (Table 2)—and quickly conclude that these two groupings of states represent very different societies.

In fact, these two distinct groups of states remind us of similar alignments that emerged in earlier work (Doob and Webster, 2006; Webster and Doob, 2007, 2012) in which we reported that U.S. states in the regions with the most “Canadian-like” values—based on a classification developed by Adams (2003) using polling data—had the lowest imprisonment rates.⁴ Given that Canada—in contrast with the United States as a whole, as well as with every state (and the federal jurisdiction)—has had a relatively stable rate of adult imprisonment (roughly 100 ± 20 adult prisoners per 100,000 overall residents) since the late 19th century and most notably since the 1970s, this relationship provides some support for the notion that levels of incarceration are partly a function of underlying values. Specifically, Canadian culture seems to be rooted in more nonviolent, communitarian values that may not be as supportive of increasing punitive responses to criminal behavior.

More recently, we (Doob and Webster, 2013) noted that U.S. state imprisonment rates also relate to other social dimensions of the different states. Table 3 presents some of the findings.

First, states that have retained capital punishment tended to have higher imprisonment rates both in the early 1970s and the late 2000s. Notwithstanding the fact that they started with higher rates than the abolitionist states, the states that retained capital punishment also increased their imprisonment rates more than did those that no longer have capital punishment. Second, several other more recent social policies that we examined—namely felon disenfranchisement in 2010 (Uggen and Shannon, 2012), the lifetime bans on welfare and food stamps that were imposed on convicted drug offenders by the Clinton “welfare

4. The classification of U.S. states by Adams (2003) in terms of how “Canadian-like” they are was based on a two-dimensional value structure on which individuals (or groups) can be placed. Canadians were more likely than Americans to hold such attitudes as a willingness to accept nontraditional views of the family or to consider oneself a “citizen of the world” before a “citizen of one’s community and country.” Canadians were also found to be more likely than Americans to indicate that they are comfortable in adapting to the uncertainties of modern life and were not threatened by the changes and complexities of society today. In contrast, individuals who fell into the quadrant most unlike the preponderance of Canadians were more likely to endorse such views as the belief that “there are rules in society and everyone should follow them” or that “immigrants who have made their home in [this country] should set aside their cultural backgrounds and blend in” It was also found that those least like Canadians were more likely to endorse the view that “in the end, people get what they deserve as a result of the decisions they make, both positively and negatively.”

T A B L E 3

Social Policies and Imprisonment Rates (Some Examples)

Dimension	Type of State (Number of States)	Average State Imprisonment Rate, 1971–1975	Average State Imprisonment Rate, 2006–2010	Change (Late minus Early)
Capital punishment in 2012	No (17)	55	304	249
	Yes (33)	95 ^a	462 ^a	368 ^a
Canadian-like attitudes	Yes (17)	66	344	279
	Somewhat (19)	63	359	295
	No (14)	123 ^a	554 ^a	430 ^a
Felon disenfranchisement	No (39)	77	385	308
	Yes (11)	97	491 ^a	395 ^a
Imposition of cash assistance and food stamp bans on certain ex-felon drug offenders	None/almost none (14)	68	330	261
	Mixed (26)	81	420	339
	Full, or almost full bans (10)	99	488 ^a	390 ^a
Minimum wage	Above federal rate (19)	73	371	298
	At federal rate (20)	78	379	301
	Below federal rate (11)	99	526 ^a	426 ^a

^aDifferences across groupings of the 50 states, within column, are significant at $p < .05$.

reform” but that allowed states to opt out fully or in part (Sentencing Project, 2013), and current (2014) minimum wage—did not correlate with imprisonment rates in the early 1970s. However, they did relate rather strongly to imprisonment rates in the late 2000s as well as to the change in rates.

From our perspective, the “cause” of these relationships is less important than the fact that they exist. We simply suggest that high imprisonment in the United States not only is related to other punitive criminal justice policies but also is embedded in social values (e.g., how much the least paid workers in the state should make). In fact, this type of analysis is not new. For instance, Beckett and Western’s (2001) analysis of the relationship between welfare and imprisonment rates is very similar. More recently, Downes (2012) noted that even in Europe, there are signs that welfare policies are becoming tougher and that a relationship exists across countries in the percent of GDP spent on welfare and penal policies. More broadly, an examination of imprisonment rates of 30 countries in Europe as well as Canada, Australia, and New Zealand by Lappi-Seppälä (2011) reported very similar relationships. Countries with low rates of economic disparity, generous social welfare policies, and in which the population is generally more prosperous tend to have low imprisonment rates. Notably, Lappi-Seppälä (2011) also found that in countries in which the government operated largely by consensus, imprisonment rates tended to be low. It would be difficult to argue, in mid-2014, that the U.S. federal government should be described as operating “by consensus.”

That imprisonment rates are linked to these other social policies suggests that high imprisonment cannot be addressed in a vacuum that ignores social and cultural factors or values. Intuitively, it seems reasonable to expect that states that practice capital punishment, do not allow ex-felons to vote or receive certain welfare benefits after the expiry of their sentences, and have a low minimum wage and a value structure unlike that of Canada (e.g., in which people believe strongly that “in the end, people get what they deserve,” [Adams, 2003, p. 163]) would likely need different types of political pressures to reduce their (high) imprisonment rates than are states on the other end of each of these dimensions.

Within this context, we suggest that the challenge to any attempt to change imprisonment policy in the United States is, in fact, greater than in many nonfederal states (or, one might suggest, countries like Canada in which criminal law is a federal responsibility). As Zimring and Johnson (2006: 276) remind us:

[D]istribution of governmental power in American criminal justice . . . helps to explain the salience of criminal justice as an issue. . . . Most punishment policy in the US is state policy. For state governments, crime policy looms large . . . because it has little with which to compete.

Said differently, broad political coalitions (to use Gottschalk’s [2006] words) need to be created, embedded in, and sustained in *each* state as well as the federal government. Just as the criminal justice policies and practices of individual nations are different for reasons

of political culture and history (Tonry, 2014), individual U.S. states might be best thought of in the same way. By extension, they might require considerably different “blueprints” to move past mass incarceration that take into account their unique or—to adapt an expression of Lappi-Seppala (2011: 324)—“state-specific exceptionalism.”

Conclusion

As a “technocratic” set of proposals, it is easy to support Michael Tonry’s (2014) broad plan for the United States to roll back mass incarceration. Our concerns relate to a different issue. The United States faces formidable challenge(s) in merely pushing beyond its current state of “nibbling at the edges,” much less in approaching the dramatic targets that Tonry has laid out in his article. We have proposed that an urgent and concerted focus is needed on the various strategies that might successfully create the political will for legislators and executive branch officials to act boldly. As part of this endeavor, we suggest that special attention be given to adapting Tonry’s blueprint to the political, historical, and cultural realities of each state (or groupings of states).

Optimistically, other successful decarceration projects have proven that dramatic reductions in imprisonment are possible. More pessimistically, the key seems to be, as Tonry (e.g., 2011, 2014) has repeatedly affirmed—the adoption of a particular set of normative beliefs that view prison as a “bad thing”—that is, as a necessary evil whose use should be minimized as much as possible and whose effectiveness in reducing crime should be viewed with deep skepticism. As we suggested elsewhere (Doob and Webster, 2013), high imprisonment in the United States is likely to be deeply embedded in broad and exclusionary values concerning citizenship and rights. As such, a fundamental shift in the manner in which disadvantaged Americans and crime are seen may need to occur before Tonry’s (2014) proposals ever reach the legislative table.

Tonry (2014) has clearly provided us with the “technical perfection”—to borrow from Freiberg (2000). What is missing is the “symbolic” or the “emotive” dimension that will be capable of successfully competing with the current “law and order” agenda. Or, as Tuohy (2007: 518) suggested (albeit in a different context—health care—and in a different country—Canada):

If [a policy package] is to endure partisan change and periodic shifts in the balance of interests, it must resonate broadly with Canadians. Accordingly, it needs to be tied together by a national narrative that reflects the ways in which Canadians understand themselves as Canadians.

In other words, Americans need a different narrative.

References

Adams, Michael. 2003. *Fire and Ice: The United States, Canada, and the Myth of Converging Values*. Toronto, Ontario: Penguin Canada.

- Beckett, Katherine and Bruce Western. 2001. Governing social marginality: Welfare, incarceration, and the transformation of state policy. *Punishment & Society*, 3: 43–59.
- Doob, Anthony N. and Cheryl Marie Webster. 2006. Countering punitiveness: Understanding stability in Canada's imprisonment rate. *Law & Society Review*, 40: 325–367.
- Doob, Anthony N. and Cheryl Marie Webster. 2013. American Imprisonment from a Canadian Perspective: Exceptionalism or Optimism? Talk given at a conference on American Exceptionalism in Crime and Punishment: Diagnosis and Solutions, Minneapolis, MN.
- Downes, David. 1998. The buckling of the shields: Dutch penal policy 1985–95. In (Robert P. Weiss and Nigel South, eds.), *Comparing Prison Systems*. Amsterdam, the Netherlands: Gordon and Breach.
- Downes, David. 2012. Political economy, welfare and punishment in comparative perspective. In (Sonja Snacken and Els Dumortier, eds.), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy*. London, U.K.: Routledge.
- Downes, David and René J. van Swaaningen. 2007. The road to dystopia? Changes in the penal climate of the Netherlands. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 35. Chicago, IL: University of Chicago Press.
- Freiberg, Arie. 2000. Affective versus effective justice: Instrumentalism and emotionalism in criminal justice. *Punishment & Society*, 65: 547–559.
- Gottschalk, Marie. 2006. *The Prison and the Gallows: The Politics of Mass Incarceration in America*. New York: Cambridge University Press.
- Lappi-Seppälä, Tapio. 2000. The fall in the Finnish prison population. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 1: 27–40.
- Lappi-Seppälä, Tapio. 2007. Penal policy in Scandanavia. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 36. Chicago, IL: University of Chicago Press.
- Lappi-Seppälä, Tapio. 2011. Explaining imprisonment in Europe. *European Journal of Criminology*, 8: 303–328.
- Sentencing Project. 2013. *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*. Washington, DC: Author.
- Tonry, Michael. 2011. Making peace, not a desert: Penal reform should be about values not reinvestment. *Criminology & Public Policy*, 10: 637–650.
- Tonry, Michael. 2014. Remodeling American sentencing: A ten-step blueprint for moving past mass incarceration. *Criminology & Public Policy*, 13:503–533.
- Tuohy, Carolyn H. 2007. Policy priorities for Canada: Making choices. In (Jeremy Leonard, Christopher Ragan, and France St-Hilaire, eds.), *A Canadian Priorities Agenda: Policy Choices to Improve Economic and Social Well-Being*. Montréal, Québec, Canada: Institute for Research on Public Policy.
- Uggen, Christopher and Sarah Shannon. 2012. *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*. Washington, DC: Sentencing Project.

- Webster, Cheryl Marie and Anthony N. Doob. 2007. Punitive trends and stable imprisonment rates in Canada. In (Michael Tonry, ed.), *Crime and Justice: A Review of Research*, Volume 36. Chicago, IL: University of Chicago Press.
- Webster, Cheryl Marie and Anthony N. Doob. 2012. Maintaining our balance: Trends in imprisonment policies in Canada. In (Karim Ismaili, Jane Sprott, and Kimberly Varma, eds.), *Canadian Criminal Justice Policy*. Oxford, U.K.: Oxford University Press.
- Webster, Cheryl Marie and Anthony N. Doob. 2014. Penal reform “Canadian Style”: Fiscal responsibility and decarceration in Alberta, Canada. *Punishment & Society*, 16: 3–31.
- Zimring, Franklin E. and David T. Johnson. 2006. Public opinion and the governance of punishment in Democratic political systems. *The ANNALS of the American Academy of Political and Social Science*, 605: 266–280.
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Ending Mass Incarceration

Some Observations and Responses to Professor Tonry

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We should all be grateful for Michael Tonry's (2014, this issue) characteristically thoughtful article proposing 10 concrete steps to reduce the excessive reliance on incarceration in the United States. It would behoove legislatures and judges to think carefully about each of his proposals. The following remarks constitute an attempt to expand on some of his observations and offer a few cautionary notes about some of his proposals.

At the outset, however, it is important to note that I fully agree with the general premise of Tonry's (2014) article, which is by now conventional wisdom among criminal law scholars and practitioners and, increasingly, as Tonry is at pains to document, even among politicians on both the right and the left of the American spectrum: The United States has a vastly overinflated system of incarceration that is excessively punitive, disproportionate in its impact on the poor and minorities, exceedingly expensive, and largely irrelevant to reducing predatory crime. Tonry is also correct that the public mood seems to have shifted at least to the extent that fear of crime no longer drives the political debate as it has for so long in the United States. Reductions in imprisonment, in particular, and a movement away from harshly punitive attitudes in general, are no longer politically unthinkable for candidates for public office, as they have been since the late 1960s. As Tonry emphasizes, it might be an opportune time to consider specific proposals to implement this revived willingness to think about crime in a less fearful and vindictive manner.

Accordingly, Tonry (2014) focuses in large part on the practical mechanisms of reform. That is, he asks what concrete legislative steps are called for to accomplish the desired reduction in prison populations. That said, however, it is worth noting that Tonry recognizes that the optimism about political will that informs the beginning of the piece might be

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overstated. The section “Moving Forward” in particular recognizes that the political will to serious reform does not necessarily exist, as reflected by the fact that we are still doing little, in most states and in the federal system, to reduce the number of people in prison. I also note that the proposals in the section “Unwinding Mass Incarceration” are more ambitious, and are of a different nature, than those in the section “Sentencing Laws for the Future.” Tonry’s proposals in the first section could be considered, in one sense, to be mechanical—although they are still difficult to accomplish politically. That is, they are presented as a technical means of accomplishing progress toward an assumed goal of reducing incarceration. But the proposals in the “Unwinding Mass Incarceration” section are not so much means as ends: Tonry calls for the states to adopt specific goals for reducing incarceration over time. I think his choice to include these proposals demonstrates an implicit recognition that whatever consensus is beginning to develop around the abstract proposition that “we have too many people in prison,” this still-nascent consensus has not evolved into a concrete acceptance of any specific goal or target for reducing prison populations. Moreover, the proposals in the “Unwinding Mass Incarceration” section are more radical insofar as they suggest not merely a revision of criminal sentencing law on a prospective basis (which would be welcome but would reduce the prison population only gradually) but also the release of people currently in prison, in substantial numbers. Such proposals test whether we are really serious: They translate “we have too many people in prison” into something much more concrete. Reaching an agreement on these proposals would be a major political advance; if we had a genuine political consensus that prison populations need to be reduced in significant numbers, including the release of many persons now in prison, many of the changes in the mechanics of sentencing set forth by Tonry would become no-brainers.

Moreover, some suggestions made by Tonry (2014) regarding sentencing law will not necessarily have any effect on reducing incarceration, absent a genuine determination, backed by enforceable legislative goals, to reduced prison populations. One of my few substantive concerns about one of Tonry’s specific proposals illustrates this point. He proposes that all states create sentencing commissions and adopt sentencing guidelines. I agree with him—I played a role in persuading the American Law Institute (ALI) to start its sentencing project to replace the sentencing provisions of the Model Penal Code, and the impetus behind that change was in large part to promote guideline sentencing (and the model legislation that has slowly taken shape within the ALI reflects that policy preference). So I am on board with the general proposition. I understand that the experience in several states (North Carolina and Minnesota come to mind) is that guidelines can be a factor in reducing incarceration. I appreciate that the federal experience with guidelines is aberrational in many ways. However, the federal example is a significant cautionary tale. Commission and guidelines systems have many advantages, especially with respect to predictability and equity in sentencing. But guidelines and commissions do not inherently lead to reducing (or increasing) prison populations: That depends on the substance of the guidelines. In

the federal system, harsh mandatory guidelines were a significant factor in dramatically increasing sentence lengths.

There are many reasons for the increase in sentence lengths and many reasons to think that, in state systems (particularly ones with elected judges), standardizing sentences can be expected to decrease sentence lengths rather than increase them. But the federal experience suggests a few points about guideline systems. First, guidelines will reduce incarceration only when there is a political will to reduce sentences; otherwise, they probably will not. In North Carolina, the adoption of a commission and guidelines was specifically intended to reduce prison terms for nonviolent crimes without the legislature having to take the heat for any specific reductions in sentences that might be considered “soft on crime.” But the legislature wanted to reduce prison budgets and recognized a commission-driven reduction in property-crime sentences as a desirable goal. The resulting reduction in overincarceration was not a product of guidelines in themselves but of the political will that lay behind the adoption of the guideline system. Some of what Tonry (2014) writes about guidelines reflects the kind of optimism that Marvin Frankel (1973) brought to his original proposal for sentencing guidelines—optimism that at least in the federal system proved misplaced. Judge Frankel believed that because creating guidelines was much too complicated a task for politicians to undertake for themselves and enact into legislation, having a commission would ensure that the guidelines process would be in the hands of politically insulated experts. He was right that creating guidelines was a daunting task. But if creating guidelines was too difficult for Congress, messing with them once a system had been created was not. Once a system is created, it is not complicated for a legislature to direct that the guideline sentence for a given crime be increased, and even if the general political climate is less driven by bitterness about rising crime rates, there will always be a temptation, driven by news reports of spectacular crimes, to react by tightening the screws. If the political actors want increased toughness, then I do not think that guidelines can exert any much counterpressure; they can even be a facilitating factor in increasing incarceration.

Second, Tonry (2014) repeats the view, which is common among guideline proponents, that voluntary guidelines do not work. But the term “voluntary” can be misleading. A wide spectrum of *de jure* and *de facto* systems of guidelines exists between the purely hortatory (I think that the view that “voluntary” guidelines are ineffective address such entirely advisory system) and the effectively mandatory and inflexible/like the federal guidelines, although even they were not, as a matter of law, mandatory, because they permitted (narrowly circumscribed) departures in the discretion of sentencing judges. Tonry supports “presumptive” guidelines. I think that is the right rubric, but in practice a great deal depends on the strength of the presumption. Both the current federal “advisory” guideline system and the former putatively “mandatory” guideline system could be described as involving presumptive guideline sentencing, although the systems are widely perceived as very different from each other.

Third, part of the problem with the federal guidelines is that they operated as a substitute for penal code reform. Unlike most (especially Model Penal Code–based) state codes, which already contain degrees of offenses and typically cover a relatively discrete type of conduct under each statutory heading, the federal guidelines had to create a sentencing scheme for offenses that had no coherent core. This technical fact about the federal guidelines raises the general point that substantive penal law is important. One reason we have too many people in jail is that we have too-long sentences for conduct that is appropriately made criminal, but another is that we overuse the criminal sanction for conduct that need not be dealt with by the criminal law at all. That might be a topic beyond Tonry's (2014) scope, but it is an important one for us to consider. The "war on drugs" is just one example of a policy whose reliance not just on long prison terms, but on the criminal law itself, warrants reconsideration. Such reconsideration need not involve a debate about legalizing conduct that is now illegal, but noncriminal sanctions and nonpunitive responses to a variety of social problems with targeted use of criminal punishment for only the most severe aspects of the conduct we aim to control might be both cost-effective and liberty enhancing.

Moreover, measures to reduce sentences, or even to cut back on the content of penal codes, ignore a large part of our custodial population. A significant portion of our carceral population is not in prisons (institutions for punishing offenders convicted of serious offenses and sentenced to long terms in custody) but in jails (local institutions for detaining those accused of crime or sentenced to short terms). Tonry (2014) does little to address this facet of the problem. Repetitive short terms in jail for petty offenses or the jailing of persons to await trial on charges that are eventually dropped deprive many people of liberty, often for a surprisingly long time. Many of these people do not need to be imprisoned and (like many of our prison inmates) are in custody as a practical matter because they are mentally ill, or otherwise disruptive of their communities. Finding alternative ways to deal with these individuals, and reduce our jail population, is an important project.

The reminder that many of the inhabitants of our prisons and jails are mentally ill leads me to another point, which I am afraid is a pessimistic one. Reformers are prone to overpromise about the benefits to be expected from the reforms they propose. I fully agree that we spend too much on prisons and that the belief that mass incarceration is necessary to control crime is exaggerated. It should follow that we can reduce the size and cost of our prisons without unacceptable increases in crime. But caution is in order, on both the cost and crime fronts.

Tonry (2014) points to the dollar costs of our overuse of imprisonment and argues, like many reformers, that providing other social services would be cheaper. That might be true. But I think it is a mistake to sell reduced incarceration primarily as an economy measure—especially if we are arguing that our streets can be safe without incarceration. A substantial part of our prison and jail population exists as a result of the deinstitutionalization of the mentally ill. That process was also sold on the ground that it would be both economical and liberty enhancing to treat the mentally ill in the community. Well, it turned out to

be cheaper mostly because the social services that were supposed to be provided in the community were not in fact provided. But that led to the reinstitutionalization of many troubled and troubling people via the criminal justice system. Turning a lot of people out of jail without services (which is the predictable result of a policy of “reduce prison populations and save a lot of bucks”) risks bad consequences on the street. I think we need to be clear that our problem is using prisons to deal with social problems and that reducing our use of prisons will not do much to solve those social problems. No doubt a reduction in incarceration could do some good in that regard: Avoiding family disruption and reducing structural unemployment of ex-prisoners would be useful, and prisons are criminogenic in some ways. But we are fooling ourselves, possibly in dangerous ways or in ways that risk a return to public fear and restoration of the prison regime, if we do nothing with the money saved but reduce taxes or deficits. Many of those who do not belong in prisons do need treatment through mental health services, probationary oversight, and the like. Freeing prisoners without any social oversight is costly, but the necessary treatment and supervision is costly. Efforts to save money by farming probationary and treatment services out to the private sector is not likely to work, either—we are already beginning to observe evidence of the abuses that result when alternatives to incarceration are managed for private profit. Ignoring the social pathologies that lead young men to think that violence, theft, or the drug trade are the only available routes to income, social status, and self-respect will leave us with the same depressing crime problem we turned to prisons, ineffectively, to solve. Attempting to treat those pathologies will easily eat up whatever we save in prison budgets.

Finally, I would say one other word of caution. I am a little more hesitant than Tonry (2014) about the idea that our experiment in mass incarceration had nothing to do with recent reductions in crime. That seems to be the conventional wisdom among criminologists, but there is a tendency to oversimplify the point. I understand and applaud the fact that New York, for example, has managed to reduce prison populations while reducing serious crime. That is the key takeaway on which I fully agree with Tonry: We can be smarter about our use of incarceration without sacrificing public safety. But it remains true that if you lock up everybody who has committed a crime, you will (at great and excessive cost to liberty and the public fisc) be locking up a lot of people who are indeed dangerous and who might not be accurately identified by more selective means of incapacitation. I do not argue that the possibility that overinclusive imprisonment might reduce crime rates at the margins is worth the cost of imprisoning huge numbers of people who pose little or no threat and whose incarceration brings misery to themselves, their families, and their communities. But I am wary of implicitly overpromising. There is some controversy in the literature about the effectiveness of longer periods of incarceration in reducing crime. I am not sufficiently knowledgeable to argue the point; I do not have an opinion about the relative role of various factors in reducing crime rates generally in the United States and especially steeply in a few cities (most notably New York). Perhaps it is just my tragic worldview that leads me to assume generally that we cannot always have it all and to be

skeptical of the argument that having a humane carceral policy will have no cost at all in terms of crime rates. Perhaps Tonry completely disagrees, and he knows much more than I do about the relevant criminological studies. But to the extent that there is any nuance in his views or any controversy in the literature, I would like it to be acknowledged more explicitly. There is a difference between arguing that we are insanely overdoing imprisonment to no good effect and failing to recognize the risks in indiscriminate reductions in incarceration that mirror the harm caused by the indiscriminate increases of the last generation.

References

- Frankel, Marvin. 1973. *Criminal Sentences—Law Without Order*. New York: Hill and Wang.
- Tonry, Michael 2014. Remodeling American sentencing: A ten-step blueprint for moving past mass incarceration. *Criminology & Public Policy*, 13:503–533.
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Assessing the State of Mass Incarceration

Tipping Point or the New Normal?

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With good reason, criminal justice reformers who have long advocated for a reduction in America's prison population are near-giddy with optimism these days. An illustrative list of recent events provides ample grounds for understanding why hope is in the air. It is indisputable that the prison population has declined in recent years. After nearly four decades of relentless annual growth, the number of individuals held in state and federal prisons peaked in 2009 and has decreased each successive year. Between 2006 and 2012, prison populations declined in more than half the states. In 10 states, the prison population fell by 10% or more (Carson and Golinelli, 2013). In a few states, the reductions have been considered sufficiently large to provide cause for celebration (The Sentencing Project, 2014).

When asked to explain the reasons for this change in incarceration trends at the state level, many commentators point to a new left-right political consensus, one hardly imaginable a short decade ago. A new entity, cleverly called "Right on Crime," has burst on the scene bringing heavyweight conservative opinion leaders and politicians into the justice debate on the side of lower incarceration rates. Traditional left-leaning prison-reduction advocates long accustomed to decrying the influence of the political conservatives now celebrate the support of unlikely allies such as Grover Norquist, head of Americans for Tax Reform; Newt Gingrich, who as Speaker of the House oversaw enactment of federal legislation ramping up the prison population; and Texas Governor Rick Perry, whose state proudly led the tough-on-crime, lock-'em-up movement decades ago.

The new stance of conservative voices on incarceration is more than rhetoric. Some of the most noteworthy efforts to reduce prison populations have succeeded in Republican states, including Georgia, Mississippi, and Texas, led by Republican governors and

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legislators. The new conservative voice that has emerged is more than an echo; it is a self-confident call to action. Newt Gingrich has bluntly stated that conservatives should take credit for the reduction in incarceration rates. In a 2011 op-ed he penned for the *Washington Post*, Gingrich asserted that “the criminal justice system is broken, and conservatives must lead the way in fixing it” (Gingrich and Nolan, 2011: para. 7). In 2014, Kentucky Senator Rand Paul, a Tea Party Republican with libertarian leanings, confidently accepted the invitation to address the Urban Coalition, where he called for reform of sentencing policies that disproportionately impact minorities and for the restoration of voting rights to felons who complete their sentences, notwithstanding protests over his general opposition to the group’s civil rights agenda (Catanese, 2014).

Add to this promising mixture the steps taken by the Obama administration to cut back on policies that contribute to high incarceration rates. Beginning with his speech at the Vera Institute of Justice in 2009 calling for sentencing reform, Attorney General Eric Holder has been a constant voice for changes in the country’s criminal justice policies. He has supported reduced sentencing practices for nonviolent offenders and has pushed for the eradication of mandatory minimums for nonviolent drug offenses (U.S. Department of Justice, 2014). As noteworthy as these pronouncements might be, more telling is the lack of sustained push back to these forays into the justice reform domain. In an environment where opponents of the Obama administration seem to find every reason to raise a ruckus, the Attorney General’s statements on crime policy, once thought to be the ultimate treacherous terrain for progressive reforms, have generated remarkably little opposition.

Analysts searching for more tea leaves that might be read to presage a significant change in punishment policy in America would find ample supply. The U.S. Sentencing Commission (2014) recently recommended retroactive application of reduced sentences for crack cocaine offenses. In *Brown v. Plata* (2011), the U.S. Supreme Court, building on a series of decisions that have restrained retributive impulses in America and citing the Eighth Amendment’s prohibitions against cruel and unusual punishment, upheld a lower court decision ordering the state of California to reduce its prison population by more than 30,000 inmates by 2016. Michelle Alexander’s (2012) book, *The New Jim Crow*, which frontally tackled the issue of race in the justice system, a topic often thought too hot to handle, set new sales records for a book on criminal justice policy, exceeding 70 weeks on the *New York Times* best seller list. The National Research Council (NRC) of the National Academies (NRC, 2014) recently released a report on high incarceration rates in the United States recommending, after a careful review of the evidence, that the country should “significantly” reduce the use of prison as a response to crime.¹ Even the children’s television show *Sesame Street*, recognizing that millions of young children now have a parent in prison, created “Alex,” a new character designed to help children deal with this new reality

1. I served as the Chair of the Consensus Panel that produced this report. The views expressed here do not necessarily represent the findings and recommendations of that panel.

in the era of mass incarceration. Perhaps, an optimist might conclude, we have reached a tipping point and the nation is poised to do the hard work necessary to cut back on its prison population.

Lest this new era of optimism distract justice reformers from the larger ambition of a significant reduction in rates of incarceration, it is important to listen to other more cautious voices, often from individuals who share that ambition. Tonry (2014, this issue), one of the most thoughtful and seasoned scholars of sentencing policy, reminds us that the current level of incarceration is sustained by some deep structural realities. Only by confronting those realities, he argues, can the reform movement actually succeed. His analysis might put a damper on the current cautious celebration of actual, symbolic, and rhetorical victories, but his voice—and similar voices—must be given careful attention.

Tonry (2014) reminds us that our celebration of the recent reductions in prison population is premature for several reasons. Much of the national reduction in state incarceration rates is attributable to the court-ordered reductions in the California prisons. Given that California officials mounted sustained resistance to this idea for more than a decade, caved only when ordered by the Supreme Court, and are still mounting a rear-guard action to limit the court order, this hardly qualifies as evidence of a shift in national mood. In addition, the population of the federal Bureau of Prisons continues to grow at a rapid pace, accounting for more than 25% of the budget of the Department of Justice in 2013 (La Vigne and Samuels, 2012). This fact lends credence to the notion that the progress in reducing prison populations at the state level is driven mostly by financial imperatives, not by a sense that the justice apparatus has lost its bearings. After all, states must balance their budgets, a financial discipline not found in the federal government. One could find other indicia that the national stance of punitiveness has not softened. Exhibit A, not mentioned by Tonry (2014), would be the explosive growth in immigration detention: In 2012, U.S. Immigration and Customs Enforcement detained approximately 478,000 foreign nationals, an “all-time high” (Simanski and Sapp, 2013).

More telling, however, is the simple fact that, notwithstanding any progress, the rate of incarceration in the United States is still, in the words of the NRC report’s first finding, “historically unprecedented and internationally unique” (NRC, 2014: 2). The slight decline in incarceration rates in recent years still leaves the United States with rates more than 4 times the pre-1972 level, and 5 to 10 times higher than countries of Europe. So Tonry (2014), taking a long view and a comparative perspective, appropriately curbs the enthusiasm of the moment. As Tonry frequently cites from the NRC report, “[t]he size of the prison population is the clear, unambiguous evidence that nothing fundamental has changed.”

Yet the most profound analytical framework that Tonry (2014) brings to our understanding of this possible inflection point is his sober assessment of the state of our sentencing legislation. Much has been made of the fact that many states have enacted sentencing reforms that have reduced the use of prison (Austin, 2010; The Sentencing Project, 2014). Some would argue this evidence shows that the ground has softened and that change is on

the horizon. Tonry's analysis compels a different conclusion. He notes that today "nearly all the harshest laws enacted from 1984 through 1996 remain in place. No state has repealed a three-strikes, truth-in-sentencing, or life-without-possibility-of-parole (LWOP) law, and most changes to mandatory minimum sentence laws have only nibbled at their edges by creating exceptions or earlier eligibility for parole release for nonviolent first offenders." Later in the article, he notes that "[l]egislators and executive branch officials have made only minor, marginal changes to laws that sent so many people to prison for so long."

When Tonry's (2014) analysis is combined with the accepted notion that the ramp-up in harsher sentencing policies was driven by the political imperative, as perceived by elected officials of both parties to be tough-on-crime, then a sense of despair begins to take hold. On what basis, one might wonder, can we imagine that the politics of crime would change sufficiently so that our elected legislators would affirmatively vote to reduce—significantly, not at the margins—the use of prison as a response to crime? When will a legislative body decide to cut back on the policies that have led to the current state of affairs? Which state will decide to abandon a policy as alluring as truth in sentencing or will say that crimes previously thought punishable by life without possibility of parole now warrant a sentence that envisions ultimate return to society? Which elected official will vote to repeal three-strikes sentencing provisions?

Tonry (2014) quickly jumps to a set of prescriptive policies that would help the nation move in the right direction. It is no surprise to a student of Tonry's scholarship that he proposes an embrace of the "best features of the indeterminate sentencing system" (somewhat modified from its original form) and recommends, as the vehicle for reform, the creation, in every state, of a sentencing commission that would establish presumptive sentencing guidelines. This prescription meets many of the concerns about the current approach to punishment. Through sentencing commissions, determinations of sentencing policy would be removed from the political cauldron of legislative bodies. Evidence of effectiveness can be considered more carefully. Modifications can be made more nimbly. After a concise and constructive review of the history of sentencing reforms, Tonry concludes that this prescription is also backed up by evidence: "The strongest reason for adopting the sentencing commission/presumptive guidelines model in American jurisdictions is that it has been shown to be effective."

But what is "effectiveness" in the modern era of mass incarceration? Tonry (2014) counts himself among those who have large ambitions for the nascent reform movement. Despite his support for them, he recognizes that the prescription of indeterminate sentencing, presumptive guidelines, and sentencing commissions, if adopted, would not have significant impact on incarceration rates in the near term. "Something drastic needs to be done," he correctly concludes, "if the imprisonment rates in the United States are to reach even the 300–350 per 100,000 rates that characterize the Baltic countries of Estonia, Latvia, and Lithuania." To get to this result would require even bolder action by the same governmental entities—state legislatures—that have only taken modest steps in recent years. At this

uncture, Tonry loses steam. Perhaps, he speculates, states would grant “large-scale amnesties or mass pardons,” perhaps a new release system would undertake case-by-case reviews with an eye toward shortening prison terms, perhaps state legislatures could allow release after a specified number of years in prison (5 years?) or when an inmate reaches a certain age (35 and older?), or perhaps states would enact “second-look provisions” such as those proposed by the American Law Institute (2011) that would create opportunities for judicial review of long sentences.

Why should we think these sweeping changes might be possible? Tonry (2014) asks us to engage in a massive collective leap of faith. He recognizes that the political decision to create a system for shortening sentences:

will require decisions that are ultimately based on normative beliefs that too many people have been sent to prison for too long and that something should be done about it. If that choice is made, the mechanics will not simply take care of themselves, but the normative change of heart will lay necessary foundations for meaningful solutions.

It would be asking too much to expect from Tonry’s (2014) article a full-blown political strategy; yet the jump from diagnosis to prescription leaves the reader hungry for more. Tonry does point to some of the obstacles that must be overcome. For example, in the focus on elected officials, much attention is paid to legislators who, granted, have enacted the sentencing law that got the country into this mess. But only fleeting attention is paid to prosecutors, who are also elected officials and wield outsized influence in the determinations of sentencing policy. Nor is there sufficient focus on the role of elected judges. Although one could agree with Tonry’s assessment, in a footnote, that “[c]onstitutional change required to shift from elections (for these officials), however, is a bridge too far to aim for as part of an agenda to undo mass incarceration and prevent its reappearance,” a multifaceted reform agenda must account for their influence.

In legislative considerations of any form of criminal justice reform, particularly sentencing reform, the voices of prosecutors are particularly influential. Would it be possible, in moving toward a “normative change of heart,” to think that legislators might be mobilized to argue that the country has too many people in prison, for too long, in conditions that fall below our standards of decency? Could elected district attorneys, especially those who represent large urban jurisdictions with significant minority populations, be encouraged to make the argument that current incarceration policies are negatively affecting communities of color? Could federal and state prosecutors, many of whom now have significant experience working with their police counterparts in implementing crime control policies that reduce violence and drug markets without the heavy use of imprisonment, be urged to support the view that long sentences are ineffective crime control measures? Could these voices be mobilized to provide political cover for legislators who wish to cut back on excessive sentences?

Judges are among the most highly respected government officials. Their voices as individuals and their collective support for reform have been enormously influential in the formation of criminal justice policy. Indeed, as Tonry (2014) notes, the judiciary provided much of the muscle behind one of the most successful criminal justice reform movements in recent years: the creation of drug courts and other problem-solving courts. Closer to the topic of sentencing policy, several judges, on and off the bench, in individual cases and in public pronouncements, have expressed their frustration at the restrictions of the federal sentencing guidelines, particularly as applied to drug offenses. The chorus of judges who have decried the legislative intrusion on their discretion in matters of sentencing is a potent weapon in a debate over sentencing policy. Indeed, one of the most eloquent critiques of current incarceration policy was provided by Associate Supreme Court Justice Anthony Kennedy in his 2003 keynote speech to the American Bar Association. After reviewing the history of the rise in incarceration rates, he concluded: “Our resources are misspent, our punishments too severe, our sentences too long” (Kennedy, 2003: para. 14). As with prosecutors, we should ask whether these public officials, both appointed and elected, could be mobilized to provide the respected voice that would encourage our legislators to take the steps necessary to reduce incarceration rates.

Finally, we could also imagine both narrow and broad leadership roles for the chief executives of our government, state governors, and the U.S. president. In many states, the policies of the parole board are set by individuals appointed by governors. These governors could direct their appointees to adopt policies allowing for early release, work or educational release, compassionate release for the elderly or infirm, and other policies that would reduce prison levels. Similarly, at the back end of the justice process, parole boards can also cut back on the use of parole revocations that send someone back to prison, often for minor offenses or “technical violations.” Other practical adjustments, such as the date of parole eligibility or the calculation of good time, could reduce the length of prison terms and can be accomplished either directly by parole boards or by legislatures on the recommendation of parole boards.

These ideas might be considered to be more “nibbling around the edges,” but we can also construct a more ambitious scenario for executive branch action that would require political courage. Imagine a “brave governor” who commits his or her state to reducing the state’s incarceration rates in half over the next decade, while taking steps to reduce crime rates.² In a speech announcing this ambitious goal, the governor would frankly admit that the state had gone off course, wasting resources that could have been better spent on other public purposes, depriving citizens of their liberty far beyond that required for a legitimate social purpose, housing those individuals in conditions that are harmful to one’s health and damaging to one’s prospects for successful reintegration following release, imposing

2. I first proposed the “brave governor” scenario in a keynote address at the Public Service Conference on the Future of Community Justice in Wisconsin on February 20, 2009.

hardships on those individuals' families and communities, exacerbating racial disparities, and doing little to heal the harms caused by crime.

The "brave governor" would then lay out three possible scenarios for sentencing reform that could achieve the goal of a 50% reduction and encourage a robust policy debate on which scenario the voters would prefer. At the same time, the governor would project the possible budget savings, announce a plan for prison closings that minimizes job losses for individuals who work in those prisons, and launch a discussion about the best ways to invest those savings. The governor might name a special commission, co-sponsor a legislative task force, or ask a sentencing commission to facilitate the public discussion leading to enactment of a reform package to accomplish the stated goal. By leading rather than following, the "brave governor" would help to create the "normative change of heart" that Tonry (2014) correctly asserts is a precondition to a dramatic shift in sentencing policy.

These examples underscore a central insight: Reducing mass incarceration requires a political strategy aimed at legislative change. If, as the recent NRC report (2014) concludes, we have high rates of incarceration because of our policy choices, then we will have lower rates of incarceration only if we make different policy choices. Stated more bluntly: Our democracy got us here, our democracy must get us out of here. Yet the exclusive focus on our legislative branches of government overlooks the power of the executive and judicial branches. A successful political strategy will mobilize those governmental voices as well.

But an inside game will never suffice. Elected officials will rarely act without political pressure to act, particularly when the risks are so high. A sophisticated political campaign will be required, one that mixes savvy messaging, broad-based organizing of the electorate, and effective lobbying and advocacy. Lessons can be learned from other successful campaigns to change public opinion in order to change public policy. The recent shift in views—and laws—on marriage equality might offer helpful insights. The civil rights movement might provide useful parallels. But this much is clear: Simple logic, even when combined with a clear prescription of the way out of the morass of mass incarceration, will not suffice.

In thinking about ways to move from status quo to tipping point, it is useful to ask about the steepest hurdles ahead, and to speculate about new arguments that might turn public opinion. Clearly the largest obstacle is the nexus between incarceration and crime. The simple fact that the nation enjoys historic low crime rates while experiencing record high incarceration rates leads John and Jane Q. Public to conclude this incarceration policy has been a smashing success. For politicians to find a way forward to big reform, this Gordian Knot must be untied. The report by the NRC (2014) has provided a three-part answer to the question of the relationship between high incarceration rates and crime. Based on its review of the evidence, the NRC panel concluded that (a) the rise in incarceration was not directly caused by rising crime rates although rising crime rates in the 1960s contributed to the environment in which politicians could succeed if tough on crime; (b) the impact of high incarceration rates on crime is "uncertain" but likely small; and (c) the public safety benefits

of long prison sentences, and mandatory minimums, the two drivers of high incarceration rates, are very small.

It is difficult to fit this conclusion onto a bumper sticker to counter one that claims “prison works.” But a larger campaign must take on this challenge. The communications gurus must find a way to develop a narrative that allows the public, and therefore its elected officials, to realize that significant reductions in prison populations are possible without significant increases in crime rates. Unfortunately, some of the claims coming from advocates for prison reductions are only reinforcing the prison–crime connection rather than moving away from it. Many of the reports showing reductions in state prison populations are quick to assess the changes in crime rates during the same period (Austin and Jacobson, 2013; The Sentencing Project, 2014). Voila, they claim! We can have it both ways: fewer people in prison, and little or no increase in crime. Given what we know about the minimal impact of high incarceration rates on crime, this conclusion should be expected—not a surprising discovery. Granted, the reform movement must take care to inoculate itself against the next Willie Horton, but the focus on whether aggregate crime rates rise or fall during modest reductions in prison populations is merely reaffirming the political argument that brought us to the current state of affairs.

To tackle the issue of high incarceration rates, advocates should note, as the NRC report (2014) concluded, that much of the prison build-up can be attributed to laws making long sentences longer. Of course, a reform campaign should note that these long prison sentences have very little public safety value. But other arguments are available that would trump the crime issue and bring the debate closer to the normative values that Tonry (2014) correctly asserts lie at the heart of the issue. In a brilliant recent example of advocacy for reducing long sentences, the Osborne Association (2014) noted that the “US prison population aged 55 or older nearly quadrupled” from 1995 to 2010, despite research suggesting that age, not lengthy sentencing, serves as a reliable indicator of recidivism. The annual cost of housing elderly inmates—who pose a lesser threat to public safety than does the younger prison population—has now reached \$16 billion—a high cost that reminds us that prisons were not designed to serve as “long-term care facilities” (Osborne Association, 2014, p. 2). The clear implication: We have put people in prison for far too long, at a high expense, and into their senior years; these costs will only escalate. Painting clear pictures of inmates on dialysis machines, suffering from dementia, unable to move through a prison because the hallways do not accommodate a wheelchair, and unable to express remorse before a parole board because the fact of the crime is long forgotten—these images will underscore the excesses of America’s punitiveness. As part of a larger campaign, this approach is more likely to generate support for reforms that would cut back on long sentences than would a focus on their low risk to public safety.

One other strategy that might augment a campaign to reverse course is a focus on the racial disparities of our current policies. Certainly this argument provided a centerpiece to the successful effort to reduce the penalties for crack cocaine, although it is difficult to feel

victorious when the crack–powder differential was reduced from 100:1 to 18:1 (Grindler, 2010). Granted, there are also risks to basing a campaign on appeals to racial justice. In some public opinion survey research, these claims have been found to reinforce the general public’s belief in the crime–race nexus such that current punishments are deserved (Hetey and Eberhardt, 2014). Yet an optimist might argue that the country would respond positively to the notion that high rates of incarceration undermine the country’s aspirations for a racially just society. Given, for example, that the startling fact that an African American man who drops out of high school now faces a 68% chance that he will spend at least a year in prison before age 35—up from 15% before the prison boom started (NRC, 2014)—how can we imagine a country where this reality is the new normal? Painting this picture and asking searching questions about the future of the country will—more than a focus on the crime–prison nexus—move the policy discussion in the direction of the normative principles that lie at the heart of our justice system.

The celebrations of a tipping point in the American epidemic of incarceration are clearly premature, although not without basis in reality. But the challenge now is to imagine a long-game campaign, one that mobilizes the public and opinion leaders to demand different policies. Unlikely allies can be mobilized—including prosecutors, judges, unions, and victim advocates—to provide running room for the brave legislators and governors who are poised to exercise the leadership made possible by the shifting public mood. Tonry (2014) has clearly defined the very steep hill this movement must climb, articulated a set of guiding principles that must light the way, and set forth new and revised sentencing mechanisms that can embody a new approach to justice. What is needed now is the birth of a multifaceted, sophisticated political movement that operates with equal ease at the grassroots where concerned people are mobilized, the inconspicuous back rooms where political deals are made, and editorial board rooms where thought leaders gather—places where successful social movements leave their mark.

References

- Alexander, Michelle. 2012. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.
- American Law Institute. 2011. *Model Penal Code: Sentencing*. Retrieved from ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf.
- Austin, James A. 2010. *Criminal Justice Trends—Key Legislative Changes in Sentencing Policy, 2000–2010*. New York: Vera Institute of Justice.
- Austin, James A. and Michael P. Jacobson. 2013. *How New York City Reduced Mass Incarceration: A Model for Change?* New York: Vera Institute of Justice and the Brennan Center for Justice.
- Carson, E. Ann and Daniela Golinelli. 2013. *Prisoners in 2012: Trends in Admissions and Releases, 1991–2012*. Washington, DC: U.S. Department of Justice. Retrieved from bjs.gov/content/pub/pdf/p12tar9112.pdf.

- Catanese, David. 2014. Rand Paul's Urban League message. *U.S. News and World Report*. July 24. Retrieved from usnews.com/news/blogs/run-2016/2014/07/24/rand-pauls-urban-league-message.
- Gingrich, Newt and Pat Nolan. 2011. Prison reform: A smart way for states to save money and lives. *The Washington Post*. January 7. Retrieved from washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html.
- Grindler, Gary G. 2010. *Memorandum: The Fair Sentencing Act of 2010*. Washington, DC: U.S. Department of Justice, Office of the Deputy Attorney General. Retrieved from justice.gov/sites/default/files/oip/legacy/2014/07/23/fair-sentencing-act-memo.pdf.
- Hetey, Rebecca C. and Jennifer L. Eberhardt. 2014. Racial disparities in incarceration increase acceptance of punitive policies. *Psychological Science*. E-pub ahead of print. Retrieved from pss.sagepub.com/content/early/2014/08/05/0956797614540307.abstract.
- Kennedy, Anthony M. 2003. *Speech at the American Bar Association Annual Meeting, San Francisco, August 9*. Retrieved from supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.
- La Vigne, Nancy and Julie Samuels. 2012. *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions*. Washington, DC: Urban Institute Justice Policy Center. Retrieved from urban.org/UploadedPDF/412693-The-Growth-and-Increasing-Cost-of-the-Federal-Prison-System.pdf.
- National Research Council (NRC). 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press.
- Osborne Association. 2014. *The High Costs of Low Risk: The Crisis of America's Aging Prison Population*. New York: Author.
- The Sentencing Project. 2014. *Fewer Prisoners, Less Crime: A Tale of Three States*. Washington, DC: Author.
- Simanski, John F. and Lesley M. Sapp. 2013. *Immigration Enforcement Actions: 2012*. Annual Report, December. Washington, DC: The Department of Homeland Security, Office of Immigration Statistics Policy. Retrieved from dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.
- Tonry, Michael. 2014. Remodeling American sentencing: A ten-step blueprint for moving past mass incarceration. *Criminology & Public Policy*, 13:503–533.
- Travis, Jeremy. 2009. *Keynote Address: Building Communities With Justice*. Speech given at the 2009 Public Service Conference: The Future of Community Justice in Wisconsin, Milwaukee, WI. Retrieved from law.marquette.edu/community/past-public-service-conferences.
- U.S. Department of Justice. 2014. *Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshes Penalties for Most Serious Drug Traffickers*. Washington DC: Department of Justice. Retrieved from justice.gov/opa/pr/attorney-general-holder-urges-changes-federal-sentencing-guidelines-reserve-harshes.
- U.S. Sentencing Commission. 2014. *U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences*. July 18. News Release. Washington, DC: U.S. Author. Retrieved from [ussc](http://ussc.gov).

gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf.

Court Case Cited

Brown v. Plata, 09-1233, 131 S. Ct. (2011).

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How Do We Reduce Incarceration Rates While Maintaining Public Safety?

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The heavy reliance on incarceration in the United States is unusual relative to U.S. history and relative to the use of incarceration in other nations. By now, the facts are common knowledge. We incarcerate our citizens at a rate that exceeds every other nation and that is multiple times (on the order of five to seven) the rates of other high-income countries. Moreover, since the mid-1970s, our incarceration rate has more than quadrupled. Several recent comprehensive studies of the rise of mass incarceration have concluded that nearly all of the growth in U.S. incarceration rates over recent decades can be attributed to changes in sentencing policy that have resulted in a higher propensity to apply prison as punishment and longer effective prison sentences (Raphael and Stoll, 2013; Travis and Western, 2014).

Tonry (2014, this issue) offers a road map for the sentencing reforms that states and the federal government must pursue in some combination to affect substantial declines in the U.S. incarceration rate. The overall proposal is to the point, frank, and enumerates the sentencing practices specifically that drive mass incarceration. In terms of general principles, Tonry argues for a greater degree of proportionality between offense severity and sentence length, the greater individualization of sentencing, and a more systematic approach to sentencing that incorporates capacity constraints and social scientific knowledge on the determinants of offending and reoffending.

Tonry's (2014) proposal calls for the elimination or moderation of sentencing practices that tend to create long sentences for repeat and serious offenders, for example, three-strikes laws, truth-in-sentencing restrictions, life-without-parole sentences, and various mandatory minimums that govern sentencing at the state and federal levels. Such changes in conjunction with the establishment of sentencing commissions shielded from political influence would

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ensure transparent yet practical sentencing that addresses concerns for public safety while achieving retributive goals.

Tonry's (2014) detailed proposal raises several questions pertaining to consequences and political feasibility. Although I will not comment in any detail on the latter issue, I will note that most activists, criminal justice professionals, and informed observers of U.S. corrections policy sense a profound political change and the opening of a policy window where fundamental reform is a real possibility.¹ Setting aside the issue of political feasibility, I will focus my comments on three practical issues raised by Tonry's (2014) road map. First, are the types of sentencing reforms proposed by Tonry the only way to achieve incarceration reductions of the order of magnitude called for by the author? For example, could we achieve such declines by relying solely on reforming drug sentencing, parole policy, or parole revocation practices (reforms that would focus on sentencing practices for less serious offenders)? Similarly, would it be possible to reduce incarceration through additional declines in the crime rate?

Second, Tonry (2014) argues that the effects of such a change on crime would be minimal as research on deterrence and criminal incapacitation finds little evidence of any impact of incarceration on crime. I disagree with this characterization of this body of research yet agree with the contention that a careful selective reduction in incarceration can be achieved with little impact on crime, and that the room for doing so is especially high in the United States.

Finally, although I firmly believe that achieving significant reductions in incarceration requires fundamental sentencing reform, I also believe that the manner in which prison is financed and the decentralization of the process leading to prison admissions and lengthy sentences contributes greatly to over-incarceration in the United States. Hence, I will offer some thoughts on how changing incentives with an eye on increasing the marginal costs of incarceration to counties can be used to bolster the reforms proposed by Tonry (2014) and to incentivize local criminal justice actors to be more deliberating in deciding who to send to state prison.

Model of the U.S. Incarceration Rate

The size of a nation's prison population depends fundamentally on two different sets of rates, or more precisely, transition probabilities. The first is the rate at which we admit

1. Recent years have witnessed several moderations to federal sentencing practices as well as the public pronouncement by U.S. Attorney General Eric Holder that we are over-incarcerating drug offenders in federal prisons. Several states have on their own initiative reduced their prison populations through sentencing, parole, and probation reforms (Raphael and Stoll, 2014), whereas an additional 17 states are in the process of scaling back the use of incarceration through participation in the federal Justice Reinvestment Initiative (LaVigne et al., 2014). Even in California, the state with one of the earliest and harshest three-strikes law enacted through a direct-democracy ballot initiative, voters recently moderated the scope of the law to ensure that offenders do not receive life sentences for less serious offenses.

individuals into state prisons. This prison admissions rate is a function of both individual behavior (in particular, the propensity of the nonincarcerated to commit crime) as well as policing and sentencing policy (the likelihood of being arrested and charged conditional on committing a crime, the probability of being prosecuted, found guilty, and sentenced to prison conditional on a conviction).

The second rate is the rate at which we release the incarcerated from prison. The prison release rate is inversely related to time served. As a rough rule of thumb, the average time served is equal to the reciprocal of the release rate. For example, if half of those doing time for burglary are released each year, then the typical inmate serving time for this offense serves 2 years. Although individual behavior could ultimately impact time served especially for those serving indeterminate sentences, time served and by extension prison release rates are largely a function of sentencing policies and parole practices. For example, mandatory minimums requiring lengthy sentences, repeat offenders statutes that prescribe long prison terms, and truth-in-sentencing laws requiring that inmates serve a minimum amount of their sentences will all increase time served, lower prison release rates, and contribute to higher incarceration rates.

To be sure, there are many prison admission rates and many prison release rates that depend on the offense type and the criminal justice status of the offender. For example, one might distinguish prison admission rates by offense committed for those without an active criminal justice state from the comparable admission rates for offenders on probation or parole. In addition, there are multiple prison release rates that reflect differences in effective sentences associated with offense specifics and the offender's criminal history. Collectively, a given set of admission and release rates are associated with a steady-state incarceration rate. In other words, given sufficient time and stability in the various rates at which we admit and release people to prison, a nation's incarceration rate will eventually settle at a steady and stable rate.

This underlying framework is particularly useful for thinking about (as well as projecting) the effects of policy reforms on incarceration rates. Any policy changes that *permanently* reduce prison admission rates or permanently increase prison release rates (i.e., shorten time served) will decrease the steady-state incarceration rates. Temporary changes in these rates will have only transitory effects on the prison population. For example, the numerous collective pardons and clemencies implemented in Italy since the end of World War II effectively created one-time transitory increases in the prison release rate that predictably led to temporary reductions in the nation's incarceration rate followed by a return to the pre-pardon steady-state levels (Barbarino and Mastrobuoni, 2014; Buonanno and Raphael, 2013).

This framework is useful for thinking about Tonry's (2014) proposal as well as about alternatives to his proposal. Tonry's suggested sentencing reforms focus to a large degree on the release rates (or, equivalently, sentence lengths) for offenders convicted of relatively serious crimes and serving relatively long sentences. One might alternatively target reform

efforts on less serious offenders, such as those convicted of drug offenses or returned to custody for parole violations. Alternatively, one could focus on trying to reduce incarceration by further reducing crime rates (note, higher crime rates directly impact prison populations holding all else constant through the admissions probability). Would such alternative achieve a halving of the U.S. incarceration rate?

Perhaps the least plausible of these alternatives would be to achieve incarceration reductions in the current policy environment through reductions in crime. Crime rates as conventionally measured by the Uniform Crime Report (UCR) data are currently at historical lows, and achieving further reductions could be difficult. Moreover, while there certainly are communities throughout the country with high crime rates, even substantial reductions in overall crime would not have an impact on incarceration of the order of magnitude proposed by Tonry (2014). My colleague Michael Stoll and I performed some simple simulations of the nation's steady-state incarceration rate for 2005 using actual figures for prison admission rates, parole failure rates, and prison release rates for that year to explore this possibility (Raphael and Stoll, 2014). Our simulations suggest that the nation's steady-state incarceration rate was 553 per 100,000 for this year (above the actual rate, but suggesting that absent any policy change incarceration rates should have increase in the subsequent year). To simulate the effects of a 10% and 20% decline in the crime rates, we reduced the prison admission rates for new commitments by 10% and 20% and recalculated the steady-state incarceration rates.² A 10% reduction in the crime rate generates a decline in the steady-state incarceration rate for this year to 526 per 100,000. A 20% reduction in crime rates reduces the steady-state incarceration rate to 499. While these declines in incarceration are indeed substantial, they are small relative to the scale of incarceration in the United States.

How about focusing reform on drug offenses and technical parole violations? Certainly, tougher sentences for drug offenders have contributed to growth in the U.S. incarceration rate over the past three decades, especially in the federal prison system. However, tougher drug sentencing, although important, explains a relatively small share of growth in state prison populations. Michael Stoll and I estimated that between 1984 and 2004, tougher drug sentences accounted for approximately one fifth of state prison growth and nearly one half of growth in the federal prison incarceration rate (Raphael and Stoll, 2013).³ As federal prisoners account for only 13% of the U.S. prison population, the maximum effect

2. Because the prison admission rate equals the crime rate times the likelihood of being admitted conditional on committing a crime, a 10% reduction in crime would lead to a 10% reduction in prison admissions holding all else equal.

3. The simulations behind this calculation roll back admissions rates conditional on arrest and time served to 1984 levels for drug offenders and then simulate the counterfactual overall national steady-state incarceration rate. To be sure, if one were also to roll back drug arrest rates to 1984, the relative importance of drug policy would be larger, perhaps as high as one third. In our analysis, we were interested in particularly placing an upper bound on the possible contribution of higher offending to incarceration and growth, and thus we built in to the simulation exercises assumptions that would bias

of broad drug sentencing reform on the nation's incarceration rate would ultimately be closer to the figures for the state systems than for the federal system. Our estimates suggest that completely rolling back sentencing practices for drug offenders to those of the early 1980s in states throughout the country and in the federal system would reduce the prison population only by approximately 16%. Although this would certainly be a substantial reduction, it falls short of the magnitude of the change advocated by Tonry (2014) and suggests that responsibility for the lion's share of incarceration growth in the United States lies elsewhere. The potential to reduce the nation's incarceration rate through parole reform is even smaller.⁴

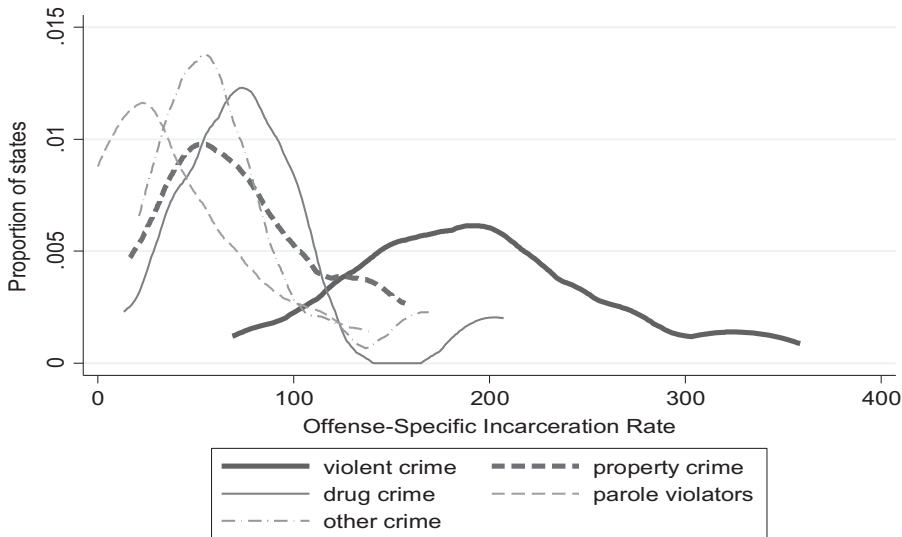
By contrast, tougher sentences for violent offenders explain a much larger share of incarceration growth during the prison boom (roughly one half of growth for the population of state prisons). These offenders are targeted by truth-in-sentencing laws and repeat offenders statutes, and perhaps they were most directly impacted by the conversion from indeterminate to determinate sentencing and the subsequent application of outdated statutory maximum sentences, as hypothesized by Tonry (2014). Also, the relative importance of sentencing for violent offenders is readily apparent in cross-state comparisons of high and low incarceration states. For example, Figure 1 presents empirical distribution of offense-specific incarceration rates for 2005 for the 22 states with available data.⁵ Although there is substantial variation across states in all of the offense-specific rates, it is clear that the violent crime incarceration rate distribution has the highest mean and variance, and it accounts for an unusually large share of variation in cross-state incarceration rates.⁶

against the overwhelming evidence that changes in sentencing policy explain nearly all of the growth in the U.S. incarceration rate. Because one cannot decompose drug arrest rates into a crime rate and an arrest rate conditional on offending (a decomposition that can be performed for UCR part 1 offenses), we conservatively attribute the entire increase in drug arrest rates to a change in criminal behavior.

4. Higher parole failure rates and changes in time served for parole violations explain very little of state incarceration growth, and we estimated that rolling back practices to the early 1980s would reduce the overall incarceration by less than 5%. Of course, in some states, parole reform might have substantial impacts on the prison population. Recent reforms in California are a case in point, where a change in parole policy explains much of the recent 17% decline in the state's prison population. The California reforms will be discussed in greater detail in this essay.
5. This figure is based on population stock data by offenses reporting in the National Correctional Reporting Program data for this year. See Chapter 2 in Raphael and Stoll (2013) for a more detailed discussion of cross-state differences in incarceration rates.
6. In Raphael and Stoll (2013), we provided a formal variance decomposition of these cross-state incarceration rates. We found that variability in violent incarceration rates accounts for one fifth of the overall cross-state variance, whereas variation in property crime incarceration, drug crime incarceration, and incarceration for technical parole violations account for 7%, 9%, and 6% of the overall variance, respectively. Interestingly, approximately half of the variance in incarceration rates across states is explained by the positive covariance between incarceration rates for different offenses. In other words, states with tough sentencing policy for one type of crime tend to have tough sentencing practices for all crimes; this uniformity across crime types explains approximately half of the variation across states.

FIGURE 1

Empirical Distributions of the 2005 Offense-Specific Incarceration Rates for the 22 States Reporting Data in the 2005 NCRP



Source. Raphael and Stoll (2013: 55, Figure 2.7).

Tonry’s (2013) blueprint for reform is certainly ambitious and focuses largely on offenders who serve long sentences. The truth is that if one wants to reduce prison population substantially, this is where the money is. Offenders that serve long sentences contribute disproportionately to the overall incarceration rate. These offenders tend to be those who have committed more serious crimes and for whom the political obstacles to reducing effective sentence lengths are likely to be the greatest.

Likely Effect of a Substantial Reduction in Incarceration on U.S. Crime Rates

A key issue surrounding all discussions of sentencing reform and reducing prison populations concerns the effect of incarceration on crime. The use of incarceration might impact crime rates through several mechanisms. Removing one from society incapacitates, suppressing criminal activity while incarcerated. The threat of incarceration might deter some from committing crime in the first place. Finally, the experience of incarceration might specifically deter future crime or have a criminogenic impact on prior offenders. One cannot predict a priori which of these effects will dominate and, thus, what the sign of the net effect of marginal changes in incarceration on crime will be. Moreover, considerable evidence suggests that the magnitude and perhaps sign of this net effect changes as the incarceration rate increases.

In my assessment, it is clear that the use of incarceration on average reduces crime. That is to say, the increase in the U.S. prison incarceration rate from roughly 110 to 500 per 100,000 certainly reduced crime rates, and abolishing prisons would certainly increase crime rates. That being said, I believe that strong evidence indicates that the crime-fighting effects of incarceration on the margin are low currently, perhaps even negative, and that there is substantial room to selectively reduce the use of incarceration without having a large impact on crime rates. That is to say, while reducing the incarceration rate back to 1970 levels would likely lead to a substantial increase in crime, reducing incarceration by one fifth, one third, even one half might have limited impacts on crime, especially if resources are reinvested in alternative crime control efforts.

My conclusions are based on two general findings from the research on the incarceration–crime relationship. First, most of the effect of incarceration operates through incapacitation rather than through general deterrence. Second, incapacitation effects decline sharply with increases in incarceration rates, with empirical evidence from the United States and other nations suggesting that diminishing returns begin to set in at very low levels (less than 200 per 100,000).

The first inference follows from the general close correspondence between estimates of the prison–crime relationship based on state panel data analysis and estimates of pure incapacitation effects using alternative research methods.⁷ State panel data estimates by design estimate the net effects of changes in state incarceration rates on crime operating through the three mechanisms described previously. As estimates of this net impact often correspond closely with estimates of pure incapacitation effects, this research indicates that most of the impact of incarceration on crime operates through incapacitation.⁸

The second inference follows from panel data research and other studies that assess how the prison–crime effect varies with the incarceration rate. My analysis of state panel data with Rucker Johnson (Johnson and Raphael, 2012), as well as the update of this analysis in Raphael and Stoll (2013), found strong evidence that increases in the prison population in most recent years have generated considerably less crime reduction than increases in years

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7. One also might argue that the sharp increase in incarceration caused by tougher sentencing provides evidence of relatively weak general deterrence. A sizable general deterrence effect of tougher sentences could in theory lead to lower incarceration rates if the behavioral response on crime were overwhelmingly large. This clearly has not happened, indicating that despite the much longer prison sentences, people still commit crime.
 8. Spelman's (1994, 2000) reviews of early incapacitation research suggested that each incarcerated offender during the 1970s and 1980s prevented 10 to 20 index felony crimes per year. This figure is close to estimates from panel data studies of the overall joint effects of general deterrence and incapacitation associated with changes in incarceration over this period (see Johnson and Raphael, 2012). Owens (2009) provided a more recent estimate of pure incapacitation, suggesting that this effect has declined considerably in more recent years (to one to two property crimes for the marginal offender per year of incarceration). Again, this is comparable in magnitude with more recent estimates from panel data of the joint incapacitation/deterrence effect of prison (Johnson and Raphael, 2012; Liedka, Piehl, and Useem, 2006).

past, with the increase occurring since 1990 being particularly ineffective. In the updated analysis, we estimate separate panel data models for three periods: 1977 to 1988, 1989 to 1999, and 2000 to 2010. During the earliest time period, the average state incarceration rate stood at 171 per 100,000. The comparable figures for the latter two time periods are 349 per 100,000 and 449 per 100,000, respectively. To the extent that the crime-fighting effects of incarceration diminish with scale, one would expect weaker impacts of incarceration on crime during the latter periods relative to the earliest period we studied.⁹

The estimates in Raphael and Stoll (2013) indicate that during the late 1970s and early 1980s, each one-person increase in the nation's incarceration rate reduced the annual violent crime rate by between 1.2 and 2 incidents per 100,000 and the annual property crime rate by 9 to 18 incidents per 100,000. In contrast, our estimates of the effects of prison increases on crime during the 1990s and the 2000s are much smaller by comparison. Our research indicates that each one person increase in the incarceration rate lowers the property crime rate between 1.2 and 2 incidents per 100,000. We found little evidence of an effect on violent crime post-1990.

These results are consistent with the analysis presented by Liedka et al. (2006). Using state-level data on crime and incarceration, Liedka et al. analyzed how the overall effect of incarceration on crime varies with the scale of incarceration. Similar to other research on this topic, the authors found significant negative effects of incarceration on crime at low incarceration rates that are substantial in magnitude. However, these effects diminish rapidly with scale. Liedka et al. estimated that somewhere between an incarceration rate of 325 and 425 per 100,000 the effect of incarceration on crime might actually turn positive.

Evidence of diminishing returns can also be found in a comparison of the evaluation results of two recent large exogenous declines in the incarceration rates of Italy and California. On July 31, 2006, the Italian Parliament passed legislation that reduced the sentences of a large proportion of Italian prison inmates convicted prior to May of that year by 3 years effective August 1, 2006, an act principally motivated by the need to address prison overcrowding. The act caused an immediate decline from one month to the next in Italy's incarceration rate from roughly 105 to 66 per 100,000. Over the subsequent 3 years, the incarceration rate returned to the pre-clemency level. The sharp decline in the incarceration rate coincided with a sharp increase in the crime rate. Moreover, the gradual return of the incarceration rate to pre-clemency levels was matched by a gradual decline in crime rates to pre-clemency levels. The magnitude of the increase in crime coinciding

9. The models adjust for bias created by reverse causality via an instrumental variables strategy. Specifically, we use the disparity between actual state incarceration rates and the steady-state rate implied by current admissions and release rates as an instrument for future changes in incarceration. Johnson and Raphael (2012) presented a model and thorough discussion of the conditions under which the proposed instrument identifies exogenous variation in state incarceration rates.

with the mass prisoner release suggests that on average each released inmate generates 14 reported felony crimes per year (Buonanno and Raphael, 2013).¹⁰

Italy's experience with the 2006 Collective Clemency Bill contrasts sharply with the recent experience of California. Under pressure from a federal court to relieve prison overcrowding, California passed legislation under the banner of corrections realignment in April 2011 with implementation beginning on October 1, 2011. The legislation halted the practice of revoking parolees back to prison for technical violations and diverted many nonserious, nonviolent, nonsexual offenders to jail sentences and sentences to be served via some form of community corrections.

The effect of these reforms on the California prison population did not occur as suddenly as was observed in Italy. However, realignment did result in a relatively quick reduction in the California prison population that was larger in magnitude than that experienced in Italy (in terms of both the numeric reduction in the prison population as well as the decline in the state's incarceration rate). By the end of 2011 (3 months into the implementation of reforms), the prison population declined by approximately 13,000 (an 8% decline). By May 2013, the prison population declined by nearly 28,000 relative to September 2011 (a 17% decline). In terms of incarceration rates, by the end of 2012, California's prison incarceration rate stood at 354 per 100,000, a rate comparable with what existed in 1992 prior to the passage of the state's tough "three-strikes" sentencing reform. This is in comparison to an incarceration rate on the eve of realignment's implementation of 426 per 100,000. The reduction in the state's prison population was partially offset by an increase in the population of county jails of approximately 8,600 inmates (Lofstrom and Raphael, 2013a). However, even accounting for this factor, there were approximately 20,000 additional individuals in noninstitutionalized society who prior to the reform would have been incarcerated.

Magnus Lofstrom and I evaluated the effects of the realignment reforms on California crime rates by comparing crime rate patterns across counties that were differentially impacted by the reforms and by comparing California crime rates with those of states that exhibited similar crime trends to California in the past (Lofstrom and Raphael, 2013b). We found no evidence of an effect of realignment on violent crime and evidence of a modest effect on property crime operating entirely through auto vehicle theft. We estimated that each prison year not served as a result of the reform results in 1.2 additional auto thefts.

I strongly suspect that the contrast in findings between Italy and California is driven entirely by diminishing crime-fighting returns to incarceration. Italy uses incarceration with great parsimony relative to California (compare Italy's pre-pardon incarceration rate of

10. Barbarino and Mastrobuoni (2014) found similar size effects for earlier Italian collective pardons using province-level panel data methods.

105 per 100,000 with California's combined prison-jail incarceration rate¹¹ of 625 per 100,000 on the eve of realignment's implementation). With such sparing use of incarceration, one would expect the impacts on crime of reducing the incarceration rate in Italy to be much larger than the per-inmate impacts in California, where the criminal justice systems dips much further into the population of convicted offenders. Interestingly, the evaluation of the 2006 Collective Clemency on its own strongly suggests that the incapacitation effect declines rapidly as the incarceration rate increases. In a province-level analysis of the impact of the Collective Clemency act, Paolo Buonanno and I found that provinces with higher pre-pardon incarceration rates experienced small increases in crime associated with the prisoner release, whereas provinces with low incarceration rates experience large increases per inmate released (Buonanno and Raphael, 2013). This is particularly interesting as "high-incarceration" provinces in Italy have incarceration rates below 200 per 100,000.

Hence, although I disagree with Tonry's (2014) characterization of the research on the prison-crime relationship, I generally agree with the proposition that a sizable reduction in the U.S. incarceration rate could be achieved with relatively modest impacts on crime. This, however, is perhaps the wrong way to think about the trade-offs that we face as a society. The preceding discussion suggests that the crime increases of an incarceration reduction would be modest, and if we could cost-out the resultant increase in crime and compare these costs with the benefits from reduced incarceration, the benefits of such a change likely outweigh the costs in terms of higher crime. In other words, some version of Tonry's proposal might pass a cost-benefit test, holding all else constant. However, given the current amount of resources devoted to corrections in the United States, one might alternatively think about the use of prison to control crime in terms of its relative cost-effectiveness.¹²

To be specific, suppose that society wishes to maintain crime rates at a specified level and has at its disposal several policy options for doing so—for example, hiring police, investing in early childhood education, and incarcerating people. Presumably, we would like to achieve our objective (a given low crime rate) in the most efficient manner possible. That is to say, we would strive to employ that mixture of policy interventions that delivers our desired low crime rate at the lowest possible cost, where costs are defined broadly to include both the budgetary outlays as well as the social costs of our policy choices. Let's assume that for each possible policy tool, the marginal benefits of expanding the use of any one tool diminishes with scale. For example, the benefits from hiring additional police officers decline as the police force grows, or as I discussed previously, the crime-preventing benefits of increasing the prison population diminish as the incarceration rate increases.

11. This comparison is appropriate as Italy's incarceration rate includes both the sentenced as well as pretrial incarceration rates.

12. The discussion that follows draws heavily from Raphael and Stoll (2013).

The efficient, or lowest cost, policy strategy would be that for which our various policy tools are employed to the point where the marginal benefit in terms of crimes prevented for each additional dollar spent was equal across all possible interventions. In other words, our policy mixture is efficient when a dollar spent on policing generates the same benefit as an additional dollar spent on prisons or early childhood interventions. To understand why this describes the efficient strategy, suppose that our current policy strategy is inefficient by our definition. Specifically, at our current mixture of policing levels and incarceration expenditures, suppose that the benefit–cost ratio (the “bang-per-buck”) associated with additional spending on police is higher than the comparable benefit–cost ratio for additional prison expenditures. Under this scenario, if we were to reduce the prison population and reinvest the savings in more police, then the crime reduction from the additional policing levels would exceed the crime increase caused by the reduction in prison population. On net, crime would decline with the same level of expenditures. Of course, reallocating spending in this manner would push us further down the diminishing-returns path for policing and increase the benefits on the margin from additional prison spending (because by reducing the incarceration rate, the benefits on the margin of additional incarceration spending would increase). In other words, the resource reallocation described earlier would narrow the difference in the benefit–cost ratios of these two interventions. Ideally, we would continue to reallocate resources in this manner until the benefits-per-dollar spent is equalized across these two interventions.

This line of reasoning for thinking about the optimal use of prisons has several implications. First, if the bang-per-buck is not equal across interventions, then we could reallocate expenditures in a manner that would reduce crime without increasing expenditures. Equivalently, when the “bang-per-buck” differs across our alternative interventions, we could achieve the same crime rates at a lower social cost. Our preceding discussion illustrated that we are currently at a point where the benefits on the margin derived from our current high incarceration rate in terms of crime reduction likely fall short of the costs in terms of explicit outlays and difficult-to-price collateral consequences. Hence, one could likely justify a move toward lower incarceration rates even if crime were to increase as a result. However, there is no reason why our public choice should be framed in this manner. We can address crime in ways other than state and federal prisons. To the extent that the bang-per-buck of these alternatives is higher than that associated with recent increases in incarceration, we could reduce incarceration rates, reallocate the freed resources toward other more effective interventions, and have lower incarceration rates without higher crime.¹³

13. Strong evidence shows that the bang-per-buck of additional police spending is high (on the order of \$1.60 in reduced crime costs for each additional dollar spent) (see Chalfin and McCrary, 2013). Lofstrom and Raphael (2013b) estimated that the bang-per-buck for prison spending in California is currently much less than one.

Another implication of this line of reasoning is that even if incarceration reduces crime on the margin, it still might be socially desirable to reduce the use of incarceration if this particular policy intervention is not cost-effective relative to other crime control strategies. To illustrate this point, consider the one study that presented compelling evidence of a general deterrent effect of state three-strikes laws. Eric Helland and Alexander Tabarrok (2007) provided a convincing empirical assessment suggestive of enhanced general deterrence resulting from the California law. The authors analyzed the postrelease arrest outcomes of individuals released from California state prisons that vary in terms of the number of prior strikes on their criminal history records as well as the sentences that they face should they reoffend. The authors of the study compared those who have two prior strikes with those who have one prior strike, were charged and tried for a second-strike offense, but were convicted of a less serious felony the second time around that did not result in an increase in the offender's strike count. Helland and Tabarrok (2007) found that within 3 years of release, 40% of those with two strikes on their criminal history record were rearrested compared with 48% of those in the comparison group. This eight-percentage-point differential is highly statistically significant.

If we take as truth the deterrent effects estimated in this study, one can then ask whether controlling crime via three-strikes laws given the magnitude of the general deterrent effect is the optimal strategy to pursue. Helland and Tabarrok (2007) estimated that California's three-strikes law generates costs of \$148,000 for each crime prevented. The authors estimated that reallocating the additional expenditures from three-strikes toward policing would have a far larger effect on crime rates than the resultant increase in crime from lighter sentences. Thus, even with a demonstrable deterrent effect, the policy is not particularly cost-effective as we could have greater crime reductions by spending the money elsewhere.

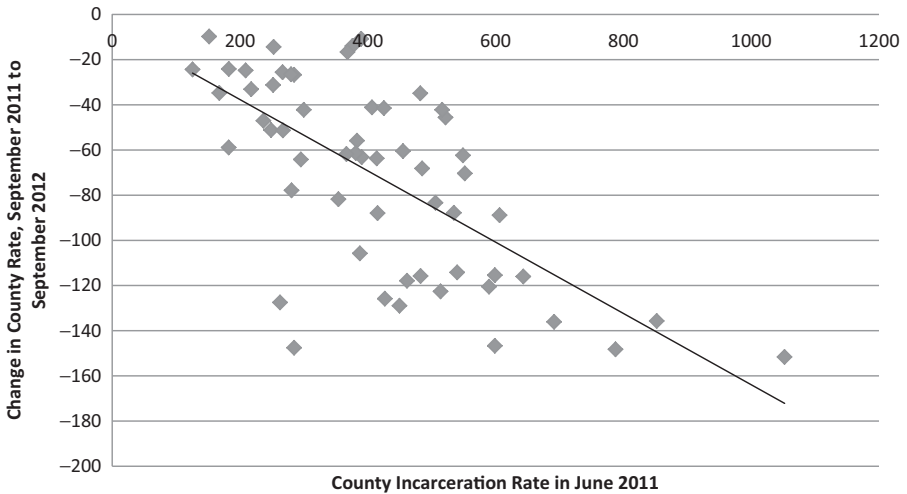
Applying optimization theory to a formal analysis of mass incarceration highlights the importance of alternative crime control strategies and the need to think about reinvesting criminal justice resources toward interventions with higher returns per dollar spent. This reasoning also highlights how even if prisons reduce crime rates on the margin, it might still be optimal to reduce the use of incarceration if more cost-effective alternatives exist.

Changing Incentives Pertaining to the Use of Incarceration

The state of California was recently forced into sentencing reform under the threat of a federal court order to relieve overcrowding in its state prisons. Through greatly curtailing the practice of returning parolees to custody for technical violations and through diversion of nonserious, nonsexual, nonviolent ("triple nons") offenders to local jail or community corrections, the state reduced its prison population by nearly 17% in 1 year. Within California, the realignment reforms shed new light on the great degree to which California's

FIGURE 2

Scatterplot of the Pre–Post Realignment Change in County-Level Prison Incarceration Rates in California Against California County-Level Prison Incarceration Rate in June 2011



Source. Lofstrom and Raphael (2013b, Figure 4).

58 counties varied in their use of the state prison system. Figure 2 presents a scatterplot of the change in county-specific prison incarceration rates over the first year of realignment's implementation (September 2011 to September 2012) against the county's pre-realignment prison incarceration rate (measured as of June 2011).¹⁴ Several patterns stand out in this figure. First, note the great disparities in pre-realignment incarceration rates with the rates across the counties varying from slightly less than 200 per 100,000 to greater than 1,000 per 100,000. Second, note the very large declines in county-level incarceration rates, with a weighted average of roughly 60 per 100,000 across counties but declines as high as 150 in some. Finally, note that those counties with the highest pre-realignment incarceration rates clearly experienced the largest per-capita declines as a result of the reform.

Why were some counties incarcerating residents at five times the rates of other counties? This disparity is in part a result of differences in crime rates. Magnus Lofstrom and I (Lofstrom and Raphael, 2013c) showed that counties in the bottom third of the pre-reform incarceration distribution have violent and property crime rates that are approximately 75% of those for counties in the top third of the incarceration distribution. Counties with

14. The county incarceration rates are measured as the number of county residents per 100,000 incarcerated in any of the state's adult correctional facilities regardless of prison location.

T A B L E 1

Cross-County Regression Examining the Correlates of the Pre-Realignment County-Specific Prison Incarceration Rate

Explanatory Variable	Regression Coefficients	25th Percentile of Explanatory Variable	75th Percentile of the Explanatory Variable	Effect on Incarceration Rate of a Variation Equal to the Interquartile Range
Poverty rate, 2006 to 2010	18.24* (5.34)	10.9	17.5	120.4
Percent voting for Proposition 36	-7.11* (2.58)	60.7	70.9	-72.5
Property crime rate 2011	-0.023 (0.050)	1,134.2	1,782.3	-14.9
Violent crime rate 2011	0.168 (0.155)	258.2	479.1	37.1
R ²	0.463	-	-	-
N	57	-	-	-

Note. Standard errors are in parentheses. The regression is based on 57 of California’s 58 counties. We drop Alpine county in Southern California because Alpine does not maintain its own local jail system. Data on county poverty rates come from the Census Bureau American Community Survey. The percentage of county voters supporting proposition 36 comes from the California Secretary of State. Data on property and violent crime for 2011 come from agency level crime counts provided by the California State Attorney General’s office.

Source. Lofstrom and Raphael (2013c, Table 2).

* $p < .01$.

higher incarceration rates also have substantially higher poverty rates and likely have a lower per-capita tax base than counties with lower incarceration rates. Finally, counties with high incarceration rates tend to be more conservative and are less supportive of criminal justice reforms that moderate sentencing.

These patterns are summarized with a simple multivariate regression in Table 1. The table reports the coefficient from a regression of pre-realignment incarceration rates on county poverty rates, crime rates, and a variable measuring the proportion of voters supporting the 2012 state Proposition 36, an ultimately successful proposal that limits the scope of third-strike, 25-to-life indeterminate sentences to serious felony crimes. The table also reports the value of each explanatory variable at the 25th and 75th percentile as well as the implied size of the effect of such a variation (the inter-quartile difference) on county prison incarceration rates. Of course, this is clearly a descriptive exercise and there are likely numerous omitted variables in this analysis. Nonetheless, the basic patterns are interesting and revealing. First, once poverty is controlled for, there is no measurable effect of violent and property crime rates. My best guess would be that the poverty rate captures both the underlying criminogenic fundamentals of the county as well as the tax base of the county and the resources available to handle offenders within the community. Second, there is a

strong correlation between the voting behavior of local residents and the pre-realignment incarceration rate, with more conservative counties (those less supportive of Proposition 36) having substantially higher incarceration rates.

These simple patterns suggest that many considerations beyond local criminogenic conditions and even beyond state penal code determine the local use of state prisons. The patterns in Figure 2 suggest that a fair share of the cross-county variation is explained by a differential propensity to incarcerate low-level offenders, as the reforms targeted less serious offenders and incarceration declines the most in counties with high incarceration rates. The patterns in Table 1 suggest that to a substantial degree, county incarceration rates reflect local political preferences and perhaps insufficient resources to deal with low-level offenders locally. What is most fascinating is the fact that these patterns emerge across counties that are essentially operating within the same state penal code.

These patterns for California suggest that many of the sentencing reforms laid out in Tonry's (2014) blueprint could be circumvented at the local level by criminal justice officials responding to the political demands of their offices or perhaps responding to the incentive to pass the cost of such offenders onto the state. The fact that local political preferences result in such large differences in the use of state prisons within the same sentencing structures suggests that there is great discretion and variation in the application of a common penal code, and that localities that lean toward tougher sentencing might continue past practices absent some strong incentive to behave otherwise.

Sentencing reforms targeted at more selective and hopefully efficient use of prison beds would be bolstered by policy changes that better align the incentives faced by counties with the interests of the average taxpayer.¹⁵ Currently, there is a fundamental disconnect between the incentives faced by counties across the country (the main administrative unit that generates prison admissions) and the incentives faced by state governments (the level of government that pays the bill for state prison systems). At the county level, a criminal offender is a nuisance local resident that when convicted and sent off to state prison becomes someone else's problem. The marginal cost of committing an additional inmate is effectively zero, whereas the marginal benefit in terms of criminal incapacitation and savings in policing and monitoring resources can only be positive. Although the prison spell might generate substantial costs for the family and intimates of the convicted offender, and perhaps additional costs for the county when the individual is released from prison, these costs are effectively off the current year's budget. Moreover, these costs likely receive less weight in the decision making of local elected officials. I believe that this incentive structure facilitates the use of sentencing toward political ends and leads to the overincarceration of less serious offenders.

15. The remainder of this section draws heavily from the reforms proposals presented by Raphael and Stoll (2014).

If counties were made to face some portion of the marginal costs generated by each prison admission, then one might expect local officials to be more selective about who is sent to prison and for how long. Indeed, evidence shows that counties can be responsive to both fiscal carrots and sticks. Reform to the California state juvenile justice system provides a vivid example of the latter. In 1996, the state legislature passed a bill that greatly increased the monthly costs for juvenile admissions to the California Youth Authority (CYA), the state agency that at the time ran state juvenile corrections facilities. Prior to this legislation, counties paid \$25 per month per CYA ward. Starting in 1997, the monthly payment increased to \$150 per month for serious offenders (with severity defined in terms of the commitment offenses). For less serious offenders, counties were required to pay anywhere from 50% to 100% of the custody costs to the state. Subsequent legislation passed in 1998 capped the maximum annual per-ward payment from the counties to \$31,200. Nonetheless, for all juvenile commitments, and especially for less serious offenders, the increases in costs to counties created by the reform were substantial. This change caused an immediate and sustained decrease in admissions to CYA beginning in 1997 (Ouss, 2014).

Evidence of responsiveness of counties to positive incentives can be found in the evaluation of the California Community Corrections Performance Incentives Act of 2009 (Administrative Office of the Courts, 2012). The act creates a mechanism by which the state shares with the county any cost savings associated with reductions in incarceration driven by lower rates of probation failures. The county probation department must employ evidence-based community supervision practices and decrease probation failure rates and admission to prison below a benchmark rate measured for the 3-year period preceding the legislation's passage. In the 3 years since implementation, the probation failure rates have declined by 33%.

These policy examples suggest a reform option for reducing incarceration and fostering efficiency in the use of existing prison capacity. A change in policy that ensures that counties have some "skin in the game" is likely to unleash efforts at the local level to be more sparing in the use of incarceration, especially for relatively low-risk offenders. Of course, one would not want to punish poorer counties with an intergovernmental finance structure that charges higher fees to areas with demographics and other local conditions that lead to higher crime rates. However, some creative thinking could certainly generate schemes that better target incentives regarding marginal cases and perhaps combines an implicit tax on counties with a corresponding transfer that leaves county budgets whole while discouraging excessive admissions to the state prisons.

For example, the CYA fee structure in the preceding example nominally increased the cost for the most serious offenders—in other words, the state still paid for those committing the most serious offenses for which diversion to an alternative nonincarceration punishment was simply out of the question. One could imagine a scheme that levied differential tax rates that (a) increased as offense severity (and perhaps the severity of an offender's criminal

history) decreases and (b) increases for offenses in which there is the greatest degree of cross-jurisdiction heterogeneity in the proportion of offenders sent to prison.

Alternatively, one could imagine a block grant combined with an incarceration tax. A state could transfer to each county a fixed amount of state funds for the purposes of criminal justice and safety expenditures to be allocated across potential uses at the locality's discretion. The amount of the block grant could be conditioned on local population, crime rates, and demographics. Pairing the block grant with a per-head annual tax for each person admitted from the county to the state prison system would create an incentive to use prison sparingly. In addition, the block grant structure does not alter the marginal cost of jail admission (i.e., the marginal cost of a local jail inmate would still be positive), as the intergovernmental grant is decoupled from the size of the local correctional population. Moreover, the additional resources in the block grant and the higher relative price of using prison admissions would create incentives for local officials to seek alternative policies that control crime while reducing prison admissions.

An alternative strategy might assign a target incarceration rate to each county based on existing state prison capacity, past crime rates, age structure, and whatever other demographic characteristics are deemed important and legally and ethically appropriate, and it would permit use of the state prison system free of cost within some narrow band around the target. Counties that come in sufficiently below the target could be rewarded with a grant for criminal justice expenditures that increases in the gap relative to the target, whereas counties whose county-specific incarceration rates exceed their targets can be symmetrically taxed. Such a strategy could be particularly effective at identifying the marginal low-risk offenders as counties that overuse the prison system the most relative to a defined benchmark would face the largest tax bill. In other words, achieved reduction in incarceration would be generated largely by reductions in incarceration for outlier counties with unusually high incarceration rates.

This solution has much room for policy experimentation. Currently, incentives are designed to generate too many admissions to prison. Moreover, local officials are sensitive to cost incentives. This should be harnessed in fostering a more humane and cost-effective crime control policy.

Conclusion

Tonry (2014) clearly and succinctly identifies the sentencing practices that must change if we wish to bring down the nation's incarceration rate. Many of these changes, although likely reducing time served during the period when the offenders have aged out of crime, would impact individuals who have committed serious offenses. The political challenges to such changes are likely to be considerable. Nonetheless, reforms that incorporate formal risk assessment and careful deliberation might be able to overcome these challenges.

Although many people in prison would be offending if they were on the street, our high incarceration rate creates room for a selective retreat from mass incarceration that

would not compromise public safety. Moreover, given the amount of resources devoted to corrections across the country, the savings from reducing the extensive and intensive use of prisons could be reallocated toward other policy levers designed to fight crime. Our current policy mixture is not optimal, and fairly strong empirical evidence suggests that the benefit–cost ratio of marginal investments in alternative nonincarceration policy tools (policing and human capital investments, in particular) exceeds the benefit–cost ratio of subsequent increases in the prison population.

Finally, sentencing reforms are much needed. However, policy attention should also focus on incentives in the criminal justice system and ensure that the current structure generating admissions to prison and long sentences is not encouraged via parochial cost incentives toward overusing this costly social institution.

References

- Administrative Office of the Courts. 2012. *SB 678 Year 2 Report: Implementation of the California Community Corrections Performance Incentives Act of 2009*. San Francisco, CA: Author.
- Barbarino, Alessandro and Giovanni Mastrobuoni. 2014. The incapacitation effect of incarceration: Evidence from several Italian collective pardons. *American Economic Journal: Economic Policy*, 6: 1–37.
- Buonanno, Paolo and Steven Raphael. 2013. Incarceration and incapacitation: Evidence from the 2006 Italian Collective Pardon. *American Economic Review*, 103(6): 2437–2465.
- Chalfin, Aaron and Justin McCrary. 2013. *Are U.S. Cities Under-Policed? Theory and Evidence*. Working paper, University of California, Berkeley.
- Helland, Eric and Alexander Tabarrok. 2007. Does three strikes deter? A nonparametric estimation. *Journal of Human Resources*, 42: 300–330.
- Johnson, Rucker and Steven Raphael. 2012. How much crime reduction does the marginal prisoner buy? *Journal of Law and Economics*, 55: 275–310.
- LaVigne, Nancy, Samuel Bieler, Lindsey Cramer, Helen Ho, Cybele Kotonias, Deborah Mayer, et al. 2014. *Justice Reinvestment Initiative State Assessment Report*. Washington, DC: The Urban Institute.
- Liedka, Raymond, Anne Morrison Piehl, and Bert Useem. 2006. The crime control effect of incarceration: Does scale matter? *Criminology & Public Policy*, 5: 245–275.
- Lofstrom, Magnus and Steven Raphael. 2013a. *Impact of Realignment on California Jail Populations*. San Francisco: Public Policy Institute of California.
- Lofstrom, Magnus and Steven Raphael. 2013b. *Public Safety Realignment and Crime Rates in California*. San Francisco: Public Policy Institute of California.
- Lofstrom, Magnus and Steven Raphael. 2013c. *Incarceration and Crime: Evidence from California's Public Safety Realignment*. IZA Working Paper #7838.
- Ouss, Aurélie. 2014. *Incentive Structure and Criminal Justice*. Working paper, University of Chicago, Chicago, IL.

- Owens, Emily G. 2009. More time, less crime? Estimating the incapacitative effects of sentence enhancements. *Journal of Law & Economics*, 52: 551–579.
- Raphael, Steven and Michael Stoll. 2013. *Why Are So Many Americans in Prison?* New York: Russell Sage Foundation.
- Raphael, Steven and Michael Stoll. 2014. *A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime*. Washington, DC: The Brookings Institution.
- Spelman, William. 1994. *Criminal Incapacitation*. New York: Plenum Press.
- Spelman, William. 2000. The limited importance of prison expansion. In (Alfred Blumstein and Joel Wallman, eds.), *The Crime Drop in America*. Cambridge, U.K.: Cambridge University Press.
- Tonry, Michael. 2014. Remodeling American sentencing: A ten-step blueprint for moving past incarceration. *Criminology & Public Policy*, 13:503–533.
- Travis, Jeremy and Bruce Western. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: National Academies Press.
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