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EDITORIAL INTRODUCTION

The past, present, and future of mass incarceration in the United States

Marie Gottschalk
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The United States is the world's warden, incarcerating a larger proportion of its people than any other country. Since the 1970s, the U.S. inmate population has increased by more than sixfold (Manza and Uggen, 2006: 95). A staggering 7 million people–or approximately 1 in every 31 adults—are either incarcerated, on parole or probation, or under some other form of state supervision today (Glaze, 2010; Pew Center on the States, 2009). These figures understate the enormous and disproportionate impact that this bold and unprecedented social experiment has had on certain groups in the United States. If current trends continue, one in three Black males and one in six Hispanic males born recently are expected to spend some time in prison during their lives (Bonczar, 2003).

Since the late 1990s, the phenomenon of mass incarceration has been a growing source of scholarly interest. Today the carceral state is a subject of rising public interest. In 2009, *Wired* magazine included emptying the country's prisons on its "Smart List" of "12 Shocking Ideas that Could Change the World," and *Parade* magazine featured Sen. Jim Webb's (D-Va.) call to end mass incarceration on its front page (Webb, 2009).

Two related questions have long dominated discussions of mass incarceration: Why did the U.S. incarceration rate, which had been reasonably stable for much of the 20th century, shoot up in the 1970s and continue to climb for decades despite a fluctuating and then plummeting crime rate? And what precisely is the relationship between the incarceration rate and the crime rate? Today a scholarly consensus is congealing that the dramatic rise in the incarceration rate contributed to only a modest dent in the crime rate. Although identifying the causes of mass incarceration in the United States remains a central concern, the focus is shifting.

This special issue of *Criminology & Public Policy* showcases several emerging frontiers in research on mass incarceration that have enormous public policy implications: penal

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developments at the state and local levels; the collateral consequences of the carceral state, especially for already disadvantaged individuals, families, and communities; and the possibilities for trimming or dramatically reducing the incarcerated population and downsizing prisons.

Developments at the State and Local Levels

In their efforts to unravel why the United States has the world's highest incarceration rate and locks up more people than any other country, scholars initially focused on developments at the national level dating primarily from the 1960s. As for the states, much of the early research consisted of large, multistate quantitative studies. Some of the most promising new research takes a more fine-grained look at historical, institutional, legal, political, racial, and cultural differences at the state and local levels to explain the embrace of mass incarceration. New work in this area seeks to identify some key engines of mass incarceration that have been overlooked because "they are not easily reducible to quantitative measures" (Lynch, 2011, this issue).

The construction of such an expansive and unforgiving carceral state in the United States is a national phenomenon that has left no state untouched. All 50 states have witnessed their incarceration rates explode since the 1970s. But the state-level variation in incarceration rates is still enormous, far greater than what exists across Western Europe. Incarceration rates (including both the jail and prison populations) range from a high of more than 1,100 per 100,000 people in Louisiana to a low of approximately 300 per 100,000 in Maine (Pew Center on the States, 2009: 33). This great variation and the fact that crime control in the United States is primarily a local and state function, not a federal one, suggest that local, state, and perhaps regional factors might help explain the sharp punitive turn in U.S. penal policies.

Trying to unravel why the carceral state has been more extensive, abusive, and degrading in some states than others is a blossoming area of interest. Scholars have shown that differences in socioeconomic variables, demographic factors, and/or crime rates help explain some of the state-by-state variation in incarceration and criminal justice policies (Beckett and Western, 2001; Greenberg and West, 2001; Hawkins and Hardy, 1989; Jacobs and Helms, 1996). Trying to account for the remaining variation, scholars have zeroed in on differences in the institutional and political context at the state level (Barker, 2009; Davey, 1998; Domanick, 2004; Jacobson, 2005; Zimring, Hawkins and Kamin, 2001). New state-level case studies are identifying some common factors that help explain what propelled the prison boom at the state level, as well as some differences that account for variations in the timing, extent, and nature of the punitive turn among the states.

The Great Recession has raised expectations that the United States will begin to empty its jails and prisons because it can no longer afford to be the world's warden. Lynch (2011), Page (2011a, this issue), and other state-level analyses are a sober reminder that gaping budget deficits will not necessarily reverse the prison boom because a penal system is not

only deeply embedded in a state's budget but also in its political, cultural, legal, institutional, and social fabric. These new state-level case studies suggest that certain states may be more likely than others to reduce their prison populations in the near future.

Some of the most promising new scholarship on the states has focused on the South and Sunbelt. This work is upending the conventional narrative of the rise of the U.S. penal system, with its emphasis on the Northeast, notably New York and Pennsylvania. In the standard account, the foreboding penitentiaries of the 19th century, which were meant to restore wayward citizens to virtue through penitent solitude, evolved by fits and starts into the modern correctional bureaucracies of the 20th century that, at least for a time, viewed rehabilitating prisoners as a central part of their mission (Perkinson, 2010: 7). Lynch (2011) and others (Campbell, in press; Perkinson, 2010; Schoenfeld, 2009) suggest that the history of punishment in the United States is a more southern story than has been generally recognized.

Among the many questions about what propelled the turn toward mass incarceration in the South and Sunbelt, one in particular stands out: Why were law-and-order conservatives able to launch an expensive prison-building spree that spanned decades, even though the burgeoning conservative movement they spearheaded was premised on fiscal conservatism and rolling back the public sector? One of the most puzzling cases is Arizona, a Sunbelt state that has been a main cauldron of the ascendant conservative movement premised on fiscal conservatism and disdain for the public sector. Home to Barry Goldwater, fiscal frugality has long been the "guiding principle of all government endeavors in Arizona" (Lynch, 2010: 25). Nonetheless, Arizona embarked on a huge, costly penal expansion. Until the 1970s, Arizona doggedly resisted making a big investment in new penal facilities. Yet from approximately 1975 onward, the state's legislators and governor "were more than willing to make sentencing changes they knew were fiscally unsustainable and for which they had no workable plans for financing" (Lynch, 2011). As a consequence, the state's imprisonment rate increased nearly sevenfold, going from a stable and minuscule 75 per 100,000 (a rate comparable with that of the Scandinavian countries) to more than 500 per 100,000 (Lynch, 2010: 4), and spending on corrections skyrocketed.

In explaining the prison boom in Arizona and other states, Lynch (2011) stresses how certain legal changes, including alterations in the penal code, federal case law (especially with regard to prisoners' rights), and postsentencing laws and policies, were refracted through local norms and culture. In short, she provocatively suggests, "mass incarceration is local at its core." Lynch identifies several factors that helped neutralize or deflect concerns about how the huge size and growing expense of the penal system were at odds with Arizona's historical commitment to frugality and a limited public sector. First, correctional administrators and state officials repeatedly sought to assure the public that Arizona's penal system was "tough and cheap" (Lynch, 2010). They also kept the public focus on states' rights issues and allegations of excessive federal intrusion (Lynch, 2011). State officials raged that Arizona's prisons had become such a fiscal burden because of onerous and intrusive federal regulation

and oversight of the state's penal system. They also blamed federal permissiveness to inmate lawsuits. Their withering attacks on Washington and the federal judiciary obscured the fact that the prison boom in Arizona had radically increased the power of the state government, the size of the public sector, and the fiscal burden of the penal system.

Lynch (2011) contends that mass incarceration is more a ground-up phenomenon than a top-down one. She argues that Arizona and other Sunbelt states have been national trendsetters in penal policy as their penal "innovations" diffuse regionally and then nationally. Arizona has been a leader not only in incarcerating its citizens but also in pioneering the widespread use of supermax prisons and other degrading and humiliating punishments like "no frills" prisons. Arizona's state officials also provided the legislative blueprint and crucial political momentum to propel the Prison Litigation Reform Act through the U.S. Congress, which has drastically curtailed prisoners' opportunities to challenge their conditions of confinement in the courts since its enactment in 1996.

Changes in penal policy lie at the heart of Lynch's (2011) explanation of mass incarceration. But, as she shows, it is not enough to catalogue how sentencing structures and policies vary across states and over time. We also need to consider intently the implementation of penal policies at the local level by all the key actors in the criminal justice system—from police to prosecutors to judges to parole and probation officers. If we do not, we end up with a homogenized view of the causes of mass incarceration that is unhelpful or even counterproductive in devising effective penal and political strategies to roll back the carceral state. Simply put, we need to understand the significant gap that "often exists between law on the books and law in action" (Lynch 2011).

California is another Sunbelt state that poses a penal riddle of its own. The Golden State was a trailblazer for the "rehabilitative ideal" in the 1940s and 1950s, but it also was ground zero for the conservative taxpayer revolt of the 1970s and 1980s. With passage of Proposition 13 in 1978, which capped property taxes and deprived municipal governments of key revenues, California faced growing opposition to tax increases and expansion of the public sector. Nonetheless, California was able to build approximately 24 state prisons (at a cost of about $280–$350 million each) since 1982, as well dozens of smaller penal facilities (Gilmore, 2007: 7). Even in the face of fiscal Armageddon and a federal court decision declaring that the state's overcrowded, underfunded penal system is unconstitutional (which was upheld in May 2011 by a divided U.S. Supreme Court in *Brown v. Plata)*, California has been unable to agree to a plan to shrink its penal population significantly.

As Page argues (2011a, 2011b), California's unionized prison guards pose a major—but not insurmountable—impediment to downsizing the state's prison system. He contends that the California Correctional Peace Officers Association (CCPOA) has been "uniquely influential" in resisting efforts to reduce the state's prison population, a point that Doob and Gartner (2011, this issue) and Thompson (2011, this issue) contest. California's massive

prison expansion entailed a massive expansion of the corrections workforce at just the time that the scrappy prison officers' association, which originally resembled a social club or fraternal organization, was transforming itself into a powerful, militant, and fiercely independent union. Under forceful and savvy leadership, the CCPOA set out in the 1980s to capitalize politically and financially on the prison boom already underway. Wielding its financial largesse, the union rewarded allies with generous campaign contributions and punished foes with well-funded primary challengers and disparaging and mean-spirited public attacks. In Page's (2011a) account, it almost single-handedly created the powerful victims' rights movement in the Golden State that has pushed so hard for more punitive legislation, including the toughest three-strikes law in the country. The CCPOA also framed the union's interests in terms of the public good. Furthermore, as more Blacks, Hispanics, and women became prison guards and joined the union, the CCPOA started reaching out to minority groups by celebrating diversity and by funding ethnic- and gender-based criminal justice organizations and political action committees.

The CCPOA also framed its actions in highly charged moral terms. It portrayed prison guards as the frontline in an epic battle between good and evil, hence, the union's long-standing motto, "The Toughest Beat in the State." Subtly and not so subtly, the union exploited negative racial and ethnic stereotypes. It charged that inmates in the state's prisons were the worst of the worst and beyond redemption.

The union's political savvy does not fully explain why initiatives to make California's penal system less punitive have been thwarted time and again, even in the face of rising fiscal conservatism and anti-tax sentiment. Drawing on key insights from Vanessa Barker's (2009) comparative study of the development of penal policy in California, New York, and Washington, Page argues that the Golden State's political culture and institutions have rendered it especially vulnerable to the siren call of law-and-order politics. California's "neopopulist political culture and institutions," most notably its ballot initiatives and its relatively low levels of civic engagement, helped foster the CCPOA's disproportionate influence, according to Page (2011a). But he cautions that the CCPOA is not politically invincible. The real problem, he suggests, is that politicians like former Governor Arnold Schwarzenegger and Governor Jerry Brown, who was heartily endorsed by the CCPOA in his winning 2010 campaign, have used the union's reputed might as a scapegoat "for their own inability or unwillingness to promote real penal change."

The new state-level case studies by Page (2011a, 2011b) and others challenge Austin's contention (2011, this issue) that scholars of crime and punishment should start focusing less on the origins of mass incarceration and more on how to reduce the prison population radically. In fact, it is not easy to sever these two subjects or compartmentalize them. The factors that created the carceral state are not identical to the ones that sustain it today. Nonetheless, a keen understanding of the nuances of the institutional, political, historical, and racial origins of mass incarceration in particular states, and of the similarities and differences between states, are essential components for any successful "Manhattan

Project on Decarceration" that Austin would like scholars of crime and punishment to undertake.

The Mounting Collateral Consequences of the Carceral State for Individual Offenders

For a long time, the expansion of the carceral state was widely viewed as a peripheral problem in American politics and society that was largely confined to poor urban communities and minority groups. But mounting evidence suggests that having such a large penal system embedded in a democratic polity has enormous repercussions that reverberate throughout the political system and society. The carceral state has grown so huge in the United States that it has begun to metastasize and warp core political institutions, everything from free and fair elections (Brown-Dean, 2004: Ch. 2; Ewald, 2002; Manza and Uggen, 2006; Pettus, 2005) to an accurate and representative census (Heyer and Wagner, 2004; Lotke and Wagner, 2004; Wagner, 2002). Furthermore, the emergence of the carceral state has helped to legitimize a new mode of "governing through crime" that has spread well beyond the criminal justice system to other key institutions, including the executive branch, schools, and the workplace (Simon, 2007).

Research by Traci Burch (2007), Cohen (2010), Weaver and Lerman (2010), and others on the impact of penal policies on political and civic participation and by Bobo and Thompson (2006) on criminal justice and public opinion indicate that the carceral state may be rapidly cleaving off wide swaths of people in the United States—most notably African Americans—from the promise of the American dream. The political consequences of this are potentially explosive because the American dream has arguably been the country's central ideology and has served as a kind of societal glue holding together otherwise disparate groups (Hochschild, 1995).

Evidence is growing that many of today's crime-control policies fundamentally impede the economic, political, and social advancement of the most disadvantaged Blacks and members of other minority groups in the United States. Prison leaves them not only less likely to vote but also less likely to participate in other civic activities, find gainful employment, and maintain ties with their families and communities (Pattillo, Weiman and Western, 2004; Roberts, 2003/2004). The landmark work on the collateral consequences of imprisonment is Bruce Western's *Punishment and Inequality in America* (2006). Western soberly concludes, after a careful analysis of wage, employment, education, and other socioeconomic data, that mass imprisonment has erased many of the "gains to African American citizenship hard won by the civil rights movement" (p. 191).

The carceral state raises other troubling and largely unexplored issues about political participation and citizenship. Mass imprisonment is helping to create and legitimate a whole new understanding of citizenship and belonging (Roberts, 2003/2004). Fixated on the staggering increase in the number of people behind bars, analysts have paid less attention to the political and social implications of the stunning rise in the number of people consigned

to legal and civil purgatory who are not fully in prison or fully a part of society. On any given day, in addition to the more than two million people sitting in jail or prison, another five million people are on probation or parole or under some form of community supervision (Glaze, 2010). Parole and probation officers are permitted to regulate major and mundane aspects of offenders' lives—everything from where they live and whom they associate with to whether they have a beer in their refrigerator and whether they are permitted to carry a cell phone. Many people on parole or probation are subject to random drug tests. Law enforcement officers also are permitted to conduct warrantless searches of parolees and probationers that are not subject to the standard Fourth Amendment protections.

For many former offenders, their time in purgatory never ends, even after they have served their prison sentence or successfully completed their parole or probation. Former felons (and even some former misdemeanants) risk losing the right to vote and are subject to other acts of "civil death" that push them further and further to the political, social, and economic margins. Former felons often must forfeit their pensions, disability benefits, and veterans' benefits. Many of them are ineligible for public housing (Simon, 2007: 194–198), student loans, or food stamps. Dozens of states and the federal government ban former felons from jury service for life. As a result, nearly one third of African American men are permanently ineligible to serve as jurors (Kalt, 2003: 67).[1]

States prohibit former offenders from working in scores of professions, including plumbing, palm reading, food catering, and even haircutting, which is a popular trade in many prisons. A new American Bar Association study funded by the National Institute of Justice counted 38,000 statutes that impose consequences on people convicted of crimes (*Crime and Justice News,* 2011). In April 2011, Attorney General Eric Holder urged states to eliminate the legal burdens on former offenders that do not imperil public safety, such as certain restrictions on housing and employment (*Crime and Justice News*, 2011). Many jurisdictions forbid employers to discriminate against job applicants solely because of their criminal record unless their offense is directly relevant to the job. But applicants with criminal records are still disproportionately denied jobs (Pager, 2003, 2007), and rejected job seekers have great difficulty getting redress in the courts (Hull, 2006: 32–34). In some major cities, 80% of young African American men now have criminal records (Street, 2002, in Alexander, 2010: 7) and thus are subject to a "hidden underworld of legalized discrimination and permanent social exclusion" (Alexander, 2010: 13). Wacquant characterizes this underworld as "a closed circuit" of perpetual social and legal marginality (2000: 384).

Beckett and Harris (2011, this issue) excavate an important piece of this underworld—the substantial fines and fees that the courts and other criminal justices agencies now routinely impose supplement "criminal penalties that already are harsh by comparative

1. In one county in Georgia approximately 70% of the African American men are ineligible for jury service as a result of a felony conviction (Wheelock, 2006, in Wheelock and Uggen, 2008: 278).

standards." These fines and fees are rapidly growing, so much so that "a new punishment regime is becoming quietly embedded in the organizational structures and normative tenets of the American state" (Katzenstein and Nagrecha, 2011, this issue). Usually not scaled to income or employment status, these monetary sanctions generate sizable long-term debts that are "incompatible with policy efforts to enhance" the reintegration of criminal defendants, who are overwhelmingly poor (Beckett and Harris, 2011). Penal fines and fees are but one piece of the "now deeply institutionalized debt collection regime" that ensnares offenders and ex-offenders and jeopardizes their reintegration into society (Katzenstein and Nagrecha, 2011). Onerous state policies that compel low-income fathers to continue paying child support while in prison burden them with additional debt they will never be able to pay once they are released (Comfort, Nurse, McKay and Kramer, 2011, this issue; Katzenstein and Nagrecha, 2011).

The nonpayment of legal financial obligations accounts for a considerable number of parole and probation violations, according to Beckett and Harris. In some instances, these accumulated debts are cause to send someone back to prison, as judges creatively maneuver around the U.S. Supreme Court's 1983 decision in *Bearden v. Georgia*, which ostensibly bans sending people to prison for unpaid debts. Notably, many poor defendants are apparently waiving their right to counsel to avoid having to go into debt to repay the cost of an assigned public defender.

The extensive and arbitrary systems of fees and fines levied on criminal defendants is so pernicious in the United States, according to Beckett and Harris (2011), that the only real policy solution is to ban all of these legal financial obligations, excepting restitution payments for victims. Katzenstein and Nagrecha (2011) generally second this stance. Ruback (2011, this issue), however, suggests that the problem of excessive fees and fines may not be as severe as Beckett and Harris claim. He also contends that the use of these monetary sanctions varies enormously from one state to another; thus, proposals to abolish them across the board "may be ill-advised."

O'Malley (2011, this issue) injects a refreshing comparative perspective into this debate, one that is all too often absent in discussions of U.S. penal policy (see also Allen, 2011, this issue). He notes that day fines scaled to income have long been the "predominant sentencing option" in many common law and European countries. These countries have a long tradition of day fines dating back to the early 20th century that is rooted in a deep-seated belief then and now that prison sentences, especially short ones, are often counterproductive. O'Malley, joined by Ruback (2011), laments the absence of a "public or serious criminological debate to date" in the United States on the advantages of day fines as an alternative—not as a supplement—to incarceration. He forcefully argues that a ban on all penal fines "would make a line of flight away from high rates of incarceration" in the United States all the more difficult by foreclosing serious discussion of an important intermediate sanction that has kept incarceration rates down in other countries. It is critical that "this space for a politics of fines" be kept open, he argues.

Most of the commentators seem resigned to the persistence of these fines, given the current fiscal and political climate. Traci Burch (2011, this issue) presents data that suggest Beckett and Harris (2011) may be underestimating how economically dependent some jurisdictions are on fees and fines. She notes that fees fund more than half of the probation agencies' operating budget in Texas and approximately one third of the probation and parole budget in Florida (Parent, 1990: 5). Burch and the other commentators make several suggestions to render these legal financial obligations less onerous and fairer, including prioritizing child support and restitution payments, banning the imposition of fees for state-appointed attorneys, reducing the number of fees and fines, making them less arbitrary, centralizing their collection, and, most importantly, scaling them to income and other debt obligations.

How are the Children?

The recidivism rate towers over all assessments of the costs and benefits of incarceration and alternative sanctions. As a result, other major costs, like the numerous and far-reaching collateral consequences of the carceral state, have been eclipsed or severely underestimated. These collateral consequences do not just fall heavily on offenders and ex-offenders but also on their families and communities, as Beckett and Harris (2011) show in their discussion of legal financial obligations.

As recently as 5 years ago, we did not even know what proportion of children had an incarcerated parent. Thus, "we had only a vague idea of what the consequences of mass imprisonment for future inequality would be" (Wakefield and Wildeman, 2011, this issue). We now know that the "risk of parental imprisonment for Black children is large and has grown tremendously in recent decades, whereas the risk of parental imprisonment for White children remains modest" (Wakefield and Wildeman, 2011). The large racial disparities in the incarceration rate help account for sizable disparities in the mental health and behavioral problems between Black and White children, according to Wakefield and Wildeman. Having an incarcerated father tends to increase the mental health and behavioral problems of children considerably. The two apparent exceptions are the children of violent offenders and of those with a history of domestic violence.

Wakefield and Wildeman (2011) implore us to take a more comprehensive look at the impact of mass incarceration on children that goes beyond the narrow question of whether the children of incarcerated parents are more likely to become criminal offenders themselves. Mental health and behavioral problems are predictors of crime and delinquency later in life, but they also are associated with a variety of other negative outcomes, like lower levels of educational and occupational attainment and poor family formation. The children of the incarcerated are more likely to exhibit externalizing behaviors like aggression and delinquency that are associated with criminal behavior later in life. But they also are more likely to suffer from internalizing behaviors like depression and anxiety. Not

all (or even most) of the children of incarcerated parents will one day become inmates themselves. That said, "a narrow focus on the likelihood of future criminal justice involvement" ends up obscuring "significant social harm," most notably the intergenerational transmission of inequality. It also "relegates the experiences of female children to the background."

Wakefield and Wildeman (2011) and the commentators on their article, to borrow from Donald Rumsfeld, provide a long list of "known unknowns" about the impact of parental incarceration on child well-being that is a ripe area for future research. Key questions are as follows: Do the effects vary depending on whether the incarcerated parent is a mother or father? Do differences in the timing of imprisonment and the age of the child matter? How about variations in the parent's conditions of confinement? How do other known risk factors interact with the risks associated with having an incarcerated parent?

The commentators seem somewhat divided over Wakefield and Wildeman's (2011) specific policy prescriptions. These differences highlight broader differences over the question as to what is next in penal reform. Most of the commentators generally agree about the need to mitigate some of the collateral consequences of mass incarceration on children by going after the "low-hanging fruit"—that is, keeping nonviolent drug and property offenders out of prison. But they differ over Wakefield and Wildeman's more ambitious proposals to strengthen the social safety net, especially as it applies to the poorest children, and to institute programs targeted at the complicated needs of the children of the incarcerated, many of whom are Black.

Because racial animus and exploiting the race card for electoral and political gains were key drivers of the expansion of the carceral state,[2] Kruttschnitt (2011, this issue) is skeptical that targeted race-based policies to address the collateral consequences of mass incarceration "would hold much sway with legislators." She suggests that framing mass incaceration as a society-wide rather than a race-specific issue might gain more political traction,[3] but only if we had more and better research on the "known unknowns." Massoglia and Warner (2011, this issue) and Sampson (2011, this issue) echo Kruttschnitt's caution against launching any major policy initiatives in this area without more credible research on this subject. Massoglia and Warner argue that "in an era of economic scarcity, little public or political tolerance exists for nonfocused policy initiatives." Sampson aims to usher in a new era of research on mass incarceration centered on the numerous and complex pathways by which the carceral state leaves its deep mark on society—or what he terms the "social ledger of incarceration's effects."

2. See, for example, Alexander, 2010; Beckett, 1997; Provine, 2007; Murakawa, 2005; Tonry, 2011b; Weaver, 2007; Wacquant, 2001.

3. See also Foster and Hagan, 2009 on this point.

Comfort et al. (2011) and Shedd (2011, this issue) endorse several interventions targeted at strengthening the ties between the children of the incarcerated and their parents, such as making jails and prisons more child-friendly and accessible for young visitors. Shedd implores the federal government and other jurisdictions to adopt the "Bill of Rights for Children of Incarcerated Parents," which was devised by the San Francisco Children of Incarcerated Parents Partnership, and to develop suitable policies to implement those rights. But Comfort et al. and Shedd go beyond that. They take up Currie's call (2011: 111) to spurn the "spurious prudence" that holds us back from "bold and expansive thinking about the layers of hardship piled upon the children" of the incarcerated (Comfort et al.). They strongly argue for a major urban, antipoverty agenda targeted at the communities decimated by the carceral state.

The Dollars and Cents of Penal Reform

The growing recognition that the enormous carceral state is a pressing economic, political, and social problem has spurred interest in how to reverse the prison boom. Understanding what brought about major decarcerations in the past is a new frontier in research (see, for example, Gartner, Doob, and Zimring, 2011). So is understanding the constellation of interest groups and social movements that might successfully push to downsize prisons.

Views vary considerably among the contributors about whether the Great Recession, if properly exploited, presents an enormous opportunity to roll back the carceral state. Enthusiasts of justice reinvestment tend to agree that the fiscal crisis has created an unprecedented opportunity to make the case that much of the money spent on incarceration could be better invested in community corrections (J. Burch, 2011, this issue) and community-based development (Clear, 2011, this issue). They also see the potential for an unprecedented political convergence of the right and the left on key penal issues. In their view, the time is ripe to invest in a burst of public- and private-sector innovations to reduce the prison population—all subject, of course, to the test of evidence-based research to assess whether these innovations save money and reduce recidivism.

Clear (2011), an ardent supporter of justice reinvestment, nonetheless has two central concerns about many of today's justice reinvestment strategies: They fail to ensure that the dollars saved are truly reinvested in community-development programs targeted at the neighborhoods hardest hit by mass incarceration; and they fail to enlist the private sector to make up for the public sector's limitations in this area. Clear champions reinventing justice reinvestment by creating incentives to bring the private sector on board, a stance heartily endorsed by James H. Burch II (2011). The centerpiece of Clear's proposal calls for providing huge subsidies to private employers willing to hire people who otherwise would still be sitting in prison running up the corrections budget. To receive the subsidy, employers would be required to provide the early-release inmates with jobs, and perhaps housing, located back in the disadvantaged communities that have borne the brunt of mass incarceration. The size of that subsidy would be based on making credible calculations of

how much time an offender released early would otherwise on average have spent in prison serving out his or her sentence. For each year that an offender who was released early stays clean, the employer would receive a sizable proportion of the money it would have cost the government to keep him or her incarcerated. That subsidy typically could amount to tens of thousands of dollars annually. Clear's proposals are akin to some private-sector justice reinvestment initiatives now under consideration in Britain (Allen, 2011).

In his response to Clear's proposal, Maruna (2011, this issue) laments the "chronocentrism"—or disavowal of the past—that afflicts this and other discussions of penal reform.[4] He reminds us that earlier moments of apparent left–right convergence on penal issues have resulted in a sharp turn toward more punitive policies. One notable example is the apparent convergence in the early 1970s around the "justice model," as both the left and right became disillusioned with the rehabilitative potential of the prison. Contrary to expectations, this did not herald a major rethinking of the utility of imprisonment to bolster public safety and address concerns about crime. Instead it marked the start of the continuous and unprecedented four-decades-long rise in the U.S. incarceration rate. Powerful interest groups co-opted the "justice model," which "played brilliantly into the hands of the 'penal harm' movement by providing a fancy justification for deinvesting in support services" and by putting most of the blame for rising crime rates and other deteriorating conditions on disadvantaged individuals and the communities themselves (Maruna, 2011).

Viewed through a wider historical lens and within a broader political context, Clear's proposal has some unsettling parallels with earlier chapters in the long and ignominious history of penal labor in the United States. The prison factories of the North and the convict-leasing arrangements of the South in the 19th and early 20th centuries permitted employers to exploit inmates brutally with little oversight or regulation (Blackmon, 2008; Curtin, 2000; Lichtenstein, 1996; Mancini, 1996; McLennan, 2008; Oshinsky, 1996). Employers also were able to use convict labor to bid down local wages and keep unions at bay. Under Clear's proposal, released offenders might literally be captive labor with limited means to challenge their employment and, in some cases, their living conditions for fear of being bounced back into prison by their employers. They likely would be bound to a single employer in an arrangement that cannot help but bring to mind the exploitative tenant farmer arrangements that predominated in the South and bound poor, often African American, tenant farmers to a single plantation owner. Tenant farmers who broke their contracts or who could not provide proof of employment come January 1 each year often were charged with vagrancy or some other minor crime and became fodder for the brutal convict-leasing system. Employers used leased convicts to undercut the wages of free workers and to break unions in the newly industrializing South (Blackmon, 2008; Shapiro, 1998).

4. Maruna borrows the term *chronocentrism* from Rock, 2005.

The community boards that Clear (2011) proposes to assure that employers do not exploit this captive labor and that the corrections dollars saved are reinvested back in community-development programs may not be up to the task. Compared with other countries, U.S. prisons and jails are subjected to shockingly little regulation and independent oversight.[5] This persistent lack of will and capacity to monitor conditions in U.S. penal facilities will likely carry over to any quasi-penal schemes managed by the private sector. Moreover, the private sector in the United States has been enormously successful at keeping the government on the defensive when it comes to monitoring and regulating the workplace and other conditions of doing business (Gottschalk, 2000). With the continuing decline of organized labor in the United States, unions are no longer in the position they once were to protect the rights of working people, let alone the rights of laboring offenders. We often forget that a strong, highly mobilized labor movement played a key role in regulating and ultimately bringing about the demise of the brutally exploitative prison factories of the 19th and 20th centuries (McLennan, 2008). In pockets of the United States, unions also played a central part in abolishing convict leasing (Shapiro, 1998).

We have numerous examples in U.S. penal history of well-intentioned reform efforts that have failed to stem the growth of incarceration and penal inequities (Gottschalk, 2006; Schoenfeld, 2009, 2011, this issue). In some cases, these "reforms" actually served to bolster the carceral state. Subsidizing employers based on an offender's anticipated prison term is a reform that runs this risk. It gives employers a vested interest in maintaining the current sentencing regime in the United States, which is premised on meting out comparatively long, punitive sentences, even for low-risk minor offenders.

The private sector has a huge vested interest in maintaining an expansive carceral state and has expended extraordinary resources to realize that goal in the political arena (Austin, 2011; Thompson, 2011). Drawing on Feeley's assessment of the "entrepreneurs of punishment" (2002: 322), Maruna notes that the legacy of privatization has tended to be penal expansion not contraction (2011). Allen (2011) raises the question of whether justice reinvestment schemes geared to the private sector would unduly advantage for-profit firms and large charitable trusts and foundations at the expense of small nonprofit groups. This, paradoxically, would leave the small neighborhood voluntary organizations "which are central to the purest forms of justice reinvestment" struggling to operate. Maruna is more optimistic and suggests that Clear's (2011) proposal has enough safeguards built into it to harness the private sector in the right direction.

Justice reinvestment, with its calls for cost-effectiveness, might ultimately provide a way out of mass incarceration. But first the vague, somewhat thin model of justice reinvestment needs to be more explicitly "situated on the shoulders of theories and models of justice that have preceded it," according to Mauna (2011). Otherwise, justice reinvestment schemes

5. See the special issue of *Pace Law Review* (2010) on prison oversight.

may fall short. They may succeed in nipping around the edges of the carceral state and in slowing down the future growth in correctional costs. But they will not necessarily spur radical cuts in the country's incarceration rate, state corrections budgets, and the racial and other inequities on which the carceral state sits. Austin (2011) warns that justice reinvestment strategies are an ideal vehicle to make the huge criminal justice system more efficient while keeping the powerful constituents that built the carceral state largely intact. "[T]his entire approach could simply be a lot of technocratic nonsense—a lot of politics masquerading as economistic, cost-efficiency language," according to Harcourt (2011: 25).

The Politics of Ending Mass Incarceration

One of the biggest movers and shakers in penal reform today is the Pew Charitable Trusts, which has been the major funder of numerous state-level justice reinvestment initiatives and groups (Clear, 2011). The U.S. Department of Justice also has been a big supporter of justice reinvestment (J. Burch, 2011). The primary vehicle for many of these state-level efforts is the Council on State Governments (CSG) Justice Center. As a condition of its involvement in a state, the CSG requires a bipartisan letter of invitation signed by top officials in all three branches of the state government. This assures, in Clear's words, that "the work is nonpartisan"(Clear, 2011). But as Miller (2008, 2011, this issue) and others have noted, one should be wary of elite-level bipartisan approaches to penal reform. The construction of the carceral state was a deeply bipartisan project as leading politicians of both parties exploited fears of crime and racial anxieties and excommunicated from public policy discussions the very communities most hurt by high crime rates and the exponential growth in incarceration rates. State and national lawmakers were able to "press forward with ever more punitive programs, independent of whether they worked or how much they cost, because they frequently have little accountability to neighborhoods and communities that face the most serious crime" (Miller, 2011). Because crime and violence are "stratified across American publics by race and class," those most victimized by crime and mass incarceration have had the least capacity to hold lawmakers and other state officials accountable for the penal and other public policies they pursue (Miller, 2011; Peterson and Krivo, 2010).

It remains an open question whether the CSG approach fundamentally changes this dynamic. To the CSG's credit, its justice reinvestment strategy calls for consulting at the start with a broad range of stakeholders, including law enforcement, service providers, and victims advocates (CSG Justice Center, 2011, in Schoenfeld, 2011). But is it possible to make serious reductions in the size and gross inequities of the carceral state through a largely top-down process that is ostensibly nonpartisan and politically bloodless? Schoenfeld (2011) contends that "dismantling mass incarceration will require a network of *state-level political coalitions with ties to citizen-based groups* across multiple localities *to build a movement and engage in the political process*" (emphasis in the original). It is not clear that the CSG's justice reinvestment strategy, which ostensibly is apolitical, could ever be a catalyst for that kind of movement. Even though the CSG approach is stridently bipartisan, it is not necessarily

nonpartisan or apolitical. It is premised on three key political decisions that have enormous and potentially far-reaching consequences for the course of penal reform: Keep economic concerns—not concerns about racial justice, morality, or justice writ large—at the center of the debate over penal reform; embrace reductions in the recidivism rate as the central pillar of any prison reduction strategy; and eschew calls for fundamental sentencing reform. Several contributors to this special issue challenge these three premises.

Framing the carceral state as primarily or exclusively an economic issue will ultimately fall short in the political arena, some contend. This strategy will not yield major reductions in the incarceration rate or in the dollars spent on prisons and jails.[6] To the claim "what goes up must come down," Austin replies, "Not really" (2011). Economic arguments will ultimately come up short politically for several reasons. "Although this [economic] message might be the right one, it might only be the right one for right now; it is doubtful that rhetorical, in-the-moment strategizing of this kind or any kind will eradicate the rash and short-sighted culture of penal policy-making," Lucken explains (2011). The monetary and political incentives to retain the current penal system remain formidable (Austin, 2011; Thompson, 2011). Furthermore, the economic promise of justice reinvestment may be more illusionary than real (Tonry, 2011a, this issue). Even Clear concedes that thus far "[j]ustice reinvestment work has been carried out in more than 12 locations, but in every one of them, the correctional budget has continued to grow."

Moral arguments focused on racial inequities and gross miscarriages of justice—not instrumental arguments based on dollars and cents—are what have carried the day in some of the most notable recent victories in rolling back the carceral state (Tonry, 2011a). These include the growing momentum among the states to revert to age 18 as the minimum age to try someone as an adult, Congress's decision last year to reduce the federal crack-powder cocaine sentencing disparity, and the "Drop the Rock" campaign in New York State to undo the draconian Rockefeller drug laws. "If the moral arguments are never engaged, they can never be won. If they are not won, then nothing will change much," according to Tonry. "[W]hat is needed is a widely shared belief that high imprisonment rates are undesirable, unjust, and destructive."

For Tonry and several of the other contributors to this special issue, the problem of mass incarceration cannot be addressed in race-neutral terms that whitewash the deep racial inequities on which the carceral state was erected and rests today. "[R]emediating penal overindulgence will require a coordinated campaign that challenges, not just policies, but the racialized ideas and assumptions that sustain the current system," argues Schoenfeld (2011). She and Mauer (2011, this issue) caution against emphasizing state-level solutions at the cost of ignoring the big national picture. The punitive and racially charged national discourse on crime and punishment was a key accessory to the crime of the extraordinary explosion in state

6. For another skeptical view of whether the economic crisis marks the beginning of the end of mass incarceration, see Gottschalk, 2011.

and federal imprisonment rates. "Although policy reform generally proceeds incrementally, unless we can affect the political climate in which these policies are fashioned, the scale of change may be inherently limited," argues Mauer.

The issues of race, class, and the carceral state expose a fundamental divide running through many of the contributions to this special issue. On the one side are those who take the current political context largely as a given. They see the fiscal crisis and the economic burden of the carceral state as a major opportunity to forge an elite-level bipartisan consensus to push for less punitive policies based on the best new evidence-based research. On the other side are those who argue that we already know more than we think we know about which public policies are necessary to reduce the prison population significantly—and that politicians and public officials may not be that much in the dark about the latest evidence-based research (see, for example, Austin, 2011; Schoenfeld, 2011). On the policy side, they claim, we largely know what works. Simply put, "we need to go back to sentencing systems that existed prior to 1970 when *both* crime rates and incarceration rates were much lower. We have already achieved the crime rate reduction so all that remains is altering the punishment system," according to Austin (2011, emphasis in the original).

Reducing the recidivism rate should not be the central pillar of any prison reduction strategy, Tonry (2011a) and Austin (2011) argue. In their view, the evidence is clear that even the very best reentry, parole, and probation programs can make at best only very modest reductions in the recidivism rate.[7] Moreover, because of cost and other factors, it is probably not possible to replicate these programs on a wide scale. "Much of the lament on prisons begins with the observation that recidivism rates are excessive," explains Austin. "If we could take marginal people and convert vast majorities of them into law-abiding, tax-paying citizens, then I would be all in favor of it. But we cannot, and we should move on to more promising options." Kleiman splits the difference here (2011, this issue). He argues that vast improvements in parole and probation supervision modeled after Hawaii's promising HOPE program would go a long way toward lowering the recidivism rate and cutting corrections costs, something that reentry programs focused primarily on delivering services like substance abuse treatment and job training have proven incapable of doing, in his view.

The most pressing issue for several contributors is not how to create more state capacity to invest in evidence-based research on mass incarceration and to bring the best of that research to the attention of policy makers and public officials. Rather, the preeminent issue is primarily a political one: how best to forge a political movement that transcends the current political climate, which remains deeply and reflexively punitive, in order to make deep and sustainable cuts in the incarcerated population and to address the breathtaking needs of the individuals, families, and communities decimated by the decades-long build

7. See also Western (2008) on this point.

up of the carceral state and the simultaneous decline of many inner cities. "Put simply, knowing what is effective (for crime control or reducing incarceration) matters little if no one is willing to fight for it in the political arena," according to Schoenfeld (2011).[8]

Advocates of a wider political movement to challenge the carceral state tend to focus on the key role of race in any penal reform movement. The racial aspects of the carceral state are so striking, especially the 8 to 1 disparity in black-white imprisonment rates (Western, 2006: 16), that they overshadow other important factors, notably class and ethnicity, in sustaining the carceral state. Any durable political movement to challenge mass incarceration in the United States will need to consider not just the racial aspects of mass incarceration, but also how class, ethnicity, and, increasingly, immigrant status sort out who is most likely to be sent up river.

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8. As Richard Thornburgh, the former Attorney General and Governor of Pennsylvania, said at a recent congressional briefing on crime and imprisonment, improving services for offenders both in prison and after release, which is something he strongly favors, remains a "difficult sell politically" (COSSA, 2011).

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EXECUTIVE SUMMARY

MONETARY SANCTIONS AS MISGUIDED POLICY

On cash and conviction

Monetary sanctions as misguided policy

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Research Summary

Substantial fees and fines now are now routinely imposed by courts and other criminal justice agencies across the United States. This article summarizes research on the imposition of monetary sanctions in the United States and shows how they differ from European day fines. In the contemporary United States, court-imposed legal financial obligations supplement other criminal penalties in the majority of felony and misdemeanor cases. Judges impose many fees and fines at their discretion, and evidence from Washington State indicates that extralegal factors–including ethnicity–influence their assessment. Many states have also authorized jails, departments of correction, and probation offices to levy fees. In the United States, fees and fine amounts are determined by statute and are not tethered to defendants' earnings. Recent studies suggest that the assessment of these penalties often generate long-term debts that are sizeable relative to expected earnings and impede reintegration.

Policy Implications

This essay contends that the disadvantages of the widespread and discretionary imposition of substantial and supplementary financial penalties outweigh any benefits associated with this practice. Proponents of correctional and court fees argue that offenders—not taxpayers—should pay for the cost of punishing their misdeeds. The idea that offenders should foot the bill for criminal justice expenditures is a moral and political claim, one that likely has broad appeal. Nonetheless, this claim is in tension with at least two other important principles. First, public criminal law systems rest on the premise that crime is mainly a wrong against the state; violations of criminal law are thought to be significant enough to warrant the state's usurpation of the dispute

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resolution process. Compelling defendants to reimburse the state for its criminal justice expenditures is in tension with this principle. Moreover, unlike users of other services for which fees are assessed, penal targets are compelled to partake of these services; they cannot use fewer of them or look for an alternative provider of them. It can be argued that if the state compels penal targets to use (often expensive and ineffective) state "services," then the government is obligated to pay for them. Indeed, this fiscal obligation is arguably an important check on government power.

Competing moral and political arguments regarding the appropriateness of assessing fees to recoup criminal justice expenditures thus exist. Even if it were universally accepted, the idea that offenders should pay for their adjudication, punishment and rehabilitation must be balanced against policy and practical considerations, as well as against ethical issues concerning justice and fairness. Our analysis pertains only to the imposition of fees and fines in the contemporary United States and does not extend to European-style imposition of day fines. The widespread assessment of substantial and nongraduated fees and fines lacks a convincing penological rationale, is incompatible with policy efforts to facilitate reintegration, and raises numerous concerns about justice and fairness.

At least in theory, penal policies are aimed at incapacitation, rehabilitation, deterrence, and retribution. Monetary sanctions do not appear to accomplish any of these goals. By definition, monetary sanctions do not prevent crime by incapacitating offenders. Theoretically, monetary sanctions might be rehabilitative if their repeal was offered as a reward for participation in rehabilitative programs or prosocial outcomes. Yet erasure of legal debt generally is not offered as a reward for good behavior. For a penalty to effectively deter wrong-doing, its consequences must be known to potential offenders as they contemplate their options; swiftness and certainty are key. But the assessment of monetary sanctions is characterized by neither swiftness nor certainty. Finally, because monetary penalties in the United States are supplements to criminal penalties that already are comparatively severe, directly and adversely impact the partners and children of the criminally convicted, and typically remain in effect long after all other elements of criminal sentences are completed, they are disproportionate to the offense and, hence, approach vengeance rather than retribution.

Monetary sanctions also complicate reintegration. An estimated 700,000 inmates return to civil society from jail or prison every year. In this context, researchers and policy makers increasingly emphasize the need to facilitate the reintegration and stabilization of the criminally convicted. Yet there is evidence that the widespread imposition of substantial and nongraduated fees and fines impedes reentry. For example, legal debt tends to be long term due to the low earning power of the criminally sanctioned, the magnitude of the sanctions imposed, and the accrual of interest. Monetary sanctions imposed by the criminal justice system thus constitute an additional, substantial, and often long-term financial liability for people living with a criminal conviction. Like

other types of debt, legal debt reduces access to housing, credit, and employment; it also limits possibilities for improving one's educational or occupational situation. Unpaid legal debt can lead to a warrant, an arrest, and/or incarceration. In some locales, legal debtors also are denied drivers' licenses, a practice that creates an additional barrier to employment. Legal debt thus has a variety of adverse and destabilizing consequences for those who possess it, including the threat of arrest and incarceration.

The widespread imposition and collection of substantial and supplementary monetary sanctions in the United States also raises several important concerns about fairness and justice. In particular, nongraduated monetary penalties supplement already severe confinement sentences, impose a disproportionate burden on the poor, and are, at least in Washington State, influenced by various extralegal factors, including ethnicity. These penalties also directly and adversely affect family members, lead with some frequency to the arrest and incarceration of debtors, and raise important questions about the meaning and legacy of Gideon v. Wainwright (1963). Moreover, the collection of fees and fines to fund government operations is of uncertain fiscal benefit to the state. A comprehensive assessment of the fiscal benefit to the state of imposing fees and fines must consider both the direct and indirect costs associated with the collection of LFOs. It is unclear that the results of this mathematical exercise would, if the necessary data were available, show that the imposition and collection of LFOs is a net financial gain. Even if revenues from fees and fines are greater than the expenditures devoted to their collection, dependence on this private funding source for criminal justice operations arguably compromises the integrity of courts and creates conflicts of interest for judges.

This essay concludes that the widespread imposition of nongraduated, supplementary and substantial monetary penalties by U.S. criminal justice agencies lacks a convincing penological rationale, is incompatible with policy efforts to facilitate reentry, raises important concerns about fairness and justice, is of uncertain financial benefit to the state, and arguably compromises the integrity of the courts.

Keywords

fees, *fines*, *monetary sanctions*, *punishment*, *reentry*

On cash and conviction

Monetary sanctions as misguided policy

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Mass incarceration creates significant social and public safety challenges. With nearly three quarters of a million people returning from jail or prison to civil society each year, researchers and policy makers increasingly emphasize the need to facilitate the reintegration and stabilization of the criminally convicted (Clear, 2007; Council of State Governments, 2005; Petersilia, 2003; Solomon, Osborne, LoBuglio, Mellow, and Mukamel, 2008; Travis, 2005; Urban Institute, 2006). Yet growing recognition of the importance of reentry coexists with myriad penal policies and practices that frustrate that goal. In this article, we argue that the discretionary imposition of substantial and nongraduated legal financial obligations (LFOs) as supplements to other criminal penalties is one such practice.

LFOs include fees (cost assessments, surcharges, and interest), fines, and restitution orders that are imposed by courts and other criminal justice agencies on persons accused of crimes. Unlike European day fines, fees and fines in the United States are imposed largely at judges' discretion; they also supplement rather than replace other criminal sanctions (Bannon Nagrecha and Diller, 2010; Beckett, Harris, and Evans, 2008; Harris, Evans, and Beckett, 2010). Moreover, in the United States, the assessment of fees and fines is not scaled to defendants' income or employment status (Bannon et al., 2010).[1] We argue here that the widespread assessment of substantial and nongraduated fees and fines is incompatible with

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1. In some states, however, court representatives do consider defendants' financial circumstances in determining their payment plans. In Pennsylvania, an effort is underway to structure the initial imposition of economic sanctions based on offenders' ability to pay (see Guideline Sentence Recommendations: Economic Sanctions, Act 2007–37 (2008)).

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policy efforts to enhance reintegration, lacks a convincing penological rationale, and raises numerous concerns about justice and fairness. Moreover, reliance on this revenue stream to fund key government operations is inefficient and creates undesirable conflicts of interest for judges and other criminal justice actors.

Our analysis and policy recommendations pertain to both fees and fines, but not to restitution. Fees are intended mainly to recoup criminal justice costs and may not be statutorily defined as penalties. By contrast, fines are intended as criminal penalties. Nonetheless, we treat both fees and fines as monetary sanctions, for several reasons. First, some fees *are* legally defined as penalties. In Washington State, for example, the mandatory $500 crime victim compensation fee is defined in the relevant statute as a "penalty assessment."[2] More generally, the imposition of LFOs (including fees) by Washington State judges is part of criminal "judgment and sentencing," and the legislative intent proffered for the assessment of LFOs does not differentiate between fees and fines.[3] In addition, the fees and fines imposed in a particular case generate a single LFO; the debt that results from their imposition is collected through identical methods. It therefore matters little to a legal debtor whether his or her financial obligation stems from a fee or a fine; the effects are indistinguishable. Fees are de facto penalties, even if they are not defined as such under statute.

Although restitution might also be conceptualized as a monetary sanction, we do not include it in our analysis or recommendations. Restitution differs from fees and fines in important ways. Restitution is imposed only in cases in which specific and direct crime victims have incurred financial losses; restitution payments are allocated to these particular people (or to those who have provided services to them). By contrast, fees and fines are routinely assessed in cases in which no direct victims exist or in which victims did not incur financial losses. Moreover, the revenues generated through the imposition of fees and fines are used to fund government operations and programs, a practice that raises particular concerns that we address toward the end of the article. For these reasons, our analysis focuses on fees and fines but not on restitution.

Proponents of correctional and court fees argue that offenders—not taxpayers—should pay for the cost of punishing their misdeeds (see Parent, 1990). The idea that offenders should foot the bill for criminal justice expenditures is a moral and political claim, one that likely has broad appeal. Nonetheless, this claim is in tension with at least two other

2. See Penalty Assessments (Revised Code of Washington 7.68.035, 1989).

3. The Washington State legislature identified the purpose of the legislation authorizing the imposition of LFOs as follows: "The purpose of this act is to create a system that (1) Assists the courts in sentencing felony offenders regarding the offenders' legal financial obligations; (2) holds offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior." See Penalty Assessments, Revised Code of Washington 7.68.035, 1989.

important principles. First, public criminal law systems rest on the premise that crime is mainly a wrong against the state; violations of criminal law are thought to be significant enough to warrant the state's usurpation of the dispute resolution process (Pennington, 1993). In such systems, the criminal law process wrests conflicts from private parties and renders them the responsibility of government. Compelling defendants to reimburse the state for its criminal justice expenditures is in tension with this principle. Moreover, unlike users of other services for which fees are assessed, penal targets are compelled to partake of these services; they cannot use fewer of them or look for an alternative provider of them (Parent, 1990). It can be argued that if the state compels penal targets to use (often expensive and ineffective) state "services," then the government is obligated to pay for them. Indeed, this fiscal obligation is an important check on government power.

Competing moral and political arguments regarding the appropriateness of assessing fees to recoup criminal justice expenditures thus exist. Even if it were universally accepted, the idea that offenders should pay for their adjudication, punishment and rehabilitation must be balanced against several policy and practical considerations, as well as against ethical issues concerning justice and fairness. This article examines these issues.

In the first section, we briefly describe trends in the use of fees and fines in the United States. The evidence shows that monetary sanctions increasingly supplement other criminal penalties and typically create long-term legal debts that are substantial relative to expected earnings. Legal debt is especially injurious; unlike consumer debt, it is not subject to relief through bankruptcy proceedings or offset by the value of goods or services. Possession of this debt, in turn, reduces access to housing, credit, educational loans, and employment. It also has unique indirect effects, including, potentially, the loss of driver's licenses and federal benefits as well as arrest and incarceration. Collectively, then, the data suggest that the widespread imposition of substantial fees and fines creates enduring and consequential debt, one that is clearly at odds with the goal of reintegration. In the next section, we argue that the imposition of monetary sanctions is misguided and counterproductive absent meaningful consideration of defendants' ability to pay and as a supplement to severe confinement sentences. This claim is based on numerous considerations, including the absence of a persuasive penological rationale for this practice, concerns regarding justice and fairness, and problems associated with state dependence on this revenue source. We conclude that the imposition of nongraduated and supplementary monetary sanctions must cease. We begin with a brief overview of the use of monetary sanctions in the United States.

Part I. Monetary Sanctions in the U.S. Criminal Justice System

Historical Background

Monetary sanctions have long been a component of criminal sentencing. In many European countries, restitution was the primary form of punishment for centuries (Mullaney, 1988); fines also were ubiquitous (O'Malley, 2009). In the United States and its colonial territories,

monetary sanctions became commonplace with the arrival of European settlers (Merry, 2000; Miethe and Lu, 2005). In the northern states, financial penalties were imposed mainly in minor criminal cases; serious crimes were thought to warrant physical punishments such as flogging (Miethe and Lu, 2005: 88). In some cases, however, fines were coupled with corporal penalties, and those who could not afford to pay their fines were subjected to additional physical penalties and penal servitude (Miethe and Lu, 2005: 90).

Monetary sanctions also were commonplace in the South, where their imposition was the foundation of the convict lease system that existed from emancipation through the 1940s (Adamson, 1983; Blackmon, 2008; Oshinsky, 1997; Perkinson, 2008). Charged with fees and fines several times their annual earnings, many southern prisoners were leased by justice officials to corporations who paid their legal debt in exchange for inmates' labor in coal and steel mines as well as on railroads, quarries, and farm plantations (Adamson, 1983; Blackmon, 2008; Oshinsky, 1997; Perkinson, 2008). Fees and fines collected from convict labor, in turn, were used to pay judges' and sheriffs' salaries (Blackmon, 2008). Monetary sanctions were thus integral to systems of criminal justice, debt bondage, penal servitude, and racial domination in the southern United States for decades.

Monetary Sanctions in the Contemporary United States

Although monetary sanctions are not new, legislatures have authorized many new fees and fines in recent years, and criminal justice agencies increasingly impose them. This trend coincides with the rapid expansion of the penal apparatus that began in the late 1970s, and was facilitated by developments in case law. In 1974, 11 years after *Gideon v. Wainwright* (1963),[4] the court upheld an Oregon statute allowing courts to assess poor people a fee for the legal representation that is provided to them by the state because of their indigence (*Fuller v. Oregon*, 1974).[5] The number of statutorily authorized financial penalties has grown dramatically since that time. A recent Brennan Center study of the rules regarding the imposition of fees in the 15 U.S. states with the largest prison populations found that such "user fees" were common and that the number and size of authorized fees have increased over time (Bannon et al., 2010; see also Butterfield, 2004; California Performance Review, n.d.; Levingston, 2008; Liptak, 2006; McLean and Thompson, 2007; Mullaney, 1988; Rosenthal and Weissman, 2007).[6] In Washington State, for example, up to 24 different fines and fees may now be imposed on felony defendants for a single conviction. Similarly,

4. In this decision, the U.S. Supreme Court unanimously ruled that state courts are required under the Sixth Amendment to provide defense counsel to criminal defendants who cannot afford their own attorneys.

5. For a discussion of this ruling and practice, see Anderson (2009). Proponents justify assessing indigent defendants a fee for the cost of their legal representation by arguing that indigent clients might pay in the future. However, in many locales, fees are assessed at the time representation is provided; future ability to pay is not examined systematically (Bannon et al., 2010).

6. These states include California, Texas, Florida, New York, Georgia, Ohio, Pennsylvania, Michigan, Illinois, Arizona, North Carolina, Louisiana, Virginia, Alabama, and Missouri.

in New York State, judges now might impose up to 19 statutorily authorized fees (Rosenthal and Weissman, 2007).

It is not just the courts that have been authorized to impose monetary sanctions; a broad range of criminal justice agencies now are permitted to levy such fees. Felons and misdemeanants are often charged by state Departments of Correction (DOC) and the private companies that house and supervise them for the cost of their imprisonment, supervision, and court-mandated tests (Levingston, 2008; Liptak, 2008; Perry, 2008). Indeed, DOC fees are allowed in all 15 states included in the Brennan Center study (Bannon et al., 2010). Jail fees, also increasingly are permitted and, to the extent that they are imposed, supplement the fees and fines imposed by the courts (Levingston, 2008).

Moreover, unpaid legal obligations are typically subject to interest, surcharges, and/or collection fees. The assessment of interest and late fees is authorized in 13 of the 15 states included in the Brennan Center study; 9 states also allow collection fees, often payable to private collection agencies (Bannon et al., 2010). The rate of interest applied to financial obligations varies but is generally substantial. For example, financial obligations assessed by Washington State criminal courts are subject to an interest rate of 12%.[7] The state of Michigan charges a 20% "late fee" on payments made after 56 days. In some states, private collection agencies assess up to 40% of the unpaid debt in collection fees. In Arizona, surcharges add 84% to debtors' underlying fees and fines (Bannon et al., 2010).

In most jurisdictions, correctional agencies are responsible for the collection of legal debt from persons under criminal justice supervision. When this is the case, probation and parole officers sometimes sanction nonpaying debtors by extending or revoking supervision (Weisburd, Einat, and Kowalski, 2008). Responsibility for the collection of legal debt often is transferred to county clerks or private collection agencies once offenders have completed their confinement and supervision sentences. These agencies employ a broad range of civil and criminal tactics in an attempt to recoup financial penalties, including the issuance of arrest warrants, wage garnishment, and tax rebate interception. In some cases, arrest results in incarceration (American Civil Liberties Union, 2010; Bannon et al., 2010; Harris et al., 2010), a subject we discuss in greater detail in the second part of this article.

Comparison with European Day Fines

Across the United States, the number of authorized financial penalties has proliferated. Some U.S. scholars, impressed by European approaches to criminal sentencing, advocate the use of fines as an intermediate sanction (see Bureau of Justice Assistance, 1996; Hillsman and Greene, 1992; Tonry and Lynch, 1996; Tonry, 1998) and thus might be interpreted

7. In Washington State, LFOs ordered in criminal proceedings are subject to the greater of two interest rates—12% or four points above the 26-week Treasury Bill rate. For at least the past 10 years, the greater of these two has been 12% (Revising the Interest Rate on Legal Financial Obligations, Washington State Senate Bill Report 2SHB 1359, 2006).

as supporting this trend. Yet monetary sanctions in U.S. state and federal courts bear little resemblance to the "day fines" that are imposed in Sweden, Germany, and other European countries, for two reasons. First, in Europe, fines serve as an alternative rather than as a supplement to incarceration (Bureau of Justice Assistance, 1996; Hillsman and Greene, 1992; O'Malley, 2009; Tonry and Lynch, 1996; Tonry, 1998). Second, day fines are based on the idea that financial penalties should correspond to the seriousness of the offense and should have a similar impact on people with different incomes (Bureau of Justice Assistance, 1996; Hillsman and Greene, 1992). To achieve these ends, day fines are determined by only the following factors: offense seriousness and offenders' current daily income (hence the term "day fine"). The imposition of day fines by European judges is thus highly structured and is determined *only* by offense seriousness and offenders' actual (rather than by hypothetical or possible) earnings.

By contrast, the imposition of fees and fines in the United States is highly discretionary and may therefore be shaped by factors other than offense seriousness (Harris, Evans, and Beckett, 2011). Although fine and fee *amounts* often are specified statutorily, judges have significant discretion in determining *whether* to impose many of them. Under Washington State law, for example, two monetary sanctions are mandatory, but judges possess significant discretion in determining whether to impose the other 22.[8] This discretion explains why defendants with similar criminal histories who are convicted of the same crime can incur different LFOs. In Washington State, for example, one first-time offender sentenced for assault in the second degree during the first 2 months of 2004 was assessed $500 in fees and fines. In a different county, another first-time offender convicted of the same charge during the same time period was assessed $2,370 in fees and fines (Beckett et al., 2008: Table 4). Similarly, one first-time defendant convicted of delivery of methamphetamine was assessed $610 in fees and fines; another was assessed $6,710 (Beckett et al., 2008: Table 4). Clearly, the judges in these cases exercised meaningful discretion in determining whether to impose numerous fees and fines. In Washington State, this discretion is significantly influenced by both legal and extralegal factors, including ethnicity (Harris et al., 2011). Moreover, drug offenders receive significantly greater fees and fines than violent offenders (Harris et al., 2011), a pattern that is inconsistent with the idea that financial penalties should correspond to offense seriousness. This discretion—and the impact of extralegal factors on its expression—raise important questions about justice and fairness which we address later in this article.

Moreover, unlike in European countries where day fines are used, most states do not require that judges tether decisions regarding the assessment of fees and fines of defendants' earnings or employment status (Bannon et al., 2010). As indicated, fee and fine amounts generally are specified in statute and thus are not graduated to reflect defendants' ability

8. Under Washington State law, some fees and fines can only be assessed in some kinds of cases, but judges may or may not assess those fees or fines in eligible cases. See Beckett et al. (2008).

to pay. Nor are judges required under statute to assess defendants' employment status or income when deciding whether to impose discretionary fees and fines (American Civil Liberties Union, 2010; Bannon et al., 2010; Harris et al., 2010).[9] Moreover, 13 of 15 states included in the Brennan Center study require judges to impose at least one mandatory fee that *cannot* be waived as a result of indigence. Even where judges are authorized to waive fees based on defendant indigence, they often do not (Bannon et al., 2010); where they exist, the requirements for securing a waiver often are too onerous to be meaningful.[10]

In short, the largely discretionary imposition of nongraduated and supplementary fees and fines in the United States bears little resemblance to the structured use of day fines in some European countries. Below, we show that the imposition of these fees and fines as a supplement to incarceration is now common in U.S. state and federal courts.

The Prevalence and Magnitude of Monetary Sanctions in the Contemporary United States

Although scholars have long recognized the centrality of fines in U.S. misdemeanor courts (see, e.g., Gordon and Glaser, 1991; Tonry and Lynch, 1996), the imposition of monetary sanctions in felony cases is comparatively understudied (but see Ruback and Bergstrom, 2006; Ruback, Hoskins, Cares, and Feldmeyer, 2006; Ruback, Shaffer, and Logue, 2004). Yet financial penalties now are imposed on most people convicted of felonies in the United States (Harris et al., 2010). Across the United States, two thirds (66%) of felons sentenced to prison, and more than 80% of other felons and misdemeanants, were assessed fees and fines by the courts in 2004 (Harris et al., 2010). These figures do not include any fees assessed to these defendants by other criminal justice agencies (such as jails, departments of correction, and offices of assigned council) and thus understate the frequency with which monetary sanctions are imposed in the United States. Because monetary sanctions now are assessed in most cases, and because the number of people convicted of criminal offenses in the United States has reached a record high, we can infer that the number of people who possess legal debt is significant and rapidly increasing. Indeed, the figures reported

9. In some jurisdictions, authorities responsible for setting monthly payment plans do consider defendants' financial circumstances. As illustrated in our discussion of the incarceration of legal debtors, however, the statutory framework places no limit on the percent of defendants' income that can be required as monthly payments, nor does it preclude the courts from requiring that indigent debtors who have been deemed unemployable by the state pay substantial portions of their welfare and social security income toward their legal debt.

10. For example, Washington State does allow for the waiver of interest on LFOs. However, the interest on restitution only can be waived if the principal on any restitution ordered has been paid in full. Furthermore, "the offender must show that he or she has personally made a good faith effort to pay, that the interest accrual is causing a significant hardship, and that he or she will be unable to pay the principal and interest in full and that reduction or waiver of the interest will likely enable the offender to pay the full principal and remaining interest there on" (Interest on Judgments, Revised Code of Washington 10.82.090(2) (2009). Few indigent debtors can establish these conditions, particularly because they do not have legal representation in these proceedings.

above suggest that more than 1 million people sentenced as felons in 2004 alone received monetary sanctions from the courts. Millions more are convicted of misdemeanor crimes each year (Buruchowitz, Brink, and Dimino, 2009).

It thus appears that tens of millions of U.S. residents have been assessed financial penalties by the courts and other criminal justice agencies. Our analysis of Washington State Superior Court data sheds light on the magnitude of the monetary sanctions imposed in felony cases and shows how legal debt accumulates in the lives of people with criminal histories (Harris et al., 2010).[11] In 2004, the mean fee and fine assessment for a single felony conviction was $2,450, the median was $1,347, and the maximum was $11,960. Yet these figures, striking as they are, do not include other sources of legal debt or show how legal debt accumulates over the life course of persons with criminal histories. Toward the latter goal, we calculated the total value of the fees and fines imposed by juvenile, district, and superior courts over the life course of 500 (randomly selected) defendants in our sample. The results indicate that, by 2008, these 500 legal debtors had been assessed an average of $11,471 by the courts. Although these results show how court debt accumulates as a result of repeat convictions, they do not include interest or any fees assessed by jails, clerks, private collection agencies, or offices of public defense/assigned counsel, and therefore still underestimate the true magnitude of legal debt held by Washington State felons.

Our findings also indicate that legal debt is substantial relative to the expected earnings of people with criminal histories. Criminal defendants are overwhelmingly poor (Pew Charitable Trusts, 2010); between 80% and 90% of those charged with criminal offenses qualify for indigent defense (Brennan Center for Justice, 2008). Nearly 65% of those incarcerated in the United States lack a high-school diploma (Western, 2006). Incarceration deepens poverty by reducing employment and earnings and by impeding economic mobility (Pew Charitable Trusts, 2010; Western, 2006). Western's (2006) research indicated that formerly incarcerated White men earned an annual average of $11,140, Hispanic men earned $10,432, and Black men earned $8,012.[12]

It is, then, an overwhelmingly poor and disadvantaged population that is assessed LFOs (Pettit and Western 2004). As a result, legal debt is typically large relative to expected earnings. Comparing Western's estimate of expected earnings with median legal debt indicates that formerly incarcerated White, Hispanic, and Black men owed 60%, 36%, and 50%, respectively, of their annual incomes in legal debt (see Harris et al., 2010: Table 7). Not surprisingly, efforts to collect legal debt are not highly successful (see also Weisburd, Einat, and Kowalski, 2008). As of 2008, the legal debtors in our subsample owed

11. This study analyzed the dollar value of the monetary sanctions imposed by Washington State Superior Courts for all felony cases sentenced in the first 2 months of 2004. LFOs included fees and fines but not restitution as restitution is driven by specific case-level factors for which we have no information.

12. Western's results have been converted to 2008 dollars to facilitate comparison with LFO data.

77% of their court debt. It thus seems that legal debt is sustained over time for a clear majority of those who receive monetary sanctions.

The magnitude of the fees and fines assessed, low repayment rates, and the accrual of interest help to explain why legal debt is typically long term. Even if formerly incarcerated male debtors manage to pay $100 a month—10–15% of their expected monthly earnings—toward a typical Washington State legal debt, they nonetheless will owe substantial legal debt 10 years later, even when assuming no additional monetary sanctions are imposed. Similarly, debtors who consistently pay $50 a month toward a typical LFO still will possess legal debt after 30 years (Harris et al., 2010). Because our data omit some potential sources of legal debt, these results almost certainly underestimate the magnitude and longevity of a typical Washington State legal obligation.

In summary, our Washington State study indicates that legal debt tends to be long term because of the low earning power of the criminally sanctioned, the magnitude of the sanctions imposed, and the accrual of interest. Notably, Washington State's 12% interest rate does not seem to be high by comparative standards. Monetary sanctions imposed by the criminal justice system thus constitute an additional, substantial, and often long-term financial liability for people living with a criminal conviction. Although additional research from other states is needed, it seems that the monetary sanctions imposed in Washington State are similar to those assessed in other states (see Bannon et al., 2010; McLean and Thompson, 2007; Rosenthal and Weissman, 2007).

The Consequences of Legal Debt

Interviews with 50 legal debtors living in four Washington State counties suggest that legal debt reproduces poverty and impedes reintegration in at least four ways (Harris et al., 2010). First, if debtors make payments, legal debt substantially reduces household income and compels people living on tight budgets to choose between food, medicine, rent, and child support. Even "small" payments of, for example, $50 a month can consume a significant share of defendants' monthly income. This financial effect is distinct from, and compounds, the diminished employment and earnings that result from felony conviction and incarceration (see Pager, 2003, 2005, 2007; Pew Charitable Trust, 2010; Western, 2006; Western and Beckett, 1999; Western and Pettit, 2005). Indeed, this loss of income is not reflected in studies of felon's earnings.

Second, whether or not legal debtors make regular payments, monetary sanctions often create long-term debt, which in turn has several adverse effects. This is an important point. Advocates of monetary sanctions might argue that because recoupment rates generally are low, monetary sanctions largely are inconsequential. Yet legal debt itself is damaging despite whether payments are made. Like other types of debt, legal debt reduces access to housing, credit, and employment; it also limits possibilities for improving one's educational or occupational situation (Bannon et al., 2010; Harris et al., 2010). But legal debt is an especially injurious type of financial obligation; unlike consumer debt, it is not offset by

the acquisition of goods or property and might trigger an arrest warrant, arrest, and/or incarceration. In some locales, legal debtors also are denied drivers' licenses, which in turn reduces employment prospects (Bannon et al., 2010; Pawasarat, 2000, 2005). Possession of legal debt thus constitutes a significant barrier to reintegration.

Third, because the wages of the convicted (and their spouses) are subject to garnishment, legal debt creates a disincentive to find work. In our interviews, several interviewees indicated that finding employment was not "worth it" because their earnings would be so diminished by garnishment. Several clerks also reported that employers generally dislike hiring those whose wages are garnished because of the cumbersome bureaucratic processes this entails. Although additional research is needed to assess the magnitude of this effect, it is notable that Holzer, Offner, and Sorensen (2005) found that the increased imposition of child support orders, which also often lead to garnishment, significantly reduces a father's employment (see also Holzer, 2009).

Fourth, unpaid legal debt—and the threat of criminal justice sanction it engenders—encourage some to "go on the run" (Goffman, 2009), which in turn leads to destabilization. The issuance of an arrest warrant sometimes leads to the termination of federal benefits, as people with warrants stemming from (any) violation of a felony sentence are considered "fleeing felons" and are thus ineligible for federal benefits, including Temporary Assistance for Needy Families, Social Security Insurance, public or federally assisted housing, and food stamps (Szymendera, 2005).[13] Warrants for nonpayment also lead not infrequently to arrest and incarceration (American Civil Liberties Union, 2010; Bannon et al., 2010; Harris et al., 2010).

Summary

LFOs are supplementary penalties that now frequently accompany other criminal sanctions across the country. Although fee and fine amounts are typically determined by legislatures, judges possess significant discretion in determining whether to impose many of them. In the United States, fee and fine assessments are not based on offenders' ability to pay, and these penalties supplement rather than replace other punishments, especially confinement. As a result of their widespread imposition (and the rapid expansion of the penal system), millions of mainly poor residents of the United States now possess legal debt. Even if legal debtors make regular payments toward their LFO, legal debt tends to grow over time because it is subject to interest and surcharges and often is substantial relative to expected earnings.

13. The Social Security Administration's Office of Inspector General matches "wanted persons files provided by the participating law enforcement agency against SSA's computer files of individuals receiving Title XVI payments, Title II benefits and/or serving as representative payees" to ensure that benefits are stopped in such cases (see ssa.gov:80/oig/investigations/fugitivefelon/fugitivefelon.htm). Although none of our interviewees told us that the issuance of a warrant for their arrest had triggered the cessation of their benefits, at the time of the interviews, we were unaware that this was possible and did not ask directly about it. However, defense attorneys with whom we spoke reported that they were aware of this occurring with some regularity.

Finally, legal debt has a variety of adverse and destabilizing consequences for those who possess it, including the threat of arrest and incarceration.

Part II. The Argument for Abolition

In what follows, we argue that the disadvantages of the widespread and discretionary imposition of substantial and supplementary financial penalties outweigh any benefits associated with this practice. Our analysis pertains only to the imposition of fees and fines in the contemporary United States and does not extend to European-style imposition of day fines. Indeed, we agree that the structured use of graduated day fines as an alternative to incarceration offers many advantages (see Bureau of Justice Assistance, 1996; Hillsman and Greene, 1992; Tonry and Lynch, 1996; Tonry, 1998). Our critique focuses instead on the discretionary imposition of fees and fines without regard for defendants' ability to pay and as a supplement to other criminal penalties.

Our argument is based on three broad considerations. First, this set of practices lacks a convincing penological rationale and impedes reintegration. Second, it violates standards of justice and fairness in myriad ways. Finally, dependence on this revenue stream to subsidize the cost of fundamental government operations may not represent a net financial gain for the state and, more importantly, creates undesirable conflicts of interest for judges and other criminal justice actors. We begin with the first of these points.

The Absence of a Penological Rationale

In our view, no convincing penological rationale exists for the discretionary imposition of non-income-based and supplementary monetary sanctions. At least in theory, penal policies are aimed at incapacitation, rehabilitation, deterrence, and retribution (Wilson, 1994). We have little reason to believe that monetary sanctions accomplish any of these goals.

By definition, monetary sanctions do not prevent crime by incapacitating offenders. Theoretically, monetary sanctions might be rehabilitative if their repeal was offered as a reward for participation in rehabilitative programs or prosocial outcomes. Yet erasure of legal debt generally is not offered as a reward for good behavior. Nor do we have reason to believe that monetary sanctions provide an effective deterrent. For a penalty to deter wrongdoing effectively, its consequences must be known to potential offenders as they contemplate their options; swiftness and certainty are key (Robinson and Darley, 2004). But the assessment of monetary sanctions is characterized by neither swiftness nor certainty. As previously noted, tremendous variation occurs in the imposition of LFOs across cases and counties.). In Washington State, nonlegal factors explain much of this variation (Harris et al., 2010). The discretionary, varied, and arguably arbitrary assessment of LFOs as a supplement to confinement means that the imposition and magnitude of monetary sanctions is neither swift nor certain and, therefore, is unlikely to have a deterrent effect.

Finally, we are not persuaded that financial penalties even enhance the retributive qualities of criminal punishment in the United States. The imposition of legal debt, as a

supplement to confinement and other criminal penalties, is severe. At first glance, this might imply that monetary sanctions help to achieve retribution. Yet the idea of proportionality is central to retribution; in its absence, punishment approaches vengeance (Posner, 1980; von Hirsch, 1976). Because monetary penalties in the United States are supplements to penalties that already are comparatively severe, directly and adversely impact the partners as well as children of the criminally convicted (points we illustrate shortly), and typically remain in effect long after all other elements of criminal sentences are completed, the imposition of substantial and supplementary monetary penalties is disproportionate to the offense and, hence, approaches vengeance rather than retribution.

It is thus difficult to proffer a convincing penological rationale for the discretionary assessment of substantial and supplementary fees and fines. Moreover, the available evidence suggests that legal debt has counterproductive effects and impedes reintegration. In particular, our research indicates that legal debt has many adverse and destabilizing consequences for those who possess it and, therefore, limits ex-offenders' already constrained capacity to "reenter" society (see also Bannon et al., 2010; McLean and Thompson, 2007). As noted, we found that legal debt made it more difficult for our respondents to support their families, secure housing, obtain credit, pay for professional licenses, and enroll in higher education. Many also were unable or unwilling to make regular payments toward their legal debt and, hence, had warrants issued for their arrest; some were incarcerated as a result of their nonpayment. As we will discuss subsequently, this occurs with some regularity in jurisdictions across the country. Reduced income, unstable housing, constrained employment prospects, arrest, and short-term jail stays often result from legal debt and are important barriers to reintegration (McLean and Thompson, 2007).

In short, the imposition of nongraduated financial obligations that carry particularly onerous consequences lacks a sound penological rationale and exacerbates the many challenges associated with reintegration.[14] Subsequently, we will contend that the imposition and collection of monetary sanctions also violates important norms regarding justice and fairness.

Concerns about Justice and Fairness

Penal Severity. The widespread but discretionary imposition of substantial, supplementary, and nongraduated monetary penalties in the United States raises several concerns regarding fairness and justice. The first relates to the intensity of criminal punishment.

14. Many consequences that flow from legal debt—including lost income, enhanced housing instability, ongoing entanglement with criminal justice institutions, and additional barriers to legal employment—are predictors of recidivism (Chiricos, Barrick, Bales, and Bontrager., 2007; Council of State Governments, 2005; New York State Bar Association, 2006; Urban Institute, 2006). Thus, although the hypothesis that legal debt is criminogenic, to our knowledge, has not been tested directly, the available evidence indicates that the imposition and collection of LFOs contributes to the creation of circumstances that are known to increase recidivism.

In the United States, monetary sanctions supplement criminal penalties that already are harsh by comparative standards. The most obvious indicator of U.S. sentencing severity is its retention of the death penalty (Garland, 2010). The imposition of life without the possibility of parole sentences by U.S. judges also differentiates the United States from many industrialized countries (Appleton and Grøver, 2007). More generally, drug, property, and violent offenders in the United States are more likely to be incarcerated than their European counterparts and, when are, generally receive longer confinement sentences (Tonry and Frase, 2001; Whitman, 2003). The imposition of comparatively lengthy confinement sentences on persons convicted of nonviolent drug offenses in the United States is particularly striking. Ironically, our study of Washington State court data indicates that drug offenders receive significantly greater fees and fines than violent or other nondrug offenders (Harris et al., 2011). Supplementing already severe confinement sentences with significant financial penalties renders U.S. penalties unduly harsh, especially for nonviolent drug offenders.

Class Bias. The imposition of monetary sanctions absent consideration of defendants' income is inherently class biased, as these sanctions pose a disproportionate challenge to, and burden on, the poor. Indeed, recognition of the class-biased nature of nongraduated financial penalties is a primary rationale for the use of day fines in many countries (Hillsman and Greene, 1992). As noted, European day fines are intended to have the same impact on defendants with differing incomes. To accomplish this, fines are scaled to offenders' daily earnings. By definition, monetary sanctions that are not adjusted by income have a disproportionate impact on the poor.

Moreover, in the United States, monetary sanctions limit poor people's capacity to regain their civil rights. In many states, felons cannot restore their civil rights until their LFOs are paid in their entirety (Manza and Uggen, 2006). Indeed, this is the case in 6 of the 15 largest U.S. states recently surveyed (Bannon et al., 2010). This issue was recently litigated in Washington State, where the American Civil Liberties Union challenged a law that barred people with felony convictions and outstanding LFOs from obtaining their civil rights, including the vote. In *Madison v. Washington* (2006), the Washington State Supreme Court ruled that the plaintiffs had not established class bias because no evidence that poor defendants were assessed greater sanctions than nonpoor defendants was provided.[15] In our view, this ruling is predicated on an overly narrow definition of discrimination—one that limits it to purposeful and conscious actions intended to discriminate—and excludes practices that have foreseeable discriminatory effects.[16] In doing so, this ruling

15. In 2009, the Washington State Legislature approved HB 1517, which grants the "provisional" right to vote to persons who have met all other conditions of their felony sentence except full payment of their LFOs. However, this vote can be revoked by the sentencing court if it finds the person missed three or more monthly payments in a 12-month period.

16. For a discussion of this general issue, see Murakawa and Beckett (2010).

ignores the substantive issue at hand, namely, the disproportionate impact of nongraduated monetary sanctions on the poor. The imposition of nongraduated monetary sanctions, and the requirement that all legal debts be paid before defendants' civil rights can be restored, disproportionately impacts the poor. They are, therefore, inherently class-biased practices.

Discretion and Disparities. The fact that judges possess significant discretion in determining whether to impose many fees and fines also raises concerns about justice and fairness. This discretion means that nonlegal differences might influence sentencing outcomes. Indeed, our analysis of such outcomes in Washington State indicates that many extralegal factors significantly impact the imposition of monetary sanctions. For example, the ethnicity of the sanctioned, the type of offense of which they are convicted, and the demographic context in which they are sentenced all influence the allocation of monetary penalties. We also found that the assessment of LFOs varies by jurisdiction. That is, even among cases involving identical charges and defendants with similar offense histories, significant county-level variation persists in the assessment of fees and fines (Beckett et al., 2008; Harris et al., 2011). In short, because assessment of these sanctions is highly discretionary, it is especially vulnerable to ethnic and other disparities; the evidence from Washington State shows that extralegal factors play a significant role in the imposition of monetary sanctions.

Ironically, statutory authorization of many of these discretionary sanctions coincided with efforts to minimize racial and other disparities in confinement sentence outcomes. For example, state legislatures in Washington, Minnesota, Pennsylvania, and Oregon authorized new and largely discretionary monetary sanctions even as they as moved to structure judicial decision making regarding confinement sentencing.[17] Although the enactment of sentencing guidelines did reduce the impact of nonlegal variables on confinement sentencing outcomes (Moore and Miethe, 1986; Nagel and Schulhofer, 1992),[18] defendants' race and ethnicity as well as other extralegal factors sometimes influence confinement sentencing outcomes even where guidelines have been adopted (Albonetti, 1997; Bontrager, Bales, and Chiricos, 2005; Engen, Gainey, Crutchfield, and Weis, 2003; Johnson, 2005, 2006; Kramer and Steffensmeier, 1993; Steffensmeier and Demuth, 2000; Spohn and Holleran, 2000; Ulmer and Kramer, 1996). For example, judges are more likely to depart from sentencing guidelines in an upward direction when the defendant is African American or Latino (and when s/he opted for a trial); judges also are less likely to select the lower incarceration length identified in the guidelines when the defendant is Black or Latino (Engen and Gainey, 2000; Engen et al., 2003; Johnson, 2005; Johnson, Ulmer, and Kramer, 2008; Steffensmeier and Demuth, 2001).

17. See Guideline Sentence Recommendations: Economic Sanctions. Act 2007–37 [SB 116, PN1323], 204 Pennsylvania Code chapter 303, section 14 (2008); Minimum Fines for All Criminal Offenders, Laws of Minnesota Ch 601.101 (2004).

18. For negative findings, see Koons-Witt (2002).

In short, sentencing guidelines reduced but did not eliminate, racial and ethnic disparities in confinement sentencing outcomes. This suggests that the adoption of sentencing guidelines also might reduce but would not eliminate, racial, ethnic, and other disparities in the imposition of monetary sanctions. In some cases, such disparities might be justified as an undesirable but inevitable consequence of a valid and necessary penal practice. However, given all the other problems associated with the nongraduated use of monetary sanctions as a supplement to comparatively severe confinement sentences, it is difficult to make the case that their use is, in fact, a valid and necessary penal practice.

Impact on Families. As noted, our research suggests that the imposition of monetary sanctions typically creates long-term legal debt, which often has adverse consequences for those who possess it. The point we wish to emphasize here is that these effects are not limited to the criminally convicted. In Washington State, for example, county clerks are authorized to garnish up to 25% of the earnings of the debtor *or his/her spouse* and to seize jointly held bank assets, home equity, and tax refunds (Beckett et al., 2008; see also Lawrence-Turner, 2009). Thus, it seems that spouses pay financially for the misdeeds of others not only through the lost income, travel costs, and phone bills associated with confinement (see Braman, 2002; Comfort, 2007), but also through the collection of monetary sanctions from family income. Moreover, in our interviews, respondents regularly told us that they had to choose between financially supporting their children and making payments toward their legal debt. Although some of these accounts might be self-serving, it is true that by reducing household income, legal debt affects family members, including children. Uggen, Manza, and Thompson (2006: 283) estimated that 16 million felons were living in the United States as of 2004. Most felons are parents.[19] The imposition of LFOs on millions of poor parents thus reduces the resources potentially available to millions of poor children long after their parent has completed her or his confinement sentence.

The Incarceration of Debtors. The arrest and confinement of nonpaying legal debtors also raise important concerns about justice and fairness. "Debtor's prisons" now are typically perceived as barbaric and uncivilized responses to poverty. Nonetheless, the incarceration of debtors continues to occur with some regularity. Roughly one fourth of those we interviewed for our Washington State study reported that an arrest warrant had been issued as a result of their failure to pay; most of these people reported that they were subsequently incarcerated for nonpayment (Harris et al., 2010). This finding does not seem to reflect the particularities of the counties or state from which we drew our respondents. For example, approximately 15% of those serving time in a Washington State county from which our interview respondents were *not* drawn are behind bars as a result of their failure to make regular payments toward their legal debt (Lawrence-Turner, 2009). Similarly, in Rhode

19. Roughly 70% of male state prison inmates aged 33–40 years are fathers (Western, 2006: 137); approximately the same proportion of female prisoners are mothers of young children (Greenfield and Snell, 1999).

Island, "incarcerations [sic] for court debt currently comprise 17 percent of all pre-trial commitments in the state" (Rhode Island Family Life Center, 2007: 16). And two recently released reports indicate that legal debtors are regularly incarcerated in states across the country (American Civil Liberties Union, 2010; Bannon et al., 2010; see also Kelleher, 2010; *New York Times*, 2009; Schwartz, 2009).

In some cases, incarceration is triggered by the issuance of bench warrants. Nonpayment of legal debt also seems to account for a nontrivial portion of probation and parole violations nationally. In 1991, 12% of the probation violations among probationers sent to state prison for technical violations involved failure to pay monetary sanctions (Cohen, 1995: 3; see also McLean and Thompson, 2007). In 1995, 34.1% of adult felony probationers had a disciplinary hearing as a result of failure to pay; 29.1% of all disciplinary hearings resulted in incarceration (Bonczar, 1997: Tables 12 and 13). It thus seems that nonpayment of monetary sanctions leads to a significant number of warrants, arrests, probation revocations, jail stays, and prison admissions in locales across the country.

That debtors are incarcerated with some regularity in the United States is surprising given case law on the subject. In recent decades, the U.S. Supreme Court issued a series of rulings that banned or restricted the imprisonment of legal debtors. In 1970, the court ruled in *Williams v. Illinois* that the extension of an incarceration sentence as a result of a defendant's failure to pay court costs violates equal protection under the 14th Amendment. In *Tate v. Short* (1971), the court similarly ruled that indigent defendants could not be incarcerated solely for their inability to pay their legal debt. In *Bearden v. Georgia* (1983), the court modified this stance somewhat, ruling that criminal courts must determine whether defendants made a bona fide effort to pay their legal debts; only if the defendant "willfully" refused to pay could she or he be incarcerated. Thus, in theory, indigent people cannot be incarcerated for not making payments toward their legal debt, and courts must investigate the extent to which individuals have the ability to make payments.[20] Several states also have statutes that forbid the incarceration of poor people who cannot pay their legal debt (for a discussion of these laws, see American Civil Liberties Union, 2010).

Yet legal debtors continue to be arrested and incarcerated as a result of nonpayment with some regularity. Authorities have circumvented the constraint proffered in *Bearden v Georgia* (1983) in several ways. First, debtors might spend time in jail pending an "ability to pay" or violation hearing (Bannon et al., 2010). In addition, debtors are frequently arrested and incarcerated not for nonpayment, but rather for (civil) contempt of court stemming from failure to comply with a court order to pay (American Civil Liberties Union, 2010; Bannon et al., 2010). By construing nonpayment as contempt of court, some judges have circumvented the obligation to assess whether a defendants' nonpayment is

20. The Washington State Supreme Court recently reiterated the obligation of courts to assess defendants' ability to pay prior to incarceration (see State of Washington v. Nason, 2010).

"willful." Similarly, failure to respond to a summons issued in response to nonpayment is a violation of a court order (failure to appear) that might trigger incarceration.

Finally, in some cases, a correctional officer or judge does consider evidence regarding whether a debtors' nonpayment is "willful." Yet it seems that "willful" is a highly elastic concept, one that fails to create a meaningful barrier to the incarceration of indigent debtors. For example, one community corrections officer told us that in his view, "all nonpayment is willful" because felons "can always go out and get a day job." Judges sometimes accept this reasoning. During a recently observed violation hearing, for example, a judge asked an unemployed man (who we call Bob) with a severe back injury why he had not been making his court-mandated $60 monthly payments. According to Bob's public defender, Bob's only source of income was his state-funded General Assistance Unemployable check. People receiving this monthly payment of approximately $370 are deemed unemployable by the State of Washington. At the time of this hearing, Bob was living in a halfway house that charged 75% of his income for rent, leaving him approximately $90 a month for all other living expenses. Nonetheless, the judge only reduced his monthly payments from $60 to $50, and informed Bob that if he did not make these payments regularly he would be incarcerated.

The ruling in Bob's case does not seem to be extraordinary; our observations and interviews indicate that many debtors are required to make LFO payments from their government assistance checks. In other states as well, nonpayment by indigent, disabled, and homeless individuals has been deemed "willful" by the courts (American Civil Liberties Union, 2010; Bannon et al., 2010). Indeed, in some cases, homeless parents have been incarcerated for nonpayment of their children's legal fees (American Civil Liberties Union, 2010). Where courts are authorized to reduce or eliminate debt postsentencing, the available evidence suggests that this reduction rarely occurs (Bannon et al., 2010). Moreover, in some locales, debtors do not have access to legal representation in these "ability to pay" proceedings (Bannon et al., 2010). In short, courts have determined that nonpayment by indigent and unemployable defendants can be construed as "willful," a determination that renders the incarceration of said debtors legal. In this manner, some courts have circumnavigated the constraint on the incarceration of debtors that *Bearden v. Georgia* (1983) ostensibly provides.

In some jurisdictions, debtors are presented with the "option" of paying off their debt by going to jail. In Washington State, this is called the "pay or stay" option and is authorized by state statute.[21] In some cases, debtors who choose this "option" are subsequently assessed fees for the days they spent in jail to reduce their legal debt (American Civil Liberties Union, 2010; Beckett et al., 2008).[22]

21. Offenders Responsibility for Legal Financial Obligations, Revised Code of Washington 9.94A.760 (1989); see also American Civil Liberties Union, 2010.

22. This practice is permitted under Washington State law. RCW 10.82.030 (Commitment for failure to pay fine and costs, 2010) specifies that, if a person is solely incarcerated for nonpayment, then a financial

In short, it is commonly believed that indigent debtors are no longer incarcerated in the United States. This is not the case. Legal debt created by monetary sanctions cannot be eradicated through bankruptcy proceedings. And although Supreme Court rulings offer, in theory, some protection against the incarceration of debtors who fail to pay legal debt because they are indigent, an apparently increasing number of courts and correctional agencies are circumnavigating this constraint, either by treating failure to pay as contempt of court or by invoking an extremely inclusive definition of "willful" nonpayment. Indeed, the definition of "willful" nonpayment that is emerging in case law is as broad as the legal definition of discrimination is narrow. Although today's debtors are not confined in separate "debtor's prisons," they are nonetheless incarcerated because they are too poor to pay their LFOs.

Legal Representation. Finally, the assessment of fees for the cost of public defense counsel raises important concerns about fairness and justice. As noted, defendants do not always have legal representation in ability-to-pay proceedings. Similarly, some lack legal representation when payment plans are negotiated even under highly questionable circumstances.[23] More generally, the Supreme Court has determined that defendants across the country can be assessed a fee for the cost of the legal representation that is provided for them by the state after a showing of indigence (Anderson, 2009).[24] This assessment occurs at the time their legal counsel is provided and thus does not result from a change in defendants' financial circumstances. In some Washington State counties, some defendants are assessed this fee twice—once by the courts and once again by the Office of Assigned Counsel/Public Defense (Beckett et al., 2008). Moreover, evidence suggests that the assessment of fees for legal representation leads many indigent defendants to forego legal representation.[25] Charging poor defendants—once or twice—for the cost of the legal representation provided to them as a result of their indigence absent evidence that their financial circumstances changed

credit is applied toward one's LFO. However, some jails assess their own fees to cover the costs of booking, confinement, and services. Thus, a person might reduce court or DOC debt by serving time in jail but increase his or her financial obligation to the jail at the same time.

23. In some Washington State counties, for example, people who are booked for nonpayment have been visited in jail by county clerks, who requested that defendants sign payment plans. According to our interviewees, defendants were told that, if they did not sign the form, they would serve up to 120 days in jail and that, if they violated the payment plan at any time, they would serve time in jail automatically under the counties' "autojail" program. According to our interviewees, these signature requests were made in the absence of legal representation. In subsequent interviews, respondents indicate that the "autojail" policy has not been practiced since the Washington State Supreme Court issued its 2010 ruling in *State of Washington v. Nason* (2010).

24. See *Fuller v. State of Oregon* (1974).

25. According to a recent report by the Brennan Center, "defender fees often discourage individuals from exercising their constitutional right to an attorney—leading to wrongful convictions, over-incarceration, and significant burdens on the operation of courts. In Michigan, for example, the National Legal Aid and Defender Association found that the threat of paying the full cost of assigned counsel resulted in misdemeanor defendants systematically waiving their right to counsel—at a rate of 95 percent in one county, according to a judge's estimate" (Bannon et al., 2010: 12).

strikes us as a significant perversion of the logic underlying *Gideon v. Wainwright* (1963) and undermines, in practice, the right of indigent defendants to enjoy legal representation in criminal matters.

Summary. The widespread imposition and collection of substantial and supplementary monetary sanctions in the United States raises several important concerns about fairness and justice. In particular, nongraduated monetary penalties supplement already severe confinement sentences, present a disproportionate burden on the poor, and are, at least in Washington State, influenced by various extralegal factors, including ethnicity. They also directly and adversely affect family members, lead with some frequency to the arrest and incarceration of debtors, and raise important questions about the meaning and legacy of *Gideon v. Wainwright* (1963). These problems are compounded by the absence of a clear penological rationale for the assessment of nongraduated, supplementary monetary sanctions, as well as by evidence that legal debt impedes reintegration. In the next section, we suggest that generating revenues for government operations in this manner also is inefficient and creates undesirable conflicts of interest for judges and other court actors.

Private Funding for Public Justice Systems: Problems and Unresolved Questions

Fiscal Concerns. The operation of the criminal justice system is, of course, enormously expensive—increasingly so. These fiscal pressures undoubtedly explain why many governments are authorizing the imposition of additional fees and fines. Some states and localities do collect substantial revenues from the criminally convicted. In Washington State, for example, county governments collected $30.4 million in fee, fine, and restitution payments in 2009 (Washington Association of County Officials, 2009: Figure 1). Thus, at first glance, it seems that significant funds are being recouped to offset the fiscal costs associated with crime and the operation of the criminal justice system.

However, tremendous variation persists in the fiscal fruitfulness of this practice; in many cases, total LFO collections contribute modestly to criminal justice budgets (Beckett et al., 2008; Parent, 1990). Moreover, a comprehensive assessment of the fiscal benefit to the state of imposing fees and fines must consider both the direct and indirect costs associated with the collection of LFOs. We are unaware of any such assessment, and it is unclear that the results of this mathematical exercise would, if the necessary data were available, show that the imposition and collection of LFOs is a net financial gain (Bannon et al., 2010).

We use data from Washington State to illustrate the problem. In 2003–2004, Washington State spent $3 million on direct LFO collection costs, such as the cost of mailing monthly LFO statements and the employment of additional county clerks who work solely or primarily on LFO collection. Counties spent another $12.8 million to support collection efforts.[26] Direct state and county expenditures for revenue collection

26. For example, King County has seven full-time employees who work specifically on the collection of LFOs. Some counties also have specific LFO dockets for the management of LFO nonpayment.

totaled $16 million; these efforts generated $21.6 million in public revenues (Washington Association of County Officials, 2006) for a net gain to the state of less than $6 million. Yet this calculation does not include the myriad indirect costs that also should be included in a comprehensive assessment of the LFO enterprise. These indirect costs include the court and law enforcement expenses associated with identifying and processing individuals for nonpayment, the cost of jailing those who fail to make regular payments, and so forth. Although these indirect costs are difficult to quantify, they are nonetheless significant (see also Bannon et al., 2010). In short, claims about the fiscal benefits of monetary sanctions must be treated as aspirational rather than as empirical, and should be weighed against the practical and policy considerations previously described.

Court Conflicts. Even if revenues from fees and fines are greater than the expenditures devoted to their collection, dependence on this private funding source for criminal justice operations compromises the integrity of courts and creates conflicts of interest for judges and others. As the authors of the aforementioned Brennan Center report explained:

> *[W]hen courts are over-dependent on fees, such reliance can interfere with the judiciary's independent constitutional role, divert courts' attention away from their essential functions, and, in its most extreme form, threaten the impartiality of judges and other court personnel with institutional, pecuniary incentives.* (Bannon et al., 2010: 30)

Indeed, the idea that judges are responsible for sentencing and for the assessment of fees and fines that subsidize court operations is a significant conflict of interest. For these reasons, the National Center for State Courts concluded that the concept of self-supporting courts "is not consistent with judicial ethics or the demands of due process" (Tobin, 1996: 50). The American Bar Association also recommends that courts have "a predictable general funding stream that is not tied to fee generation" (American Bar Foundation, Commission on State Court Funding, 2004). We concur.

Conclusion

The use of financial penalties in the United States bears virtually no resemblance to the use of day fines in Europe and elsewhere. In the United States, the imposition of fees and fines is highly discretionary, yet untethered to defendants' income or employment status. Moreover, in the United States, monetary penalties are substantial and consequential supplements to other, comparatively severe criminal penalties. We have argued that the imposition of discretionary and nongraduated monetary sanctions should be abolished, for several reasons. First, no convincing penological rationale exists for this practice, and it conflicts with another increasingly important policy objective—reintegration. Indeed, the available evidence indicates that the widespread imposition of a particularly injurious form of debt on millions of poor people already burdened with a criminal conviction

impedes their efforts to stabilize their lives and rejoin society. In addition, the processes by which these sanctions are imposed raise numerous concerns about fairness and justice. Among these is the disturbing fact that, *Bearden vs. Georgia* (1983) notwithstanding, the incarceration of debtors without consideration of their ability to pay continues to occur with some regularity in states and localities across the country. Finally, dependence on this revenue source for the operation of criminal justice agencies is of uncertain fiscal benefit to the state and creates undesirable conflicts of interest for criminal justice actors, particularly judges.

More broadly, we note a significant disconnect between criminological understandings of the lives and prospects of people with criminal histories and the expectation that defendants will make substantial and regular monthly payments toward their legal debt. People with criminal histories suffer not only from extreme poverty but often also from mental illness, drug and alcohol addiction, and disability (Anderson and Bondi, 1998; Denzin, 1987; Giordano, Cernkovich, and Rudolph, 2002; Giordano, Schroeder, and Cernkovich, 2007; Laub and Sampson, 2003; Maruna, 2001; Maruna and Immarigeon, 2004; McCorkel, 1998; Paik, 2006; Petersilia, 2003). Many also experience structural constraints such as being undereducated, unemployed, and under- or nonbanked (Anderson and Bondi, 1998; Denzin, 1987; Giordano, Cernkovich, and Rudolph, 2002; Giordano, Schroeder, and Cernkovich, 2007; Laub and Sampson, 2003; Maruna, 2001; Maruna and Immarigeon, 2004; McCorkel, 1998; Paik, 2006; Petersilia, 2003). Many lack stable housing. Many come from, and return to, communities characterized by high levels of crime and instability (Clear, 2007; Fagan, West, and Holland, 2003). Many experience significant mental and physical health challenges (Massoglia, 2008; Massoglia and Schnittker, 2009). And all felons suffer the debilitating consequences that flow from felony conviction (Pager, 2005, 2007; Western, 2006).

In short, the criminological literature strongly suggests that the criminally convicted face multiple obstacles, including extreme poverty, to establishing stable and productive lives. The construction of a policy and funding system based on the expectation that these same individuals will earn a steady and reasonable income, secure stable housing, open and maintain checking accounts, financially support their children, keep track of often unclear and inconsistent communication about their legal debt, and make regular monthly payments toward it strikes us as highly dubious. Although criminal wrongdoers should pay their debt to society, they should not be asked to pay again and again, or in a way that dooms them to a perpetual state of poverty and instability.

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MONETARY SANCTIONS AS MISGUIDED POLICY

Fixing the Broken System of Financial Sanctions

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The article by Beckett and Harris (2011, this issue), "On cash and conviction: Money sanctions as misguided policy," highlights the myriad issues associated with the practice of states' and localities' assessment of fines and fees on criminal offenders for court and punishment costs. Beckett and Harris identify the following main concerns with the current system of assessing fines and fees to offenders through court and corrections systems: the arbitrary nature in which the fines and fees are assessed and the tremendous burden such financial obligations place on convicted offenders and their families. These authors conclude that the imposition of these monetary sanctions should be abolished because they are implemented unfairly, serve no penological purpose, and interfere with the process of offender rehabilitation and reintegration.

Based on the evidence presented in Beckett and Harris (2011), no doubt exists that the fines and fees associated with criminal conviction and punishment significantly and arbitrarily burden current and former offenders. However, it seems unlikely that this practice will be abolished entirely as Beckett and Harris propose. At least two factors ensure that states and localities will continue to impose financial obligations on people convicted of crimes, at least in the near future. First, although little public opinion exists on this issue, the few studies that are available suggest that the public overwhelmingly supports the notion that offenders, particularly prisoners, should help pay for the cost of their punishment. For instance, the "Crime in America" survey, conducted in 1995, found that 80% of those surveyed thought that it was a "good idea" to "pay prisoners for their work, but require them to return two-thirds of this amount to their victims or to the state for the cost of maintaining the prison" (Roper Center for Public Opinion Research, 1995). This figure

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is virtually unchanged from 1982 when Gallup found that 81% respondents thought this policy was a "good idea" (Roper Center for Public Opinion Research, 1982). Similarly, 94% of respondents to the National Victims Week Study in 1991 favored "requiring convicted criminals to pay a substantial share of the cost of their imprisonment" (Roper Center for Public Opinion Research, 1991) Thus, abolishing this practice might stir up public disapproval, despite Beckett and Harris' (2011) claim that such policies increase recidivism and discourage labor market participation among ex-offenders.

Second, the long and deepening state fiscal crisis encourages states to pursue revenue from all available sources, including current and former offenders. States collect room and board, probation and parole fees, as well as court fees from people while they are under supervision; these obligations might persist after the jail, prison, probation, or parole sentence ends. For instance, states often partner with private companies to provide jobs for inmates and then deduct fees for victims programs, room and board, and child support from their wages through the Prison Industry Enhancement Certification Program, or PIECP (Bureau of Justice Assistance, 2004). Since the program's inception, participating jurisdictions have deducted $70.6 million from inmate wages for room and board, $35.6 million for taxes, and $24.5 million for victims programs (Bureau of Justice Assistance, 2004). Fines and fees from this and other programs represent a substantial portion of local and state court and corrections revenues—money that states cannot replace under such severe fiscal constraints. According to Dale Parent (1990: 5), correctional fee revenue provided more than 50% of the total operating budget of Texas probation agencies, 34% of the total operating budget of Florida probation and parole agencies, and approximately 30% of the total operating budgets of Arkansas and North Carolina probation and parole agencies. The evidence suggests that fines and fees paid by offenders continue to provide a significant revenue stream for courts and corrections. For example, in 2006, probation fees made up 46% of the Travis County, Texas, community supervision and corrections department's $18.3 million budget (Reynolds, Cowherd, Barbee, Fabelo, Wood, and Yoon, 2009). An American Civil Liberties Union (ACLU) report chronicles the reliance of the Orleans Parish, Louisiana, court on defendant fees and fines, noting that "[f]or fiscal year 2009, the Orleans Parish Criminal District Court projected just over $4 million in revenues for the court's general fund—and collected $1,470,191 from defendants over the course of the year" (25). Georgia charges halfway-house residents for 17.5% of the cost of their room and board and probationers for 15% of the cost of their supervision (Georgia Department of Corrections, 2010).

Public support of offender fines and fees, coupled with fiscal demands, means that state agencies will continue to impose these obligations. In fact, many new obligations have been proposed as a way to close state budget deficits. According to the National Council of State Legislatures, several states enacted new fees on offenders to help fill 2010 budget shortfalls. Arizona doubled probation surcharge fees and increased intensive supervision fees; Louisiana enacted a $65 probation and parole processing fee; Ohio changed court

costs related to felony, misdemeanor, and nonmoving traffic violations; and Texas created "a $34 court cost for those placed on community supervision and a $50 disposition fee for certain felony adjudications by juveniles committed to the Youth Commission (or a $34 fee if the child is not committed to the Youth Commission)" (National Council of State Legislatures, 2011). More visible, but less effective proposals include efforts to charge wealthy inmates for the cost of their prison stays. An example of this practice can be found in New York State, where Republican State Legislator James Tedisco introduced the "Madoff Bill," which would charge wealthy criminals $90 per day for room and board at state prisons to "help the beleaguered taxpayers who play by the rules" (MSNBC.com, 2009).

Given these events, dismantling the entire system of offender fees seems highly unlikely. However, short of abolishing all offender fines and fees, the prospect of reform seems much more economically and politically promising. Several nonprofit groups, state government agencies, and professional organizations are studying the current system of assessing fees and fines for criminal convictions and punishment as well as are recommending policy changes that would alleviate the issues raised by Beckett and Harris (2011). These reforms focus on standardizing the arbitrary nature of such fees and fines as well as reducing the overwhelming debt burden of current and former offenders.

Reducing Arbitrariness in Fines and Fees

A particularly troublesome problem Beckett and Harris (2011) identify with the current system of fines and fees is the arbitrary nature in which these fees are imposed. The problem seems to stem from the numerous mandatory and discretionary fees that judges and corrections agencies can levy on prisoners, probationers, and parolees. These fees often are confusing and frustrating for judges and court clerks as well as for defendants. As a result of administrative confusion and other factors, disparities in the imposition of these fines across judges, circuits, and jurisdictions means substantial inequality across offenders in the debt burden they face, even across those who commit the same crime. In Texas, for instance, all people convicted of felonies are assessed a mandatory $215 fee for state and county court costs; however, other costs such as jury fees, peace officer fees, restitution fees, and time payment fees mean that "the court costs a defendant must pay can vary for the exact same offense (Reynolds et al., 2009: 21). These fees might be assessed in addition to those supervision costs assessed by the department of corrections (Reynolds et al., 2009: 84). In Michigan, the ACLU notes that courts vary across the state according to their sensitivity to indigent defendants' ability to pay; as a result, some areas of the state are more lenient in assessing fees than others (American Civil Liberties Union, 2010: 37). Finally, in Washington State, Hispanic defendants and defendants convicted of drug offenses often received higher fines and fees than defendants convicted of other crimes (American Civil Liberties Union, 2010: 68). Olson and Ramker (2001) found similar biases in Illinois.

Several agencies have recommended policy changes that might help to reduce inequality and arbitrariness in the assessment of offender fines and fees. Standardizing fines and fees across offense class seems to be an important step to reduce inequality in the imposition of fees and to simplify the administration and collection of fees. The Texas Office of Court Administration recommends that Texas legislators "clarify and consolidate the sprawling variety of state and local fees and costs into a comprehensible package" by converting discretionary fees into mandatory fees, extending fees that apply to certain offenses to all offenses within a certain category, and combining separate statutes on criminal court costs into a single broad statute (Reynolds et al., 2009: 27). Another helpful measure would be to centralize the collection and enforcement of legal debts. Right now, the administrative responsibility for these debts is fragmented across many actors, including judges, county attorneys, court administrators, clerks, probation officers, and prisons, which means that fines and fees are levied and collected by different agencies without consultation (Turner and Greene, 1999). Also along these lines, a joint report by the Bureau of Justice Assistance and the Justice Center of the Council of State Governments recommends that agencies coordinate and integrate distinct policies, procedures, and information systems to consolidate the fines, fees, child support, and restitution owed by each individual (McLean and Thompson, 2007). Taking this step would allow states to calculate the sum of legal financial obligations owed across agencies by each offender and would allow for the prioritization of child support and restitution payments over other legal obligations such as room and board payments to prisons. Furthermore, consolidating the collection of legal debts into a single agency with dedicated staff and resources would allow for more efficient debt collection and communication with debtors.

Reducing the Debt Burden of Fines and Fees

The legal financial obligations imposed by courts and corrections systems heavily burden defendants and offenders. These obligations are particularly injurious given the fact that debtors often are indigent even before their convictions and are made more so by the stain of their new criminal records. In Washington State, as Beckett and Harris (2011) note, the median fee and fine assessment for a single felony conviction is $1,347; the highest was $11,960. The lifetime court debt alone accumulated by the defendants in their study, excluding that assessed by the department of corrections, was $11,471. Such high debts, coupled with poverty, often leads to an inability to pay. The demands of multiple agencies separately collecting debts through wage garnishment could mean that the lion's share of a debtor's income might be taken to pay legal debts, leaving little left over for other financial responsibilities. As McLean and Thomspon (2007: 22) noted, "such a situation could inadvertently encourage a person to return to the behavior and illegal activities that resulted in the person's incarceration in the first place." Consolidating the system of fines and fees as

recommended in the previous section could help alleviate the problem; however, even more needs to be done to reduce the overwhelming burden of these legal financial obligations.

The problem lies in that the severity of sanctions for nonpayment, as well as the expectations of timely payment, place unrealistic and unbearable burdens on current and former offenders. The most egregious sanction imposed for these legal financial obligations is imprisonment. In many states, failure to pay legal financial obligations violates the terms of probation and parole; as a result, offenders can be returned to prison or have their probation extended for failure to pay. To avoid this situation, the ACLU (2010: 11) recommends that "defendants should not be incarcerated for failing to pay fines, fees, and costs that they cannot afford, and must be afforded the same protections as civil judgment debtors." Furthermore, McLean and Thompson (2007: 35) recommend that states and localities come up with a range of new sanctions and incentives short of prison, such as increased supervision or mandatory service at a restitution center, to encourage payment. States should attempt to distinguish between inability to pay (e.g., because of unemployment) and willful noncompliance with court orders when imposing these sanctions (McLean and Thompson, 2007).

Several agencies and organizations suggest that fines should be levied based on defendants' or offenders' ability to pay. New York's "Madoff Bill" is an extreme example of charging fees based on the ability to pay. For the average offender, the European practice of day fines has been proposed as an alternative to the current U.S. system of legal financial obligations. Day fines are a structured system of fines based on offense severity and the net daily income of the offender, thus ensuring that the offender's assets and responsibilities are taken into account (Turner and Greene, 1999: 3). Other proposals designed to facilitate the consideration of the offender's financial situation include developing an "automated financial information form that follows people through the criminal justice system" and training judges to evaluate a defendant's ability to pay better, including exceptions for indigent defendants (Reynolds et al., 2009: 12). The ACLU (2010: 11) also recommends that courts stop imposing fees for court appointed attorneys; these fees put poor defendants at an unequal disadvantage.

Finally, debt collection policies should take into account the multiple financial obligations and limited means of defendants and offenders. The most important recommendation in this respect is the consolidation of all legal financial obligations into a single system, which allows for all debts to be paid on realistic payment schedules and installment plans that prioritize child support and other debts over court and corrections debts (Hillsman and Mahoney, 1988: 23; McLean and Thompson, 2007: 23). Furthermore, attempts to collect debts also should pay attention to the financial situation of the debtor and avoid less aggressive collection options such as harassment, imprisonment, or private collection agencies. The seizure of property such as tax refunds often is used to collect on child support and other obligations. Wage garnishment also might be used; however, McLean

and Thompson (2007: 22) recommend that garnishment for all legal debts be capped at no more than 20% of income.

Conclusion

Beckett and Harris (2011) identify an important problem in the U.S. legal and correctional system—the arbitrary and burdensome imposition of fines, fees, and other obligations on defendants and offenders. Beckett and Harris propose abolishing the entire system of legal financial obligations for criminal offenses because it engenders so many problems. However, this policy solution is untenable for political and economic reasons. Instead, a more successful path to reform might involve policy changes designed to reduce inequality and increase the likelihood that defendants and offenders could pay. The most important of these policy reforms is removing prison as a sanction for nonpayment of legal financial obligations. Second on the list is the standardization and consolidation of fees so that individuals owe similar obligations based on the severity of their offense and their ability to pay. A third related point is the consolidation of various statutory obligations, court fees, victim restitution orders, child support responsibilities, and corrections reimbursement fees into a single obligation administered by one agency that prioritizes debts and pursues collections according to debtors' ability to pay. These and other reforms such as establishing long-term repayment plans and capping wage garnishment should help rectify many of the problems with the system of legal financial obligations identified by Beckett and Harris.

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MONETARY SANCTIONS AS MISGUIDED POLICY

Politicizing the case for fines

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It would be almost inconceivable for any criminologist outside the United States to argue that monetary sanctions should be abolished in their own jurisdiction. But as Beckett and Harris (2011, this issue) make abundantly clear, with respect to fines and fees, the United States offers an almost unrecognizable terrain. As they argue repeatedly, the use of financial penalties in the United States "bears no resemblance to the use of day fines in Europe or elsewhere." However, right at the outset, it should be made clear that day fines are not universally used outside the United States; in fact, only a handful of countries use them, and some jurisdictions including the English, Dutch, French, and Australian have decided not to go down that path (O'Malley, 2009a: 53–55). They have been toyed with, never taken up, and abandoned for many reasons—including the fact that the same offense would attract a swinging fine for a moderately wealthy person but a piddling fine for a pauper, leading to problems with perceptions of proportionality. Another limitation is that they work accurately only where after-tax income is a matter of public record. Beckett and Harris tacitly assume that day fines are not an option in the United States. This assumption can be conceded, although trials have taken place (McDonald, 1995). On the one hand, most common-law countries and many in Europe use discretionary fines along the lines of those available in the United States, and although these have problems, as do all sanctions, they are almost everywhere the predominant sentencing option.[1] Fees, on the other hand, are

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1. See, for example, O'Malley (2009a). In Germany, Rusche and Kirchheimer (1939) indicated that fines accounted for between 50% and 70% of sentences as early as 1930, and across the board, this scenario is similar to the situation in Britain and Australia. With reference to serious offenses, the use of fines declined sharply in the 1990s as part of the so-called punitive turn, although it is observed that, even at this end of the scale, fines are extensively used. In England and Wales, during the 1990s, among the indictable offenses, the proportion of sentences that were fines dropped from 41% to 23% for theft and handling stolen goods and from 62% to 46% for drug offenses (Home Office, 2002: 98–99).

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much less prominent outside the United States, almost never being levied for imprisonment and only in recent years being levied in some jurisdictions for victim compensation and costs of fine enforcement.

Here, we run into a significant problem. Beckett and Harris (2011) discuss fines and fees as components of legal financial obligations (LFOs) and provide a convincing analysis of how these are used in the United States in counterproductive, oppressive, and discriminatory fashion. What Beckett and Harris do not clarify is that, for the most part, the conflation of fines and fees masks the fact that most LFOs must be fees, not fines. Almost all references, other than a few references to 19th-century fines in the South, are to "fines and fees." But in 2004, at the federal level, only 4% of U.S. offenders were ordered to pay fines, and this number fell to only 1% of those who were convicted of felonies (O'Malley, 2009a: 46). As these figures include corporate offenders, among which 18% were fined, for "ordinary offenders" the fine, especially as a stand-alone sanction for felonies, seems to be a less frequent beast than Beckett and Harris (2011) suggest.[2] If similar figures apply across various state jurisdictions, then an important distinction should be made: fees, not fines, are the primary villains of the piece. This finding seems politically and historically significant for at least the following reasons: Fees cannot substitute for imprisonment, but fines can; fees, unlike fines, are a comparatively recent invention; and one reason why so many Americans are imprisoned is because fines are used so infrequently. We need to investigate fines more closely, which requires a brief historical detour.

Fines were used rarely across Europe in the 19th century, something that the German scholars Rusche and Kirchheimer (1939) attributed to the poverty of the populace. However, they ignore the fact that, in previous centuries, fines had been commonplace (King, 1996; Sharpe, 1990).[3] In fact, the use of fines declined greatly after about 1780 with the increase of the correctional prison—the latter Foucault (1977) made much of without noting that it was fines rather than corporal punishment that primarily were displaced.[4] Apart from the doubtful possibility that real incomes were lower in 1850 than in 1750, the argument that it was the emergence of correctional ideologies that caused the decline of fines is supported by two other pieces of evidence. First, from the 1870s onward, across Europe and the United Kingdom, criminologists began to argue that short periods of imprisonment were counterproductive. Such sanctions were too brief to allow for correctional pressures

2. This compares with the fact that fines were the sentence for nearly 25% of all indictable offenses in England and Wales. Even with respect to misdemeanors where, federally, 29% of U.S. offenders are fined (and Beckett and Harris [2011] exclude misdemeanors from their analysis), the equivalent figure in England and Wales is nearly 70% (Home Office, 2002).

3. King (1996: 48–50), for example, recorded that, toward the end of the 18th century, for offenses such as common assault fines made up approximately 80% of sentences.

4. Thus, between 1760 and 1820, King (1996: 48–50) recorded that fines declined from 80% to only 26% of sentences for assault, whereas imprisonment rose from less than 4% to more than 50%. Seagle (1948) argued that it was "the acceptance of the penalty of imprisonment (that) first relegated the fine to a comparatively minor role as a punishment."

to work, and they exposed minor offenders to hardened criminals.[5] Fines and short-term imprisonment thus *both* seemed to be noncorrectional punishments, and fines were less disruptive and possibly less criminogenic. Given the expense of prison versus the cheapness of administering fines, governments across Europe were quickly attracted to this sanction, and by the 1930s, Rusche and Kirchheimer (1939) showed that fines had become the predominant sentence. Although they attributed this to increasing real incomes, a second piece of evidence against the relevance of 19th-century poverty comes to bear. When fines were reintroduced around the turn of the 20th century, it was quickly obvious that many still could not afford to pay them! A series of innovations appeared, including taking the means of offenders into account, payment by installment, and "time to pay," aimed at reducing the rate of imprisonment in default of payment. Thus, a system of fines emerged that is now the norm throughout the common law countries outside the United States, which used judicial discretion to mitigate fines and tailor them to offenders' means.[6] Of course, if the aim of the fine is to reduce the rate of imprisonment, then a motive exists to take such measures. If fines are merely additional to imprisonment, then this motive disappears. In this logic lies a reason why Beckett and Harris (2011) record that taking means of offenders into account is not common in the United States—since most of those fined are being imprisoned anyway. At the same time, this provides an argument in favor of promoting fines as a stand-alone punishment as it renders workable the use of fines in place of short-term imprisonment.

Here is the startling thing. Although, in Europe, this substitution of fines for at least some short terms of imprisonment appeared at the end of the 19th century, the same thing did not occur in the United States. Fines did not make a reappearance, even though it can be assumed that American penologists were aware of what was going on elsewhere in the English-speaking world.[7] In turn, this also raises the question of why not and scotches one of the common answers—namely that fines do not rehabilitate. This common objection to fines (also raised by Beckett and Harris) has been provided routinely whenever

5. See, for example, Garofalo (1968 [1885]: 226); Seagle, (1948: 250–252). Grebing (1982: 8–9) pointed out, that across Europe and Scandinavia:
[t]he common basis here, resulting from the intense national and international discussion that took place towards the end of the nineteenth century, was the widespread recognition of the harmfulness and futility of the almost universal practice of imposing short sentences of imprisonment. The short prison term was seen to have neither reformative nor deterrent effects; indeed it was criticized for having criminogenic effects, especially on first and occasional offenders. The abolition or, at the very least, the general restriction of short imprisonment was demanded. It was to be replaced by other types of sanction and, above all, by the fine and the conditional sentence.

6. It should be stressed that judges and magistrates nonetheless frequently ignore this requirement and that commissions often bring this matter to wider attention. Some common reasons for this are that the information is not available, that mandatory sentences prevent it, and that the defense does not bring the matter to the attention of the court (Spiers and Gilbert, 2011).

7. I use the term "reappearance" even though it is not clear that fines were widely used in the 19th century in the United States. Beckett and Harris (2011) record only fines' use in limited contexts in the South, although they imply a more general usage.

fines have been mooted in the United States (American Bar Association, 1971; Gillespie, 1981; Hillsman, 1990). But this objection conveniently ignores why fines made their reappearance—the recognized lack of correctional value of short periods of imprisonment. Another argument explaining the refusal of fines, that the 14th Amendment prevents the use of a penalty that is unequal in its effect, overlooks the fact that, in the United States, common law did not develop on this point until the 1970s, and in any case, as Beckett and Harris (2011) point out, it has been easily circumvented when convenient.

This is not the place to discuss the myriad hypotheses about why the United States has such a love affair with imprisonment (see, e.g., Wacquant's [2009] claim that it replaces welfare, Lacey's [2008] and Cavadino and Dignan's [2006] views on neoliberalism and punitiveness, and Whitman's [2003] argument that the United States seeks to hit everyone hard). Such accounts rarely consider the seemingly deliberate ignoring of the European and British use of discretionary fines. Such accounts could be taken to indicate how hopeless it is to argue for fines as a more widely used substitute for short-term imprisonment. Yet it seems to me that, although Beckett and Harris (2011) provide a superb tour de force, their argument is dangerous. If money sanctions are abandoned, then the abolition of fines as a part of this legislation would make a line of flight away from high rates of incarceration even more difficult. Fines as a stand-alone punishment offer exactly such a promise of reduced imprisonment just as they did across Europe and the rest of the common law world 100 years ago.

It seems critical to me that this space for a politics of fines is kept open. The use of fines in place of short terms of imprisonment is eminently defensible in penological terms on all manner of grounds. Although Beckett and Harris (2011) do not indicate the multiple advantages of fines, others certainly have done so, ranging from Jeremy Bentham (1962) to the neoliberal Gary Becker (1974). In his later years, Bentham was far more of an advocate for fines than even for the Panopticon (O'Malley, 2009b). "Pecuniary penalties," in which both fines and damages were included, were perceived to have only one deficiency—their lack of a "spectacle" of justice. On the positive side, however, they were cheap to administer, produced revenues, could be completely undone in the event of a wrongful conviction being established, could be graduated infinitely to match the magnitude of the wrong, could be matched to the means of the offender (Bentham foreshadowed the day fine), and could be used to provide victim compensation. Becker endorses all of these reasons. Historically, as suggested, not the least of the fine's politically persuasive attractions is the enormous cost savings to criminal justice systems, something that is now a potentially great attraction to American states that are progressively facing bankruptcy. Although it might be that the attempt to recover money sanctions is not likely to make states rich because of the recovery costs, the cost savings from not imprisoning millions of poor people are palpable nevertheless. And why should stand-alone fines not be an attractive sanction for other reasons in the early 21st century?

From within the neoliberal heartland, Gary Becker (1974) made a case for fines as the default sanction, in which imprisonment remained only for those unable or unwilling to pay. In addition to the arguments made by Bentham 200 years ago, Becker made a claim that those who had served prison terms remained anathema in the eyes of fellow citizens because—and only an economist could argue this—instead of paying their debt to society, they had incurred a greater debt through the costs of imprisonment. Although this reasoning is not the main driver of discrimination toward ex-prisoners, his point is symptomatic. The timing of the introduction of criminal justice fees, from the 1970s on, suggests that the neoliberal "user-pays" mentality has been at work. Becker's radical proposal for fines as the universal sanction has been ignored. Fees—not fines—have been developed and imposed in line with a neoliberal user-pays mentality, whereas prison has been retained as the principal sanction in line with neoconservatives' preferences; it is a historic compromise that makes it important to not pass over the difference between fines and fees.

Beckett and Harris (2011) rightly point out that such fees probably are at best fiscally neutral because of the costs of collection approach the revenue raised. When all of the social on-costs Beckett and Harris mention are added, fees likely turn out to be fiscally counterproductive. Here, a policy argument clearly opens up in which neoliberals can be contested in their home territory. Fees are economically irrational—politically, this matters—but the notion that fees are unjust and counterproductive to reform and reintegration as Becker (1974) showed is not necessarily a neoliberal concern.

But then what of fines? I think a point of alliance exists with neoliberals on a push for the use of fines in place of short periods of imprisonment. Certainly, the progressive bankruptcy of so many states in the United States might create a favorable environment for reform in the direction of using fines as a primary sanction. Now might be the best time to press *for* the use of fines as a stand-alone sanction rather than simply seeking to abolish money penalties holus bolus.

Although the policy arguments are readily expanded from the foregoing comments, and from Beckett and Harris' (2011) excellent material, several obvious objections to supporting fines need attention. Not least of these concerns is the question of whether, given the difficulties in collecting LFOs in general, fines would prove to be workable. The simplest answer is to point to the fact already noted that most countries outside the United States rely heavily on fines and have done so for many decades. Therefore, it can be assumed that these fines are assessed to function adequately and that they function to keep numerous minor offenders out of prison. Evidence is scant, but it seems that rates of fine collection are high, although, as expected among the poor and ethnic and racial minorities, acute problems can and do develop (Spiers and Gilbert, 2011).

Here, the specter of imprisonment in default appears. Historically, it has been the case that large proportions of those entering prison have been fine defaulters. Young (1989) showed this figure to have been as high as 40% for Britain in the 1980s. If it is considered that all defaulters likely would have been imprisoned in the absence of fines anyway, whereas

most of those fined avoided imprisonment, then this might not be too high a price to pay. However, a decreased willingness to accept this state of affairs has led to many jurisdictions legislating against imprisonment in default of fine payment. Across Australia, for example, most states now record single-digit numbers of incarcerations for fine default annually (Spiers and Gilbert, 2011). Of course, this means some of those unable to pay fines suffer the array of significant problems Beckett and Harris (2011) point to, including seizure of assets, liens on income, and potential loss of driver's licenses. This outcome bears especially hard on poor and indigenous people. Significantly, however, no interested body, not even those representing indigenous offenders, has suggested that prison is a better alternative. Rather, the general push is being directed toward alternative noncustodial sanctions such as voluntary, unpaid work in community and voluntary organizations, admission to drug and alcohol programs, and so on.

Despite the fact that a large volume of unpaid fines clearly exists and, thus, many offenders seem *de facto* to be going unpunished, evidently, criminal justice systems can live with this issue. In short, it is possible to have a criminal justice system based extensively on fines, to have a relatively small proportion of those default, and for this proportion to be "underenforced" without either public outcry or noticeable impact on law and order.

Of course, fines are punitive and not corrective. Beckett and Harris (2011) point this out clearly enough, but as noted previously, it would be entirely misleading to read this as a critique of fines being used to displace short terms of imprisonment. No doubt it is well worth rehearsing arguments concerning the merits and demerits of fines versus other sanctions. But no such public or serious criminological debate has taken place to date in the United States—and the handful of advocates of fines referred to by Beckett and Harris were all in academic journals, and none were more recent than approximately 20 years ago. I would suggest that the time is both opportune and overdue for American criminologists to take up an academic and public politics for the fine.

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MONETARY SANCTIONS AS MISGUIDED POLICY

A new punishment regime

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A great deal of evidence has come to light to suggest that the punishment pendulum is swinging. In the last 18 months, momentum has accelerated across the partisan divide of American politics rescinding some of the harsh sentencing policies that have caused the engorgement of American prisons.[1] Conservative support for policies that are "right on crime" and liberal support for reforms that are "smart on crime" are converging on penal approaches that at least could begin to temper the American appetite for incarceration (Right on Crime Principles, 2011; Simon, 2010; Smart on Crime Coalition, 2011). Although these developments might be viewed positively by advocates of prison downsizing, Katherine Beckett and Alexes Harris's article (2011, this issue) tells a cautionary countertale. Offstage, as they recount, a new punishment regime is becoming quietly embedded in the organizational structures and normative tenets of the American state. Fees and fines, conjoined with additional significant financial levies such as those that impose child support obligations on incarcerated fathers as well as victim restitution tolls, have fostered a new, heavily burdensome debt collection regime.

Our response to Beckett and Harris's (2011) article aims primarily to underscore the importance of their claims by drawing attention to the systemic, institutionalized character of the fees and fines regime that they describe. We begin by defining the meaning of institutionalization in the context of this new debt regime. We then delineate how fines

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1. The *2010 Fair Sentencing Act*, for instance, reduced the powder crack cocaine sentencing differential from 100 to 1 to 18 to 1, the reauthorization of the *Second Chance Act* has provided funds for reentry, and statutory reforms at the state level have begun to reverse the mid-1990s trend of trying juveniles in adult courts.

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and fees have become lodged within the organizational edifice and prevailing norms of the American state. Finally, we address Beckett and Harris' abolitionist policy prescription. Although we side with their boldly stated abolitionist position, we consider the puzzle of why they reached this policy determination in lieu of a more fiscally palatable approach that would retain the present extensive system of fines and fees while stipulating the incorporation of "ability-to-pay" provisions as a contingency. Finally, we suggest that moving toward abolition—toward the frontal deinstitutionalization of the present debt collection regime—will require a carefully crafted and parsimoniously framed argument intent on bridging the liberal–conservative divide. This development has allowed for the, albeit, nascent movement toward the deinstitutionalization of mass incarceration in American society.

Defining the Institutionalization of the New Debt Collection Regime

Institutionalization refers to the dual process of both organizational differentiation and norm diffusion. When ideas and practices become institutionalized, they are incorporated within a broad array of different organizational sites (the legislature, home, office, church, and the courts) and entwined within financial, social, and administrative operations. Thus, institutionalization, Eisenstadt (1964, 237) observed, is at least partly about "a certain level of differentiation, i.e., the development of specific collectivities and roles in the major institutional spheres." Norm diffusion is also a core feature of institutionalization. *Routinization*—whether evidenced by indifference, habituation, or approbation—means that processes have been so firmly validated that they might serve an important operational function. As the sociologist Philip Selznick (1957: 6–7) observed, institutionalization "is to infuse with value beyond the technical requirements of the task at hand."

In delineating the contours of the new debt collection regime, we allude to the following dual process of institutionalization: (1) to how debt collection associated with presumptive criminal violations is becoming lodged within a vast array of organizational locales and (2) to the growing routinization and legitimation of these practices. We turn first to an analysis of organizational differentiation and to the proliferation of fees and fines dispersed throughout multijurisdictional institutions, supported by the creation of new enforcement machinery, and by the use of punitive collection measures now involving not just public but also private debt holders. We will then turn to a discussion of norm diffusion, noting both how debt collection is operationally entwined within government entities manifest in the computerization, routinization (indeed ritualization) of debt collection, and invocation of traditional liberal individualist justifications.

Organizational Differentiation

State and local governments, through courts, corrections departments, supervision agencies, and other institutions, increasingly invoice defendants for their interaction with the criminal

justice system[2] (Bannon, Nagrecha, and Diller, 2011). Beginning in the late 1970s, as Beckett and Harris (2011) recount, these charges have proliferated in both numbers and types; the amounts of existing fees and fines have inflated and the involvement of different levels of government has ballooned. As Beckett and Harris argue, moreover, in one of their many important insights, the burgeoning of monetary sanctions was never intended to offer an alternative to incarceration, which was the function of European day fines. Rather, the growth of fines, fees, and other debts accompanied the trend line in the increase of incarceration since the early 1970s.

The growth of monetary sanctions has been dramatic. Beckett and Harris (2011) cite 24 different fines and fees that an individual might accrue with a single conviction in Washington State and the 19 statutorily authorized fees that a judge can assign in New York State (Rosenthal and Weisman, 2007). Today, a defendant in Florida similarly faces dozens of fees, 20 of which have been enacted since 1997, including a fee for the attorney appointed because of the defendant's indigence. With the spread of fines and fees, moreover, collection efforts have greatly intensified state to state (Bannon et al., 2010; Diller, 2010) and publications and educational events meant to instruct state agencies in more effective collections and enforcement have proliferated.[3]

No less noteworthy, as Table 1 shows, is the wide variation in the numbers, types, and amounts of fines and fees (*Texas District Clerk's Felony Court Cost Chart*, 2010).

It is important to emphasize, however, that fines and fees are only one part of the now deeply institutionalized debt collection regime. Beckett and Harris (2011) define fees and fines to include fees "intended mainly to recoup criminal justice costs" and fines "intended as criminal penalties." We add two other categories of criminal justice debt to their discussion. The first is child support debt. Some estimates indicate that as many as 20–25% of all incarcerated men are under child support orders (Katzenstein and Shanley, 2008; Office of Child Support Enforcement, 2006) among the estimated 63% of federal prisoners and 56% of state prisoners who are parents (Mumola, 2000). Child support debt is criminal justice debt that often accumulates during the period in which incarcerated parents fall into arrearage unable to meet their debt obligation aggravated by the low-level, state-set prison wages that cap prison pay at a tiny fraction of minimum wage. Michael Vick earned 12 cents an hour. Other federal prisoners on average earn an hourly wage of between 23 cents and $1.15 (Boushey, 2002; *Wall Street Journal*, 2009). On average, one study records that prisoners begin their state time with a child support debt of $10,000 and leave prison with a debt of $20,000 (Turetsky, 2006). In about half the states, incarcerated parents

2. In addition to state-mandated fees, local jurisdictions, either by state statutory authorization or locally, might charge additional fees and fines (Bannon et al., 2010).

3. See the National Center for State Courts website with its listing of e-courses and manuals on the effective collections of fines and fees (ncsc.org/topics/financial/fines-costs-and-fees/resource-guide.aspx).

TABLE 1. Texas Felony Court Costs 2010

	District Clerk's Felony Court Cost Chart – 01/01/2010											
	FELONY CATEGORY	A	B	C	D	E	F	G	H	I	J	K
	Cost Always Assessed											
1	DNA Testing Court Cost – CCP art. 102.020	0	0	0	0	250	250	250	250	0	0	0
2	Consolidated Court Cost – LGC § 133.102(a)	133	133	133	133	133	133	133	133	133	133	133
3	EMS Trauma Fund Cost – CCP art. 102.0185	100	100	0	0	0	0	0	0	0	0	0
4	Child Abuse Prevention Fund Cost – CCP art. 102.0186	0	0	0	0	0	0	100	100	0	0	0
5	Drug Court Cost – CCP art. 102.0178	60	60	60	0	0	0	0	0	0	0	0
6	Juvenile Delinquency Prevention Fee – CCP art. 102.0171(a)	0	0	0	50	0	0	0	0	0	0	0
7	Clerk's Fee – CCP art. 102.005(a)	40	40	40	40	40	40	40	40	40	40	40
8	State Traffic Fine – Transportation Code § 542.4031	0	0	0	0	0	0	0	0	30	0	0
9	Records Management Fee – CCP art. 102.005(f)	25	25	25	25	25	25	25	25	25	25	25
10	Judicial Support Fee – LGC § 133.105(a)	6	6	6	6	6	6	6	6	6	6	6
11	Juror Reimbursement Fee – CCP art. 102.0045	4	4	4	4	4	4	4	4	4	4	4
12	County and Dist. Ct. Technology Fund – CCP, art. 102.0169	4	4	4	4	4	4	4	4	4	4	4
13	Additional Court Cost – Transportation Code § 542.403	0	0	0	0	0	0	0	0	3	0	0
14	Indigent Defense Fee – LGC § 133.107	2	2	2	2	2	2	2	2	2	2	2
	TOTAL OF COSTS THAT ARE ALWAYS ASSESSED	374	374	274	264	464	464	564	564	247	214	214
	Cost Assessed if Service Performed by Peace Officer											
15	Execute or Process Arrest Warrant – CCP art. 102.011(a)(2)	50	50	50	50	50	50	50	50	50	50	50
16	Serve Writ – CCP art. 102.011(a)(4)	35	35	35	35	35	35	35	35	35	35	35
17	Take and Approve Bond – CCP art. 102.011(a)(5)	10	10	10	10	10	10	10	10	10	10	10
18	Convey Witness (charge per day) – CCP art. 102.011(c)	10	10	10	10	10	10	10	10	10	10	10
19	Make Arrest without a Warrant – CCP art. 102.011(a)(1)	5	5	5	5	5	5	5	5	5	5	5
20	Summon Witness – CCP art. 102.011(a)(3)	5	5	5	5	5	5	5	5	5	5	5
21	Commitment to Jail – CCP art. 102.011(a)(6)	5	5	5	5	5	5	5	5	5	5	5
22	Release from Jail – CCP art. 102.011(a)(6)	5	5	5	5	5	5	5	5	5	5	5
23	Summon Jury – CCP art. 102.011(a)(7)	5	5	5	5	5	5	5	5	5	5	5
24	Mileage Fees for No. 12-20 (29¢/mile) – CCP art. 102.011(b)	X	X	X	X	X	X	X	X	X	X	X
25	Meals/Lodging Expense for No. 12-20 – CCP art. 102.011(b)	X	X	X	X	X	X	X	X	X	X	X
26	Overtime Costs for Testifying at Trial – CCP art. 102.011(i)	X	X	X	X	X	X	X	X	X	X	X
	Cost Assessed if Def. Placed on Comm. Sup. and Def. is required to submit DNA sample under CCP, Art. 42.12, Sec. 11(j) and Judge does not Waive Cost											
27	DNA Testing Court Cost – CCP art. 102.020	34	34	34	34	0	0	0	0	34	34	34
	Cost Ass. if Payment made after 30th day after Judgment											
28	Time Payment Fee – Local Gov't Code, § 133.103	25	25	25	25	25	25	25	25	25	25	25
	Cost Assessed if Conviction is by Jury											
29	Jury Fee – CCP, Art. 102.004	20	20	20	20	20	20	20	20	20	20	20
	Cost Assessed if DWI Defendant is Visually Recorded											
30	Visual Recording Fee – CCP, Art. 102.018(a)	15	0	0	0	0	0	0	0	0	0	0
	Cost Assessed if Conviction is in Statutory County Court											
31	Judicial Fund Court Cost – Gov't Code § 51.702	15	15	15	15	15	15	15	15	15	15	15
	Cost Assessed if Conviction is in District Court											
32	Court Security Fee – CCP art. 102.017	5	5	5	5	5	5	5	5	5	5	5
	Cost Assessed unless Defendant Indigent & Judge Waives											
33	Evaluation for Drug/Alcohol Rehab. Ct. Cost – CCP 102.018(b)	X	0	0	0	0	0	0	0	0	0	0
	Discretionary Costs											
34	Restitution Installment Fee – CCP art. 42.037	12	12	12	12	12	12	12	12	12	12	12
56	Transaction Fee – CCP, Art. 102.072	2	2	2	2	2	2	2	2	2	2	2

Detailed Description of Offenses in each Felony Category

A Driving While Intoxicated (DWI) if enhanced to a felony because of prior convictions - Penal Code, §§ 49.04, 49.09
B Felony Intoxication Offense other than DWI (Penal Code § 49.04) – Penal Code, §§ 49.045 - 49.09
C Felony Drug Offense – Health & Safety Code , Ch. 481
D Felony Graffiti Offense – Penal Code, § 28.08
E 1) Aggravated Kidnapping with intent to commit bodily injury or to violate or abuse sexually – Penal Code § 20.04(a)(4)
2) Sexual Assault or Aggravated Sexual Assault other than sexual assault of a child – Penal Code §§ 22.011, 22.021
F 1) Prohibited Sexual Contact – Penal Code § 25.02
2) Burglary of Habitation with intent/attempt to commit or commission of a felony other than felony theft – PC § 30.02(d)
3) Compelling Prostitution – Penal Code § 43.05
G 1) Continuous Sexual Abuse of Young Child or Children – Penal Code § 21.02
2) Indecency with a Child – Penal Code § 21.11
3) Sexual Assault of a Child – Penal Code § 22.011(a)(2)
4) Aggravated Sexual Assault of a Child – Penal Code § 22.021(a)(1)(B)
H 1) Sexual Performance by a Child – Penal Code § 43.25
2) Possession or Promotion of Child Pornography – Penal Code § 43.26
I 1) Passing a School Bus if enhanced to a felony because of certain prior convictions – Transp. § 545.066(c)(2)
2) Counterfeit Airbag or Misrepresentation of Airbag Installation if enhanced – Transportation Code § 547.614(c),(d)
3) Failure of Motor Vehicle Operator to stop or remain at scene of accident involving death/injury – Trans. Code § 550.021
J All Felonies under Title 5, Penal Code (Chapters 19-22) not in one of the foregoing categories
K All Felonies not in one of the foregoing categories

cannot obtain legal relief from the accumulating debt while confined because incarceration is considered voluntary unemployment (Pearson, 2004).[4]

We also add restitution, which although arguably analytically distinct, contributes to the institutionalization of a debt collection regime as states have increased mandatory restitution and victim compensations funds in the last 20 years (McLean and Thompson, 2007). By recognizing fees and fines as close cognates of child support and restitution, the full dimensions of the rapidly institutionalizing debt collection regime stand in clearer relief.

Child support in particular constitutes a significant debt burden even where fees and fines are less onerous than in many of the most troublesome cases that Beckett and

4. Furthermore, child support debt often accounts for a large percentage of formerly incarcerated individuals' debt burden, often accumulating to tens of thousands of dollars (McLean and Thompson, 2004).

Harris (2011) cite. In New Jersey, for instance, relatively "few" court-stipulated fines are implemented. A drug conviction will activate fines "only" under three statutory mandates—the *Victims of Crime Compensation Act*, the Drug Enforcement and Demand Penalty requirement, and the *Safe Neighborhood Act*. But additional child support obligations might reduce an individual's wage by substantial amounts, triggering the state's enforcement machinery when the debt requirements are not fully met and lowering an individual's income to the point of nonviability.[5]

As fees and fines have proliferated across states and localities, organizations within state and local governments (or silos within these organizations) have crystallized organizational roles in both debt imposition and collection functions. This is the process of organizational differentiation, and in the context of the debt collection regime, it has included the institutionalization of punitive collections mechanisms that can conflict with the institution's existing role.

Encouraged by popular notions of criminal responsibility and faced with budget problems, state and local legislators introduce and pass bills authorizing new fees, increases, and new or stepped-up enforcement mechanisms but do not measure (or require the measurement of) the impact on individuals or the state of collecting fees and fines (Bannon et al., 2010). Judicial officers impose many fees and fines at sentencing, set the amount of debt, and oversee court proceedings resulting from nonpayment such as civil and criminal contempt proceedings (Bannon et al., 2010).[6,7] Court administrators track debt, set up payment plans based on ability to pay, monitor payment, respond to delinquencies (through mechanisms such as dunning, issuing warrants for arrest, or outsourcing collections to private debt collectors), and manage funds and distribute money to state and local recipients (Bannon et al., 2010; Beckett and Harris, 2011). These court personnel, required or able to rely on fees and fines revenue to fund their operations, might have some self-interest in high debt totals and aggressive collections (Bannon et al., 2010; Beckett and Harris, 2011).[8] At

5. To use just a single example of the meaning of these debt obligations for an individual's budget, the expenditure estimates of one interviewee whose situation suggested nothing unusual, required a $65 weekly child support payment and a $20 restitution fee on a weekly laundromat salary of $240 from which $120 went toward rent and approximately $20 went for weekly transportation to the parole office, NA meetings, outpatient appointments, and the halfway house counseling. This payment does not count the amount owed for parole supervision, which leaves almost no residual money for food, let alone leisure monies. Meeting the necessities in this individual's situation seemed to be financed by occasional support from his long-time sponsor. Debt obligations, however small (and they are rarely low), can quickly push an individual to the edge of financial viability (AW, 2011).

6. Examples include fines and accompanying surcharges, restitution, fees for court administrative costs, fees for designate funds, public defender reimbursement fees, and prosecution fees, to name a few (Bannon et al., 2010).

7. In one jurisdiction, this role has become so burdensome that judges who used to announce each fee in court to allow for objections now only state the total amount of debt on the record (Nagrecha, 2009a).

8. "Chief among these concerns is that, when courts are overdependent on fees, such reliance can interfere with the judiciary's independent constitutional role, divert courts' attention away from their essential

the very least, as discussed subsequently, for a variety of reasons, they might not engage in the most thorough "ability-to-pay" determinations. Supervision agencies and officers monitor debt that has been made a condition of supervision (as most debt is), dun defendants to pay, violate defendants for nonpayment, as well as charge and collect supervision and other fees. These roles often can be at odds with their role to facilitate individuals' safe and crime-free reentry into society.[9] Finally, in Massachusetts, for example, sheriffs in charge of local jails are distracted from their public safety role by an incentive to boost their coffers with fees charged to residents of the jail.[10]

Furthermore, jurisdictions have created new institutions to manage the debt collection regime. The most notable example is Texas, which has professionalized criminal justice debt collection. A state statute requires municipalities and counties that meet a certain population threshold to designate an employee to a collections program designed to "improve the collection of court costs, fees and fines that have been imposed."[11] In other jurisdictions, judges preside over collections courts fashioned as "pay or appear" proceedings at which individuals unable to pay must report to court to explain why.[12] Finally, the

functions, and, in its most extreme form, threaten the impartiality of judges and other court personnel with institutional, pecuniary incentives" (Conference of State Court Administrators, 1986 [noting that the complexity of fees and surcharges imposed is confusing to court personnel and requires the maintenance of complex accounting systems]; Tobin, 1996, stating that "[i]t is beyond dispute that [the concept of self-supporting courts] is not consistent with judicial ethics or the demands of due process").

9. This role also has been noted to be in conflict with the supervision officer's role in reentry and reintegration: "These concerns led Virginia to abolish one of its supervision fees in 1994 (though other supervision fees remain). Virginia abolished its parole supervision fee, which had been $30 per month, in part because it had been 'a huge hassle to collect,' according to a Virginia corrections official. In addition to the problems inherent in requiring parole officers to be fee collectors, the associated administrative and accounting tasks made collection by the Department of Corrections too burdensome relative to the small amount of revenue generated by the fee. Some within the Department, including parole officers, objected to the fee and to the parole officers' role in the collections process, not only because of the administrative challenges, but also because collection undermined their other duties. As one official stated, 'parole officers are not loan sharks'" (Bannon et al., 2010). Furthermore, in a time when recognition of the role of technical violations in filling our prisons is growing, this role is counterproductive. Probation even might be extended for failures to pay; opening defendants up to violations and reincarceration (Bannon et al., 2010).

10. Such fees are authorized by statute, and sheriffs can retain the proceeds locally (Pingeon, 2011). Other institutions implicated include police departments and child support agencies (Bannon et al., 2010).

11. Texas Code of Criminal Procedure §103.0033; Texas Administrative Code § 175.1. An attorney from the Fair Defense Project in Texas reported that the model was a "business model of collections [and developed] with input from individuals with experience in credit card debt collections." The statutory scheme outlines key principles to achieve this goal including the outlining the frequency and type of communication with the debtor. It also requires payment plan amounts be set; "[p]ayment plans should require the highest payment amounts in the shortest period of time that the defendant can successfully make, considering the amount owed, the defendant's ability to pay, and the defendant's obligations to pay other court-mandated amounts, including child support, victim restitution, and fees for drug testing, rehabilitation programs, or community supervision" but then outlines specific short time frames (e.g., 4 months in municipal cases) by which payments should be completed.

12. See, for example, Orange County Florida Collections Program. Details available at myorangeclerk.com/service/collections.shtml#ml1.

institutionalization of the fees and fines debt regime is evidenced as punitive debt collection mechanisms—including incarceration—and, at the urging of private debt holders, are used to enforce private debt (Serres and Howatt, 2010).

Norms

The institutionalization of this new debt regime is manifest not only in the organizational differentiation involving fees and fines (as described previously) but also in its—for lack of a better expression—growing normativity. Fees and fines, simply put, have become routine. Their normalcy is heightened by their proliferation not only inside but also outside the realm of criminal law—whether in the form of the recession-spurred upsurge in speeding tickets (Copeland, 2010) or the proliferation of surcharges on consumer products ranging from airplane travel to household energy bills. Within the realm of criminal law, however, the growth of fees and fines as well as child support strictures and restitution carry repercussions of a different order, amplifying as they often do the already severe indebtedness of those who are entrapped within its net.

This normalization is evident in two domains—technical and discursive. At the technical level, fees, fines, and financial obligations are becoming rapidly instituted within the computerized operations of the bureaucracy. To pursue child support mandates for incarcerated men and women, for instance, new software programs have been developed to match those with child custody orders to employment listings, department of corrections' inmate lists, and other databases. Search engines provide easier access to addresses that facilitate the location of delinquent obligors. Computer programs can cross-check individuals across multiple cases in different jurisdictional and agency domains. In Colorado, the child support agency has matched more than 5,000 inmates applying liens to inmate accounts and collecting (in 2006) $306,000 from the direct garnishment of prisoner "commissary" accounts (Office of Child Support Enforcement, 2009). In New Orleans, warrants for the nonpayment of fees and fines are issued automatically when an individual misses a payment (Nagrecha, 2009b).

Child support enforcement hearings provide an instance of how the technical and discursive merge in courtroom ritual. One ordinary exchange between a hearing support officer and an obligor in New Jersey illustrates how organizational procedures are routinely leveraged, normalizing (through courteous language and matter-of-fact recitation) the harsh child support obligations that are exerted on individuals with few resources (Katzenstein, 2010). In this hearing, the parole officer begins by enumerating the databases from which the obligor's address has been authenticated (the Department of Motor Vehicles, the Postal Service, the Parent Locator, Lexis, the New Hire Labor Department list, and the Department of Corrections). Next, the hearing officer who is entering the needed information into the computer database as he talks (a process that precludes any sustained eye contact with the individual addressed) turns momentarily to the obligor as follows:

Child support hearing officer: Good morning, my name is "Michael Lombardo." I am a child support hearing officer; I am not a judge. I will take your testimony and consider any documents you have and make a recommendation about your case. If you disagree with anything I say, please let me know before you leave this room. In that case, you have a right to be seen by a judge.

Child support enforcement unit officer: Good morning, my name is Officer Velez from the child support enforcement unit. This is the matter of "*LaPalombo v. Ruiz*," Case Number xxx and Docket number xxx. Mr. Ruiz is under obligation to pay $103 per week toward child support and $30 toward arrears. The last payment was in the amount of $240 by cash; (inaudible) records show that this was made toward the total arrears of $22,784 of which $10,000 is owed to welfare and the remainder is owed to the plaintiff.

Hearing officer: Sir, did you receive your court notice today for the address that you live at now?
Sir, where do you work at now?
Do you get paid in cash?
Sir, what is the name of your employer?

Mr. Ruiz: Johnson roofing. [through translator] No, not in cash.

Hearing officer: What is the address of your employer? I'll take a telephone number if you have that information.

Mr. Ruiz: [begins to speak]. . .
Hearing officer: Sir, you have to speak in Spanish if you're going to use the interpreter.

Hearing officer: Is that a full-time job?

Mr. Ruiz: [without translator] Temporary. Some days yes, some days no.

Hearing officer: How many hours a week do you normally work? Like 30 or 35 hours? Do you have any other sources of income?

Mr. Ruiz: No, sir.

Hearing officer: What you may want to do is take on a second job. Though you are making payment, the full arrear payment is not being met.

Mr. Ruiz: [through translator] I have always been paying, I have my receipts.

Hearing officer: From the record, I can see that you are making payments but you are not making sufficient payments, which is why you owe over $20,000 now.

> *Mr. Ruiz*: [through translator] I had a second court order, but I pay her directly. I have two other children [translator, for whom he makes direct payment—if I may help explain].
>
> *Hearing officer*: How old are they?
>
> *Mr. Ruiz*: 9 and ll.
>
> *Hearing officer*: I recommend that the current order continue. You should be paying more on your arrears on this case. I'm not going to increase the arrears payment because the court has to take into account that you have two other minor children whom you are paying. I am going to recommend a bench warrant. If you miss any two consecutive payments, the probation department will have authority to issue a bench warrant for your arrest. It is very important that you make full payment. Good luck, sir.
>
> *Mr. Ruiz*: Thank you.

What is noteworthy at these enforcement hearings is their routine. The initial information is restated verbatim at each hearing. The exchanges are (for the most part) respectful. Few words are wasted. The conversation rarely strays from the script, which is designed to ascertain the sources of funding owed, to communicate the enforcement powers available, and to insist on payment—making only the slightest gesture (as this case demonstrates) in the direction of an individual's ability to pay.

The normalization of fees, fines, and debt obligations is thus visible in the increasing digitization of data and in the routinization (or ritualization) of courtroom adjudications. No less important, however, is the normalization that occurs discursively through the reliance on the language of liberal individualism. This language resonates through the use of terms such as "voluntary unemployment" that frames much child support policy or through the reference (as Beckett and Harris, 2011 note) to "willfulness" invoked to justify the incarceration of individuals who have been charged with nonpayment of debts. In child support cases involving incarcerated parents, a typical formulation relying on the idea of voluntary unemployment is articulated in *Oberg v. Oberg* (1993) by Judge Robert Ulrich, who states, "Although incarceration is not itself a voluntary situation, it is the foreseeable consequence of behavior that is voluntary and intentional. Therefore, incarceration does not excuse the obligation to support the needs of one's children. The change in financial condition resulting from the voluntary dissipation of one's talents is not sufficient reason for modifying a child support award."[13]

13. Judge Ulrich cites *Mooney v. Brennan*, 848 P.2d 1020, 1023 (Mont. 1993); *In re Marriage of Phillips*, 493 N.W.2d 872, 877 (Iowa App. 1992); *Davis v. Vance*, 574 N.E.2d 330, 331 (Iowa App. 1991); *Division of Child Enforcement v. Barrows*, 570 A.2d 1180, 1183 (Del. Supr. 1990); *Cole v. Cole*, 590 N.E.2d 862, 865–866

As Beckett and Harris (2011) observe, increasingly, the incarceration of indigent defendants, which otherwise might be perceived as violating strictures against "debtors' prison" is justified by construing nonpayment as willful. This normalization of a debt collection regime is, thus, enhanced by employing the familiar language of choice and individual volition that is deeply lodged within American ideological traditions. Given how deeply embedded the debt collection regime has become both organizationally and ideologically, what policy choices present themselves?

Policy Prescription—Deinstitutionalizing the Debt Collection Regime

In the concluding pages of their article, Beckett and Harris (2011) propose that "the imposition of monetary sanctions should be abolished." This sudden turn to the language of "abolition" catches the reader—or at least it nabbed us—by surprise. Until this point in their article, Beckett and Harris seemed to be leading toward a presumptively cautious prescription. We expected that they would argue for subjecting fees and fines "simply" to a graduated test based on the "ability to pay."

Much can be said for the "ability-to-pay" argument. It seems fair on its face, and it already has found favor in the Supreme Court's reasoning in the important decision handed down in *Bearden v. Georgia* (1983). But Beckett and Harris (2011) are right, we believe, to prefer the route of abolition. Although they do not specifically explain their apparent shift from an "ability-to-pay" argument to a call for abolition, we see at least two compelling reasons. First and foremost, nothing is "simple" in assessing an individual's "ability to pay." Relying on legislative, judicial, or administrative efforts to determine an individual's financial status or capacity is fraught with complications. To gain an accurate picture of the income position of an individual, whose work record is irregular at best, is constantly changing, and has financial obligations that might extend across multiple institutional arenas (child support, restitution, court, and state obligations in addition to informal or formal loans taken from family and friends) only can be beset by inaccuracies. Some "ability-to-pay" assessments must be attempted—for instance, in the domain of child support, however difficult. But to compound the difficulty of such assessments by predicating the burgeoning schedules of fines and fees on "ability-to-pay" determinations would be to enter into an invariably fraudulent exercise—a fact demonstrated in the New Jersey courtroom child support proceeding excerpted earlier.

A second reason not to seek a solution in an "ability-to-pay" standard is one of both principle and politics. Just as it could be argued that restitution for a crime of great seriousness should not be based on an individual's ability to pay, it also should be argued that basic rights, such as access to vote or freedom from double jeopardy in the form of reincarceration

(Ohio. App. 1990); *Ohler v. Ohler*, 369 N.W.2d 615, 618 (Neb. 1985); *Koch v. Williams*, 456 N.W.2d 299, 301 (N.D. 1990); *Parker v. Parker*, 447 N.W.2d 64, 65 (Wisc. App. 1989); *Noddin v. Noddin*, 455 A.2d 1051, 1053 (N.H. 1983).

and reinvolvement in the criminal justice system (Turner, 2010), should not be subjected to a means test lest the fundamental values are scourged on which a democratic polity is built. Despite what is arguably such a basic "truth" of democratic principle, states—ten by one recent count (Rosenthal and Weissman, 2007)—continue to prohibit citizens from voting who have either outstanding child support obligations or unpaid court fines and fees. As Beckett and Harris (2011) ably document, moreover, even the strongly articulated "ability-to-pay" ruling developed in the Supreme Court's decision in *Bearden v. Georgia* (1983) has been substantially diluted. The persistence of deeply exclusionary practices in the face of such an obvious political and Constitutional principle suggests that additional efforts to extend the "ability-to-pay" argument is likely to face not just practical hurdles but also significant political and judicial impediments.

The argument for abolition, then, helps to unmask the false promise of a broad-based system of ability-to-pay exemptions. Indeed, if the Beckett and Harris (2011) fines-and-fees argument captures a single lesson in addition to our own endeavor to locate their analysis in a broader conceptualization of an institutionalized debt collection regime, it is that the epidemic adoption of fines and fees on top of restitution requirements and child support obligations has contributed to a massive problem for the poor without justification.

To be clear, we do not think it politically likely (nor desirable) that all financial obligations against individuals in the criminal justice system be abolished. Some restitution assessments and some levels of child support will and should be collected. What we do think should be abolished is the debt collection *regime* as characterized by the thorough suffusion of the criminal justice system that is largely populated by low-income individuals with financial levies that simply cannot be paid. Nickel and diming defendants to a level that impinges heavily on their economic viability and that subjects these individuals to aggressive collections disassociated from a thorough understanding of an ability to pay calls for a radical overhaul. It is this debt collection regime that lacks a clear rationale, a fact also evidenced by the differences from jurisdiction to jurisdiction in the numbers, amounts, and collections of monies owed. If abolition means the dismantling or reduction of significant numbers of financial levies in ways that are attuned to their impact on low-income debtors, then we agree with Beckett and Harris (2011) that this is the policy direction to pursue.

But, to return to our discussion at the beginning of this policy essay, the swing of the political pendulum toward a less avaricious incarceration system has been fostered at least in part by the recent conjuncture of fiscal conservatism "on the right" and social progressivism "on the left." By the same logic, it does not make sense why fees and fines—the construction of a debt collection regime—should appeal to fiscal conservatives as it involves the heavy hand of government (much as with taxation) reaching into the pockets of the populace. Rather, the appeal to conservatives of monetary penalties is arguably a moral one. For some conservatives, at least, it is tied to the belief in individual responsibility. This might include

requiring that individuals pay for the criminal justice system that they are "choosing" to be part of, or it might mean more generally that responsibility comes with learning that penalties are attached to poor choices.

But if conservatives embrace the end objective of a belief in responsibility, then the means to that end is not fixed in any ideological amber. In the context of mass incarceration, the beginnings of deinstitutionalization have required the recognition that more punishment does not always yield greater responsibility. The authors of *The Conservative Case for Reform* cite a study by two scholars at Purdue and Rutgers universities estimating that a 10% increase in incarceration would reduce crime by only 0.5% (see rightoncrime.com/priority-issues/prisons/) in support of limiting the growth of incarceration. A similar argument has been broached that might advance the deinstitutionalization of the debt enforcement regime. As one recent report notes, two conservative Republicans—Chris Christie in New Jersey and Rick Scott in Florida—are exploring ways to reduce the burden of debts among people released from prison on the argument that doing so will discourage their reoffending and enhance their willingness to own the responsibilities of job and family—a recommendation reportedly urged by a forthcoming Manhattan Institute study (Husock, 2010; Yoder, 2011). President Barack Obama's own 2011 Budget Proposal also urges states to remediate the burden of child support obligations for incarcerated fathers where such payments may diminish the success of reentry (Yoder, 2011) To the extent that the excessive burdens of debt direct the poor toward additional crime, the failure to make payments on state monies owed leads to reincarceration, and responsibility as valued behavior simply cannot be learned by overwhelming individuals who are already struggling financially, reason exists on all sides of the aisle to reverse the direction of the growing debt collection regime.

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MONETARY SANCTIONS AS MISGUIDED POLICY

The abolition of fines and fees

Not proven and not compelling

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Advocating the abolition of a criminal justice policy has the advantages of being straightforward, coherent, and easy to understand. And, particularly for a policy that has largely gone unchallenged, such a position is likely to attract attention and discussion about the underlying assumptions of the policy. Such a simple, straightforward approach is appropriate if the following conditions are met: (a) the policy causes great harm, (b) the harm is inherent in the policy (i.e., is not a result of inefficient or ineffective administration), (c) alternative changes will not remedy the problems, and (d) the likely effects of the abolition are not worse than the current conditions. In the absence of those conditions, however, advocating abolition is likely to be perceived as overly simplistic, politically unrealistic, and perhaps unhelpful if it detracts from debate over substantive issues.

In this essay, I examine the arguments made by Beckett and Harris (2011, this issue) for abolishing fees and fines. I suggest that, although problems exist with these economic sanctions, these problems are not as severe as Beckett and Harris assert and they are not inherent in monetary sanctions. I also suggest that Beckett and Harris's limits on their proposal (i.e., not abolishing restitution) do not solve the problems they raise about economic sanctions more generally. I then suggest less drastic alternatives that might be considered as options for dealing with some problems that Beckett and Harris point out. Finally, I suggest that abolishing these economic sanctions, particularly fines, is problematic because it would reduce the ability of judges to impose intermediate sanctions.

The Issue of Economic Sanctions

Economic sanctions also are referred to as monetary sanctions, financial obligations, and legal financial obligations. Three types of economic sanctions can be imposed on convicted

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offenders (Levingston and Turetsky, 2007; Ruback and Bergstrom, 2006): fines, restitution, and fees and costs. Fines, which can be mandatory or discretionary, are monetary penalties imposed as punishment for committing specific crimes. In the United States, fines are used in 42% of cases in courts of general jurisdiction and in 86% of cases in courts of limited jurisdiction (Weisburd, Einat, and Kowalski, 2008), and they are typically imposed as add-ons to other sanctions (Hillsman, 1990). In many European countries, by contrast, fines are the legally presumptive and sole penalty and, thus, are much more common (Federal Ministry of Interior and Federal Ministry of Justice, 2001; Tonry and Lynch, 1996). Contrary to what Beckett and Harris argue, some scholars have opposed fines because they cannot be enforced against the poor (Hillsman, 1990).

Restitution is a court-ordered payment from the offender to victims to compensate them for their losses. Fees and costs refer to payments to reimburse the state and local jurisdiction to cover the costs of criminal justice processing (e.g., prosecution and DNA costs) and fees for services provided (e.g., probation supervision fee). Another distinction that has been made relates to "surcharges," which are add-on amounts to generate revenue to fund specific goals (e.g., computerization) that often are unrelated to the offender's specific crime (McLean and Thompson, 2010). Because surcharges usually are thought of as fines or fees, they are not considered separately here.

It is important to note at the outset that many scholars believe economic sanctions have strengths, that is, that they have some penological value. First, compared with incarceration, some evidence indicates that they are about as effective in deterring future crime (Gordon and Glaser, 1991) but are substantially cheaper because the state does not have to pay for housing (Morris and Tonry, 1990). Moreover, economic sanctions can avoid some of the stigma and secondary effects of incarceration, such as loss of employment and dependents, who would otherwise have to rely on public assistance (Gordon and Glaser, 1991). Second, compared with simple probation, economic sanctions are more punitive and, thus, can serve as intermediate sanctions between probation and prison. Third, economic sanctions can be flexible as they can be adjusted to the facts of the case and to the circumstances of the offender. Moreover, they can be used alone, with incarceration, with probation, or with both incarceration and probation. Fourth, evaluating the basic fulfillment of economic sanctions is relatively easy and straightforward, and it is usually determined by an offender's level of payment.

The Beckett and Harris (2011) Article

In their article, Beckett and Harris (2011) make three arguments for the abolition of fines and fees. First, they argue that no clear rationale exists for these monetary sanctions. They argue that economic sanctions do not incapacitate or deter offenders. Moreover, because these sanctions are typically add-ons to other penalties, the punishment goes beyond what is necessary for retribution. In addition, in some states, indigent defendants are charged for their legal representation by assigned counsel or public defenders.

Second, Beckett and Harris (2011) argue that these penalties raise questions of justice and fairness because they add to already severe sentences, reflect class bias, reflect disparity, and have a large impact on families. In addition, they argue that these unpaid monetary sanctions regularly serve as the basis for probation revocation and incarceration. And, they argue, even though nonpayment must be "willful," judges have discretion and, as in their example of "Bob," judges can threaten probationers with jail if they do not make regular payments. Beckett and Harris argue that these indigent offenders essentially face debtors' prisons because the definition of "willful nonpayment" is so elastic. Finally, Beckett and Harris argue that economic sanctions are not cost-effective because the revenue collection efforts are expensive, and these sanctions create ethical conflicts because judges must make judgments about payments that are needed to fund the courts' operations.

In sum, Beckett and Harris (2011) argue for an end to the "discretionary imposition of fees and fines without regard for defendants' ability to pay and as a supplement to other criminal penalties." They exclude restitution to victims and graduated day fines based on the ability to pay from their call for abolition, although they devote little discussion to these exceptions.

The Severity of the Problem

Most of Beckett and Harris's (2011) criticisms of the current system of economic sanctions are correct. They are correct that the number of fees, costs, and surcharges has grown rapidly in recent years, as state and local governments seek additional monies to fund government operations. And they are correct that economic sanctions can be opposed for being complex and confusing, for being unfair, and for not being cost-effective. In our research in Pennsylvania, for example, we have found that in some counties, more than 200 different fines, fees, and costs can be imposed and variation persists between counties and between individuals in the imposition (Ruback and Clark, 2009, in press). Currently, in Pennsylvania, offenders report that they do not understand economic sanctions, do not know how much they owe, and do not know where their payments are directed (Ruback, Hoskins, Cares, and Feldmeyer, 2006). We also have found in Pennsylvania that judges have considerable discretion regarding the imposition of fines and fees, even discretion over mandatory fines, fees, and restitution (Ruback and Clark, 2010).

But Beckett and Harris's (2011) perception of the severity of the problem might be a function of the data sources used. Beckett and Harris are basing their arguments primarily on their own work in the state of Washington (which involved a cross-sectional sample of 3,366 cases, a longitudinal sample of 500 cases, and a nonrandom sample of 50 interviews). It would have been helpful to readers if they had described these studies in more detail, particularly the data showing that the imposition of economic sanctions leads to greater recidivism.

It is important to note that differences exist between states and, thus, arguing for a national policy based on the conditions in one state might be ill advised. For example, some evidence indicates that the conditions in Washington State (the state where Beckett and Harris [2011] conducted their research) are unique. That Washington State might not be representative of the problem nationally is evidenced by a statute described by Beckett and Harris in the section of the American Civil Liberties Union (ACLU) report on Washington State. The statute involved auto-jail (i.e., if the defendant did not pay the court-imposed legal financial obligations, then he or she would have to report to a jail or be subject to a fee for arrest). In the ACLU report, Harris indicated that the auto-jail statute had been overturned by the Washington State Supreme Court. With regard to Beckett and Harris's assertion that a spouse's wages can be garnished to pay legal financial obligations, it would have been helpful if they had provided a citation to the relevant law, presumably in Washington, and indicated how widespread this practice is across the country.

Beckett and Harris (2011) also argue that ethnic and other disparities often persist in the imposition of economic sanctions. More data on this point would have been helpful, as other research suggests that minorities, especially in large cities, are less likely to have some types of economic sanctions imposed on them (Ruback, 2004).

From the Harris, Evans, and Beckett (2010) analyses of data from Washington State, referred to in the Beckett and Harris (2011) article, it is not possible to determine the economic sanctions that were *not* imposed. Their cross-sectional analysis of 3,366 convictions did not nest convictions within individuals, meaning that readers cannot determine the extent to which judges might have imposed economic sanctions for some crimes but not others. Similarly, their longitudinal analysis of 500 individuals examined fines and fees that were imposed, not those that could have been imposed but were not.

It is also important for those doing research in other states to know how representative those states are of conditions in the country more generally. For example, Pennsylvania, whose economic sanctions I have investigated, is different from other states. In Pennsylvania, judges use a back-end adjustment to economic sanctions that are unpaid. That is, they reduce or waive the economic sanctions if the offender is complying with the conditions of supervision "or is making a good-faith effort to repay the debt" (Bannon, Nagrecha, and Diller, 2010: 40, footnote 55). Moreover, Pennsylvania does not charge interest (Bannon et al., 2010: 45, footnote 89). Unlike some other states, Pennsylvania does not allow the conversion of criminal financial obligations to civil debt (Bannon et al., 2010: 27, 56, footnote 187). And finally, unlike 13 of the 15 states with the largest prison populations, Pennsylvania does not have a public defender fee (Bannon et al., 2010).

In addition to their own research in Washington State, Beckett and Harris (2011) also relied on a report by the ACLU (2010), which sent questionnaires to ACLU affiliates in the states as well as to legal aid attorneys and public defenders. Based on the responses to these questionnaires, the ACLU "narrowed their investigation to a handful of states that

would be the focus" of their report—Georgia, Louisiana, Michigan, Ohio, and Washington. Alexes Harris, a coauthor of the current article, drafted the section of the report dealing with the state of Washington. She focused "on case studies and clinical interviews of men and women who had completed their criminal sentences and were attempting to manage their legal debts after their release" (ACLU, 2010: 13). What might be problematic about the ACLU report is that the five states chosen are likely those that had the worst problems and, thus, might not be representative of problems at a national level.

The Inherency of the Problems

The problem might not be with the economic sanctions themselves but with how they are administered, perhaps especially in Washington State. In her portion of the ACLU report (2010: 70), Harris stated:

> All of those interviewed felt that it was fair that they were charged legal fines, fees, and restitution for their offenses. They clearly recognized the harm that they had done to their individual victims and society and wanted to make amends. However, they did not believe the State had a right to profit from the fines and fees by charging interest and additional surcharges.

From the interviews, then, the offenders Harris interviewed believed that most of the economic sanctions they faced were just. It was only the additional charges, perhaps just those that are used in Washington State and some others, that they objected to.

Regarding willful nonpayment, the National Center for State Courts (Tobin, 1996) conducted a survey of 40 courts to determine what practices might work to increase collections. The report found that judges and court managers in many jurisdictions believed that many offenders did not have the ability to pay fines and fees. However, the report also found that "experienced collectors consistently assert that all but a very few defendants have greater resources for meeting their obligations than might be immediately apparent" (1996: 55).

Are the problems inherent? In *Bearden v. Georgia* (1983), the U.S. Supreme Court held that a defendant could not be imprisoned for failure to make a payment unless the default was intentional or in bad faith. According to the Supreme Court in *Bearden v. Georgia* (1983: 672):

> [i]f the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.

That state courts do not follow the law does not necessarily mean that all economic sanctions should be abolished. Rather, actions should be taken to make the courts follow the law.

The situation is analogous to the U.S. Supreme Court decision in *Fuller v. Oregon* (1974), in which the court upheld an Oregon law that allowed Oregon to charge defendants for a court-appointed attorney. Under the Oregon statute, the sentencing court must find that the defendant "is or will be able to pay" (*Fuller v. Oregon*, 1974: 43 n. 5, quoting the statute). The convicted offender could petition at any time for remission if the payment would impose a manifest hardship on the defendant or the defendant's immediate family. Moreover, the defendant could be held in contempt only if the default on payment was an intentional refusal to obey the court or if the defendant did not make a bona fide effort to pay (Anderson, 2008).

Beckett and Harris (2011) suggest that judges routinely revoke probation for nonpayment of legal financial obligations. However, the problem of probation revocation solely for nonpayment is probably not as serious as they suggest. For example, Beckett and Harris refer to work involving national data regarding probation (Bonczar, 1997: Table 12) when they stated that "[i]n 1995, 34.1% of adult felony probationers had a disciplinary hearing as a result of failure to pay." The sentence is misleading in two ways. First, the category in the table is "Failure to pay fines or restitution," not just fines, a point to which I return below. Second, the percentage is almost certainly too high for failure to pay alone because, according to a note in the table, "some probationers had more than one disciplinary hearing, while others had a single hearing with more than one reason" (Bonczar, 1997: Table 12, note a). For example, 43.3% of felony probationers had a hearing because they absconded or failed to make contact, and 43.2% had a hearing because they were arrested, convicted, or both for a new offense.

Beckett and Harris (2011) might have overstated the problem evidenced by research, suggesting that judges are reluctant to incarcerate individuals for nonpayment because they are aware of the monetary and social costs of incarceration (Ruback, 2004; Wheeler, Hissong, Slusher, and Macan, 1990). Wheeler et al. (1990) found that in 7% of felonies and 3% of misdemeanors, judges revoked probation for nonpayment or failure to report. Another study found that 12% of probation revocations resulted at least in part from a failure to pay court-ordered financial obligations (Cohen, 1995). The key point is that these figures suggest that failure to pay economic sanctions is often simply one of several reasons why an individual might face revocations. In a multicollinear world, it is unfair to single out one factor when others with which it is correlated also likely explain decisions by judges and probation officers. In this world, as Beckett and Harris point out, indigent defendants also face problems of substance abuse, mental and physical health problems, and a criminal record. Thus, to point to economic sanctions alone is not prudent.

In other words, probation revocation solely for failure to pay is probably relatively infrequent, especially for misdemeanants, who are more numerous than felony offenders

and more likely than felony probationers to make these payments probably because they have less extensive criminal histories and are thus more likely to be working (Wheeler et al., 1990).

Excluding Restitution from Their Argument

Beckett and Harris (2011) explicitly exclude restitution from their argument because, as they argue, restitution is imposed only for those victims who incurred financial losses as a result of the crime, whereas fines and fees can be imposed for crimes with no victims or with victims who suffered no financial losses. Moreover, restitution payments go directly to the victims, whereas fines and fees go to the government.

Beckett and Harris's (2011) exclusion of restitution makes sense politically because of society's concern for victims. However, for three reasons that exclusion does not make sense in the larger context within which Beckett and Harris's (2011) are operating. First, although restitution is now victim oriented, historically it was an offender-focused remedy (Dickman, 2009). That is, it was intended to promote the offender's rehabilitation rather than to compensate the victim. This view has been voiced by the U.S. Supreme Court (*Kelly v. Robinson*, 1986) and by other courts and scholars (see discussion in Dickman, 2009). In other words, restitution has a penological purpose in addition to providing compensation to victims.

Second, the same problems that Beckett and Harris (2011) list for fines and fees are also true for restitution—problems with debt, credit, employment, and revocation of probation. Research on restitution suggests that only approximately half of victims to whom restitution was ordered actually receive the full amount of restitution owed them (Ruback, Cares, and Hoskins, 2008), and other studies suggest that compliance rates are low (Cohen, 1995; Smith and Hillenbrand, 1997). Thus, these offenders face the same problems of legal debt as those offenders who are ordered to pay fines and fees, as evidenced by Beckett and Harris's reference to the study by Bonczar (1997).

Third, a cost–benefit analysis would suggest that ordering restitution, as with fines and fees, is not cost-effective. Imposing, monitoring, and enforcing restitution orders is expensive, generally costing more money than they are likely to bring in. In the federal system, the cost of a single restitution order is $2,000 (Dickman, 2009).

Possible Alternatives to Abolishing Fines and Fees

Abolishing fines and fees is not the best policy, but changes might be needed. For example, economic sanctions might work for some groups and some crimes. Research suggests that they can be useful as penalties for defendants who are wealthy (Dickman, 2009), and these sanctions might be especially useful for those who committed economic crimes like stock fraud and money laundering. It also might be useful to reduce large economic sanctions for the poor because they are not likely to be cost-effective (Dickman, 2009).

For the real world, then, it would be important to consider alternatives that might improve the system. The following suggestions are likely to solve problems better than outright abolition.

1. Reduce the Number of Fees and Costs, Especially at the County Level

In our research in Pennsylvania, we have found that most of the different economic sanctions (90% of 2,629 different sanctions) relate to county-level user fees and costs (Ruback and Clark, 2009, in press). These fees are primarily aimed at generating funds for the county rather than punishing offenders. A reduction in the number would reduce the economic burden on offenders.

A similar argument was made in a report by the Brennan Center for Justice, titled *Criminal Justice Debt: A Barrier to Reentry* (Bannon et al., 2010), which argued that the problem is user fees that are explicitly intended to raise revenue. Legislators do not give much thought to the consequences of raising the amounts for old fees or of creating new fees (Bannon et al., 2010).

The analysis conducted by Bannon et al. (2010) examined laws and policies in the 15 states with the largest prison populations. This excellent study recommended that fees be discontinued—particularly fees that impose additional costs on the indigent, such as payment plan fees, late fees, collection fees, and interest. The report also recommended that fees for legal representation by a public defender be eliminated. Beckett and Harris (2011) cited the Brennan Center study several times in their article. It would have been helpful if they had indicated why the Bannon et al. recommendations to discontinue user fees were insufficient and instead clearly explained why all fines and fees should be abolished.

2. Make Payment Amounts Realistic

Beckett and Harris (2011), like most writers today, advocate imposing financial obligations that are based on the offender's ability to pay. McLean and Thompson (2010: 23) suggested capping amounts at 20% of an offender's income and creating realistic payment plans. Dickman (2009: 1707) suggested removing the mandatory amounts beyond the offender's ability to pay. In the federal system, under the 1982 Victim and Witness Protection Act, judges had to consider the defendant's financial resources, financial needs, and earning ability when imposing restitution. In contrast, under the 1996 Mandatory Victims Restitution Act, judges could not consider the defendant's financial resources regarding the imposition of economic sanctions but had to consider those financial resources when setting a payment plan.

Beckett and Harris (2011) briefly mentioned the use of day fines. Europe uses actual earnings, but many governments there have access to more information about people than in the United States (e.g., income and tax records; Hillsman, 1990). Determining the ability to pay requires more detailed information than judges in the United States currently have available to them. Tax records, links to the Internal Revenue Service and state agencies, listings of all bank accounts, and property owned by relatives (because property can be

transferred to avoid payment) are all needed. Such an investigation would be intrusive and expensive. Do we want this sort of record availability to be made more general in the United States? At the very least, linking imposed economic sanctions to ability to pay will require additional costs for a presentence investigation in addition to the legal authority for probation officers to find out detailed information about salaries and all assets, including assets that are jointly held.

3. Make Payments Easier

The National Center for State Courts (Tobin, 1996) recommended that the collection of economic sanctions is likely to be improved if courts make payments more convenient through credit card payments, installment plans, incentive plans that reduce amounts for those who comply with payment plans, community service, and day fines based on income levels.

4. Prioritize the Financial Obligations

Much of the objection to the current system of economic sanctions is that the local and state governments get paid before others. Currently, there are often no clear priorities for the collection of legal financial obligations (McLean and Thompson, 2010). Levingston and Turetsky (2007) suggested that child support and victim restitution should take precedence over fines, fees, and surcharges.

It also would be useful to have groups that collect legal financial obligations share that information (McLean and Thompson, 2010).

Will Abolition Be Better than the Current Conditions?

In addition to showing that the harm of fines and fees is severe, is inherent, and cannot be remedied with less drastic changes, those who advocate abolition need to show that the criminal justice system will be better without fines and fees than with them. Without such an analysis, it is at best premature to argue for a dramatic change in policy like the abolition of fines and fees.

There is no doubt, as Beckett and Harris (2011) assert, that the poor, the undereducated, and the unemployed, many of whom also face other serious problems, are disproportionately in the criminal justice system and in prison. But it is not clear that abolishing fines and fees will do much to help these individuals. Indeed, one goal we might want to have is to increase the number of intermediate sanctions for precisely this population. Banning the use of fines might give them some benefits, but they have to be weighed against the disadvantages that accompany the reduction in the number of alternatives that judges have at sentencing.

One of the real harms of abolition is that it means individuals who can pay the economic sanctions would not have to do so. Although most offenders have little ability to pay, some do, and for them, economic sanctions might be appropriate, particularly if the crime itself involved fraud or financial misdealing. Moreover, not only would a loss of

funds occur from individuals who can afford to pay, but also a loss of the possible benefits of economic sanctions would occur, including taking responsibility for criminal wrongdoing. In addition, the economic impact on states and local jurisdictions for abolishing fines and fees would have to be considered.

Conclusion

I agree with much in Beckett and Harris's (2011) article, and many of their findings are consistent with the work my colleagues and I have conducted in Pennsylvania. However, we hold different opinions in regard to describing a system with problems and assuming that the abolition of that system will solve those problems.

Criminology & Public Policy rightly places criminologists in the position of improving justice and the criminal justice system through research. As a field, our positions need to be based on careful research and careful summaries of research by others, and they need to consider the implications of the entire issue, not just a portion of the question. In addition, they need to be scientifically persuasive, in that a body of peer-reviewed work must replicate the general findings. Furthermore, the research must be policy relevant; that is, it should manipulate variables that policy makers can control and measure variables that policy makers care about (Ruback and Innes, 1988). At this time, no such extensive body of research on economic sanctions exists.

The problem of unpaid debt is a serious one, not only because of the current recession but also because of continued poverty that limits individuals' ability to pay. Moreover, the fact that the problem affects criminal sanctions, consumer debt (Silver-Greenberg, 2011), and child support (*Turner v. Rogers*, 2011) suggests that the issue cannot be addressed piecemeal. Rather, a thorough and thoughtful review of all civil and criminal economic sanctions is needed as well as a careful consideration of alternative ways that payment and other goals can be achieved. These outcomes and procedures need to be fair and to be perceived as fair if citizens are to respect and cooperate with the legal system (Tyler, 2011).

Although I am in agreement with much of what Beckett and Harris (2011) have written about criminal economic sanctions, I do not think they have carried the heavy burden required for a policy change. That is, the seriousness of the problem is not proven and their arguments are not compelling.

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JUSTICE REINVESTMENT

A private-sector, incentives-based model for justice reinvestment

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Research Summary

Justice reinvestment is a recent strategy designed to reduce the use of incarceration and divert the savings to improve the circumstances of communities that have high incarceration rates. More than a dozen states have mounted justice reinvestment projects. While support for justice reinvestment remains high, actual results have been mixed. In particular, the "community reinvestment" aspect of justice reinvestment has been disappointing. An approach that focuses on the private sector and creates incentives for private justice reinvestment could resolve some of these current limitations of the method.

Policy Summary

Advocates for justice reinvestment would be able to address some of the problems in the approach by developing financial incentives that involve the private sector in justice reinvestment activity.

Keywords

corrections policy, *justice reinvestment*, *privatization*, *sentencing*, *diversion*, *prison populations*, *community corrections*

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RESEARCH ARTICLE

JUSTICE REINVESTMENT

A private-sector, incentives-based model for justice reinvestment

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This article presents a private-sector model for "justice reinvestment" in criminal justice. The model has as its central aim to move funds from the institutional corrections budget into the socioeconomic infrastructure of high-incarceration communities in ways that develop the capacity of those communities to become better places for people to live, work, and raise their families. This development is accomplished by creating strategic reductions in the number of people incarcerated, with the savings distributed to targeted private-sector initiatives.

Justice reinvestment is a relatively new idea; Susan Tucker and Eric Cadora (2003) coined the phrase in a policy paper published by the Open Society Institute, in which they said the following:

> The goal of justice reinvestment is to redirect some portion of the $54 billion America now spends on prisons to rebuilding the human resources and physical infrastructure—the schools, healthcare facilities, parks, and public spaces—of neighborhoods devastated by high levels of incarceration. (p. 3)

Despite the fact that this original publication had but a small distribution, the idea of justice reinvestment caught on quickly by word of mouth, gaining popularity at a rapid pace. Justice reinvestment's quick ascendance resulted from the coalignment of four broadly shared (although by no means universal) public sentiments.

First, largely because crime rates have been dropping for 10 years or more, public alarm about crime (which has been a fellow traveler with increasing incarceration rates) has abated. This decrease has created an opening for new policy ideas to gain traction. At the same

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time, a national awareness of the importance of reentry has built a foundation of sympathy for the problems people encounter leaving prison. Having a good deal of prison capacity where people go to languish because of their crimes feels, to many in today's consciousness, like an idea whose time has come and gone.

Second, the out-of-scale imprisonment levels in the United States have become acknowledged more widely as an important way in which our crime policies are out of sync with those of many other democracies. This fact, combined with dropping crime, has made it easier to portray the U.S. prison system as unnecessarily large (see Austin et al., 2007; Whitman, 2003).

Third, a host of new research casts incarceration in a problematic light. High rates of failure for those in reentry make the inability of prison to prepare people for life after release inarguable. Recent well-publicized and widely read work, both journalistic and scientific, has called attention to the problems of incarceration in poor, minority communities. Less widely disseminated research calls into question the crime-prevention impact of imprisonment (for a summary of this work, see Clear, 2007).

By far, the most proximate catalyst for the emergence of justice reinvestment has been the current fiscal crisis. The first three forces make downsizing prisons a feasible idea both politically and tactically. But the fiscal crisis gives momentum to the desire to use prison funds elsewhere (Greene and Mauer, 2010; Schmitt, Warner, and Gupta, 2010).

Justice reinvestment, then, is an idea that resonates with several contemporary realities. It promises to reduce the size of the prison population, thereby reducing the costs of incarceration. The savings are to be diverted to support communities that contribute the most people to the prison system to interrupt the prison–community cycle. The theoretical foundation for justice reinvestment includes the broad literature of community development (Anglin, 2004). The practical foundation is a wide range of experiences, documented by various advocates and policy groups (see Clear and Cadora, 2000; Council of State Governments, 2010a; Tucker and Cadora 2003; Urban Institute, 2010). Reducing mass incarceration is an idea that appeals to the left; reducing the costs of government is an idea that appeals to the right. As a result, a fair degree of bipartisan support has been given for justice reinvestment as a concept.

Although considerable impetus exists for justice reinvestment, the idea is in its infancy. Only a handful of projects have been mounted, and no strong empirical foundation exists yet for the strategy. But even so, based on the activity to date, justice reinvestment is an idea to be reckoned with.

Justice Reinvestment Defined. . . Sort of

"Justice reinvestment" does not avail itself to an easy definition. The original idea, as defined by Tucker and Cadora (2003), is part philosophy and part strategy. As a philosophy, justice reinvestment holds that money spent on incarceration instead could be much better spent on community-based development. As a strategy, justice reinvestment proposes to move those

dollars from the corrections budget into productive uses at the community level. To free up those dollars, people are moved from prison to the communities the justice-reinvestment dollars will go to, with the "savings" following them.

This description is far from a formal definition. It is even further from a theory. Perhaps justice reinvestment can be understood best as a broad strategic plan of action; incarceration rates are purposefully reduced through new sanctioning policies and practices, and the money saved by doing so is invested in local communities hard hit by crime and cycles of incarceration.

Many details of justice reinvestment are left up for grabs. Who is diverted from prison, and how are they diverted? How are prison savings calculated? How are the savings "reinvested," and what is the investment target? The fact that questions of this magnitude are left unaddressed in the justice reinvestment framework goes to show that it is an idea in progress rather than a full-fledged strategy. A brief review of today's justice reinvestment menu of activity illustrates the breadth of the idea and the amount of development yet to be done.

Justice Reinvestment Today

Current work on justice reinvestment is being carried out by various organizations and agencies. Prominent initiatives using a justice reinvestment rubric have been undertaken by the Council of State Governments Justice Center (CSG) and the Urban Institute Project on Justice Reinvestment Initiative. However, the general idea that prison growth needs to be curtailed has been the focus of numerous private nonprofit organizations, including nationally visible projects by the Vera Institute of Justice and the Pew Center on the States. Much of the funding for this work has come from the Pew Charitable Trusts. State-level initiatives, such as RECLAIM Ohio, also contain ideas central to the justice reinvestment movement (Ohio Division of Youth Services, 2010). Perhaps the most widely acclaimed justice reinvestment work has taken place in Michigan, which eventually closed 20 prisons and reinvested millions of dollars in community-level social services (Greene and Mauer, 2010). No formal listing of justice reinvestment projects is available anywhere, but it is safe to say that the idea has taken root in many locations under the purview of numerous agencies.

What all of these strategies have in common is what makes them a part of the justice reinvestment family of projects; they try (a) to reduce incarceration intentionally and (b) to spend the money saved through that reduction in local initiatives that strengthen reentry.

Some important work and the earliest projects have been under the CSG Justice Center leadership. Their work began in Connecticut where they focused a legislative agenda on probation and parole. In the end, that work was estimated to save $30 million in imprisonment costs, when

> probation violations dropped from 400 in July 2003 to 200 in September 2005 [and the] decrease in the prison population over a two-year period was steeper

> than that seen in almost any other state while the crime rate continued to drop. Almost $13 million of the nearly $30 million saved was reinvested in community-based pilot projects. (Council of State Governments, 2010b: 1)

After its pilot effort in Connecticut, which started in 2005, additional states demonstrated interest in working on justice reinvestment with the CSG Justice Center. With funding support from the U.S. Department of Justice, the Pew Center on the States, the Open Society Institute, other private foundations, and the states themselves, the CSG Justice Center began working intensively in Kansas and Texas. The results in these states mirrored those in Connecticut. By 2010, the CSG Justice Center had worked in more than ten states, and it currently has active projects in 15 states (see Council of State Governments, 2010a). Employing a similar strategy, the Urban Institute has been working with three local governments on jail-oriented justice reinvestment projects (Urban Institute, 2010).

Systems Analysis for Justice Reinvestment

The Department of Justice under the Obama administration has continued support for the justice reinvestment initiative that begun under the previous administration (Office of Justice Programs, 2010a). In January 2010, the Office of Justice Programs cosponsored a National Summit on Justice Reinvestment in the U.S. Capitol (Office of Justice Programs, 2010b). Attorney General Eric Holder praised states that had pursued a justice reinvestment approach, and key congressional leaders from both sides of the aisle expressed their support for the data-driven approach to reduce spending on corrections and increase public safety in the communities where most people return after being released from prison. The U.S. Senate Judiciary Committee approved the Criminal Justice Reinvestment Act, which establishes a $30 million grant program to support states and counties interested in pursuing justice reinvestment (United States Senate, 2010).

As indicated by the Office of Justice programs, the strategy undertaken in these initiatives is what might be called a "systems analysis." It follows four steps:

1. *Analyze the prison and/or jail population and spending in the communities to which people often return after a period of incarceration.* Justice reinvestment experts review prison admission data to determine what is driving increases in the jail and prison populations. Using mapping technology, these experts provide geographic analyses to pinpoint which neighborhoods receive people released from prison and how public spending on programs might converge on the same families and communities.
2. *Provide policy makers with options to generate savings and increase public safety.* The justice reinvestment experts generate various options that recognize the uniqueness of each state, locality, or tribe's criminal justice system and tailor them to that jurisdiction to manage the growth of prison or jail populations better and to increase public safety. These options include strategies to reduce parole and probation revocations, focus supervision resources where they can have the greatest impact, and hold ex-offenders

(and service providers) accountable for the successful completion of programs such as drug treatment and job training.

3. *Quantify savings and reinvest in select high-stakes communities.* State government, local government, or tribal leaders work with the justice reinvestment team to determine how much they might save (and avoid spending) by adopting some (or all) options identified by the experts. Policy makers and the team's experts develop plans for a portion of these savings in new or enhanced initiatives in the communities where most people released from prisons and jails return. For example, officials can reinvest the savings and deploy existing resources in a high-stakes neighborhood to redevelop abandoned housing and to coordinate services better, such as substance abuse and mental health treatment, job training, and education. These efforts are perceived generally as benefiting everyone in the community, regardless of their involvement in the criminal justice system.
4. *Measure the impact and enhance accountability.* For each policy adopted, an appropriate, state, locality, or tribal agency is charged with setting performance measures and projected outcomes, such as the amount of corrections costs saved or avoided, recidivism rates, and indicators of community capacity. The agency also might be charged with establishing systems that can span multiple agencies to collect and analyze data and provide periodic reports to policy makers. Policy makers can use these measures to determine whether agencies are implementing the new policies effectively, to assess how closely the actual impact of these new policies corresponds to projections, and to make any necessary adjustments. (The description is taken from Office of Justice Programs, 2010b: 2–3.)

As a condition of its involvement, the CSG requires a bipartisan letter of invitation jointly endorsed by signatories from the three branches of government. This means that the work is nonpartisan, stemming from a broadly shared desire to develop a justice reinvestment agenda. The initial work is empirical, interviewing key decision makers and gathering data. Then leverage points are identified where the cost of corrections can be reduced or its projected growth at least curtailed. Working from a perspective of consensus, a plan of action is developed to reduce imprisonment and redistribute savings. This version of the justice reinvestment strategy was developed by CSG, and the Urban Institute uses strategies that mirror it.[1] Nationally, this approach seems to be developing as the standard strategy for justice reinvestment—an operational definition of the planning and development process for justice reinvestment. It is worth noting, however, that data-driven correctional population control has a longer history stemming from the original Minnesota Community Corrections Act (Schoen, 1978)

It has significant advantages. First, it is an analytical approach that builds a data-based strategy that is based on the particular dynamics of a given state or local jurisdiction. It

1. The original work by CSG was based on a four-step strategy. The CSG recently has restructured its approach to call for three steps, combining steps three and four.

works from a consensus model and works closely with key stakeholders so that the partisan politics that accompany so much justice system reform are minimized. The targets are frequently policies rather than laws, and so, implementation can be less politically charged. Strategically, pressure points that produce quick results can be selected.

Despite the widespread dissemination of this data-grounded model, people experienced with it have raised some questions about the patterns of strategies it tends to promote. Although CSG has been effective in helping states design promising strategies for justice reinvestment, the implementation of these strategies sometimes has been problematic. We should note that experience with justice reinvestment is in its early days, and the wide variety of strategies of justice reinvestment does not easily lend itself to broad summarization. That said, four key issues have resulted from the current body of work.

Justice Reinvestment Through Fiscal Incentives

The systems-analysis strategy is the most prominent method now in use, but it is not the only way justice reinvestment is approached. A few places have tried to create fiscal incentives to reduce the use of incarceration (see, for example, Davey, 2010). At least six states recently have created fiscal incentives for local justice systems, to reduce their recidivism rates (Austin, 2010). These strategies emphasize evidence-based programmatic ways of reducing incarceration by reducing the rates of return to prison for people already involved in the justice system. The idea that local corrections should enjoy some fiscal benefits when they do not send people to the state prison system is well accepted. Three quarters of the states have some sort of fiscal arrangement to promote community-based corrections (Clear, Cole, and Reisig, 2010), for example, providing state dollars to local agencies on the condition that rates of sentencing to state prison are controlled. The precise mechanisms for moving the money vary, but the following core idea is the same: make it fiscally advantageous for local justice systems to refrain from sending serious felons to the state prison system.

Attempts to create systems of financial incentives for using nonprison penalties thus have a bit of history in criminal justice. The most widely known strategy was the California Probation Subsidy Program, which reimbursed California counties for using probation instead of prison and had the express purposes of reducing incarceration rates and saving money. The probation subsidy was evaluated by Edwin Lemert and Forrest Dill (1978). The results were troubling. Instead of reducing the use of confinement, many people who were not sent to prison served jail sentences locally instead, and when the cost of the subsidy was factored in, nether savings nor reduced incarceration were realized (Austin and Krisberg, 1982).

Despite these disappointing results, state policy makers have continued to seek to create fiscal incentives for local correctional officials to keep people convicted of crimes in local correctional systems, instead of sending them to state prison. Although numerous studies have been conducted of various individual programs working under community corrections

incentives systems, a scant few studies are available of the underlying impact of incentives-based correctional strategies. Policy makers widely believe them to be effective at reducing correctional costs and increasing correctional effectiveness, but this confidence is based on a weak empirical foundation (Austin et al., 2007).

The newest form of the fiscal incentive idea is to create a private-sector competition for effective programs. The United Kingdom's Financial Incentive Recidivism Reduction Bond (Social Finance, 2010) is an example of this idea. In this strategy, a fund is created as an investment incentive for private, for-profit entities to provide more effective services to people convicted of crimes and returning to the community from Peterborough Prison. If the private provider can produce a recidivism rate that is lower than the rate produced by government-run programs, then the private provider taps into the "bond" and receives some monies as profit.[2] The incentives are graduated so that the greater the drop in recidivism, the more the return. The argument is that lower recidivism rates save real dollars by eliminating the need for incarceration, and they produce symbolic public benefits in reduced victimization. Providers that produce these savings should share in them.

Concerns About the Current Justice Reinvestment Agenda

How well is the justice reinvestment agenda progressing? Experience with justice reinvestment is in its early days, and the wide variety of strategies of justice reinvestment does not easily lend itself to broad summarization. That said, three key issues result from the current body of work.

Reducing Recidivism, Especially Technical Revocation

Justice reinvestment opportunities can be found in almost every leverage point, from rethinking the management of people convicted of drug-related crime to changing the duration of revocation terms. Because justice reinvestment is tailored to fit the dynamics of each participating jurisdiction, the range of strategies is appropriately varied as well. However, giving priority to the "leverage points" that drive prison populations often means that savings are based on a plan for reducing return-to-prison rates. Program-based strategies often try to accomplish this reduction by decreasing the rate of new arrests. Policy-based strategies seek to restrict the number of technical revocations of probation and parole.

One reason why this heavy emphasis is placed on reducing return-to-prison rates is that such approaches are politically attractive because they *reduce* risk rather than increase it. They also avoid the politically threatening problem of "early" prison releases, who can come back to haunt a politician who promotes them. In a real way, everyone benefits when recidivism rates drop.

But a focus on reducing failure rates of people poses two problems. First, a ceiling exists as to how much the incarceration rate can be affected by reductions in recidivism. For

2. The City of New York recently has announced a plan for a similar bond strategy (Jokisch, 2010).

example, say that, in a given jurisdiction, 40% of all people released from prison are back within their first year and that they serve an average of 1 year before they are released again. Let us also say that a justice reinvestment program reduces rates of return to prison by a sizeable amount, again, say 40%, which means that the overall impact of the strategy will affect 16% of all releases. In a high-incarceration neighborhood that receives 100 people returning from prison in 1 year, 24 will go back instead of 40. If 1 year of incarceration costs an average of $40,000, then the 16 people who do not go to prison will "save" $640,000. These savings are not real, of course, because diverting 16 people from prison does not enable the corrections system to close a prison, so its budget remains essentially unaffected. Working under these assumptions, the program will have to affect 1,000 people in reentry to generate "savings" of 160 prison years—a much more considerable figure of $6.4 million.

But these figures also are based on friendly assumptions. If the justice reinvestment program is aimed at reducing technical revocation rates, as many are, and if the technical return-to-prison rate is 20%, then the effect is halved. If the impact of the program on recidivism rates is a much more reasonable 20% reduction, then the effect is halved again. If the average stay in prison for a technical revocation is not 1 year but instead is 6 months, then the effect is halved again. Under the alternative assumptions—20% return rate, 20% reduction in return rate, and 6-month stay—to achieve a reduction of 160 prison years requires a program that reaches 4,000. If the program costs $1,600 per person for the services it provides, then it eats up nearly all "savings." Under these numbers, it would be a more-or-less break-even venture.

Of course, one key advantage of the systems-analysis strategy is that it begins by gathering data on rates of recidivism and program participation from which data estimates are made of savings to be generated by various strategies. The data typically lead to a potpourri of recommendations, only some of which involve working to reduce failure rates. Taken together, these strategies have produced sizeable estimates of total savings (see Greene and Mauer, 2010; Council for State Governments, 2010c).

But my own estimates are meant to illustrate how hard it is to accomplish significant savings by focusing on probation and parole recidivism. In an earlier article (Clear and Austin, 2009), the *Iron Law* of prison populations was described; they are fully determined by the following numbers: (a) how many people go in and (b) how long they stay. Failure-rate strategies have a limited capacity to affect prison populations because they target only a fraction of the number of people who go to prison and have little impact on the length of stay.

Of course, the politics of sentencing reform are thorny, which is a key reason why nonsentencing strategies of justice reinvestment have received priority. They are, simply put, more politically feasible than a broader sentencing reform agenda. Moreover, legislation that eases reentry, reduces the barriers that make reentry so fraught with difficulty, and protects the civic interests of the formerly incarcerated can offer a potentially important role for the legislature to support justice reinvestment initiatives. However, the fact remains

that the strategic focus on reducing recidivism leaves a large proportion of the prison population unaffected and, as a result, places limits on the budgetary impact of justice reinvestment.

Reinvesting in Government Instead of Communities

The second problem is that the consensus-driven, evidence-based strategies often have resulted in redirecting government funds from corrections to other government-based social services. A common theme is, for example, to expand state-run, drug-treatment capacity and to create supportive housing slots. To accomplish this expansion, correctional budget dollars are transferred to state service-provider budgets. The rationale is that, through these enhanced services, failure rates are reduced and costs are averted.

Nothing is wrong with this strategy, but the original rationale for justice reinvestment, quoted earlier by Tucker and Cadora (2003: 3), was to use prison savings for "rebuilding the human resources and physical infrastructure—the schools, healthcare facilities, parks, and public spaces—of neighborhoods devastated by high levels of incarceration." This might imply a role for government services, but it is certainly not a service-delivery agenda. It calls instead for a community development agenda.

Good reasons exist as to why much of the justice reinvestment activity to date has focused on upgrading services for people who have been convicted of crimes. Drug and alcohol addiction are dominant themes in the lives of many who end up in prison or jail, and few of them can remain substance free without some form of treatment. Many are homeless. Likewise, poor educational backgrounds and limited job readiness are endemic in this group. Obtaining housing, finding good work, and advancing one's education are important potential pathways out of the prison cycle (LaVigne, 2010).

It is also true that a transfer of funds from one government sector to another is far less complicated than a transfer to the private sector. Services for people who are under correctional supervision, either in prison or in the community, fall woefully short of need; it has been estimated that between 10% and 15% of those who go through the system have their most pressing needs met by current programs (Taxman, Perdoni, and Harrison, 2007). Expanding those services is surely a high priority.

Yet something is left wanting about the movement of correctional funds to social-service budgets. The people who work for social services are not necessarily the citizens who live in high-incarceration communities. Although the services they provide might result in improving the social-adjustment prospects for those who live in high-incarceration communities, the salaries spent employing those service providers end up being spent outside of those troubled places.

The special promise of justice reinvestment is that money now spent incarcerating people instead will be used to develop the social stability of the communities from where those people came, which is a tall order. In their original article, coining the phrase, Tucker and Cadora (2003) envisioned an "urban justice corps," in which young people who

otherwise would be behind bars are instead working to rebuild their communities. The authors put it as follows:

> Local government would develop a diversified investment strategy with a portfolio of risk reducing initiatives. The idea of a civic justice corps is to mobilize people returning home from prison as agents of community restoration. They would join with other community residents to rehabilitate housing and schools, redesign and rebuild parks and playgrounds, and redevelop and rebuild the physical infrastructure and social fabric of their own neighborhoods. But the civic justice corps is only one possible investment in a public safety portfolio. Other investments might include a locally run community loan pool to make micro-loans to create jobs or family development loans for education, debt consolidation, or home ownership and rehabilitation, transportation micro-enterprises for residents commuting outside the neighborhood, a one-stop shop for job counseling and placement services, or geographically targeted hiring incentives for employers. (p. 5)

This model is of a different kind of justice reinvestment, one that has as its direct target the infrastructure of troubled communities. It organizes private and parochial forms of social control, not public control (Hunter, 1985). Most of all, it places heavy reliance on the private and semiprivate sectors for their involvement in community life.

Cost Avoidance Rather than True Savings

A final problem is that many justice reinvestment projects are built on plans to *control* the growth in correctional costs rather than to *reduce* them. Of course, it has proven substantially more feasible politically (and practically) to put limits on correctional growth rather than to cap it. Correctional administrators can support strategies that help them to control their budgets, but it is difficult for them to get behind approaches that actually reduce their budgets. Realistically, to reduce correctional expenditures requires that staff be laid off, and the politics of staff reduction are difficult indeed. Prisons have to be closed. In fact, even *that* might not be enough. In New Jersey, where a major prison recently was shut down, staff overtime was reduced but nobody lost a job, and the state's correctional budget did not get smaller.

When the justice reinvestment strategy focuses on cost avoidance rather than on cost reduction, no surplus fiscal windfall exists to reinvest. It might be that slowing the growth of the corrections budget is an important fiscal accomplishment, but it does not promote "reinvestment." In times when states are desperate for cost containment, the argument for "reinvesting" symbolic dollars trimmed from corrections through strategies that at best merely slow the growth curve of the costs of corrections is simply a nonstarter. The idea

of justice reinvestment is considerably less attractive if no real savings are available to be reinvested.

A few states have had notably different experiences (Greene and Mauer, 2010). The most important illustration of the ability to downsize and to use true savings to reinvest in community-level services is provided by Michigan, which has reinvested approximately $200 million in local communities through correctional budget reductions achieved by closing prisons. Texas redirected a major program of funding from prison building to rehabilitation programs in community-based corrections (Council of State Governments, 2010c).

So although little doubt exists that "evidence-based" strategies, provided in community settings, have enormous promise, whether they have translated into a potpourri of effective local programs in practice is an open question. Equally important, subsidy-oriented incentive systems have tended to grow social-service initiatives locally, such as treatment beds, but they generally do not relate to the private-sector economy or to the community infrastructure. For the most part, the evidence-based movement in corrections has engaged the government sector in the design and execution of programs. It has left the private sector largely untapped as a catalyst for controlling prison costs.

Identifying Actual Savings and Capturing Them for Reinvestment

A final issue is that true correctional savings have been difficult to document and even more problematic to capture. Justice reinvestment work has been carried out in more than 12 locations, but in every one of them, the correctional budget has continued to grow. CSG evaluations make a strong case for averted costs; the rate of growth in correctional budgets was reduced with actual costs falling below projected costs. However, it is hard to think of this reduction as "real savings" that amount to dollars for redistributing to other causes. Justice reinvestment comes off as just another new program with its own budgetary demands when corrections budgets continue to grow.

Even when agreement exists that justice reinvestment has averted meaningful growth in correctional dollars, immense pressure is exerted on those savings. Programmatically, advocates have tried to tie justice reinvestment funds to new programs so that the dollars support the work that produces the savings. However, many potential takers for the correctional dollars have been freed up—education, health, and other important needs. The fiscal pressure that motivates states to try to control corrections costs is the same pressure that means that the money has many potential uses. Increasingly, justice reinvestment initiatives face a demand that correctional savings be spread across other needs.

An Incentives-Based Strategy for Justice Reinvestment

These problems—the focus on traditional recidivism programs and the pressure to dissipate the correctional savings—suggest the need for new justice reinvestment thinking that is

neither dependent on programs as a framework nor easily disconnected from the savings it generates.

In the remainder of this article, I outline a vision for a justice reinvestment strategy that focuses on the private sector for community-based action. The central driver for this strategy is a realignment of incentives. First, incentives are created for the justice system to move people from confinement to the community and for the private sector to hire people who otherwise would be incarcerated as well as keep them free of new criminality, in the community, and engaged in productive labor. In short, the model is designed to create new jobs, which is accomplished by enabling the private sector to redeem vouchers that would supplement the costs of doing business. Second, a financial accounting system provides oversight and distributes the cash associated with vouchers. Third, a local corporation is the employer so that the jobs that are created employ not only people who are diverted from incarceration but also local residents who are not involved in the criminal justice system.

By *private sector*, I am referring to both the for-profit and not-for-profit private venues. Of course, these two nongovernmental sectors have important differences. The model I describe subsequently is designed to promote both types of private entities, and although I will describe a nonprofit partner in the mix, my main interest is to stimulate thinking about the possibilities for a more traditional profit-making private venture.

Some might argue, with reason perhaps, that the for-profit world has a tendency to distort the services it provides to make money for its investors. Private prisons, for example, have been accused of offering a cheaper version of incarceration through watered-down programs, "creaming" the least problematic people from the system, and being vulnerable to corruption (Chueng, 2004). No doubt exists that this is true in some instances, although not in every case of privatization. The private corrections story is mixed, and innovation and quality efforts have been the hallmark of some privatized ventures in the field.

More to the point, excluding the profit-making sector from involvement in the justice reinvestment agenda because of the potential for problems comes at a cost. The most prominent cost is the missed opportunity to tap the entrepreneurial engine of the market in advancing the aims of justice reinvestment. In other words, what would happen if private investors could make a profit by reducing the use of incarceration? That is, what if we built a set of private fiscal incentives that economically benefitted the community over the prison as a place to carry out sanctions?

The Problem of Incentives

As a result of growing public scrutiny and declining public revenues, criminal justice is under increasing pressure to become more efficient. This pressure emanates from various sources—nonjustice services that observe their budgets diminishing as criminal justice agencies consume a growing part of a diminishing pie, citizen groups who are dissatisfied with recurring problems in correctional services, and political leaders whose hands are

increasingly tied by growing justice demand. A consequence of this situation is that justice officials and community leaders alike seek greater efficiency from criminal justice policy.

The inherent problem for criminal justice leadership is that the search for greater efficiency implies a capacity for risk taking that has structural limitations for criminal justice and the community alike. The fact is that criminal justice incentives do not promote efficient decisions. Some examples are provided in the following list:

1. Judges have no financial incentive to keep convicted felons locally; they have political (and, in some cases, financial) incentives to transfer the costs of convicted felons to the state level.
2. High-incarceration communities have little financial or developmental incentive to maintain convicted felons locally (absorbing the costs they impose). An incentive is in place to have felons removed for brief periods and transferred to the cost centers of prisons operated elsewhere in the state and paid for by other communities' tax dollars.
3. Politicians have limited political incentive to support alternatives to prison. In economically troubled areas, an incentive exists to build new facilities and to send felons to them to be supervised for costs to be transferred to income for those areas. A fiscal incentive suggests holding down the costs of prison, but politicians who support these policies seldom represent constituencies that directly benefit from the reduction in prison costs.

The incentive structure actually *inhibits* innovation and sensible risk taking in some ways by imposing costs on risk takers without allowing them to benefit from the savings of their decisions, while failing to discipline the risk-averse by imposing costs for inefficiency. Some examples are described as follows:

1. Judges who retain convicted felons in the community because they predict they will do well there receive no fiscal or programmatic benefits from taking this risk, even though they are well aware of how they will experience the costs—in the form of public and system (prosecutorial) disapproval—should their predictions turn out to be wrong.
2. Judges who send convicted felons to the state prison system, at a cost to taxpayers ten times higher than a local alternative program, feel no fiscal consequences for this decision, regardless of how the decision turns out in the long run.
3. Prosecutors who are elected based on their "toughness" on crime face potentially powerful political costs should they support a reduced reliance on imprisonment.
4. Prosecutors who send numerous people to prison face no direct budgetary consequences for these costs; they are borne by others.
5. Citizen groups who create strong local programs to serve as sentencing alternatives save money for taxpayers who live elsewhere but absorb all public safety and program effectiveness risks of "doing the right thing" with fellow citizens of the neighborhood.

6. Citizen groups who oppose strong local alternatives for people who have been convicted of crimes transfer *both* the risks and the costs of those people to the other places where they go—prisons and neighborhoods.
7. Probation and parole officers who are quick to revoke a parolee on the slightest misstep save themselves from the risk of greater failure, while imposing the costs of return to prison on other taxpayers and systems.
8. Probation and parole officers who treat return-to-prison as a last resort do not see any of the savings they generate in taxpayer costs, but they embrace considerable professional risk in doing so.

More examples could be given, but these obvious ones highlight the key problem. The incentive structure in the criminal justice system does not link risk taking and rewards, nor does it link risk-transfer decisions to the costs of these decisions. The incentive structure in criminal justice is inherently conservative, stifling innovation by punishing efficient decisions when they are risky while rewarding expensive decisions in which decision makers pass their costs onto others. It would be inconceivable for the private sector to operate under such a stifling set of disincentives for efficiency and innovation; yet we sustain this structure in criminal justice.

Of course, good reasons do exist to be conservative in criminal justice risk taking. We especially want to avoid decisions that lead to new crimes because the costs of these crimes are borne by their victims. Yet it is to our detriment that we perpetuate a system in which costs and benefits are delinked. Among other things, a range of new practices with minimal implications for public safety might exist that never are tried simply because the incentive structure makes it difficult.

Incentives and the Private Sector

What would happen if the criminal justice incentive structure more closely linked the benefits of innovation to the costs for private-sector innovators? What if those who innovated efficient methods reaped some benefits of those efficiencies that reduced the costs taxpayers incur for criminal justice? What if we sought to seed local risk taking and innovation with a share of the return when those innovations reduce costs for all?

This would require a set of financial incentives that simultaneously would create reasons for communities to welcome felons to be kept locally, reinforce (and support) local service capacities, and provide a mechanism for community-infrastructure development. This suggests that new models of risk-incentive fit are necessary that are "on-the-ground" models, offering program designs and policy structures that have obvious fit to real circumstances of communities and crime.

Such models, to be viable, would operate according to the following principles:

1. *Principle 1: No benefits follow when the decision leads to more crime*. The paramount concern that drives prison-dependent polices is to avoid crime. For alternative funding mechanisms to be viable, they must not result in more crime, and so, the rewards for

risk taking must be structured in such a way that they disappear when they lead to more crime.

2. *Principle 2: The crime victim gets a voice.* A second driver for prison reliance is concern for the victim. This concern has to be addressed either in direct victim consultation or in symbolic consultation through participation of victims groups in an advisory capacity.
3. *Principle 3: New strategies must be* truly *cost-efficient, and the amount of money transferred to the risk taker must be related to the amount of money truly "saved."* Social-control nets must not be widened. Money transferred from one source to another must reflect the actual savings by that source of the transfer.
4. *Principle 4: Nothing happens without* both *system and community oversight*. Victims are not the only important constituent group. Both the justice system and the community must have confidence that the new strategies being adopted are wise and effective. This principle suggests an oversight that is both consultative and evaluative.
5. *Principle 5: The taxpayers get a cut of the action*. Some money saved by new structures must go back into the general coffers. For the general public, this cannot be a zero-sum game, and public risks must be compensated by public benefits.
6. *Principle 6: A dollar must recycle itself in target communities*. A central problem of community investments is that dollars to innovate in communities do not stay for long. People who receive pay for being involved in the community-change efforts spend their money outside of the community, and so, the total local wealth created by the investment is small. In contrast, money that changes hands several times within that community represents magnified wealth for that community.
7. *Principle 7: Program providers must be accountable for their results*. New strategies must be evaluated, and strategic justice reinvestment work must be evidence based. Inherent within the idea of public safety is a broad expectation that newly funded programs meet accepted criteria for the work they do so that new programs are housed in proven strategies and are themselves subject to evaluation.

How It Would Work

An incentives-based justice reinvestment strategy has four main components. First, a voucher system translates the savings from diversion from incarceration into dollars and creates the capacity for those dollars to be used for other purposes. Second, some community-based organizations (profit and nonprofit) use the vouchers as funding sources for their work. Third, an oversight function audits all activities under a justice reinvestment rationale. Fourth, a risk-based justice system rationale is used for each person processed via justice reinvestment.

It is important to emphasize that the savings will be gradual. In the first year, only "projected savings" would be incurred, and thus, it would require some upfront investment from either the state or foundations. In all subsequent years, the savings would result from

(a) closed prisons and (b) reductions in the corrections budget made possible by reduced prison populations. This problem is notably difficult, of course.

Vouchers

The reinvestment is calibrated as a direct return of funds to communities when those funds are "saved" via earlier release or through a complete diversion of a person from prison. The value of this savings is an estimate of the annual cost of incarceration for people convicted of given crimes with particular prior records, which is called an *average expenditure*. This figure is the midpoint of the range of sentences typically calculated, for example, in the construction of sentencing guidelines. We might learn that a first-time armed robber might be expected to serve, say, 3.5 years. If the average cost of incarceration were, say, $40,000 per year, then this amount would translate into a $140,000 *average expenditures* for this felon. The *average expenditure* figure would serve as the base for the creation of justice reinvestment vouchers.

Then two types of vouchers would exist. Transition vouchers would be used to move people out of prison onto earlier release. Community-development vouchers would be used to support programs that enable people convicted of felonies who are otherwise prison bound to be kept in the community. To calculate all vouchers, 10% of the savings (up to a flat fee of $5,000 per person) would be deducted to reimburse the costs of the oversight authority, and 20% would be returned to the general coffers.

Transition Vouchers for Prison Release

This type of voucher would be available for employers who are taking people who are being released from confinement earlier than their sentence entails and could be used to pay for any services, including supplementing the employee's pay during reentry. In a typical voucher system, the service provider (or employer) would be reimbursed according to a fixed schedule. The value of the voucher would be equal to the expected cost of incarceration minus the period of incarceration that has been served already. To illustrate, if the armed robber were released at 90% the expected sentence, then the time served would be 3.15 years with a savings of 0.35 annual costs, or $14,000. After deducting a 10% fee for the oversight authority and 20% for the general coffers, this person would receive a voucher for $9,800. If the sentence were reduced by 50%, then the voucher would be worth $51,000 (with $5,000 for oversight fee).

Community Development Vouchers for Prison Diversion

The second type of voucher would make the voucher amount available to a community-based organization to provide services to the felon as an alternative to an expected prison sentence. Thus, for the armed robber, no sentence would be served in prison, but the person would report to a community group, which would receive $107,000 for providing services

and supervision. In addition, $28,000 would go to the general coffers and $5,000 would go to the oversight medium.

Making Vouchers Work

To be eligible to receive vouchers, a community group could be a private profit-making or nonprofit organization that would meet the following criteria:

1. It would have an advisory board comprising businesses, residents, and elected officials from the community in which the business or program operates.
2. It would be residentially based and provide some combination of housing, family reunification, community infrastructure development, education/jobs, and substance abuse treatment.
3. It would have a network of volunteers drawn from residents in the local community.
4. It would be subjected to annual program and fiscal performance audits by the oversight medium.
5. Staff would be drawn in part from local resident ex-felon and family-member pools.
6. Any service programs would be open on a limited basis to local residents to local residents who are not involved in the criminal justice system.

Community organizations eligible to receive vouchers thus would spring up in local areas where existing supports for reentry and alternative criminal justice activities are present. They would have the support of local key decision makers and would employ local residents as staff and as volunteers.

Using Vouchers

Two mechanisms would be in place for using vouchers, depending on the type of voucher being used.

Any felon processed by the criminal court and subject to a sentence that ordinarily would involve some amount of incarceration would be eligible for a *community development voucher sentence*. Such sentences would occur as follows:

1. A community group proposes a plan for a specific felon who has (a) plead guilty, (b) is about to plead guilty, or (c) is eligible for release from prison but has not been paroled.
2. This plan would be expected to deal with risk factors that enable a person convicted of a felony to remain in the community posing minimal risk to the community.
3. The person convicted of the felony agrees the plan.
4. The state (the prosecuting attorney) agrees to the plan.
5. The victim of the crime agrees to the plan. (In cases in which no crime victim can be identified, the local victim's organization can serve as a stand-in.)[3]

3. A person might forego the community justice strategy and elect to go through the traditional criminal justice process. This right means that, whatever strategy the community group selects, it must be preferable to the traditional justice system or it will not be selected.

Any person currently confined but legally eligible for any type of release (including parole and/or work release) but is not yet released would be eligible for a *transition voucher*. A person would receive a transition voucher when an employer offers that person a job and the person agrees to the following conditions of supervision applicable in accepting that job: remaining employed, reporting to a parole officer, and abstaining from drug use.

Both types of vouchers would be given on monthly basis, and monthly payments would continue up to the amount of the *expected expenditure*. Monthly payments would continue so long as the person is (a) employed full time or in school, (b) living in his or her own residence and paying costs, and (c) in compliance with all requirements imposed by the parole board or the court.

The remaining amount of the *expected expenditure* would be forgone in the event of a new felony conviction, dating from the time of arrest, and a program failure fee of 10% would be imposed to defray costs of new criminal processing. This system will create a financial incentive for the community plan to retain the person with no new crimes.

An Illustration: The Community Justice Corporation and Its Business Partners

Transition vouchers would be redeemed by private employers; community development vouchers would be redeemed by local nonprofit services. Thus, the main vehicle for diverting people from prison would be a local service provider, whereas the main vehicle for prison release would be an employer. The employer uses the vouchers as a direct supplement to create jobs; the community groups use it to create services. Because people leaving prison are eligible for services provided by local groups, a symbiotic relationship exists between the two types of vouchers.

Justice reinvestment programs would be carried out by a partnership between local businesses using transition vouchers and a nonprofit Community Justice Corporation (CJC) using community development vouchers. Their partnership has two aspects. The employer starts a business as a sustainable economic development initiative. To be eligible for justice reinvestment vouchers, the business must operate in a designated high-incarceration location, hiring people directly from prison to work alongside local residents. The business works closely with the CJC so that an array of services is available to support the employee's adjustment in reentry.

The CJC uses community-development vouchers, which are potentially much larger than transition vouchers (because they avoid the complete prison-term costs). In this way, the CJC is similar in form to the hundreds of community corrections organizations that exist around the country operating on community corrections contracts (or flow-through dollars) from the state's corrections system. Although the quality of these services nationally varies considerably, the substantial capacity for local services cannot be denied—drug treatment, employment support, housing assistance, and family-related assistance—routinely provided through this contractual vehicle.

Sustainable Economic Development

What is unique in this proposal is the way the nonprofit service provider is linked to a for-profit employer. Many likely business opportunities are linked to a transition voucher strategy, but the business plan must be sustainable. An illustration helps to show how the plan might work. Let us say that, in a given city, a one-block housing initiative is developed using the typical four-story structures of the urban environment. The top three floors are apartments where people returning from prison under the justice reinvestment initiative (and their families) would live. The bottom floor is businesses, in particular providing goods and services to the community that are not otherwise available.

For example, one business could be a restaurant serving healthy foods at affordable prices, designed to compete with fast-food restaurants that proliferate in the area. The restaurant could serve foods at reduced prices because the labor costs would be lower than most restaurants for two reasons. First, the voucher system would defray some costs of the restaurant. Likewise, people working in the restaurant would receive a portion of their rent as pay for their work, again reducing the costs of the restaurant while also stabilizing the rent for apartments.

Another example would be property development. Justice reinvestment funds could be used to pay for the rehabilitation of vacant property as well as for the processes that are required to make older properties "green" (by installing alternative energy sources and performing routine tasks such as improving insulation and replacing leaking windows). It also could use designated housing funds to build new housing.

Local Relevance to High-Incarceration Communities

The key requirement of justice reinvestment projects is that they must create jobs. One rationale for an incentives-based, private-sector justice reinvestment initiative is that it produces wealth using incarceration funds. Any recipient of justice reinvestment vouchers must show that a portion of the vouchers is used to create jobs that otherwise would not exist without the voucher investment. This process should be straightforward. A private business that receives justice reinvestment vouchers can bid on projects and perform work at a fraction of the cost of competitors because some portion of its personnel costs are defrayed through the vouchers. For example, if a business has three employees working under a voucher-based system, then they will generate more than $80,000 per year. This amount is potentially enough to create two new jobs.

The Oversight Function

Vouchers would be made available only to organizations that have been screened and approved by an oversight medium. The oversight medium could be a government entity (such as an Office of Management and Budget-type operation) or a private, nonprofit, or for-profit contractor. All programs would be audited by the oversight medium on a continuous basis with annual renewals of their contracting ability. The auditing office

will provide assurance that program standards are being met and are based on evidence-supported practices as well as that the principal aspects of the program are being followed. Among other things, for example, it would ensure that justice reinvestment dollars have been used to (a) improve the infrastructure of targeted communities and (b) have created new jobs.

This oversight medium would identify felons eligible for vouchers. It would carry out a process of assessment and planning that would ensure that each of the aforementioned requirements have been met. It would identify potential placements for justice reinvestment, obtaining victim and prosecution approval of the plan. It then would calculate the value of vouchers, allocate the reinvestment funds, and audit program performance.

Risk-Based Practice

A key to making this system work is a solid program of community justice practice. The following main elements pertain to this practice: risk assessment and control, victim restoration plan, community contract, and cost sharing.

The justice system partners in the justice reinvestment project conducts a comprehensive risk assessment not only of the risk factors that are *present* in the offender's life, creating risk problems that need to be controlled, but also of the risk-abating factors that are *absent* from the offender's situation. The ultimate result is a "risk management plan" that details the tasks of offenders, family members and associates, as well as formal service-delivery agencies, which will comprise a strategy for maintaining the offender in the community not only at a reduced level of risk but also with sufficient promise that the community can anticipate a positive, crime-free lifestyle from the offender.

Moving People from Prison and Court into the Justice Reinvestment Process

To be eligible for a voucher, a plan must be put into place and agreed to by the offender, the victim, and the community. This process is well described within community justice and restorative justice literature (Clear and Karp, 2000), so it does not need to be repeated here. For our purposes, we merely emphasize that nobody would be eligible to receive a voucher unless the victim and the community have assented to it, and this entails a victim-restoration plan as well as a community contract.

Victim-Restoration Plan. The establishment of a realistic risk-management plan is a necessary, but not sufficient, condition for the CJC to accept a case. A victim-restoration plan also must adequately provide for the alleviation of damage suffered by the victim of the crime. An adequate plan to restore the victim has the following elements:

1. A full accounting of the costs of the crime, both in tangible losses of property, services, and income as well as in emotional costs that are thought of as "quality-of-life" costs
2. A strategy for addressing those losses to which the victim assents
3. Offender contribution to the overall strategy

Community Contract. The community contract is an agreement by the community to accept the offender into the CJC under the terms described in the risk-management plan and the victim-restoration arrangement. When the community accepts a CJC plan, it accepts the reasonable risks the plan involves and sanctions the arrangements in the risk and restoration plans as consistent with community values. The CJC, to make the complex arrangement sensible, agrees to monitor all parties' progress through the agreement and to report to the community board, which provides oversight, any problems in the system of agreements.

Problems with Private-Sector Incentives

Clearly, the proposal outlined poses problems and dilemmas. The most common concern raised by people about a private-sector incentive strategy is the possibility for corruption. They worry that, when money is involved with business, unethical practices will follow.

This concern is not ridiculous. Business incentives and fiscal corruption all too commonly are aligned. I hope that, by placing an auditing function in the process, the possibility of corruption is minimized. Moreover, heavy community involvement will tend to make corruption more easily exposed. Despite these precautions, it would be unrealistic to think that corruption will never develop in any financial-incentive system. Reasonable oversight will have to be a component of justice reinvestment of this type.

A second problem is scale. It takes a few dozen people being removed from prison to result in actual savings. An employer here or there and a small CJC will not be enough. Activity of a certain scale is necessary to generate considerable movement from prison to the community as well as a considerable diversion for prison in the first place. It is likely that some sort of venture-capital style of investment will be needed to start the process and that a lag will occur between the initiation of the policy and the realization of actual savings. The bond model used in the United Kingdom (Social Finance, 2010) is a viable model for front-end funding of the strategy. An alternative would be to use foundation funds as investment start-up.

The calculation of voucher values will be tricky. Most jurisdictions can estimate the time-to-be-served by people awaiting sentencing or by those who are eligible for release but are not yet released. However, it will take credible estimates of these time-served amounts to write a voucher policy, and because undeniable disparity persists in time-served patterns, it might be necessary to discount the voucher value slightly to overcome the inevitable overestimates of calculated sentences. Entrepreneurial employers and CJCs will look for good risks whose sentences overestimate what they really should be serving.

Tension also might persist between the for-profit business and the nonprofit. This proposal calls for both to be served by a local advisory group, and a close working relationship would entail sharing the same advisors. This system will help the two interests correspond as much as possible. However, at some point, the natural instincts of for-profit work and the nonprofit orientation will collide on occasion. How that situation will work out is unclear.

The most significant problem is that this is new. Although there are existing models for every aspect of this work, there is no place where all of it is now being done under a single initiative. Policies will need to be worked out, financial arrangements will need to be made, and many new strategies will need to be knitted together to form a whole cloth. It will be a lot of work, requiring a visionary leadership role.

Conclusion: The Realignment of Incentives

The intent of this proposal is to realign the incentives of the justice system so that it becomes in the business (and residential) community interest to reduce prison populations. The arrangement described in this proposal creates the following incentives:

1. Businesses have an incentive to locate their offices in high-incarceration communities because that makes them eligible to receive justice reinvestment funds.
2. Community members in high-incarceration neighborhoods have an incentive to support the project because it not only improves community infrastructure but it also creates jobs.
3. The general public has an incentive to support the project because it reduces the tax burden.
4. Justice reinvestment providers have incentives to identify people early in their sentences (or before they go to prison) to be included in the justice reinvestment projects because they bring the largest voucher amount.
5. Justice reinvestment providers have an incentive to identify the best risks and to employ them in ways that maximize the chances of success because it allows them to receive the largest portion of vouchers.
6. A fiscal incentive exists to focus on the front end of the system because that creates the largest vouchers.
7. Most importantly, an incentive is present for community-based innovation because the proposal's configuration has as its central idea the improvement of infrastructure in communities that send numerous people to prison.

Undoubtedly, a myriad of questions result from a proposal such as this one. It is not meant to provide a fully executed plan for action. Rather, the elements proposed provide the skeleton of such an effort. This discussion describes how reconfiguring the nature of the incentives that now drive penal policy might advance a justice reinvestment rationale.

Nor is this article meant to be a perfect solution to mass incarceration. Instead, it is meant to be a distinct improvement of the current system of incentives and penal arrangements. Of course, it will have its own problems. However, they might be, as a group, a preferable set of problems to those we now face.

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Encouraging innovation on the foundation of evidence

On the path to the "adjacent possible"?

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Professor Todd R. Clear's article "A private sector, incentives-based model for justice reinvestment" (2011, this issue) describes a visionary and bold idea for leveraging a sense of urgency among policy makers to reduce criminal justice costs while improving public safety and strengthening communities. The incentives-based approach he defines pushes the envelope on risk and derives strength from its innovation and private-sector appeal. Yet it is grounded in data and evidence that tells us that our efforts truly to reform our criminal justice systems cannot be focused on reducing recidivism or the "back end" of our system alone. To reach true, sustainable reform that provides effectiveness and efficiency, we must set our sights on the entire system and aggressively leverage the full spectrum of evidence and innovation in our field and in related fields.

In this essay, I will expand on these notions while calling attention to the great value in, and need for investing in, community corrections and communities, as Clear (2011) argues. I also will make a case for embracing Clear's forward-thinking ideas about incentives and, more broadly, about encouraging innovation to advance justice in America.

Despite impressive early successes, the evolution of the Justice Reinvestment Initiative (JRI), which was originally supported by the Bureau of Justice Assistance (BJA) in 2006 (along with separate funding from the Pew Center on the States), is still in its programmatic adolescence. Early adopters such as Texas, Kansas, Nevada, and others have shown its potential to realize savings in the tens of millions to hundreds of millions and more in averted costs where plans for new correctional facilities are determined to be unnecessary. At the same time, early adopters have invested significant portions of these savings into

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strategies that build the capacity of probation agencies, increase the supply of drug treatment options, increase opportunities for diversion, and create incentives for successful completion of treatment interventions and skill-building programs. Currently, 30 new jurisdictions have submitted letters of interest to participate in JRI's data analysis phase, and 6 jurisdictions have submitted letters of interest to participate in its program and policy implementation phase. The variance in costs avoided and dollars saved in the reinvestment strategies to date reflects the flexibility encouraged by the approach, which enables states and local governments to select policy options that offer the most appropriate savings opportunities and reinvestment strategies that are most needed within a local system. In many cases, these policy choices target the most obvious system inefficiencies and counterproductive policies that will provide the most immediate cost–benefit result. As JRI continues, the range of policy options and reinvestment strategies is expected to diversify so that both short- and long-term gains can be realized, including greater investments in strengthening communities and the justice system itself. The latest updates on JRI can be found at ojp.usdoj.gov/BJA/topics/justice_reinvestment.html.

Although JRI remains one of the most promising system improvement strategies in use today, Clear's (2011) proposal illuminates the creative and progressive possibilities yet to be implemented with the savings generated through JRI. Importantly, Prof. Clear's proposal points out that our justice reinvestment strategy and associated reinvestment choices should not focus exclusively on creating more effective and efficient offender reentry. To the extent that they do, initial savings will be realized, but these savings may ultimately be marginalized by the unimpeded flow of new offenders into the system, which will likely require the overall system capacity to remain at unsustainable levels. I analogize this to a family working for years to pay off thousands of dollars in credit card debt, only to thereafter return to spending above their means, living paycheck to paycheck, and not saving money for future purchases that may be necessary. Living within our means and making smart investment choices applies to the public budget as well as to our personal accounts.

Reconsidering the Criticality and Capabilities of Probation and Parole

We should consider carefully—and question thoughtfully—the notion that social control "over" public control is the pathway to success. Too often, we treat these as completely distinct ideas or domains as opposed to considering how social control and public control intersect and reinforce one another. Furthermore, because we view probation and parole as enforcement-oriented organizations, we tend to view these organizations and other elements of public control—law enforcement, courts, prosecutors—as unwilling or incapable of supporting and encouraging social control. Evidence and newly emerging concepts of probation and parole organizations and their service delivery approaches suggest that there is ample room to blend these two concepts creatively and that they can be mutually supportive. In *Putting Public Safety First,* Solomon et al. (2008) identified a consensus among many of the national experts for 13 strategies that would enhance reentry outcomes,

including at least three strategies consistent with the notion of braiding public and social control mechanisms and resources to support reentry. In fact, the eleventh strategy proposed, "Engage Informal Social Controls to Facilitate Community Reintegration," pinpoints one way in which the two domains should interact, citing two existing models where the idea has been implemented. The strategies identified by the experts in this "consensus report" have provided valuable guidance to the field, but more must be done to take them to scale as widely as possible.

Another reason we often overlook the broader possibilities of probation and parole agencies is their perceived—and, in many cases, real—capacity deficits fueled largely by a lack of focus from many corners, both locally and nationally. We must make the improvement of this capacity a top priority to achieve the goals we now embark on, including increased public safety, reduced system costs, and lower rates of incarceration, which have given life to a rare but real bipartisan success story. We seem to have found common ground within the political spectrum around the notion of "smart on crime" approaches; there might also be agreement within that spectrum and sentiment among the public that now is the time to ensure the strongest capacity possible within our probation and parole agencies.

Former Attorney General Dick Thornburgh (2011: 181) noted:

> I consistently have felt that one of the most fruitful areas for investment in the criminal justice system would be an upgraded and sophisticated probation and parole system. If the object is to maximize the chances for offenders to avoid becoming recidivists and to "graduate" into the role of "good citizens," they must be provided with proper tools and guidance to reach these goals. In our correctional systems, this means more drug rehabilitation, meaningful education and vocational training capabilities "behind the walls," and similar services plus the necessary support and monitoring of poster release activities maximize the opportunities for success.

Faye Taxman (2008) similarly commented years earlier that

> [A] national strategy on strengthening community supervision through addressing the organizational culture to adopt behavioral management strategies would demonstrate that supervision does not need to be the front door to prison. Until such a national strategy is adopted, however, it is unlikely that we will see changes in incarceration or sentencing policies; the public must value community supervision as a commodity that can reduce the risk of recidivism for the majority of sentenced offenders. (297–98)

As noted in the Pew Center on the States (2008: 4) policy brief that summarizes the findings from Solomon et al.'s (2008) consensus report, government at all levels must work to "transform community supervision into a powerful force for public safety."

We have both the opportunity and the necessity to build on this consensus by leveraging the evidence and encouraging innovation to ensure that the institution entity best positioned to connect prevention and desistence efforts within high-risk communities—probation and parole—is fully prepared to do so and to help move the entire field forward. One opportunity for specific improvement comes through President Obama's FY 2011 and FY 2012 budget proposals for "Smart Probation." This funding program, modeled after the successful "Smart Policing" initiative, encourages agencies (a) to partner with research organizations to adopt evidence-based practices and policies and (b) to use research and evidence in support of innovative strategies that may one day become part of the body of evidence. Additional demonstration and testing approaches such as the Hawaii HOPE program, Maryland's Proactive Community Supervision Model, cognitive behavioral intervention strategies, and performance incentives-based probation models are all contemplated under this proposed program.

Clear's (2011) analysis of the potential savings that can be achieved by focusing on both the front end of the system (system entry) as well as the back end of the system (reentry) is valid and compelling. However, we must not overlook or downplay the impressive "investment return" and tremendous impact possible when we interact effectively with the more than 5 million men and women who were on probation or parole at the end of 2009 (Glaze, 2010)—a group of individuals often described as the "frequent fliers" of the justice system. If our core public service values are about people—ensuring justice and safety and restoring lives—we must keep in mind that the probation and parole population is more than twice the size of the institutional population and offers a greater potential to impact high-risk communities positively. Additionally, as long demonstrated in the literature, intervening in the cycle of violence brings many secondary savings through improving outcomes with this population, which in turn reduce risks and increase opportunities for those in the offenders' family and social networks.

Are We Ready for Private-Sector–Style Innovations?

Most impressive are the seven operating principles Clear (2011) lays out, which set guideposts for reducing crime, ensure that victims have a strong voice in the process, establish a foundation of cost effectiveness, provide transparency and accountability, and ensure that local communities are improved, without losing sight of the political imperative for taxpayer savings. These principles provide a blueprint for conceiving other possible innovations, without abandoning what the evidence tells us will be effective. Furthermore, as Clear notes,

> The incentive structure in criminal justice is inherently conservative, stifling innovation by punishing efficient decisions when they are risky while rewarding expensive decisions in which decision makers pass their costs onto others. It would be inconceivable for the private sector to operate under such a stifling

> set of disincentives for efficiency and innovation; yet we sustain this structure in criminal justice.

These exciting ideas encourage us to think in new and bold ways about the future of our system.

One example of this type of thinking is the "Pay for Success" Program included in the President's Fiscal Year 2012 Budget Proposal within the Second Chance Act Program. This program, which is modeled after the so-called social impact bond model in use in the United Kingdom and referenced by Clear (2011), is designed to combine performance-based payments and market discipline, giving it the potential "to improve results, overcome barriers to social innovation, and encourage investment in cost-saving preventive services" (Liebman, 2011: 1). In this model, the public agency enters into a performance contract with an intermediary entity that in turn provides financing for community-level services and activities up front; private funding is generated by issuing bonds to private investors rather than reliance on direct government funding. The contract stipulates that the government pay the intermediary financing organization only if performance targets are met or exceeded. Examples of performance targets might include traditional performance measures such as whether rates of recidivism are held to a certain level or measures related to cost savings and effectiveness. Private investors who take advantage of the bond offering receive a return on their investment based on the performance of the provider. Thus, the bond investors share a stake in the quality of the services provided, and to secure funding, service providers must convince the investors that their service strategy and organizational capabilities can produce results. Investors and the bond issuing organization are expected to monitor performance closely and make changes as needed to ensure the outcomes promised and needed for a return on their investment.

Although yet to be tested, the model is expected to provide improved performance and lower costs, as well as accelerated adoption of new and innovative solutions and advances in the science of criminal justice. Currently, RAND Europe is conducting an evaluation of the model in the United Kingdom, although results are not expected for some time. The Administration's budget proposal, if funded, would allow BJA to work with the justice community to test the efficacy of this funding concept in providing services to returning offenders and reducing recidivism. The budget proposal provides for up to $20 million in investor repayments based on demonstrated performance, adding a new element of excitement and innovation to the Second Chance Act Offender Reentry Program.

Such innovative thinking is often perceived as possible only in the private sector, leading many policy makers to call for a greater reliance on private-sector solutions and services. Some public managers have attempted to adopt private-sector approaches to solve public-sector problems. Although Larson (1997) argues that profound differences between public- and private-sector values greatly complicate adoption of these models, proven leaders in our field with extensive private-sector backgrounds have taken on this challenge successfully. One

such example is Diane Williams, President and CEO of the Safer Foundation of Chicago, who has shared that although some core private-sector values are not easily transferable to the public sector, private-sector discipline and its sense of urgency and commitment to follow through to get things accomplished, can, should, and is being encouraged successfully within many public criminal justice agencies.

As we struggle to maintain fiscal integrity during this difficult economic time and yet enjoy the opportunities that 30-year low crime rates afford, those of us in the public justice community—together with those from the private-sector and the academic communities—have the responsibility and the opportunity to strategically leverage innovation and evidence to improve our system.

Ready or Not, Innovation Is All Around Us and Leading Us to . . .

Innovation is taking place throughout the criminal justice system. In fact, as I reflect on the myriad efforts to align our work nationally and locally with evidence of effectiveness, I wonder where this movement will lead us. As Clear (2011) demonstrates, there is much we can do to innovate on the foundation of evidence, especially if we are bold enough to take appropriate risks and set traditions aside. We view this type of innovation in policing, for example, with the advent of predictive policing and the demand for smart policing strategies. Other signs of innovation and the will to innovate include evidence of prosecutors and defenders working together to develop joint strategies for reducing unnecessary increases in the jail population; the proposal by a major city district attorney to hire a criminologist and business manager for his office to improve overall decision-making and efficiency strategies; the development of a holistic defense model that encourages defenders to engage in problem solving by providing assistance and support to clients beyond representation; judiciary-led problem-solving efforts such as drug courts, mental health courts, and reentry courts; and the anticipation of cloud computing technology that might soon offer small and rural law enforcement agencies throughout rural America with access to sophisticated technologies to improve justice and prevent crime. At the same time, we observe law enforcement leaders engaging in JRI discussions, and we assist judges in traditional criminal courts by responding to their requests for training in topics such as the science of addiction or the latest research on the human genome and the clues it may provide into an individual's propensity for addiction or violence.

In many ways, these efforts are linked to, resemble, and borrow from the evolution and innovation in other sectors, including health, defense, commerce, transportation, and others. In his recent article, Professor Larry Sherman (2011) encouraged us to be thoughtful about the innovative ideas we pose and to be mindful of the relationship of our ideas and innovations to other important policy developments that may be underway or not yet planned. Sherman related this to a concept described in Steven Johnson's (2010) book, *Where Good Ideas Come From: The Natural History of Innovation.* Johnson, in a *Wall Street Journal* article (2010), said that innovative ideas come from many places, including some

that are developed by connecting a few or many independent concepts into one larger idea. Johnson argued that a key criterion for making innovation successful is what is called "the adjacent possible."

> The adjacent possible is a kind of shadow future, hovering on the edges of the present state of things, a map of all the ways in which the present can reinvent itself. The strange and beautiful truth about the adjacent possible is that its boundaries grow as you explore them. Each new combination opens up the possibility of other new combinations. (Johnson, 2010: para. 9)

Johnson (2010) closed this essay with words that we can all keep in mind as we consider Todd Clear's (2011) proposal and other innovative ideas—those tested and untested. "The trick to having good ideas is not to sit around in glorious isolation and try to think big thoughts. The trick is to get more parts on the table" (Johnson, 2010: para. 23). This is exactly what Clear's article does and what we should all do: Continue to put more parts on the table of justice so that we can explore how they fit together to form a larger, better idea for our future.

As we reach for evidence and innovation, and apply these possibilities to our system, we should be motivated by the possibility that we might be near the adjacent possible within and around our justice system—the turning point in our evolution that takes us to the next level of effectiveness, promise, and justice.

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Justice reinvestment and the use of imprisonment

Policy reflections from England and Wales

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What Is Justice Reinvestment (JR)?

Like other buzzwords in the criminal policy lexicon—"crime prevention" or "restorative justice," for example—the term "JR" means many things to many people. The diffuse meanings attached to all of these ideas give them a wide appeal. Who could be against acting to prevent crime before it happens rather than wait until it has? Alternatively, when crime has occurred, surely offering opportunities for offenders to make amends to the persons they have harmed seems like an extension to the common sense approach used to address wrongdoing in families, schools, and businesses every day.

In the case of JR, what better approach can there be in a time of financial austerity than one that produces greater safety for citizens through redeploying some of the wasteful sums spent needlessly on imprisonment to strengthen the capacity of crime-stricken neighborhoods to deal with their problems? There is something in such a policy for fiscal conservatives and liberal progressives alike.

Dissent, of course, can arise as soon as specific proposals are placed on the table—when we move from the "what" it is we are trying to do to the "how" it is to be accomplished. A nongovernmental organization I worked for in the United Kingdom several years ago found itself simultaneously running two projects in the same town, one training ex-offenders to find work in the security industry (as doormen at pubs and clubs, for example), and the other project was working with the police to set up a regulatory system that in effect aimed to stop ex-offenders from obtaining such employment. Both programs were undertaken in the name of crime prevention. The first took a long-term view that getting ex-offenders

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into employment provides the best route to reducing reoffending. The second sought protection from crime through shorter term measures to reduce the situational risks on the streets. It is well known too that restorative justice can be used to cover a range of different kinds of measures from face-to-face mediation through to chain gangs—with sometimes distinctly nonrestorative disputes between the proponents of different approaches about which represent the truest manifestation of the concept.

Some greater degree of specification is needed to make a sensible analysis of the contribution that these kinds of ideas can make. As for JR, there are arguably three core elements to the concept. First, obviously enough, JR focuses attention on how much is being spent on imprisonment and to what alternative uses the public money consumed by prison could be put if demand for prison places could be reduced. Second, JR draws attention to how people going to and returning from prison are drawn disproportionately from the poorest neighborhoods and how targeted investment in these areas could help develop more initiatives to both prevent crime and improve reintegration of ex-prisoners. Third, the combination of concerns about the cost-effectiveness of prison and about "places as well as cases" inevitably raises questions about what are the most appropriate mechanisms for organizing and funding criminal justice. JR approaches encourage elements of financial responsibility to be devolved with locally based agencies that can make use of the resulting savings if they find ways of bringing down prison numbers.

Todd Clear (2011, this issue) has done us a great favor by putting forward proposals that aim to be true to the basic tenets of JR but also pass the "who does what to whom" test that any such ideas must pass if they are to capture the interest of policy makers and practitioners. Importantly, he has resurrected the more radical roots of JR when it was first propounded—that funds should be moved from prisons not just to community-based measures in general but specifically to neighborhood-based organizations with a vested interest in solving the problems in their high-stakes communities (Tucker and Cadora, 2003).

This novel capacity-building dimension recently has been somewhat subsumed in a worthy but more familiar discourse that counts as JR any initiative that aims to spend funds to strengthen measures in the community so that fewer people go to prison or stay in prison so long. Under this more relaxed rubric, JR might equally involve funds going to an electronic monitoring scheme run by a multinational company or a drug treatment facility established by a national service provider. While potentially bringing benefits in terms of reducing the numbers in prisons, such "extrinsic" initiatives do not do as much to stimulate the long-term safety and health of communities in a way that the "intrinsic" funding of local grassroots initiatives might do.

JR and Prison Reduction

Reducing the use of imprisonment in any society rarely involves just one measure or even set of measures. Conventional alternatives have a major part to play, such as intensive community-based supervision, the creation of prosecutorial or court-based diversionary

options such as residential drug treatment, and the reform of sentencing to allow earned early release. Familiar as it may be, there is much to be said for using some of the funds that are currently used on incarceration and, in particular, any of those that are earmarked for future prison expansion to strengthen instead the infrastructure needed to make these alternative options work well.

From the European side of the Atlantic, it seems that in the United States, there is enormous scope for establishing and deploying more fully the kind of diversionary measures and intermediate sanctions that are enshrined in international norms. The Tokyo rules require United Nations member-states to "develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies" (United Nations General Assembly, 1990: section 1.5). In Europe, the norms created by the Council of Europe include the proposition that the extension of the prison estate should be "exceptional" and that increasing the supply of prison places emphasis on decriminalizing certain forms of behavior, extending the availability and use of alternatives to prosecution, creating alternatives to pretrial detention and community sentences, avoiding long terms of imprisonment, increasing systems of parole and early release, and perhaps most important of all, taking account of prison capacity when developing penal policy (see, e.g., Rec (99) 22E concerning prison overcrowding and prison population inflation).

In the years since these norms were propounded, the prison population in many Western European countries has increased dramatically particularly in the United Kingdom and Spain, which suggests either that these measures do not work or that the governments of these two countries at least, despite signing up to the proposals, have not put them into practice. In the United Kingdom, certainly the Council of Europe Recommendation concerning prison overcrowding and prison population inflation has been honored more in the breach than in the undertaking. Rather than decriminalizing offenses, for example, it is estimated that more than 3,000 new criminal offenses were created between 1997 and 2007, almost half of which are imprisonable.

Several Western countries have started to reduce the numbers in their prisons after sharp rises—notably the Netherlands and Portugal, whereas in others, such as Germany, prison populations have stayed more or less stable. Several countries of Eastern Europe, which previously fell under the influence of the Soviet Union, have observed a decrease in prison numbers.

There is not space here to analyze why and how the prison populations of different countries have taken these various trajectories. Cost has been a consideration in some, but there is little evidence of the application of purer forms of justice reinvestment. Rather, they reflect efforts to stabilize or reduce sentence lengths and restore or, in some cases, create for the first time the kind of law, policy, and practice of the type recommended by the Council of Europe. For example, the creation of probation services in two of the Baltic States seems to have helped reduce the use of imprisonment there, and restrictions on prosecutors' powers

to remand defendants in prison have impacted on pretrial detention in Russia and Romania (see data on Latvia and Estonia in International Center for Prison Studies, (2011).

JR in the United Kingdom

Justice reinvestment is, however, being used to describe the aspects of a new approach to criminal justice being developed in England and Wales where the Coalition government that came to power in May 2010 has announced a somewhat surprising change of direction in penal policy from that which was followed by their Labour Party predecessors.

The level of public spending on prisons in England and Wales does not yet approach that of the United States, whose 2.5 million prisoners represent an imprisonment rate four times higher than that in the United Kingdom. Nor has the doubling of the United Kingdom's prison numbers since 1992 precipitated the kind of crisis that has arisen, for example, in California. Yet the task of bringing down public debt inevitably raised questions about the cost benefits of a prison-building program set in motion by the Labour government in its third term from 2005–10. This was predicated on the need for 13,000 more prison places (with plans originally formulated by the Conservatives when in opposition for another 5,000 beds on top of these). The surprise comes from the fact that the Conservatives, which represent the dominant partner in the coalition, have historically been viewed as taking a harsher line on penal policy than either Labour or, to an even greater extent, their new coalition partners the Liberal Democrats. In fact, historically, prison population levels have been more likely to decrease or to increase more slowly under Tory rather than Labour governments, but the last Conservative government ended up adopting a strong "prison works" policy between 1993 and 1996, which still has considerable appeal to many of their natural supporters. Thus, it was not uncontroversial when the party not only stepped back from its commitment to create 5,000 new places on top of the existing expansion plans but also aimed for a prison population 3,000 people *lower* in 2014–2015 than it was in 2010.

The change in policy arises no doubt in part from the pressures of having to cut costs, with the Ministry of Justice (which has been responsible for prisons since its creation in 2007) aiming to reduce spending by one fifth over the next 4 years, which means saving almost £2 billion. More than this, the Justice Secretary genuinely seems to have been shocked by the recent increase in the prison population. By coincidence, he had been responsible for prisons almost 20 years ago as Home Secretary in 1992, when the 42,000 people in prison represented less than half the current level.

A period of public consultation has recently finished on proposals for a so-called Rehabilitation Revolution, which aims to bring down the high rates of reoffending by those leaving prison. The wide range of proposals is estimated to lead to the 3,000 reduction in prison numbers, reversing a 20-year trend.

The government's proposals have been influenced to an extent by an important inquiry conducted by the Parliamentary Select Committee on Justice. "Justice Reinvestment—Cutting the Costs of Re-Offending," published in January 2010 recommended measures

that will be familiar in content if not form to recent U.S. experiments in JR. The Committee thought that the government should cap the prison population at two thirds of its current level, deploy what they called "prehabilitation" resources in targeted communities, and incentivize local agencies to give higher priority to offender rehabilitation. To support the approach, the Committee felt it was necessary to establish a National Center of Excellence to collate and promulgate lessons about what works, address media distortions in the coverage of crime and sentencing, and engage the public in a more reasoned conversation about crime and the limits of criminal justice.

The Committee had been unimpressed by the Labour government's prison policy and, in particular, the reliance the government had placed on a report it had commissioned from a Labour member of the House of Lords. (Carter 2007) Lord Carter's report "Securing the Future — Proposals for the Efficient and Sustainable Use of Custody in England and Wales" had adopted a "predict and provide" approach to prison numbers, and while recommending one or two technical measures to reduce demand for prison places, and the introduction of a Sentencing Commission to increase consistency in sentencing, he had nothing at all to say about social, educational, and health care policies that could be used to prevent crime, rehabilitate offenders, and reintegrate those leaving prison.

Although U.K. welfare policies may strike American readers as relatively generous, by European standards these have remained underdeveloped, particularly in the most deprived areas and among the most excluded populations. A separately commissioned review of people with mental health problems and learning disabilities in the criminal justice system by Lord Bradley concluded that for diversion to be introduced effectively, sufficient capacity must exist in mainstream services, as well as confidence in those services for those making decisions about offenders (Bradley 2009). Although the Bradley review did not assess a shortfall in capacity, it noted tellingly that in 2006, only 725 of the 203,323 conditions attached by courts to community-based sentences were mental health treatment requirements. Similarly, despite considerable investment in drug treatment, the number of residential rehabilitation places is still low compared with other countries. There are about 2,500 beds in England with about 16,000 individuals accessing residential services for substance misuse each year. Given that half of male prisoners and two thirds of female prisoners have used class A drugs in the 6 months prior to imprisonment, there is a strong prima facie case for increasing capacity significantly.

The coalition is working in three main ways to address the lack of community-based infrastructure. First, it is seeking to increase the extent to which the National Health Service engages with the problems caused by mentally disordered and drug misusing offenders. The twin pressures arising from financial stringency and organizational upheaval suggest that this might be difficult to achieve in the short term and raises a question in the U.K. context about whether a more localized approach to commissioning health services will improve or worsen the options for offenders.

The Coalition is also banking on reducing significantly the rate of reoffending by ex-prisoners through the introduction of new ways of funding organizations, programs, and projects that work with offenders—an approach that they refer to as "payment by results." There is currently a pilot scheme underway in which all short-term prisoners leaving Peterborough prison are offered resettlement advice and mentoring assistance. This assistance is paid for not by the government but by investors—mainly charitable trusts and foundations—who will earn a return on their funds if the reoffending rate is lower than expected. This so-called social impact bond is obviously attractive to a government that has little to spend today but hopes to have in a few years time when the economy picks up and nonetheless wants certain objectives to be met. Even if it succeeds in the pilot area, how far this form of financing will prove applicable to existing rather than new areas of work remains open to question. The government is also keen to observe a wider use of this kind of approach in programs that it does fund directly so that private and not-for-profit organizations will be rewarded for success in rehabilitation but not for failure. For a Justice Minister,

> We call this payment by results, but you might call it "justice reinvestment." Whatever the name, it represents a radical new focus on rehabilitating offenders, recognising that it no longer makes sense to incur such costs on the public purse through high rates of re-offending. It allows us to make the "reinvestment" a reality by capturing the savings to the criminal justice system. (Herbert, 2010: 9, para. 3)

The details of how this will work in practice have yet to be made known, and there is considerable anxiety on the part of service providers that they might be expected to borrow funds to do their work in the hope of recouping their costs plus any interest accrued should they prove successful. Paradoxically, the kind of small neighborhood voluntary organizations that are central to the purest forms of justice reinvestment would struggle to operate on this kind of basis.

The third approach that is relevant to JR is the new emphasis across government on localism. It is arguable whether the distorted priority given to increasing imprisonment over the last period has been encouraged by the costly, centrally driven system of offender management (which is the child of an earlier review of correctional services undertaken by Lord Carter)(Carter, 2004).The creation of a National Offender Management Service (NOMS) and, to a lesser extent, the Youth Justice Board (which coordinates services for juvenile offenders younger than 18 years) has produced a situation in which local health, education, employment, and social services can slough off their responsibilities for people in the criminal justice system, safe in the knowledge that their needs will be addressed by a central government agency. This is most starkly illustrated in the juvenile system where local authorities can shunt the costs of meeting the needs of demanding teenagers onto

central government; but it is more generally the case that local mainstream agencies have little incentive to address and absorb crime and delinquency problems in the way that they might. There is therefore much to be said for shifting responsibility for the prevention of crime and rehabilitation of offenders to a much more local level and for requiring the educational, social, housing, and health care agencies to give priority to these objectives, working alongside the police, probation, and prison services. This would consolidate existing local machinery such as the multiagency teams that supervise prolific and other priority offenders, high-risk sex and violent offenders, young offenders, and substance misusers. In addition, this process could incorporate new criminal justice mental health teams proposed in the review of mentally disordered offenders mentioned previously. Local authorities, new locally elected policing commissioners, and their partners could be responsible for developing detailed "crime and justice plans," containing targets for reducing the numbers going to prison. Such plans would be developed and delivered with assistance from the center—in the form of an advisory council on crime and justice along the lines of what has been proposed by the Justice Select Committee—that would act as a clearinghouse for research and offer technical assistance, and even grants. The local bodies would also inform, engage, and consult local people. The implementation of plans would be resourced through savings made by reductions in the use of custody and the scaling down of NOMS and the Youth Justice Board.

Enormous questions are hanging over a devolution of powers and responsibilities to local government at a time when their budgets are being hit and considerable skepticism abounds about the so-called Big Society, which the Conservative Party in particular views as providing a vibrant alternative to the shrinking state. There is an equally large question as to whether these changes would deliver the reductions in prison numbers needed to kick start the virtuous cycle of less spending on prison and more on alternatives As the previous Justice Secretary Jack Straw told the Justice Committee, "so far I have seen no evidence that says if you spend this amount of money, then we can guarantee that there will be fewer crimes committed, and therefore the demand for prison places will drop accordingly" (Straw, 2008).

Nevertheless, getting Justice Reinvestment off the ground does not have to rely solely on more successful prevention and rehabilitation to reduce the candidates for prison. More direct ways of shrinking demand need to be put in place, but in line with JR's approach, locally based strategies would need to be informed by detailed local analysis of who is going to prison and why. It is likely that a local "curriculum of services" would contain measures that would reduce the demand for imprisonment in several distinct ways.

The first is through increasing diversion from prosecution. Approximately 40% of people who commit offenses are cautioned by the police each year, but the rate varies among police force areas from over half to less than a quarter. Although JR's emphasis on local responsibility brings with it the scope for just such variations, better community-based services will bring greater options for the police and prosecutors to divert cases

from prosecution. There is particular scope for diverting young adults in the 18–21 age group and those with mental health and drug problems. Dramatic falls in the use of custody for juveniles have in large part been brought about by increasing rates of diversion and developing ways of responding to young people outside the formal system (Allen, in press).

The second mechanism is by reducing the numbers remanded to custody for want of a place to live. Providing accommodation of this kind could sensibly be a function for local government and its partners. Providing better support for those with mental health problems could also enable more of these to be bailed. Providing suitably supported accommodation would help in a third way—by enabling more prisoners to be released on home detention curfew (HDC)—an early release program that allows certain prisoners to leave up to 4 months before the end of their sentence subject to an electronic tag. In March 2011, there were approximately 2,600 subject to HDC, almost 1,000 fewer than 7 years earlier. The fourth mechanism for reducing demand would be to bring down the number of offenders given short prison sentences, which are widely observed to achieve little in terms of crime reduction or rehabilitation. There has been some progress with the numbers sentenced to immediate custody for 12 months or less falling by 10% over the last 10 years. The type of offenses leading to short sentences—mainly thefts, motoring offenses, and offenses categorized as other (i.e., not sexual or violent, robbery, burglary, or drugs)—suggest scope for robust and imaginative alternatives to bring this number down even more.

Achieving effective replacements for short sentences requires the development of a more effective response to those who do not comply with their community sentences. This is the fifth way that JR could affect prison. The number in prison for breach increased by almost 500% since 1995. Although the absolute numbers are relatively small (the increase amounts to approximately 800 prison places), increasing compliance through more effective community supervision—such as through tracker and other intensive support programs—should help to reduce this number.

Greater dividends would be provided if such supervision led to reductions in the numbers of prisoners recalled for breaching parole, the sixth target for JR population reduction. Whereas the introduction of a fixed 28-day period of imprisonment for those who breach parole should reduce demand for prison places, investment in increasing compliance could bring down even more the numbers in prison as a result of recall—an extra 5,300 since 1995.

Substantial reductions also would result from reversing the year-on-year declines in the proportion of cases recommended for parole, which has fallen from a half to slightly more than one third over the last 10 years. Success here—the seventh way in which JR could reduce imprisonment—would depend not only on enhancing arrangements in the community but also on improving opportunities in prison. But starting to reduce prison numbers could mean that greater resources are available—both inside and outside prison—for those for whom a period of incarceration is unavoidable.

Progress in these seven areas could be achieved without any legislative change. Focusing on increasing the availability of relevant services for particular types of offenders, including women, young adults, and the mentally ill, would produce results as well.

For one group, juveniles younger than 18, there is an opportunity to implement a purer form of justice reinvestment: by making local authorities responsible for meeting the costs of custodial sentences imposed on young people from their areas. Devolving custody budgets to a local level would enable the development of more effective and compelling alternatives to custody and incentivize investment in early prevention activities (Allen, 2008). When a young person is sentenced by the court to custody, the costs of the placement are met by central government. This means that local authorities have nothing to lose financially when a custodial sentence is imposed. Historically, they may have gained; costs that, in some cases, have been met by the local authority while the child is in the community—for example, for care or special educational provision—cease to be charged while they are placed in custody.

Several models are available for increasing local responsibility for juveniles, with the purest form having the whole of the secure budget transferred to local government, with local authorities having to purchase the places used for their children. Money saved by a reduction in use could be invested in the development of preventive programs or community-based alternatives, such as intensive fostering. This form of justice reinvestment has proved successful in reducing juvenile incarceration in Oregon (Tucker and Cadora, 2003). A forthcoming study of reductions in juvenile custody in the UK has suggested that the airing by central government in 2008 of proposals for greater local accountability for costs has served to concentrate the minds of local authorities on the case for reducing numbers (on the basis that in due course they might become liable for the costs involved) (Allen in press).

The package of measures outlined previously could start to reduce the numbers in prison relatively quickly. The impact would not initially be huge on the number of prison places required. Prisoners serving 12 months or fewer, for example, represent only 10% of the total prison population on any one day, although of course they account for two thirds of the receptions. Yet the vigorous application of each of these initiatives at a local level could combine to prevent the projected increase in the prison population and sow the seeds for its long-term reduction.

Conclusions

Unanswered questions remain about the JR approach. How, for example, do sentencers fit into the JR equation? Community Justice Centers offer a model in which courts are encouraged and enabled to adopt a more problem-solving role in partnership with community agencies. But the remaining issue is whether their decision making about individual offenders will lead to less use of prison via the provision of more persuasive alternatives or whether this needs to be complemented by greater controls on their discretion (through more restrictive guidelines produced by the Sentencing Council) or reductions

in their powers (by removing or reducing options for short prison sentences or reducing maximum sentence lengths).

A related issue is how much local variation should be allowed in criminal justice? Does it matter that custody rates vary in Magistrates Courts from 6% to 16% and in Crown Courts from 45% to 68%? Without stronger guidelines from the center, would a more localized system bring greater still variation depending on the priority and resources attached to the crime and justice agenda and the vigor with which the seven initiatives discussed previously are pursued?

If the justice reinvestment approach is designed primarily to reallocate spending on prisons into more socially constructive channels, it is likely to be more effective if its practices are developed alongside changes in law and policy, which effect a more sparing use of prison. But even without these, there is some reason for hoping that a more localized and cost-focused approach will over time make such changes more likely. Ministry of Justice research on local variations in sentencing found that one crucial factor was the relationship between sentencers and other agencies of the criminal justice system; another was the perception that not all options were available for community orders. Both of these elements could be addressed by a more locally based structure. Moving the center of gravity from central to local might help to take the political heat off the center when mistakes or tragic cases arise and to build greater local ownership of and confidence in community-based measures. Jack Straw called the Crime and Disorder Act "the triumph of community politics over detached metropolitan elites" (Straw, 1998). JR provides the opportunity to engage those community politics with the costs of prison policy and to create the conditions in which the penal inflation of recent years could be reversed and a process of restricting and recalibration of sentences could be introduced. More importantly, it paves the way not simply from moving funds from one form of government to another—from prison to probation or from central departments to local authorities. Drawing on the original ideas put forward by Susan B. Tucker and Eric Cadora (2003), Clear (2011) envisions a role for something qualitatively different—not just new programs but also new operating systems.

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Making imprisonment unprofitable

James Austin
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Although it might not be perfectly correct to say that America is a capitalist society, it cannot be denied that capitalism has a lot to do with how Americans behave and how we structure public policy. Put differently, if one wishes to restructure current public policy, then one must take into account the power of capitalism and traditional economic theory. This truism has many examples. Example A is the current tax code. Its purpose is to encourage economic gains in certain sectors of our economy. If we want to encourage people to buy houses, then we provide tax credits on the mortgage interest they pay. If we want people to buy solar systems or purchase more energy-efficient appliances and electric cars, then we provide tax credits.

If we want people to stop smoking, then we impose high taxes on cigarettes to make them more unaffordable. In social policy, which is relevant to the question of how to reduce prison populations, two strong examples have been noted of using financial incentives to lower the people cared for by government. As reported by Spelman (2009) and Gottschalk (2009), the massive decarceration of state hospitals was the result of two developments. The first was the successful invention of mind-altering drugs like Thorazine that allowed mentally ill patients to be treated in community-based settings. But the other factor was the passage of Medicaid in which the federal government paid for the care of the mentally ill in local hospitals and nursing homes. These two developments reduced the state mental health population from approximately 560,000 in the 1950s to less than 100,000 today.

The same effects have been noted for public welfare. To get people off welfare, we paid the states. In President Clinton's first campaign, he promised to "end welfare as we know it." When the 1996 law replaced the federal Aid to Families with Dependent Children (AFDC) with a state-run Temporary Assistance for Needy Families (TANF), it was funded, in part,

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by the federal government. Prior to 1996, ADFC had 14.1 million recipients. Today TANF has 4.4 million recipients.[1]

Even in the criminal justice system, using economic incentives to change public policy has been applied successfully. The Department of Justice's Office of Justice Program can be viewed, in part, as a means to induce states, counties, and cities to behave differently through economic incentives. Large grants were offered by the Clinton administration to lure states into passing more severe prison sentences (truth in sentencing or TIS) by helping to pay for the new prisons that needed to be built. Clinton also promoted the hiring of 100,000 police also paid for by the federal government. Boutique programs like smart policing, weed and seed, drug courts, boot camps, and residential drug treatment programs have been largely fueled, at least initially, by federal grants. But these federal justice programs, unlike the successful efforts to reduce the mentally ill and welfare populations, have had the collective effect of *increasing* and not reducing the size and scope of the criminal justice and correctional systems.

Economic incentives have had some interesting but limited uses, which have impacted the size of correctional populations in California. In the 1990s, the state's parole population and revocation rates dropped dramatically when parole agents were told that reducing parole revocations would increase the resources they would have to manage their parole caseloads (Holt, 1995). More recently, the California Youth Authority, which numbered more than 10,000 juveniles and young adults, has been reduced to approximately 1,200 in the matter of only a few years by simply paying the counties to manage these youth rather than committing them to state facilities.[2]

But can we craft new financial incentive systems on a wide-scale basis that will, in effect, take the profit out of imprisonment?

What Goes Up Must Come Down—Not Really

The rapid escalation in the entire correctional system was justified, in part, by the rapid increase in the Uniform Crime Reports crime rate. But the question of the day is why the prison and other correctional populations have not declined as the crime rate has receded?

Today's crime rate is now at the level it was in 1968 and is showing no signs of rebounding to its previous levels. In 1968, the prison population totaled approximately 188,000 people, which produces an imprisonment rate of 117 per 100,000 population. Today, with virtually the same crime rate as in 1968, we have 1.6 million prisoners and a total incarceration rate of 526. If one takes the 1968 incarceration rate and applies it to today's population, we would have a prison population of approximately 360,000 or

1. See acf.hhs.gov/programs/ofa/datareports/caseload/2010/2010_recipient_tan.htm.
2. See californiareport.org/archive/R201103230850/a.

TABLE 1

Comparisons on Crime and Punishment 1968 and 2009

	1968	2009	% Change
Crime rate per 100,000	3,370	3,466	3
Population	200. 7 million	307.0 million	39
State prisons	168,211	1,405,622	736
Federal prisons	19,703	208,118	956
Total	187,914	1,613,740	759
Imprisonment rate	117	526	350
2009 prison population based on 1968 incarceration and crime rates		359,190	

Sources: Uniform Crime Reports, Bureau of Justice Statistics, and U.S. Census.

one fourth of what it is now (see Table 1). So although crime rates might have explained, somewhat, why prison populations went up, they are not having the reverse effect.

Financial Incentives for Retaining the Status Quo

Prison and other correctional populations are not declining because current financial incentives serve to sustain the size of the criminal justice system. Put directly, too much profit exists in the current system. By *profit* I mean monetary and political. Clearly, much has been invested, and too many people make money off of the world's largest and most expensive social control system. The total cost of the criminal justice system exceeds $200 billion per year. Two million persons are directly employed by criminal justice agencies, and this number does not include persons who perform services but are not directly working for these agencies. More than 750,000 people are directly employed by correctional agencies (Bureau of Justice Statistics, 2011).

But politicians and policy makers also profit from a large and costly criminal justice system and invoke the sacred mantra of "public safety" whenever the criminal justice system is threatened with substantial budget cuts. They ominously warn that *any* reductions in police or prison population will result in massive increases in the crime rate—even though they fully know this is not the case. Taking down such a large industry base with all of its financial and political support is like asking for major cuts in the Pentagon.

The Failure of Criminologists

Criminologists have served to help sustain high imprisonment rates by failing to craft meaningful decarceration strategies. We are good at describing why prison populations have increased or the estimated effects of high imprisonment rates on crime rates, but we have little to offer on how to reverse the imprisonment trends. Two current examples of intellectual impotency are the 2009 and 2011 editions of *Criminology & Public Policy*. The former devoted a section on the question of "Explaining the prison boom" (Cook, 2009).

Besides stating the obvious (the product of higher crime rates, state spending, and politics), no serious discussion took place on how to lower the prison population. Spelman (2009) came the closest to suggesting that a federal initiative be launched along the lines of the deinstitutionalization effort of the mentally ill. But his plan is conspicuously absent of any concrete actions one would need to take to produce such a reduction. Nor does it make any sense given the current mood of reducing federal spending (2009).

The 2011 edition is more of the same. Here, the topic is California, which is the subject of federal court intervention. Thanks to the hard work of lawyers and some criminologists willing to become involved in the litigation, the federal court has been convinced that for many years the nation's largest prison system is unconstitutional (Barker, 2011). On May 23, 2011, the U.S. Supreme Court affirmed the order of a lower three-judge panel to reduce the California prison population by over 40,000 prisoners in two years. But none of articles in the 2011 edition of *Criminology and Public Policy* presented any concrete plans for reducing California's prison population without increasing crime rates.

Criminologists seem content to study and lament the origins of mass incarceration but not to orchestrate its demise. My fear—or more directly my observation—is that criminologists have little training in such matters and have little to offer policy makers and the public for how to get it done. It is like establishing a Manhattan-type Project on how to reduce imprisonment with no scientists to build the "decarceration bomb."

A New Financial Incentive System—Justice Reinvestment

Clear (2011, this issue) tries to depart from the limited contributions of mainstream criminology by proposing a financial incentive system that is linked to the origins of the justice reinvestment (JRI) movement. He provides a much needed historical review of the evolution of the JRI movement and its weaknesses. In its original design, JRI assumed that public policy officials could be persuaded to shift the vast sums of money being spent on incarceration to other *noncriminal justice* investments. Why? Because it would be better use of the money being invested in imprisonment and would reduce crime rates. But for reasons cited earlier, current revenue streams dedicated for imprisonment are perceived by powerful constituents to be money well spent.

The contemporary version of JRI only seeks to make the current criminal justice system more efficient apparently by transforming probation, parole, and prison systems into an effective rehabilitative system—something that not yet occurred. Prison populations are not reduced, but future prison costs are *avoided* by assuming that prison populations will continue to grow if JRI did not intervene. Here the powerful constituents of the status quo perceive JRI to be a means for making the huge criminal justice system more efficient but largely intact.

Clear's (2011) proposed voucher system plan returns to the original tenets of JRI. It requires substantial federal and state seed money to jump-start the voucher system that does not exist. More directly, it also assumes that a private-sector-based voucher system

will transform dysfunctional communities and their residents, many of whom are involved in the criminal justice system. And of course, considerable push back will come from the public sector, which will argue that only it is equipped to do this work.

Key Attributes of Decarceration

In crafting a decarceration plan, criminologists should pay attention to the following "lessons learned" if they are serious about prison population reductions:

1. *Abandon Recidivism Rate Reduction as a Central Prison Reduction Strategy*
   Much of the lament on prisons begins with the observation that recidivism rates are excessive. If we could take marginal people and convert vast majorities of them into law-abiding, tax-paying citizens, then I would be all in favor of it. But we cannot, and we should move on to more promising options.
2. *Reduce Probation and Parole Populations*
   One cannot lower prison populations unless the size of the two biggest feeders of prison admissions are also reduced. Indeed, one can significantly reduce a prison population by simply lowering the number of people placed on probation or released to parole and by reducing the amount of time one serves on probation or parole. I find it remarkable that the various efforts to estimate the impact of higher imprisonment rates on crime rates have ignored the same increases in parole, probation, and jail populations. It is not that prison populations have increased. Rather, the whole system of social control has escalated. More significantly, we know that approximately 60–75% of all prison admissions come from the criminogenic probation and parole systems. People's exposure to these control systems should be reduced, as has been done in Washington State, Nevada, and Arizona, by either directly limiting the admissions of parolees for technical violations or indirectly granting good-time credits for those who comply with supervision conditions.
3. *Include "Violent Offenders" and Lifers*
   With the exception of sex offenders, no other group strikes fear in the hearts of JRI and other reformers than people who have been convicted of a violent crime (usually assault or robbery) or those serving a life sentence (typically for murder). Today this group of people constitutes more than 50% of the standing prison population. Never mind that these prisoners (1) have lower recidivism rates and are rearrested or commit violent crimes at the same low rate as "nonviolent" and "drug" offenders, (2) have lower risk assessments largely because of age and maturation effects, and (3) have been severely punished by virtue of their crimes. Excluding these people limits the amount of decarceration that is feasible.
4. *Alter Local Police and Prosecutorial Policies*
   The decision by police to arrest someone and the subsequent decision by a prosecutor to charge that person formally with a crime sets the table for the range of punishments

to which one can be exposed. The recent experience of New York, which reduced its prison population from 71,000 to 58,000, shows the impact of police arrest polices on crime rates. Recent analysis shows that the state prison drop was largely the result of New York City police shifting their arrests from felony-level crimes to misdemeanors. This also reduced the NY City Jail population from 21,000 to less than 13,000 (see Austin and Jacobson, 2011 and Zimring, 2011).

A Manhattan Project on Decarceration

In addition to the four requirements listed above, I remain increasingly convinced that the best strategy for lowering the correctional populations will require nothing more than modestly recalibrating the amount of punishment one can receive for committing crimes. As I noted in an earlier article, this can be done by adopting policies that either exist today in some states or have existed in the past (Austin, 2010). More directly, we need to go back to sentencing systems that existed prior to 1970 when *both* crime rates and incarceration rates were much lower. We have already achieved the crime rate reduction so all that remains is altering the punishment system.

Criminologists need to play a more active role in designing and implementing the decarceration movement rather than lamenting about how we got here. It might take financial incentives to activate them. Perhaps the American Society of Criminology, National Academy of Sciences, a major foundation, and/or the Department of Justice could convene a panel of criminologists to develop the most effective decarceration strategy, much like the recently convened budget deficit reduction commission. Alternatively, a competition could be created in which various proposals like Clear's (2011) voucher system would be presented, with the winner awarded a substantial prize. Ultimately, the decarceration plan must also include financial incentives where maintaining the status quo becomes unprofitable. Whatever the venue, we have a historic opportunity to reverse the massive incarceration binge, and criminologists need to get off the sidelines.

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Making peace, not a desert

Penal reform should be about values not justice reinvestment

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The words in Todd Clear's (2011, this issue) provocative article describe a strategy for reducing the number of people held in American prisons. The music is about the moral need to build a more just society, and criminal justice system, and with that to reduce the harms that American punishment policies do to offenders, their families, their communities, and the nation. The strategy is admirable, although Clear's model for implementing it is unrealistic and impossibly complex. The moral need is compelling, but it needs to be addressed head-on rather than obliquely through complicated proposals aiming simultaneously—and magically—to save money, reduce offending, and reduce the numbers of people in confinement.

For the past 40 years, most advocates for humane criminal justice policies have made the fundamental mistake of arguing disingenuously. Instead of arguing that unduly harsh policies are unjust, and should be repealed or modified for that reason, they much more often argued that policies—which they believed to be unjust—should be changed because they are ineffective or too costly. Proposed alternatives—exemplified by most reentry initiatives—are generally supported by arguments about reduced cost or improved recidivism reduction. This is a mistake. As 30 years of program evaluations have shown, most "alternatives" cannot keep their promises. A few well-managed, well-funded programs with charismatic leaders can divert offenders from prison, save money, and reduce reoffending, but few real-life programs are like that.

More importantly, however, the strategy of disingenuous argument has failed because it does not recognize that the supporters of harsh contemporary punishment policies do not much care about cost savings or program effectiveness. Mandatory minimum,

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three-strikes, truth-in-sentencing, "dangerous offender," "sexual psychopath," and life-without-the-possibility-of-parole laws were not adopted because their supporters had done cost–benefit or recidivism-reduction analyses that demonstrated their cost- or preventive effectiveness. They were adopted—usually openly—because their supporters believed they were morally justifiable, that "we" deserve to be protected from the dangerous "them" and that "they" have forfeited any claim to have their interests or human rights taken into account. Clear's (2011) proposals are predicated on that fundamental mistake: Instrumental arguments about costs and effectiveness, especially weak ones, will never win over people motivated by moral beliefs. The ultimately moral arguments about disproportionate punishments, ruined lives, and social injustice need to be made explicitly if the argument is ever to change minds.

It oversimplifies to characterize views about crime control and punishment policies in terms of conservatives and liberals, but those categories are commonly used and capture at least central tendencies among people who fit into them. For 35 years, conservative policy advocates have mostly made normative claims: Offenders deserve to be punished severely, procedures that enable guilty people to avoid conviction are wrong, "lenient" sentences depreciate the seriousness of crimes, victims' needs and interests are more important those of offenders, and severe policies do and should emphatically denounce wrongful conduct. Liberal advocates typically have ducked the normative claims and responded with instrumental ones, arguing that particular policies and practices are ineffective, cost too much, divert funds from more important public needs, and are financially unsustainable. Or, accepting conservative assumptions and values, liberal advocates argue that their policy proposals do what conservatives want done, but better: They are more cost-effective and reduce recidivism rates as much or more.

Normative arguments concerning criminal justice policy have generally defeated instrumental ones since the mid-1970s. During the late 1970s and early 1990s recessions that made Jimmy Carter and George H. Bush one-term presidents, liberals in countless legislative hearing rooms argued earnestly that sentencing and corrections policies must be changed because they were unaffordable. In the political climates of those times, the arguments fell on deaf ears. The national march toward increasingly severe policies continued. During the current recession, policy makers in some states have made modest changes to America's unprecedentedly severe sentencing and corrections policies (e.g., Porter, 2011). That's good. It is more than happened during the Carter and Bush I administrations, and it may portend a change in the political climate. The changes, however, have mostly nibbled at the edges and are inherently unstable. When the good times once again roll, as they will, changes adopted to save money or improve efficiency, rather than because they are the right thing to do, are likely to be inherently unstable.

No one should be surprised that normative arguments based on ideas about justice and moral rights and wrongs often trump instrumental ones. The proposition that punishments should be harsher because that will better acknowledge a victim's suffering is a normative

claim about what is due victims. The proposition that violent or repeat offenders have forfeited any right to have their interests considered is a normative claim about appropriate consequences of wrongful behavior. The proposition that laws that punish minor offenses disproportionately severely are unjustifiable is a normative claim about unjust punishment. The proposition that laws that punish Black offenders disproportionately severely are unjustifiable is a normative claim about social justice. The proposition that no punishment should be so severe that it ignores possibilities of redemption and denies people affected by it any hope for a better future is a normative claim about what is due to human beings because they are human beings.

The five propositions in the preceding paragraph are in the abstract irreconcilable. Different people subscribe to various of them in different degrees. I described the claims as normative. Others would describe them as moral. However they are described, they represent deeply held beliefs about how offenders should be treated and about the weight that should be given to their interests in deciding how to respond to crimes they have convicted.

Given a choice between doing what seems morally right and doing something else, most people prefer the morally satisfying choice, even if it costs more. If the morally preferable choice is rejected because it seems unaffordable, it is with a feeling of regret, an uncomfortable sense of doing the wrong thing for the wrong reason. Given the chance later on to do the right thing, most people—I believe—would jump at the chance.

To the extent that contemporary crime control policies are based on deeply held normative or moral beliefs, their proponents and supporters are unlikely to repudiate them for instrumental reasons. Those policies will be repudiated, or support for them weakened, only if enough of their proponents can be persuaded that they are unjust and cannot be morally justified. That will not happen unless normative disagreements are brought into the open and engaged directly. Sometimes, at least, when that happens, minds are changed. Lawrence D. Bobo and Victor Thompson (2006, 2010) found, for example, that Whites' support for the federal 100-to-1 law that punished crack cocaine offenses as severely as powder cocaine offenses 100 times larger plummeted when they learned about its disproportionate effects on Black offenders.

On a couple of subjects—adult court jurisdictional ages and mandatory minimum sentences—liberal advocates have achieved some successes making normative arguments. The *New York Times* described growing momentum in states to revert to age 18 as the minimum age of adult court jurisdiction, as it was before law-and-order winds began to sweep across the country in the 1970s (Secret, 2011). The arguments for change are not typically about efficiency or cost—everyone agrees that juvenile court processing costs more—but about justice: Young people are in important respects different from adults; processing them in adult courts does unnecessary harm to them and to their prospects of growing up to become successful adults.

The same is true for mandatory minimums. The federal 100-to-1 law was first narrowed in influence by the U.S. Sentencing Commission and then converted into an 18-to-1 law and made less harsh in some respects by the U.S. Congress in 2010. The arguments for the change were not primarily about effectiveness but about justice; the 100-to-1 law was said to be unjust because it treated Blacks disproportionately severely and because it mandated lengthy sentences for trifling offenses. More generally, Families Against Mandatory Minimums has had success in some states persuading legislators that mandatory minimum sentences should be narrowed in scope or repealed because they are unjust (e.g., Greene and Mauer, 2010).

In the end, law and legal institutions—especially concerning issues as emotionally laden as crime and punishment—are based on values, not on cost–benefit analyses and effectiveness studies. Somewhat improbably for an article in a criminology journal, I quote the late Yale Law School professor Grant Gilmore, one of the 20th century's great commercial lawyers, to make the point:

> Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed. (Gilmore, 1977: 110–111)

Criminal justice reform arguments that speak directly to normative issues about justice and injustice, fairness and unfairness, and decency and indecency are more likely in the middle and long term to influence change than are other kinds of arguments. In this short essay, I do two things: comment on "justice reinvestment" as a strategy and explain why Clear's (2011) proposed approach is unrealistic and discuss other approaches to criminal justice reform, based on normative arguments that have proven successful elsewhere.

Justice Reinvestment

"Justice reinvestment" is an entirely sensible, although not a new, idea, and it is a useful tool for thinking about management of sentencing and corrections systems. Absent widespread agreement about values and goals, it is unlikely to serve as a successful strategy for policy change. The idea, which lay at the foundation of California's Community Treatment Program in the 1960s (Lerman, 1977), the push for Community Corrections Acts in the 1970s and 1980s (Schoen, 1978), and North Carolina's sentencing guidelines system in the 1990s (Wright, 2002), is that prisons are hugely expensive to operate. Diverting people from prisons can potentially save large amounts, which might more fruitfully be spent on community corrections programs and services.

If, for example, there were widespread agreement, including among the political class, that too many people are held in American prisons and that imprisonment rates should be radically reduced, then justice reinvestment could be a win–win–win strategy. If sufficiently large numbers of would-be prisoners were diverted to permit closing of prisons, then prison operators would realize major savings. If, say, half of the cost of housing diverted prisoners were transferred to community agencies to provide evidence-based services, then the state treasury would benefit, offenders and their families would benefit, and local communities would benefit. If Durlauf and Nagin (2011), and many others, are correct in their judgments that prisons are criminogenic and that the case for the deterrent effects of prisons is difficult-to-impossible to make, then potential crime victims will benefit from offenders' lower crime rates. And if widespread but guarded optimism about the crime-reductive effects of many treatment programs is justified, then crime will be reduced even more as a result of the proliferation of new programs paid for from diverted funds. In our time, however, broad-based agreement that prison populations should be radically reduced does not exist.

In practice, for reasons that are well understood, justice reinvestment efforts generally fail. First, they can only succeed if large numbers of prisoners are diverted. It is common to estimate the funds available for reinvestment based on per-capita annual imprisonment costs measured in tens of thousands of dollars. That is a wild exaggeration except in instances in which entire prisons are closed. Most of the costs of running prisons are fixed costs for facilities amortization and operation, and for personnel. The savings to a prison system with 10 or a 100 fewer prisoners is the marginal cost of food, toilet paper, laundry, and paperwork. Only big reductions in numbers can potentially save much money.

Second, even when prisoner numbers fall enough to justify closing entire facilities, the politics of prison closing are difficult. Unions are loath to accept layoffs and can usually find influential politicians to represent their interests (see Page, 2011, this issue). Rural communities—and increasingly suburban and urban ones—view prisons as economic engines and fight to retain them. There will be few savings if empty or tokenly occupied prisons remain open and staffed.

Third, in many states, prison populations are continuing to increase. Unless the annual number of prisoners diverted by a new program is larger than the expected annual increase, the diversion will not save money but will avoid the need for an increase in corrections spending. For there to be fund transfers, it would have to be from new funding.

Fourth, assuming prisoner numbers fall and prisons close, the justice reinvestment strategy assumes that policy makers will be willing to transfer a large part of the savings to community corrections programs and services. In economic hard times, policy makers are more likely to use newly available money to fund K–8 schools, higher education, or Medicare. The history of the use of funds from the $200 billion tobacco company settlement with state governments provides a cautionary precedent. Although many states undertook in those flusher times to allocate the money to antismoking and related initiatives, in most

states, the funds have disappeared, reallocated to plug one-off budget deficits. Governors announcing their decisions express satisfaction that the projected state deficit is that much smaller and move on to another topic. In current state budget conditions and for at least the short-term future, it is unclear why policy makers would be expected to spend money saved by closing prisons on community corrections and social programs for offenders rather than on other state needs.

Fifth is the classic problem of the intrastate equivalent of American federalism. Except for the handful of states such as Delaware, Vermont, and Alaska that operate unified corrections systems, state governments pay for prisons; county governments pay for jails, sheriffs' deputies, and district attorneys; and municipal governments pay for local police. In many states, most probation and other community corrections costs are county responsibilities. State policy makers prefer to spend state revenues on state-level operations over which they have oversight and control than to transfer them to counties.

Thus, there are reasons why Community Corrections Acts have not swept the country. Todd Clear (2011) knows all this and alludes to most of it in his article. His community reinvestment model, however, ignores this, assuming states will be prepared to transfer average annual per-capita costs of imprisonment to nonstate agencies in respect of each state prisoner diverted.

Clear's (2011) proposal is akin to what philosophers call "ideal theory." Many prominent philosophers in recent decades have developed what to them seem morally persuasive theoretical justifications or depictions of punishment but then have acknowledged that their arguments presuppose conditions of social justice that do not exist (e.g., Duff, 1986; Murphy, 1973). Jeffrie Murphy, for example, offered a "benefits and burdens" or "equilibrium" retributive argument. If you enjoy the benefits of community membership, then you are also expected to accept the burdens. Offenders, although they benefit from others' law-abidingness, effectively reject the burdens of citizenship. Punishment resets the balance. The only problem, Murphy noted, is that many offenders are deeply disadvantaged, and it is difficult to explain in what sense they have enjoyed the benefits of community membership, and accordingly, it is difficult to explain why they are obligated to accept the burdens. Having admitted that their ideal theories cannot be reconciled with the real world, philosophers nonetheless argue that the theories, even if impracticable, provide standards to which we should aspire and moral calipers by which we should measure what in practice we do.

Clear's (2011) proposal is like that. It assumes that the political and economic realities just described do not exist. The proposal is to create a system in which each state prisoner diverted to the community at sentencing or later triggers the issuance of vouchers equal in amount to most or all the average per-capita cost of confinement he or she would otherwise have served. Some vouchers, for employers, could provide funds to pay the diverted offender for work. Others could be used to pay for treatment services and various forms of community development. Treatment vouchers would require that a treatment plan

be prepared for each affected offender, in cooperation with a community group, and be acceptable to the victim and the prosecutor. One element must be a "victim restoration plan" that addresses both tangible and emotional (lawyers' "pain and suffering") costs. Relatively complicated discussions explain how community reinvestment programs might be fashioned to attract private-sector involvement.

Thought of as the equivalent of a philosopher's ideal theory, the proposal is fine. Clear and others can tinker with it and use it as a frame of reference for talking about more limited proposals and practices. Thought of as a proposal for real world change it is . . . improbable. I say this in part because of the financial and political problems I laid out.

I also say it in part because the proposal bears similarity to a Rube Goldberg machine—incredibly complicated but aiming at day's end to do something simple. The aim is to shift money from state to county accounts to parallel shifts of offenders from state to county jurisdiction. That is what Community Corrections Acts are about, and if the political will to support them can be found, they offer a much simpler way to do it.

And I say it in part also because of accumulated learning from evaluations of community corrections programs. The most common finding is "implementation failure." Relatively simple community service and intensive supervision initiatives, programs with comparatively few moving parts, are difficult to implement consistently and effectively. Clear's (2011) community reinvestment machinery is orders of magnitude more complicated.

Justice Reinvigoration

The biggest failure of Clear's (2011) proposal is not its complexity or feasibility but that it implicitly accepts the American criminal justice system as it is, and the normative beliefs on which it is based, and proposes minor incremental changes. The problems, however, are not minor and they will not be much affected by incremental changes. A brief familiar litany should make the point—an imprisonment rate eight times higher than Canada's or the Western European average, an imprisonment rate for Blacks seven times higher than that for Whites, a third of Black men in their 20s under criminal justice system control, and sentencing laws that are incomparably harsher than at any other time in American history or in any other developed democratic country ever. Even if Clear's proposal were realistic, and feasible, and implemented effectively, it could make only a tiny difference to the fundamental injustices of the American criminal justice system. Even if, on heroic assumptions, community reinvestment reduced the imprisonment rate by 10%, the rate would exceed 700 per 100,000 and remain incomparably higher than in any other country on the globe. That would be a pyrrhic victory at best.

The American criminal justice system is profoundly unjust. It will become less unjust only when American policy makers decide to change it in fundamental ways. Three-strikes, life-without-parole, and mandatory minimum laws should be repealed, dangerous offender and sexual psychopath laws should be narrowed substantially, and systems should be devised

to provide meaningful reviews of the need for continued confinement of prisoners serving long sentences. Even if that happened, decades would pass before American punishment practices became comparable with those in other developed countries.

Changes of that nature will not occur because well-managed community corrections programs slightly reduce participants' reoffending rates. It will happen only when American policy makers become convinced that current policies and practices are morally unjustifiable. That, in turn, can happen only after they have been challenged successfully in moral terms. Clear's (2011) community reinvestment, Durlauf and Nagin's (2011) "more police, fewer prisons," and Sherman's (2011) "more and better policing" proposals are doomed to fail because they accept the conservative position that crime prevention effectiveness—rather than justice to individuals—is the ultimate measure of criminal justice policy.

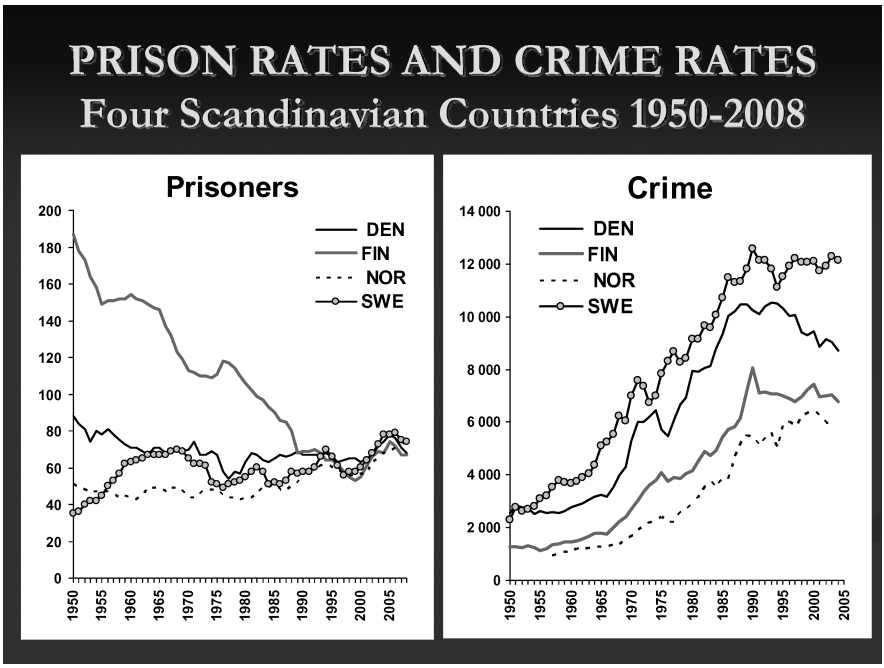
If the moral arguments are never engaged, they can never be won. If they are not won, nothing will change very much. They can be won. In small doses, they have been. After two decades of complaints by judges and others about the remarkably harsh and inflexibly unjust federal sentencing guidelines, the U.S. Supreme Court returned to federal judges the authority to base sentences on assessments of what is deserved in individual cases. After two decades of complaints about the racial injustice of the federal crack/powder cocaine 100-to-1 sentencing law, the Congress reduced the differential to (a still unjust) 18-to-1. Voters in many states rejected drug law enforcement officials' advice and enacted medical marijuana laws. California voters in 2000 by referendum enacted Proposition 36, which required diversion of first- and second-time drug offenders from prosecution to treatment. Earlier, I mentioned the growing movement to return the age of adult court jurisdiction to age 18 and the occasional successes of Families Against Mandatory Minimums to persuade state legislatures to repeal or modify mandatory minimum laws.

All of those changes followed proponents' arguments that the status quo was unjust. Changes to mandatory minimum laws, for example, did not happen because advocates persuaded legislators that mandatory penalties are not effective deterrents of criminal behavior or that mandatories reduce the transparency of the criminal process. They happened because advocates persuaded legislators that lives were being ruined unnecessarily and that people were being required to serve much longer prison terms than could be morally justified. Larger changes will require that similar moral arguments be made successfully.

In other places and times, they have been. Here are three examples. Finnish policy makers in the 1960s decided that the Finnish imprisonment rate—then approaching 200 per 100,000—was unjustifiably and unjustly high. Using many statutory and administrative changes, the imprisonment rate was cut by two thirds, reaching 60 per 100,000 in the early 1990s, a level around which it has since oscillated (Lappi-Seppälä, 2001). During the 25 years of steadily declining imprisonment rates, Finnish crime rates tripled. The crime rate increase did not cause policy makers to change their minds. The decision that high imprisonment rates were morally unjustifiable had been made. Since the early 1990s, as in

FIGURE 1

Imprisonment Rates and Crime Rates, Four Scandinavian Countries, 1950–2008.

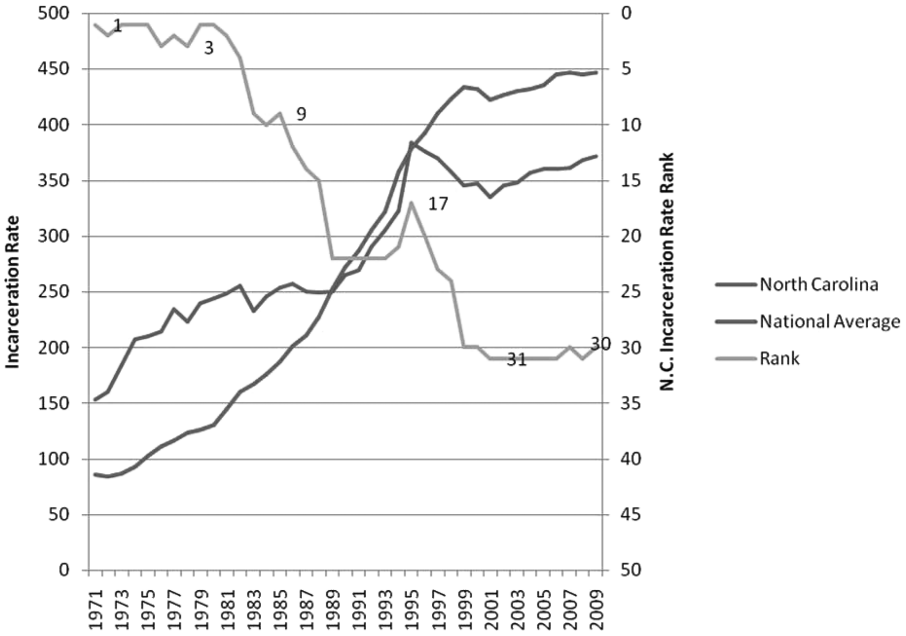


the United States, crime rates have fallen steadily and substantially. Figure 1 tells the tale. The imprisonment rates of Denmark, Norway, and Sweden fluctuated within narrow bands throughout the period. From the late 1960s to 1990, the rate in Finland continuously fell.

In the 1970s, North Carolina consistently had one of the highest imprisonment rates in the United States. In the 1980s, after a successful "prison overcrowding" lawsuit brought in federal courts, North Carolina political leaders decided they would not allow the state imprisonment rate to continue to increase. The first strategic approach to do that was to establish a prison population cap: If newly admitted prisoners would cause the cap to be exceeded, then current prisoners would have to be released. When that approach attracted public and political objections, North Carolina established a sentencing commission, which decided greatly to reduce the use of imprisonment for property and minor violent offenders. The legislature created a community corrections mechanism that provided state funding for the development of county-level community programs for the formerly prison-bound offenders (Wright, 2002). It worked, as Figure 2 shows. The scale on the left axis shows North Carolina and average U.S. state imprisonment rates from 1970 to 2010. The right axis shows North Carolina's imprisonment rate ranking among states. North Carolina's

FIGURE 2

Imprisonment Rates and Rankings, North Carolina and National, 1971–2009.



ranking fell from first in 1970 to 30th in 2009. Since 1980, North Carolina's rate grew much more slowly than the national average.

Many European countries—Germany, Belgium, Sweden, Norway, Denmark, and Switzerland—offer a third model for controlling prison populations. Confronted by the tripling of crime rates that afflicted every developed country except Japan between 1970 and 1990, they adopted policies of "bifurcation" in which prison sentences were increasingly reserved only for serious violent offenses and new prosecutorial diversion and community penalty programs were created to deal with the rest. The result in all those countries is that imprisonment rates increased only slightly or not at all between 1970 and 2010.

Experience in Denmark, Finland, Norway, and Sweden shows how bifurcation worked. Tapio Lappi-Seppälä (2007) documented every significant statutory and administrative agency change potentially affecting imprisonment rates in the four countries over the 40-year period beginning in the mid-1960s. Until the mid-1990s, most changes had the effect of reducing prison use. Since then, paralleling changes in many other countries, a higher percentage of the changes tended to increase prison use. Lappi-Seppälä noted, however, a striking pattern: Changes reducing prison use were broad based and affected large numbers of cases; changes increasing prison use were invariably narrowly focused and affected only small numbers of cases. The widely held Scandinavian normative belief that imprisonment

is in its nature undesirable persisted; the formulas according to which its scant use is allocated were rejiggered. Figure 1 also tells this tale. Note how, despite the rapid and steep increases in crime rates in the 1970s and 1980s, and the falls beginning in the 1990s, the imprisonment rates in Denmark, Norway, and Sweden remained steady. In countries in which imprisonment is widely believed for normative reasons be a Bad Thing, policy makers will work to restrain its use.

Liberal reform advocates in the United States have, for three decades, made a major strategic mistake in arguing for change in instrumental terms of cost and effectiveness rather than in normative terms of injustice and human rights, while conceding the normative arguments to conservatives. The strategy of disingenuous argument was bound to fail.

Conservatives made the equally mistaken—although much more costly in terms of human suffering—decision to attempt to control crime rates by enacting laws targeting the criminal manifestations of underlying social conditions. That too was a colossal mistake. Preventive strategies that target symptoms rather than causes are foreordained to fail. Quoting Grant Gilmore again:

> Law is always an instinctive response to disorder, never a reasoned approach to the quite different problem of achieving order. For ten years or so after World War II the slogan World Peace through World Law was one which appealed to many men of good will. That always seemed to me to be a case of putting the cart before the horse. Conceivably, we might get World Law through World Peace but not the other way around. And if we did achieve World Law through World Peace—the Romans, you will remember, are said to have made a desert and called it peace—there is no reason to believe that we would be any better off, legally speaking, than we are now. (Gilmore, 1975: 1044)

And so it has proven with crime. I doubt that many, if any, conservative political leaders of the 1970s would have chosen the future in which we now live. Even so politically engaged and astute an observer as Alfred Blumstein in 1987 wrote a *Crime and Justice* article titled "Prison Populations: A System Out of Control?" in which he expressed the view that by 1986, imprisonment rates had reached an extraordinarily high level of 227 federal and state prisoners per 100,000 population and that something would have to give; the increase could not continue. Little did he know, nor could he have foreseen, a rate in excess of 500 per 100,000 in 2009 (and approaching 800 if jail inmates are counted).

The United States is in a place no one would have chosen to go. The North Carolina, Finnish, and other European examples show that it is not impossible to reduce or control imprisonment rates, even during periods when crime rates are rising rapidly. It should be easier when crime rates are stable or falling. What is needed is a widely shared belief that high imprisonment rates are undesirable, unjust, and destructive. That belief cannot come to exist unless people engage in moral discourse about justice and injustice. So far, at least,

few liberal law reformers, including Clear (2011), have chosen to do so. Focusing on cost savings and small reductions in reoffending rates may win a few small victories, but it will not win a war.

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Justice reinvestment in community supervision

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The proposition of "justice reinvestment" is attractive on the surface. If the money now spent on reducing crime by keeping people in prison could prevent just as much crime, or even more crime, if spent some other way, then why not do so? And if the problem is a defective budget mechanism, unable to translate prison savings into funding for the programs that could replace prison, then the obvious solution is to change the budget mechanism. Such a change would be "justice reinvestment" as a policy, rather than merely as a slogan.

In "A private sector, incentives-based model for justice reinvestment," Todd Clear (2011, this issue) makes a valiant attempt to imagine such a policy, focused on private-sector employers and community-based nongovernmental organization program operators offering employment and housing to the particular offenders whose nonincarceration will pay for the programs. But each of those choices—community focus, services orientation, delivery to specific offenders, and nongovernmental actors—has alternatives, and the article offers us no clear reason to think that those are the right choices in terms of crime control.

The literature on recidivism reduction via service delivery—the "reentry" literature—for the most part, makes for fairly depressing reading; a program that moves the 3-year return-to-prison rate from 66% to 60% counts as a success. Given that the total annual prison budget is only $60 billion, the potential savings from reduced incarceration can hardly finance major increases in social-service budgets or fuel major upsurges in neighborhood economic activity, even if spent in ways that lead to respending within the affected neighborhoods.

By contrast, there are strong reasons to think that improved probation and parole supervision—as opposed to enhanced services—can make a big difference in reoffending and reincarceration, and can do so for small sums compared with the savings from reduced

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reincarceration. As Clear (2011) points out, this approach is not "justice reinvestment" in the sense intended by those who coined that term, but it might still be worth attempting.

The Promise of Community Corrections

The supervision side of community corrections has a bad name. It is widely regarded as no better than a mechanism for ensuring repeated failures and incarcerations—part of the pattern sometimes called "life in prison on the installment plan." The Petersilia and Turner (1993) analysis of intensively supervised probation was undoubtedly discouraging; if much more supervision does not reduce crime compared with little supervision, then why do we think that more supervision is helpful, or that *less* supervision would not be a good idea if it led to fewer technical violations and therefore fewer trips "back inside?"

Indeed, the claim that tighter community supervision could reduce incarceration is a near paradox; after all, probation and parole revocation are a major source of prison entry, and reducing revocation rates, especially for "technical" violations, has been a major target of reform efforts, including California's introduction of "nonrevocable parole." But the paradox is only apparent. Tighter supervision need not mean more revocation if sanctions short of revocation are used to enforce probation and parole conditions and if well-designed and properly enforced probation and parole conditions reduce the reoffending rate and thus the number of people who return to prison as a result of new arrests

A strong line of evidence—most recently, but not exclusively, from the HOPE program in Hawaii and its replications elsewhere (Hawken and Kleiman, 2009)—indicates that the failure of supervision is primarily a failure of sanctioning. The right sort of sanctions (swift, certain, and not severe), can, it seems, change behavior change in a way that leads to not only less crime but also fewer days behind bars. If it were possible to capture the savings from reduced incarceration to fund such programs, then they might become financially self-sustaining, with potentially large implications for crime, prison populations, and state budgets. A community-corrections–based version of justice reinvestment could (although of course failure is always more likely than success in programs of massive reform) generate a change in the scale of incarceration while also reducing crime.

Why Community Corrections Is Not Working

Probationers and parolees are subject to a wide range of rules and restrictions, designed, at least in principle, to encourage them to lead law-abiding lives. Their compliance with those rules tends to be imperfect. Noncompliance exposes them to sanctions: in the extreme, revocation of community-release status and incarceration. In some jurisdictions, noncompliance can also lead to extensions of the original supervision period. But the sanctioning process reproduces the flaws of the larger criminal justice system: the potential sanctions are severe, but they are administered only sporadically and after a delay. If Beccaria (1764/1986) and the behavioral psychologists (Tversky and Kahnemann, 1974: Ainslie, 1991) are correct in that swiftness and certainty are more important than severity in

determining the deterrent value of a threatened sanction, then the current system is precisely backward.

The system is caught in a "social trap"—a self-reinforcing pattern of undesirable behavior. Sporadic sanctioning encourages high violation rates, and the high violation rates, combined with heavy caseloads and the heavy paperwork burden associated with revocation proceedings, maintain the pattern of sporadic sanctioning. A probation officer with a caseload of 180 felons, each subject to a monthly meeting and drug test, in which 10% fail to appear in any given month and an additional 20% test "dirty," cannot possibly "write up" all of the violations if a write-up takes 2 hours. As a result, the first several violations by any offender are likely to be "punished" with no more than a warning—first verbal and then perhaps written. The offender, lacking any way to know which "last chance" is truly the *last* chance, is then surprised to find himself one day in front of a judge and looking at months "inside" as a result of behavior that has gone unpunished up to that point.

How Inadequate Supervision Increases Incarceration

The failure of community supervision tends to increase incarceration rates through at least three distinct mechanisms:

1. Probationers and parolees learn by experience that they can safely, at least in the short term, ignore the rules. This situation leads some of them to build up a long list of "technical" violations that eventually lead to revocation.
2. Some behaviors forbidden by the rules (e.g., continued hard-drug use by offenders whose substance abuse problems contribute to their criminality) are demonstrably criminogenic. A system that fails to discourage those behaviors results in increasing reoffending rates as well as incarceration that results from arrests on new charges.
3. Both the apparent laxity of the system and the high rates of reoffending make probation and parole seem like less credible alternatives to incarceration in the eyes of voters, legislators, judges, prosecutors, and victim advocates.

Principles of Effective Community Supervision

Nothing is mysterious about providing effective community supervision. They are well known to anyone who has ever successfully raised a child, managed an office, or coached a team. People are more likely to comply with rules when:

1. They know what the rules are.
2. They perceive the rules, and the system that enforces them, as fair.
3. They believe that violations are likely to be detected.
4. They believe that detected violations will have unpleasant consequences.

So to be effective at enforcing its rules, the community-supervision system would have to:

1. Identify undesirable behaviors that can be reliably monitored at modest cost

2. Give clients clear warnings about the precise behaviors to be avoided, show them a monitoring system that can detect those behaviors, and promise them swift and certain sanctions when those behaviors are detected
3. Monitor those behaviors
4. Deliver sanctions quickly and reliably

Again, the principles are straightforward. The problem is crafting a system capable of monitoring behavior and sanctioning violations. That requires a demonstrated capacity to chase down those clients who abscond from supervision. Building such a system requires modifying current practices.

For example, hard-drug use among offenders is demonstrably criminogenic behavior, and it can be monitored for any 3-day period using a test that costs approximately $5. Most probation and parole agencies perform such tests. But many of them still use a process of taking a specimen and sending it out to a laboratory for analysis; this creates a delay of several days between the test and any consequence. Test kits that provide on-the-spot results are commercially available at prices competitive with laboratory-based testing. Switching to on-the-spot testing is a key first step in making drug monitoring effective.

Similarly, to deliver on the threat of consistent sanctioning, the product of the number of violations any given community-corrections officer has to deal with on any given day and the time required to process such a violation must be made to fit within the officer's time budget. In Hawaii, the probation department developed a short-form reporting document designed to handle only a single, recent violation (in contrast with the usual motion for revocation, which documents multiple violations stretching back over a period of months). The key data—the name of the client, the date of the violation, and its nature (typically, a missed testing appointment or "dirty" drug test)—can be recorded in minutes rather than in hours, on a form that mostly consists of blanks and checkboxes with a signature space at the bottom. The form itself is transmitted by fax rather than by hand. The whole process is designed to minimize the burden on the probation officer and, thus, to ensure that time pressure will never cause an omitted report.

Courtroom time is another constraint that has to be respected. A hearing focused on a single recent violation, clearly documented, with a relatively modest sanction (days in jail) at stake can be made brief (in Hawaii, an average of 20 minutes) without sacrificing due process.

Even with these simplifications, a HOPE-style program would collapse under its own weight if it were applied at once to a large number of clients. The community-corrections system has a long history of bluffing: making threats it cannot or will not deliver on. Overcoming that history and convincing clients that the current threat is real takes time. Under consistent sanctioning, violation rates decline dramatically over measured in weeks or months. In time, such a program can establish a reputation for seriousness, reducing the violation rate even for new clients if they have learned of it from others. But the number of new clients at any one time must be kept down, especially at the beginning, to avoid

a clash between the higher new-client violation rates and the capacity of the system to carry out sanctions. From this perspective, a formal warning process—perhaps the single greatest innovation introduced by Judge Alm in Hawaii—has great operational benefits, in addition to contributing to the program's perceived fairness. Even so, such programs need to start small (50 might be a reasonable upper limit) and take time to shake themselves down operationally and establish the credibility of their sanctions before expanding.

Unlike drug courts, HOPE programs spend little time and resources managing compliant clients. A HOPE probationer who has been "clean" for 6 months is tested only once per month, and his contact with the system is limited to a daily phone call to the drug test "hot line" to see whether that is the day he must report for testing in addition to a routine monthly visit with a probation officer. This process makes the program's success feed on itself, in a reversal of the "social trap" of sporadic monitoring and sanctioning. After a year, most HOPE probationers have worked their way into the low-monitoring group, which makes the cost of supervising them only slightly higher than the cost of ordinary probation supervision.

Therefore, once such a program is running, its scale has no natural limit. HOPE-style monitoring and sanctioning, in which the intensity of monitoring varies with the characteristics of the client and is reduced after periods of sustained compliance, could be the future of probation and parole.

Drug use is relevant to reoffending and is easy to monitor. But in Hawaii, the HOPE process has been applied successfully to sex offenders and to perpetrators of domestic violence for whom drug abuse was not an issue; the focus in those cases was on the enforcement of other conditions of release, such as "stay-away" orders and compliance with treatment regimens. The obvious extension would be to combine a HOPE-style sanctioning with electronic position monitoring via GPS-enabled, tamper-evident anklets. This would allow the enforcement of time-and-place conditions such as stay-away orders and requirements to be at work or treatment during scheduled hours, and provide incapacitation by creating the ability to link an offender's position to a crime scene, thus greatly reducing the opportunities for unobserved reoffending. It would also enable the use of curfews to punish offenders for violating other conditions of release, potentially reducing the use of jail as a sanction.

Shrinking the Prison Headcount

A really effective program of community supervision could reduce incarceration directly by reducing both revocations and sentences for new crimes. Those effects are demonstrated in Hawaii. The HOPE experimental group experienced half the revocation rate and half the rate of conviction for new offenses of the randomized control group, and its members served fewer than half as many days behind bars per month of community supervision. The avoided costs of incarceration were several times the additional cost of HOPE (compared with routine probation supervision).

Two additional mechanisms exist in which more effective community supervision could reduce the population behind bars.

First, it could encourage judges (and legislatures) to make more generous use of probation and parole as alternatives to incarceration. Well-enforced community supervision would represent more of a sanction than conventional parole and, thus, a closer substitute for prison in providing retribution and (perhaps) deterrence. It would also reduce the reoffending rate, thus reducing the marginal value of a prison cell as a means of incapacitation. One does not have to attribute any sort of global rationality to the processes that generate prison populations to think that some actors in those processes are sensitive to benefits and costs.

Second, if tightly supervised probation proved a better deterrent to crime than lightly supervised probation—a plausible, but unproven, possibility—then it might reduce the total inflow to the population that cycles in and out of correctional supervision, both institutional and community. Most first-time (caught) offenders receive probation rather than prison, and conversely, most people who go to prison have been on probation before, many of them more than once. It is not necessary to accept the current rate at which those arrested for a first adult felony become habitual offenders as a law of nature, and attempts to reduce that rate might reasonably focus on the nature of the sanctions those novice felons face. The current system might have been designed to produce as many long criminal careers as possible.

Budgetary and Crime-Rate Impacts

Compared with the current system of incarceration for 2.4 million offenders and ineffective community supervision for another 5 million, a much smaller prison system combined with much more effective community supervision could reduce cost and, more importantly, the suffering imposed by incarceration on those incarcerated and those who care about them while shrinking crime. With HOPE at production scale only in Hawaii, any national projection is necessarily speculative, but the arithmetic is nonetheless intriguing.

In rough numbers, which conceal both state-to-state and offender-to-offender variation, keeping someone in prison or jail costs approximately $30,000 per year. Parole supervision costs one tenth of that; probation costs even less at approximately $1,000. HOPE adds approximately $1,400 to the annual probation bill (most of that is for drug treatment for the minority of HOPE participants who fail repeatedly and are mandated to treatment). Adding "passive" GPS monitoring (with departures from the rules reported electronically but without constant attention by a human being) would roughly double that additional cost for as long as the anklet remained in place; the cost could be reduced by removing the anklet after a period of sustained compliance.

Assume that, at any given time, half of the probation and parole population would have earned, by a period of compliance, relatively loose monitoring (only monthly drug testing and no GPS anklet) but with the threat of return to tight monitoring in case of a detected

violation. Parole with drug testing, drug treatment as needed, GPS monitoring, and HOPE-style sanctioning might cost $6,000 per year; with half of the parole population in that status, the average cost of parole would increase from the current $3,000 to approximately $4,500. Making the same assumption about probation—half of all probationers subject to expensive scrutiny, and the other half only to the threat of expensive scrutiny should their behavior require it—would increase the average cost of probation from the current $1,000 to $2,500.

So a system with 1 million people behind bars (including those serving community-corrections sanctions time) and 6.5 million under tight community supervision (2 million on parole and 4.5 million on probation) would cost roughly $30 billion for institutions and $20 billion for community supervision, which is approximately $10 billion in annual national savings compared with the current system.

The effect on crime would depend on the rate of offending of the 1.4 million additional offenders who would be in the community rather than in prison or jail compared with the reduction in offending because of tighter supervision of the existing probation and parole population and any effects on longer term trajectories of offending (The system also might be usefully extended to those on bail, again paid for by reducing the number held in jail pretrial). The high variance in offending rates (when not confined) among prisoners, parolees, and probationers complicates any projection of how much additional crime would be allowed for by having fewer people behind bars. And although the results from Hawaii suggest that 50% reductions in out-of-custody offense rates are achievable (even more might be achievable if GPS position monitoring were added to the mix), no study of HOPE-style parole has yet been published; those experiments are just now starting. Therefore, it would be fatuous to offer a numerical estimate of the change in crime rates. But it is not hard to believe that reduced crime by 5 million current probationers and parolees could made up for the increased crime from having 1.4 million fewer offenders behind bars; indeed, if the 50% figure could be realized in practice, then it is hard to imagine a distribution of lambdas that would mean anything but a reduction in the crime rate, even in the short run. And the longer-run effects are all in the right direction.

Budgeting as a Barrier

Less incarceration, lower spending, and less crime should be an attractive package, and many relevant political actors might find it so if they were offered an explicit choice. But that choice has not been presented to any particular official. In the short run, as Clear (2011) notes, the marginal cost of a prison is much less than the average cost; except in states that contract out incarceration on a per-day basis, a small reduction in prison headcount might not lead to substantial budget savings. The big savings appear only when the reduction leads to closing an institution, or to not building a new one.

Moreover, in most jursidictions no mechanism to recycle the savings from reduced incarceration back into improved community supervision. Even in states where parole

supervision is within the corrections department, it is budgeted separately from the institutions. And probation is generally a county-level rather than a state-level function and budget item; in some states, probation is part of the court system and budget. An invitation to a county executive or administrative chief judge to spend his or her already scarce funds on a program that might (or might not) help the state save prison dollars is unlikely to receive a warm reception.

Unless the idea of justice reinvestment is given budgetary form (e.g., by allowing counties to share in the savings that result when fewer of their residents go to state prison), HOPE's potential to reinvigorate community corrections might continue to go largely untapped.

The federal government proposes to dip a toe into these waters, with millions of dollars budgeted for "smart probation" (which, with luck, might be extended to parole, pretrial release, and juvenile corrections). Those funds could overcome the other part of the problem Clear (2011) points to—the need at the beginning for some "pump-priming" funds to create programs to create the savings that can then be recycled. Federal appropriators are reportedly afraid of creating another funding stream for state and local criminal justice operations; the example of the Byrne grants is not one that Congress cares to replicate.

Perhaps the right form of a "smart probation" grant program would explicitly build in "reinvestment." Let jurisdictions compete for modest-sized grants (a few hundreds of thousands of dollars) to start programs of enhanced community supervision on the HOPE model. A grant might last for 2 years, with second-year funding contingent on first-year success. Each proposal should demonstrate that the applicant has worked through the statutory, procedural, and organizational problems that might get in the way of successful implementation, specifying:

1. The population of offenders to be monitored in this fashion
2. A rule that will select the initial group (of modest size)
3. A process by which those enrolled in the program will be informed of the rules and the enforcement process
4. A set of community-corrections rules designed to reduce reoffending
5. Processes to monitor compliance with those rules in timely fashion
6. A process to impose modest sanctions quickly, and principles or guidelines for doing so
7. A police agency prepared to give high priority to the task of chasing down absconders
8. A process to track the operations of the system, identify glitches, and get them fixed
9. A rule or process to link the results of that tracking process to program expansion
10. A mechanism to calculate the budget savings resulting from reduced incarceration based on actual results rather than on projections

To put "justice reinvestment" into this process would require only one additional step: a budgetary mechanism to recycle part (perhaps half) of the calculated savings into

operating the program. If that were required as a condition of applying for the initial funds, then the lifetime of the grant program would be no longer than necessary to start "smart probation" (or parole, or pretrial release) in each jurisdiction. This method would provide both assurance for appropriators and incentive for local officials to make good use of the start-up money.

Perhaps the exceedingly ill wind of the current crisis in state budgets will blow a certain amount of good. If legislators and governors find that a budget deficit is even scarier than a Willie Horton, perhaps we can reinvest our way out of the current scandalous and pointlessly cruel system of mass incarceration.

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Lessons for justice reinvestment from restorative justice and the justice model experience

Some tips for an 8-year-old prodigy

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Has a criminological idea ever has caught on as rapidly as "justice reinvestment?" As recently as 2002, no one outside of a small circle of justice activists and ex-prisoners in New York had ever even heard of justice reinvestment. By 2009, the state of Michigan's bipartisan "Justice Reinvestment Working Group" was outlining plans to channel $300 million saved by closing prisons into community improvement work. Parallel developments are in the works across a wide variety of states (including unexpected ones like Texas), and a similar enthusiasm has spread internationally. In the United Kingdom, a House of Commons paper called *Cutting Crime: The Case for Justice Reinvestment* (2009) has garnered support from all three major political parties and has generated considerable activity on the ground. That is not too shabby for an 8-year-old idea considering that many of us are still trying to finish book chapters based on ideas we had a decade ago.

Perhaps most remarkably, as Todd Clear (2011, this issue) rightly points out, justice reinvestment (hereafter, JR) has enjoyed all this success even though the idea is still "in its infancy," has been only "sort of" defined, is not based on a "strong empirical foundation," and above all, does not really qualify as being a proper "theory!" As such, Clear's first-ever, rigorous academic assessment of the JR idea is a badly needed contribution to this discussion. It is also something of a shame, of course, as Clear's exposure of the idea to the cold light of day does reveal some of the devils buried in its details.

After all, justice reinvestment is a thing of beauty. By which, I mean it is an aesthetically compelling idea or, as per the *American Heritage Dictionary*, a vision characterized by "the

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quality that gives pleasure to the mind or senses and is associated with such properties as harmony of form or color, excellence of artistry, truthfulness, and originality." One read of Susan Tucker and Eric Cadora's brief 2003 paper spelling this argument out, and one is immediately struck by the elegance of both the critique and the proposed solution. Indeed, with justice reinvestment, the aesthetic element has been intrinsic from the earliest days of the idea. The maps of "million dollar blocks" first promoted by Eric Cadora and colleagues were both logically and visually compelling. According to an article in the *New Yorker* magazine (an outlet that certainly appreciates aesthetics):

> Cadora and his team believe that their map depicts a system spending millions to imprison people but little on the communities to which they return. Cadora clicked on a map of New York State that charted the migration patterns of Brooklyn criminals: thousands of lines sprang from Kings County to prisons all over—Attica, Watertown, Great Meadow. The image was striking, like a bird's spread wing. "We've had art galleries ask to exhibit the maps," [architect Laura] Kurgan said. (MacIntyre, 2007)

That the JR idea should appeal to both art galleries and policy makers should be no surprise. One key finding in the research literature on beauty is that humans seem to be hardwired to find symmetry beautiful, whether in art, architecture, or facial features (Enquist and Arak, 1994). This desire for balance is nowhere more fundamental than in the area of justice studies, and the symmetry inherent in ideas like the "just deserts," "restorative justice," and JR is undeniable. As different as they are, the logics of an "eye for an eye," "making amends" for harm caused, and investing justice dollars in the communities with the greatest crime problems all appeal to this human preference for the elegance of symmetry and balance.

The difficulty—as evident in Clear's (2011) far messier portrait of what JR might look like in actual practice—is the translation of beautiful ideas into workable policy. It is notable (and somewhat alarming to those of us in academia), for instance, that JR has moved from beautiful idea into real-world practice without a stopover first in academic theory development. In his article, Clear suggests that the JR idea spread by old-fashioned "word of mouth." Although true, this "word" was accelerated by media coverage in outlets like the *New Yorker* and the *Village Voice*, itself made possible through a very late-modern network of think tanks and foundations. Criminology journals have been notably absent (until Clear's important intervention) on this road from conception to global success, raising concerns for academia[1] but also for the JR movement.

1. Wacquant (2009) described a parallel development, albeit emerging from the political Right, with broken windows theory. This surely says something important about the relevance (or possibly irrelevance) of traditional academic publishing practices to contemporary policy debates, but that is for another article (see Uggen and Inderbitzin, 2010).

Although in his article Clear (2011) does briefly link JR to other existing bodies of research and theory (in particular, giving a nod in the direction of restorative and community justice theory as well as the literature on community development in general), there is an undeniable element of "chronocentrism" (or disavowal of the past) in this and other JR publications. In his article "Chronocentrism and British criminology," Paul Rock (2005) empirically demonstrates that the majority of criminological articles "display a largely unexamined propensity to ignore writings that are more than fifteen or so years old." He argued that this disciplinary amnesia challenges the field's ability to cumulate knowledge and leaves criminology open for the periodic reinvention of wheels. Some of this might be on display with the justice reinvestment movement. For instance, Tucker and Cadora's (2003) hugely creative, original article on JR does not cite a single piece of previous research or theory, nor do many of the Council of State Government documents on justicerinvestment.org cited by Clear. Clear's own article is better in this regard, briefly referencing Austin and Krisberg (1982) and Lemert and Dill (1978)—importantly both are cited as cautionary tales for those who think creating alternatives to incarceration is straightforward. Yet, even Clear's article still manages to cite more than 15 references from 2010 compared with only 4 from before 2000.

Clear (2011) acknowledges this weakness, admitting that "[t]he most significant problem" with his own JR proposal is that "this is new." Of course, this novelty is probably among the plan's chief strengths as well. The lack of scholarly baggage allows the idea to remain politically "neutral." If one wants to garner the cross-ideological support that documents like *The Case for Justice Reinvestment* (House of Commons Justice Committee, 2009) have achieved in the United Kingdom, one best avoid linking the policy to better developed theories that have already been labeled (and discarded) as too "soft" for the Right or insufficiently radical for justice activists on the Left.

Yet, efforts like Clear's (2011) to flesh out JR into a practical plan of action also expose the weaknesses of such an ahistorical approach. The JR idea, as Clear readily admits, is too thin on its own to cover all of the necessary complexity of a working model of justice and therefore needs to be situated on the shoulders of theories and models of justice that have preceded it. It also could learn a great deal from the failings of previous efforts to transform beautiful ideas into real-world revolutions. Surely, there must be a graveyard somewhere that contains the skeletons of ideas once touted as "the solution" for crime and justice, and it would behoove those of us who are highly excited by the promise of JR to do a little digging among these bones.

Learning from Past Panaceas

Has a criminological idea ever has caught on as rapidly as justice reinvestment? Actually, maybe so. Ideas like community policing, drug courts/therapeutic jurisprudence, broken windows theory, and the "what works" principles in corrections all "went viral" in their own day in their own way. An enterprising Ph.D. student somewhere should do a "sociology of

ideas" study comparing a sample of these various super-trends to understand more clearly the dynamics that generate the "next big thing" in criminological thinking. The two ideas that provide the most instructive comparisons (on multiple levels) for JR, however, are probably the "justice model" and "restorative justice." Like JR, both big ideas benefited (and ultimately suffered) from unusual Left–Right political coalitions, mainstream media coverage, and groundswells of popular support. Restorative justice and the justice model (which are of course still alive and well) have the closest theoretical links to JR, as well, so it is also worth unpicking the convergences and divergences with the justice reinvestment notion.

The "justice model" is the name given to the reform agenda that first emerged in the 1970s placing "just deserts" and due process at the center of sanctioning policy. According to Cavender (1984: 204), "[t]he keystone of the justice model . . . is retribution. . . . Simply put, it is the idea that rational people deserve punishment if they violate the law." This may sound a far cry from the progressive ideals of JR, but when it was first promoted around four decades ago in works like *Struggle for Justice* (AFSC Working Party, 1971) and *Doing Justice* (von Hirsch, 1976), the justice model drew from a similar support base and had similar selling points to those of JR today. "And sell, it did," according to Moore (1989: 76). "People who had been dissatisfied (or outraged) by the criminal justice system found *Doing Justice* to be The Answer. . . . Legislatures and parole boards moved ahead with incredible alacrity to put the reforms into effect." The original idea emerged out of the prisoner rights movement and had radical ambitions and implications. For some prominent activists, in fact, the justice model proposals "fit logically into a program for building a socialist movement in the United States" (Greenberg and Humphries, 1980: 211).

To say these ambitions were not fully achieved is something of an understatement. According to Cohen (1985: 113), "[t]he progressive, even radical thrust to the original 'struggle for justice' movement . . . was transformed by powerful interests. Only one element of the ideology was abstracted—the individualistic, moralistic notion of justice—and the rest was discarded." Indeed, the first eulogies for the justice model began to appear only a few years after the idea's inception, as it became clear that the changes resulting from the justice model idea "bear only a superficial resemblance to the principles they purport to embody" (Greenberg and Humphries, 1980: 221). The justice model idea still has its contemporary champions among the 1970s true believers (notably in the pleasingly retro Austin et al. 2007 report, cited and coauthored by Clear), but none can look back at the disgrace of the last 30 years of penal policy in the United States and argue that mistakes were not made. I will offer just two of the better-known lessons that might (or might not) have relevance for the JR movement:

The Negative is easier than the positive, but the positive is more important. Justice model advocates were scathing in their criticisms of the rehabilitative ideal; they spent much time articulating the sinister underbelly of the therapeutic state, and they achieved substantial

victories in undermining the perceived legitimacy of this work. They spent much less energy imagining what would emerge in the place of the rehabilitative ideal and (hopefully) did not imagine the grotesque and degrading human warehouses that filled the void left behind by the therapeutic state's demise (see Toch, 1980, for one dissenting voice that predicted this outcome). The JR movement, somewhat parallel, focuses primarily on the waste of mass incarceration, but JR advocates may not be devoting the same amount of attention to what would be involved in the community development work that would theoretically replace it.

Look out for cooptation by powerful interest groups. The justice model played brilliantly into the hands of the "penal harm" movement by providing a fancy justification for deinvesting in support services and responsibilizing disadvantaged individuals and communities. Despite its origins among progressive justice advocates, the language of the justice model was quickly co-opted by those with different agendas. Likewise, the JR movement is accruing some strange bedfellows as it grows. As Clear (2011) argues, the perception that JR is fiscally conservative has been one of the idea's key selling points, and it is easy to imagine JR language being used as cover when cutting state jobs and challenging unions. Clear's article will raise additional concerns by assigning a fairly central role to for-profit companies in the private sector. Afterall, as Feeley (2002: 322) has shown in his assessment of "entrepreneurs of punishment," the legacy of privatization has been penal expansion: "when successful, private efforts have . . . expanded, not contracted public social control . . . and public expenditures." To its considerable credit, however, Clear's proposal recognizes these incentives toward constant growth and seeks at least to harness these forces in a positive direction. Moreover, the role to be played by private-sector companies in Clear's vision is actually one in which there is firm criminological evidence of effectiveness: They are to act primarily as employers (not as service providers or treatment experts), and ample research suggests a strong link between such employment and desistance from crime (Laub and Sampson, 2001; Uggen, 2000).

Still, there are concerning parallels (albeit opaque ones) between Clear's (2011) hypothetical JR proposal and the push for "postconviction commercial bail" emerging from the right-wing lobbying group the American Legislative Exchange Council (see Maruna, Dabney, and Topalli, forthcoming). Under the ALEC plan (already under consideration in several states), prisoners would only be able to secure their release only by posting "post-conviction bail." As with pretrial bail, the individual would pay a percentage of this amount (for instance, $10,000 for release bail that is set at $100,000) as a nonrefundable charge to be released to the responsibility of a commercial bail agency. Persons in the participant's release environment, such as parents and guardians, voluntarily sign agreements of indemnity whereby they, along with the individual, would have a monetary incentive as indemnitors to the surety, to encourage compliance by the participant. After a breach, the bond could be revoked, and bounty hunters can be legally empowered to bring the individual back to prison. Unsurprisingly, the idea is being pushed strongly by the representatives of the commercial bail bonding industry who have not hesitated to use the rhetoric of "reducing

prison overcrowding" (Maruna et al., forthcoming). Who is to say that such a program will not go further and adopt the rhetoric of "justice reinvestment" as well?

Indeed, despite the parallels and shared origins with the justice model, chief among the gaps in the JR idea exposed in Clear's (2011) helpful article is the question of "what about justice?" Not justice department spending, but justice itself. The hypothetical JR vouchers, as outlined by Clear, for instance, would certainly raise numerous traditional justice concerns, ranging from parity/consistency to "less eligibility." Desert theorists, like von Hirsch and Ashworth (1998) would, I imagine, have real issues with the idea of one's "community" or victim—let alone some private employer—deciding whether a person should be released early or spared imprisonment altogether. One might predict systematic biases between those selected for the JR alternatives and those left to serve their full sentence behind bars.

To address such concerns, JR needs (as Clear [2011] acknowledges) to be situated within the much better established (although still developing and amorphous) literature on restorative justice theory. Restorative justice is "best understood as a different way of 'doing justice' by repairing the harm caused by crime in a non-adversarial process that invites offenders to 'take responsibility' rather than simply take their punishment" (Bazemore and Maruna, 2009: 376). The JR literature is infused with restorative concepts throughout, although interestingly the "restorative" term is generally avoided. Indeed, Dennis M. Maloney's work has come to symbolize the heart of the JR movement, but before there was JR, Maloney understood himself as working very much in the restorative justice tradition (see Maloney and Umbreit, 1995). There is a reason for this: Without adopting the logic of restorative justice and situating itself in this wider, possibly more radical framework, JR simply does not make sense.

Despite its logical beauty, the JR idea, on its own, has no real theory of justice. Embedded within JR, there are underdeveloped empirical, utilitarian claims (i.e., that creating jobs and improving infrastructure in high-crime neighborhoods will prevent future crime) and an implicit theory of social/distributive justice (i.e., that resources should be focused where need is greatest). Yet, there is no normative theory of criminal justice—why the reinvestment of justice resources is a just response to the harms that were committed. Whereas the JR discussion has, since its origins, involved sophisticated discussions of economics and cost-effectiveness (and the restorative justice movement on the other hand has never met an economist as far as I am aware), JR lacks the sophisticated normative foundations of restorative justice (e.g., Braithwaite and Pettit, 1990).

As such, the fact that JR advocates seem to distance themselves from the wider and better developed restorative justice movement speaks volumes for the future of the latter, itself a previous heir to the title of "The Answer" in criminal justice.[2] The rise and rise

2. There may be a geographical component to these things too. For its critics (e.g., Acorn, 2004), restorative justice is associated with deeply unhip places like rural Indiana, Wagga Wagga in Australia,

of restorative justice throughout the past two decades (but especially the 1990s) was just as swift as that of the justice model, with equally impressive successes, but the restorative justice movement's failings are almost the opposite of those of the justice model (as indeed the two theories are famously in opposition; see e.g., von Hirsch and Ashworth, 1998). Again, there are many lessons here, but I will only pick two for space purposes.

Don't let them put you on the fringes. Even the strongest advocates of restorative justice acknowledge that, despite the widespread adoption of restorative practices across nearly every continent on the globe, the idea has been too often marginalized into "boutique" or tokenistic "programs" (Bazemore and Maruna, 2009) rather than delivering the fundamental overhaul of criminal justice promised by the movement's early advocates. The ghettoizing of restorative ideas into interventions designed for adolescents caught committing misdemeanor or very low-level criminal offenses (shoplifting, unsafe driving) in so many jurisdictions has tarred the "restorative" brand and raised the serious risk of "net-widening" (Cohen, 1985). Conceivably, JR could suffer a similar fate. Indeed, Clear's (2011) statement that "[j]ustice reinvestment work has been carried out in over a dozen locations, but in every one of them the correctional budget has continued to grow" has to be a wake-up call in terms of this potential marginalization of justice reinvestment as yet another "add-on" project. Additionally, some of the standards that Clear sets in his list of principles (e.g., "No benefits follow when the decision leads to more crime" and "Nothing happens without both system and community oversight") sound remarkably stringent (would the same rules apply for decisions to incarcerate?) raising the concerns that such alternatives will be limited in their potential scope.

At the same time, avoid overpromising. Whereas the justice model's virtue was that it promised so little (and, some would say delivered on this!), restorative justice from the beginning made ambitious claims that were bound to come back to haunt it. Restorative justice critics like Annalise Acorn—a former advocate turned apostate who says she had been "seduced" by restorative justice's "utopian" promises—mock the hyperbolic rhetoric associated with the movement as a way of discrediting the theory. For instance, Acorn (2004: 67) wrote, "No punitive system would presume to promise 'healing' to victims." Such published critiques of restorative justice are often self-contradictory and paper-thin (see Morris, 2002); yet many criminologists and criminal justice practitioners feel a deep-seated distrust of the theory for reasons they often cannot articulate. When pressed, many admit that their reaction is more gut-level than rational; they fear there is something too evangelical or too proselytizing about restorative justice's support base, and as naturally skeptical social scientists, they resist it.

Vermont, and New Zealand. JR, however, is straight out of New York, with its upstate prisoners (sent "up the river") and downstate parolees—not to mention its media outlets, think tanks, and universities. The JR idea itself surely plays better among city dwellers as well, with its promise of resources flowing from rural to urban economies.

Justice reinvestment advocates can certainly learn from this experience as well. The enthusiasm surrounding this 8-year-old idea is encouraging and contagious, but the idea may need less hype and more sober scrutiny to shoulder the burdens of this great promise. One place to start is to begin subjecting the idea to the sort of rigorous academic examination that Clear (2011) initiates with his article. The JR that results from such analysis over the next decade may not be as beautiful as the initial JR vision, but it may be stronger, wiser, and more resilient than some of its predecessor panaceas. I, for one, hope so.

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EXECUTIVE SUMMARY

AMERICAN PENAL OVERINDULGENCE

Mass incarceration, legal change, and locale

Understanding and remediating American penal overindulgence

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Research Summary

In this article, I have three major aims. First, I examine in detail the role that changes to legal policies and practice have played in the rise of mass incarceration. I look at four distinct aspects of legal change and argue that the law (and legal change) in these varied forms is the engine that has driven prison growth and, therefore, must be addressed in explanations of this phenomenon. This discussion leads to my second major goal, which is to move beyond national-level explanations of American mass incarceration and call for a more unified empirically based understanding that highlights the localized social, cultural, and political factors that have contributed to the imprisonment explosion. I conclude by exploring how this kind of theorization provides a road map to a more localized policy reform strategy that aims to reduce our reliance on incarceration.

Keywords

mass incarceration, *penal change*, *legal change*, *theory*

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RESEARCH ARTICLE

Mass incarceration, legal change, and locale

Understanding and remediating American penal overindulgence

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Since the turn of the 21st century, a proliferation of empirical and theoretical scholarship has developed regarding mass incarceration in the United States. This work has grappled with its causes, contours, and consequences and has led to numerous important insights about how we arrived at our current state of overincarceration and about its human and economic impact. Yet, as I hope to tease out in this article, several aspects of the processes that gave rise to mass incarceration are theoretically and empirically underdeveloped in the existing literature. The American case, I will suggest, is neither as homogeneous nor as straightforward as might be implied by much criminological research.[1] This observation is of central importance to strategizing about policy reform because it means that remediation efforts will need to be multiple, varied, and smaller in scope than what might be assumed from the existing body of work.

I have three major (and interconnected) goals here in examining the American mass incarceration story. First, I explicitly make the case that, to understand American *penal* change, we must make analyses of *legal* change central to the endeavor. In doing this, I map the four different forms of legal change that have been catalysts to the rise of mass incarceration.[2] The first of these forms is the most obvious and the one best attended to in the criminological literature—legislative and other statutory changes to penal codes that

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1. For the purposes of this article, I will focus primarily on empirical examinations of the mass incarceration problem so I will not consider or critique in any detail the primarily theoretical works on this subject, including Garland (2001a), Simon (2007), and Wacquant (2009).

2. The concept of "mass incarceration," or "mass imprisonment," is not fully defined in the literature, although in general, the following elements are commonly assumed: vast numbers of imprisoned citizens and skyrocketing rates of imprisonment, overcrowded facilities, and the concentrated impact on minorities and the poor (Garland, 2001b).

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have increased the likelihood and lengths of prison terms in jurisdictions across the country. The second form is found in federal case law, particularly 8th Amendment jurisprudence on conditions of confinement and related issues. The third aspect of legal change is in the area of postsentencing law and policy (especially related to parole release, supervision, and revocation). Finally, the fourth form of legal change has to do with the myriad changes to on-the-ground legal practices related to sentencing and punishment in local courtrooms around the country. I argue that the law (and its transformation) in these varied forms is the engine that has propelled mass incarceration and, therefore, must be foregrounded in explanations of this phenomenon.

This discussion leads to my second goal, which is to move beyond national-level explanations of American mass incarceration to begin to sketch out an empirically based, more unified understanding that highlights the localized social, cultural, and political factors that have contributed to the imprisonment explosion. To do so, I illustrate how much of the criminal law and policy that resulted in mass incarceration is local at its core, emanating in large part from specific regions of the nation and then diffusing from there. I suggest that punitive policy development and its pattern of movement across jurisdictional boundaries help to explain the regional and national effects we have witnessed. I also illustrate how criminal and penal law *as practiced* is significantly shaped by the local (and locale) such that, although law on the books might lead us to expect some homogenization of outcomes within state and federal jurisdictions, law in action indicates much more microlevel variation shaped by local norms and culture related to how the business of criminal justice happens in any given place. In essence, I will make the case that, to understand the proliferation of penal populations, we also must look at where the power to imprison resides, which is typically at the county level in the United States. In making these claims, I do not intend to deny the impact of national and even global factors that have brought about and helped sustain mass incarceration; rather, I hope to add a multilevel dimension to the analysis of its causes.

My final goal is to explore potential avenues that would work to scale back or at least stem the tide of mass incarceration. In this exploration, I highlight how the law, and its grounding in local sociopolitical cultures, can be strategically deployed in this effort. In so doing, I make a claim that the mitigation of mass incarceration must emerge from an understanding of, and intervention into, the specific and intertwined catalysts that brought it on in the first place.

The Criminology of Mass Incarceration

As many observers have noted, the explosion in American imprisonment that followed the infamous "decline of the rehabilitation ideal" (Allen, 1981) was stunning in several regards, including the following: its breadth and size, in that all U.S. jurisdictions began to incarcerate at rapidly growing rates within several years of each other; the ironic nature of its timing, in that the critique of the prison as a rehabilitative institution would seem to have logically led to the development of alternative interventions to reduce the reliance

on the prison as a sanction; and its dramatic fiscal impacts that nonetheless seemed to raise little concern for elected legislators and executive officers. Given that, beginning in the mid-1970s, increases in the use of incarceration seemed to be occurring everywhere in the United States, the major empirical investigations of its causes have tended to treat the problem as a national one, and state-level variations in social and political conditions have been treated as factors that could predict incarceration growth at this more macrolevel. This approach has been especially prevalent for quantitative criminological analyses, which have looked at such influences as population demographics, economic conditions, political factors, various forms of state spending and revenue capacities, crime rates, as well as sentencing policy on incarceration rates and growth.

One problem with this approach is that it assumes these factors mean the same thing over time and in different jurisdictions. It also has meant that some potential causes of mass incarceration are not included because they are not easily reducible to quantitative measures. As a result, to the extent that researchers have tried to develop empirically testable hypotheses about the American incarceration explosion, they have had to make some questionable assumptions about how law, policy making, politics, and social relations happen, including assuming that these processes work the same way across and within different states and regions of the country. In particular, some important variations across time and place get homogenized in problematic ways in quantitative research that relies on aggregated national-level trend data or even state-level imprisonment data (see Kovandzic and Vieraitus, 2006 for a thoughtful discussion of this issue).

For example, researchers can and do account for whether states have enacted determinate sentencing or other nondiscretionary sentencing schemes (Greenberg and West, 2001; Marvell and Moody, 1996) to test whether such laws predict incarceration rates. But such sentencing policies qualitatively differ so substantially from state to state that their presence or absence hardly can be expected to be predictive of sentence outcome lengths. As a point of specific illustration, Minnesota was at the forefront of the determinate sentencing revolution, developing an often-emulated guidelines system to constrain sentencing discretion. Since those guidelines were put into practice in 1980, this state has been among the most resistant to mass incarceration in the nation. At the end of 2009, the state's imprisonment rate was 189 per 100,000 population, trailing Maine, which had a rate of 150 per 100,000 population (West, Sabol, and Greenman, 2010). On the other end of the spectrum, Louisiana also adopted a guidelines system for sentencing; yet it has been consistently either the top state incarcerator or in second place since the guidelines' adoption, and it maintains an imprisonment rate that is nearly five times that of Minnesota. At the end of 2009, its rate stood at 881 per 100,000 population (West et al., 2010).[3] Thus, the fundamental differences in these sentencing structures' content—the actual presumptive sentences delineated for

3. As such, both Maine and Minnesota more closely resembled Canada (116/100,000) and England (153/100,000) in terms of rates of imprisonment than their Southern and Western peer states (Walmsley, 2008).

specified offenses—render them proverbial "apples and oranges," which should not, in any conceptualization, be treated as equivalent on anything but rudimentary form (see Knapp and Hauptly, 1992 for more on this issue).

Many prevailing understandings of mass incarceration also assume that specified causes move in only one direction in triggering the effect of prison growth even in cases where the process might be more bidirectional. For instance, several major state-level studies have found that levels of state-level revenue predict incarceration rates and growth (Greenberg and West, 2001; Spelman, 2009). These research designs appropriately build in a time lag to ensure that the proposed cause (revenue) clearly precedes the effect (incarceration). Nonetheless, such an approach still might elide the much messier underlying process of revenue generation for prison costs. My own historical research on Arizona's move to mass incarceration highlights how incarceration pressures predict revenue as much as the other way around (Lynch, 2009). In the Arizona case, legislators and governors were forced to figure out revenue-generating schemes when faced with inadequate resources to manage the projected prison population growth brought on by a variety of law changes (affecting both the influx and the release rates of inmates) during several key periods since the 1970s. Such schemes take a variety of forms in different jurisdictions, but in Arizona, they included reallocation of existing funding streams, the institution of new fines and fees imposed on certain convicted offenders (particularly drunk drivers), "sin" taxes added to liquor and cigarette sales that were designated specifically for prison construction, and increased vehicle licensing fees. Thus, a bidirectional and spiraling pattern of the generation of funds to meet present and projected incarceration demands might have looked, from the outside, like a simple case of expanded revenue capacity of the state.

Finally, and most problematically, as I will delve into in much more detail in a subsequent section, absent from many quantitative examinations that aim to explain the increase of mass incarceration is detailed attention to key local- and county-level variables, despite their centrality to the sentencing process that leads to imprisonment. Most of the power to incarcerate rests at the substate level, in county courts where prosecutors pursue prison sentences, defendants plead guilty to prison-eligible felonies, and judges formally impose sanctions; yet the impression one gets from many studies is that such decisions occur at the state or federal level. Although sentencing statutes have been toughened at the state and federal levels, thereby creating the capacity for mass incarceration, mass incarceration has not been realized without local-level criminal justice actors transforming their daily practices to send more and more offenders away to state penal institutions.

Penal Change as Legal Change

As alluded to previously, penal change—specifically the explosion in the American prison population—at its heart is a case of legal change. It is indeed influenced by politics, public sentiment, economics, and other similar factors, but it would not have happened without

specific legal transformations both to the formal law in jurisdictions around the nation and to the legal practice in courtrooms throughout the United States. Furthermore, those legal changes are much more complex and variegated than how they typically are characterized, and they have impacted almost all aspects of imprisonment. Thus, to understand the causes of mass incarceration, it is not enough to specify a version of legal change (such as the adoption of determinate sentencing or truth-in-sentencing statutes) as a potential causal factor; rather, we need to uncover and interrogate those processes that brought about changes to criminal/penal law, including how they were decided and how they are implemented in different locales.

Statutory Changes

Again, the effect of formal changes to sentencing statutes on emergence of mass incarceration has generated the most significant attention by criminological scholars. These changes are typically—although not always—conceived of, drafted, and enacted by legislative bodies and, therefore, are fairly heavily grounded in the political process.[4] Yet, despite its centrality to many analyses, much criminological research—particularly quantitative empirical examinations—has treated this form of legal change as it exists after the fact, with little attention given to the conditions and contexts in which sentencing laws were devised or transformed. Nonetheless, the important clues to mass incarceration lie in the legal reform processes themselves in that they reveal, in some instances, a window into how irrational and short-sighted such lawmaking was from the start.

A growing body of empirical research that primarily uses historical analytic methods to examine these processes at the individual state level (Barker, 2006, 2009; Campbell, 2010; Lynch, 2009; Miller, 2008; Schoenfeld, 2009) and at the federal level (Gottschalk, 2006; Provine, 2007) provides some insight in this regard. Taken together, this work suggests that, as the symbolic politics of crime and punishment grew, particularly by the late 1970s and early 1980s, pragmatic and realistic criminal justice policy making nearly disappeared.

My study of Arizona's prison buildup, for instance, demonstrated how, from approximately 1975 on, legislators and governors were more than willing to make sentencing changes that they knew were fiscally unsustainable and for which they had no workable plans for financing (Lynch, 2009). This kind of policy making represented a dramatic shift from how state policy making had been done in Arizona since territorial days (Arizona previously had subscribed to a relatively rigid commitment to only implementing policies for which known and available funds existed). My research also indicated that, during the incarceration buildup, lawmakers became increasingly hostile to evidence-based analyses of

4. Two most typical kinds of sentencing policy changes to emerge from sources other than the legislature are those promulgated by sentencing commissions that are then approved legislatively and those passed into law through the initiative/referendum process.

criminal justice policy or other forms of expertise that could inform their decision making, thus calling into question how much rationality can be assumed about how policy was made during the last 25 years of the 20th century. As such, this research lends support to those theories that suggest mass incarceration has less to do with sound crime-control policy than with other social, cultural, and political forces (e.g., De Giorgi, 2006; Garland, 2001a; Gilmore, 2007; Simon, 2007; Wacquant, 2000) and casts some doubt on the work that presumes it was driven primarily by a rational quest of crime control (e.g., Useem and Piehl, 2008).

Changes to 8th Amendment Case Law

The second key legal change that must be attended to in explanations of American mass incarceration is federal case law. Again, a growing body of empirical scholarship, primarily in the law and society tradition, illustrates how federal courts' management of prisons (brought about through prison conditions litigation) from the 1970s onward has contributed to mass incarceration in somewhat unexpected ways. The lesson from this work converges with that on "tough-on-crime" sentencing reforms in that it indicates that state political leaders in some jurisdictions openly eschewed pragmatic solutions to pressing and severe criminal justice problems and rejected criminal justice expertise in responding to court orders.

For example, Schoenfeld (2010) examined the paradoxical role that prison conditions litigation challenging overcrowded conditions played in creating mass incarceration in Florida. Her research highlights the importance of timing; in particular, how litigation in that state began in a different political climate than when the case was resolved, which shaped the state response to the case. Rather than complying, state actors dug in against court orders to reduce prison population and rhetorically transformed the battle as one of state's rights versus federal intervention. Consequently, the state embarked on "an aggressive prison construction program" rather than making efforts to reduce prisoner population in response to court orders, thereby providing increased capacity for mass incarceration (Schoenfeld, 2010: 751).

A similar pattern of response to court orders mandating that the state reduce overcrowding was evident in Arizona in the late 1970s and early 1980s (Lynch, 2009). Again, particularly telling was the interpretation of the court orders by elected officials as a more symbolic issue of state's rights, which was expressed as resentment toward the *federal* judges who were telling the state how to run its institutions. In both the Florida and Arizona cases, no surplus revenue was readily available to respond through increasing institutional capacity (quite the opposite, in fact), which created a crisis in itself. Yet rather than complying immediately with orders to reduce the prison population by implementing viable but low-cost release strategies, both states engaged in stalling tactics until, eventually, they came to sink unprecedented amounts of money into large-scale prison building programs. In Arizona, at least, such action was done despite evidence provided by the Department of

Corrections that options were available to comply with the orders using early releases and alternative sanctions without undue risk to public safety and with significantly less capital outlay (Lynch, 2009).

These single-state historical analyses are supported by recent research by sociologists Josh Guetzkow and Eric Schoon that looked at the relationship between prison overcrowding litigation and prison building across the United States. In a time-series analysis using data from 49 states, Guetzkow and Schoon (2010) demonstrated that major resource allocations to prison and actual prison capacity building followed prison overcrowding litigation, and they concluded that such litigation is an indirect contributor to American mass incarceration. Taken together, this set of findings prompts the question as to why states did not respond to court orders to reduce overcrowding in a way that would have been simplest and cheapest for lawmakers and the executive branch (i.e., by releasing low-risk offenders and developing lower cost alternatives to prison). No shortage of support was found for this route among legal scholars and criminal justice experts, and this option would mean that lawmakers and governors would not have to do the hard work of figuring out how to fund the construction and operation of new penal facilities. In addition, if public backlash or other negative consequences were to occur, then state actors could have fully deflected responsibility onto the federal courts. Yet this response was not the predominant course of action in most states, again suggesting that something powerful, other than pragmatic policy concerns, was driving the response to such court orders in jurisdictions across the country. This is not to suggest that prison conditions cases should not have been mounted. The right (albeit increasingly limited) to seek relief from damaging and even deadly conditions of confinement is fundamental and necessary to ensuring at least some limits to penal cruelty. Rather, the point I aim to make here is that understanding the specific irrationalities in states' responses to such lawsuits provides a more complete explanation of the mass incarceration problem and sheds light on the limits of prison litigation as a policy solution to mass incarceration.

Changes to Postincarceration Law and Policy

The third form of legal change has to do with the regulation of prison releases and returns to custody. Major legal and policy transformations in jurisdictions across the country have limited the availability of back-end parole release mechanisms, on the one hand, and have increased the likelihood of returns to prison among releasees, on the other hand, thereby contributing to mass incarceration. Under many determinate sentencing statutes, prisoner release decisions are no longer left up to parole boards and are functionally mandated at the time of sentencing. By 2000, only one of every four releasees was let out of prison based on a parole board decision, whereas 25 years earlier, most prisoners were so released (Travis and Lawrence, 2002). As such, an important form of institutional release valve, which could be (and was) used to regulate prison population size, has been curtailed dramatically. In addition, during the same period, both the nature and the terms of parole supervision

have been transformed in many jurisdictions to emphasize enforcement and control over rehabilitation and reintegration (Lynch, 1998, 2000; Petersilia, 2003; Simon, 1993). This policy shift has been shaped partly by technology, as drug testing rose to become the predominant mode of monitoring parolees in some jurisdictions (Lynch, 1998; Simon, 1993). As a result of these changes, parolees are less likely to receive assistance that will facilitate successful reentry and agents are more likely to revoke parole and return parolees to prison in response to violations, even ones that might call for more reasonable alternative interventions. Thus, Jacobson (2005) has demonstrated how probation and parole violators have played a huge role in burgeoning penal populations and has suggested that reforms to violation policies will be the key to downsizing them.

California stands as a hallmark case of how policy change in parole has played a central role in mass incarceration. The state enacted a determinate sentencing law in 1977 that dramatically changed how prison sentencing and release was done, by specifying presumptive sentences for felonies and by eliminating discretionary parole release that had been the venue of a parole board, the Adult Authority, for all but the few offenses subject to a life sentence. Consequently, this change had the potential to do away with parole supervision, which had been used for those released from institutions by the board. Yet, as Mayeux (2010) detailed in a recent manuscript, the parole officers' lobby responded to the possible elimination of parole supervision by pressuring the legislature for an expanded term of supervision for most felons to 4 years (including revocation time). According to Mayeux, there were no apparent policy-relevant reasons related to crime control or rehabilitation for this proposal, lobbyists and supporters did not cite any research that suggested such a long period of supervision would be optimal (in fact, most research available at that time suggested its costs would outweigh its benefits). Nonetheless, the legislature complied by passing SB 1057 in 1978, which mandated a standard 3-year term of supervision (extending to a 4-year time period for those who were sent back to prison on violations; see also Simon, 1993 on the politics of California parole).

Looking back to that policy implementation, its impacts on California's prison population are crystal clear. The extended period of supervision, coupled with a distinct shift to parole-as-surveillance that accompanied the policy change, has resulted in staggering numbers of parolees returning to prison on violations. By 2000, more than 40% of the California prison population was comprised of parole violators (the majority of whom were technical violators), and six out of ten new admissions were returns to custody from parole (California Department of Corrections and Rehabilitation, 2008; Mayeux, 2010). Parole had become a revolving door back to prison in the state.

Changes to Local Legal Practices

The final form of legal change—transformations in local court adjudication of felony cases—is probably the least explored in the criminological literature in terms of its contributory role to mass incarceration. In many ways, however, it is the most intriguing and provides the

most interesting avenues for examining how local practices interact with state and federal factors in producing mass incarceration. As a wide range of law and society scholarship has demonstrated, a significant gap often exists between law on the books and law in action. Such work has highlighted how changes to statutes and legal policies that occur in a given jurisdiction might be put into practice in ways that are contrary to the stated goals of the formal laws or that subvert the aims of the legal change in question. Indeed, this line of scholarship suggests that looking only at how formal law has changed to understand the increase of mass incarceration would lead to an incomplete and even misleading picture of the process.

Perhaps one of the best illustrations of this "gap" in a criminal law context comes from Candace McCoy's (1993) now-classic study of the reshaping of plea-bargaining practices in California after the passage of Proposition 8 in 1982. This initiative was billed as a victim's bill of rights, and it included a provision that "banned" plea bargaining in felony cases. McCoy's research indicated that the law change merely moved the stage at which bargaining took place to earlier stages of felony processing—prior to the felony indictment or information being filed. The new law thus directly increased prosecutorial power in negotiations by creating pressure on defendants to plea bargain earlier in the process, and the change affected many more cases because the opportunity for a plea negotiation disappeared at later stages. The law also added a provision for a sentence enhancement in serious felony convictions, which became an additional weapon wielded by prosecutors as a threat against those who did not want to plead guilty immediately. As such, this law, as practiced, diverged from its stated intent and likely contributed to the state's incarceration growth by driving up the "cost" of offenses in plea negotiations, especially in serious felony cases that were subject to the enhancement.

More fundamentally, as noted in the beginning of this article, it is local courts that produce prison-sentenced felons, so explanations of the rapid increase in incarceration numbers should attend to how those court practices were transformed from the late 1970s on. How much of mass incarceration is a function of the increased prosecutorial power that has co-occurred with formal legal changes (Gershman, 1991; Simon, 2007; Stith, 2008)? To what extent do "law-and-order" politics and the fear of being labeled soft on crime, especially in places with judicial elections, shape actual sentencing by state-level judges (Swisher, 2010; Weiss, 2006)? How much can be explained by increasing criminal court caseloads brought on by higher crime rates and expanded law enforcement resources (Weidner and Frase, 2001)? Does a large part of the *capacity* for mass incarceration lie in the unique American structure that provides local criminal justice actors with the power to incarcerate but no responsibility to pay for it (Lynch, 2009; Zimring and Hawkins, 1991)? Some strands of research are suggestive about each of these transformations, but additional examinations of how local factors have contributed to the national phenomenon are still needed.

Law as Local(e)

Indeed, because of the fragmented American criminal justice system(s), the mass incarceration puzzle is much more complex and layered than it is in national jurisdictions with a more centralized and singularly hierarchical legal system. Thus, a key task in explaining American mass incarceration lies in teasing out the degree to which the "51 different countries" that make up the American criminal justice system are "a single organism having diverse organs. . . or a group of autonomous units functioning independently but marching together" (Zimring and Hawkins, 1991: 137).[5] Beyond that, within those 51 autonomous systems are 3,141 county (or county equivalent) jurisdictions that do the actual prosecution and sentencing of felony defendants that themselves receive cases from even more local and regional law enforcement jurisdictions. In other words, criminal justice policy is made and put into action at the municipal, county, state, and national levels, and the thousands of organizations that comprise this criminal justice network are, for the most part, relatively autonomous both horizontally and vertically.

Because of this structural anomaly in the United States, it seems that the problem of American mass incarceration might be explored more fruitfully as a ground-up process, rather than as a top-down process. It is risky to assume that similar processes and outcomes underlie the production of prison sentences across these microjurisdictions, even at the state level of analysis. Again, this is not to say that no macrolevel processes have contributed to the increase of mass incarceration, particularly global economic transformations that have constrained opportunity for huge subpopulations. In terms of theory, however, shifting the starting point from the macro to the micro offers a more contextualized, interactive, and grounded understanding of how massive penal change occurred in the United States over such a relatively brief period. Moreover, as Gottschalk has suggested, from a policy standpoint, the best avenue for reform is through altering the laws and policies that allowed for mass incarceration, which means intervention at the specific points of legal decision making. Opportunities for reform efforts also might emerge through an analysis of, and intervention into, the on-the-ground local legal practices that overproduce prison sentences.

Region—irrespective of literal jurisdictional lines—also provides locale-based clues into American mass incarceration. Laws, policies, practices, and norms get shared, adopted, and remade as local across jurisdictional lines, and these boundary crossings often follow regionally based movement in adoption patterns. Indeed, as I will explore in more detail in the subsequent discussion, the regional picture adds a level of complexity to the picture of American mass incarceration and it serves as an intriguing point of linkage between microlevel and macrolevel impacts across periods of time.

5. By this, the authors are referring to the autonomous state political and legal systems, which make and enforce laws relatively independent from each other, as well as the federal system, which is actually just a small player in American criminal justice.

The Localized Practices of Criminal Law

Criminal law is almost always local in its application. Any given known criminal offense has the potential for vastly different outcomes as a function of where it happens. The chances of it being prosecuted at all, the actual charges filed and pursued, the type and content of any plea bargain negotiations, and the final disposition are all subject to variations by locale.[6] Of course, such differences across state lines (or between state and federal jurisdictions) are, in part, a product of different statutes that define and punish similar acts in varying ways. But even within a single legal jurisdiction, microlocale matters.

The "gap" between law on the books and law in action, described in the preceding section, produces vast local intrajurisdictional variations despite the fact that the formal law is the same for any given state or federal jurisdiction. In California, for instance, one can find significant differences between counties in the rates of application of the "three strikes" law, even though that law, as drafted, specifically aimed to take away legal actors' discretion in dealing with defendants with prior serious or violent felony records (Clark, Austin, and Henry, 1997; Males and Macallair, 1999). Specifically, as of the end of 2004, county-level courts in Kern County, which is a large agricultural and oil-producing locale in the Central Valley, were more than 13 times likely to sentence under a provision of the three strikes law than were San Francisco County courts (Legislative Analyst's Office, 2005).[7]

Perhaps the best example of how the local level shapes state-level punishment is the contemporary administration of the death penalty.[8] As Baumgartner (2010) has illustrated, American capital punishment is neither a national- nor a state-level story; rather, its persistence is largely the product of a few counties in the nation. Only 14% of the nation's counties have been responsible for those executed since the death penalty was reinstated in the 1970s, and only 14 counties (of 3,146), concentrated in four states, have produced 30% of all executed offenders. Indeed, one county in the nation—Harris County, Texas—has been responsible for nearly 10% of all executions in the modern era. Additionally, numerous state-level studies have illustrated how local (county) jurisdiction, above and beyond homicide rates, matters in who ends up going to death row, particularly in terms of prosecutorial policy in seeking death sentences (e.g., Baldus, Woodworth, Grosso, and Christ, 2002; Ganschow, n.d.; Paternoster, Brame, Bacon, and Ditchfield, 2004).

6. Before even getting to this stage, of course, major disparities by locale exist in the likelihood of even coming to the attention of the criminal justice system, especially for offenses that are detected primarily through proactive law enforcement, such as drug offenses. See King (2008), for example, for a study on "disparity by geography" in urban drug arrests.

7. Kern County sentenced at a rate of 1,518 per 100,000 population adult felony arrests; San Francisco sentenced at a rate of 113 per 100,000 population adult felony arrests (Legislative Analyst's Office, 2005).

8. Although contemporary American capital punishment is distinct from mass incarceration, more than one commentator has argued that the two are part of the same sociopolitical process (Gottschalk, 2006; Hallsworth, 2002; Simon, 2007).

The persistence of wide variations in sentence outcomes by district and region in the federal criminal justice system—despite major efforts by the U.S. Sentencing Commission to eliminate such variations—is a testament to the important role of local legal norms and practices (Johnson, Ulmer, and Kramer, 2008). Johnson et al.'s (2008) work indicates that, in the federal system, which has had a rigid guidelines system in place since 1987 that aims to reduce sentence disparities for similarly situated defendants, the likelihood of getting a prison sentence and the length of prison sentence significantly varies as a function of local courts and local court actors (see also, Kautt, 2002).

The purported reasons for such intra-jurisdictional differences within state jurisdictions and the federal system are varied, ranging from levels of crime, arrest rates, and conviction ratios (McCarthy, 1990; Weidner and Frase, 2001, 2003); degree of urbanization (Bridges, Crutchfield, and Simpson, 1987); region of the nation (Weidner and Frase, 2001, 2003); economic conditions (McCarthy, 1990); and population demographics of locale (Bridges, Crutchfield, and Simpson, 1987; Weidner and Frase, 2001). In any case, there is little question that the application of criminal law varies significantly as a function of local court jurisdiction (Johnson, 2006).

Local application of criminal law also helps to explain the temporal dimensions of mass incarceration. As Weiman and Weiss (2009) recently demonstrated, localized "grassroots" enforcement policies within New York City, rather than federal- or state-level factors, explain the long lag time between the passage of the harsh Rockefeller drug laws in 1973 and the surge in drug offense imprisonment rates in the state. They found that law enforcement agencies and prosecutors developed pragmatically selective policies toward the drug law enforcement and applied the new laws only in more serious cases rather than in all eligible cases. In the 1980s, local law enforcement policy change, at the direction of the New York City mayor's office, which began to focus on lower level offenses, ended up significantly increasing arrest rates, prosecutions, and tougher sentences in local courts, which then drove up the state's incarceration rate. The researchers concluded that the majority of the state's move to mass incarceration was a result of these local factors within the city of New York.

Law is local in postsentencing legal practices as well. For probationers and parolees, the risk of being incarcerated or returned to prison for violating conditions is influenced by microlocale. In a national study, Kerbs, Jones, and Jolley (2009) found that probation officers and parole agents responded to rule violations differently as a function of geographical characteristics, in that suburban officers were more punitive than urban or rural officers. Grattet, Petersilia, and Lin's (2008) analysis of parole revocations in California also indicated that the parole region within the state influenced the likelihood of revocation and returns to prison above and beyond case factors.[9]

9. Even the way doing time is experienced by felons sent to prison varies in significant ways depending on the institution one is sent to within a given penal system—even for those at equivalent custody levels (Kruttschnitt and Gartner, 2005)—so in this sense, the prison sentence itself has local characteristics.

Federal prison case law always emerges from the local as cases begin with individual litigants (or groups of litigants) that file complaints about conditions specific to individual institutions. These cases might be joined to implicate a larger system, but the nature of such litigation limits access to the courts to individual parties with standing—those who can reasonably claim that they are harmed by specific actions (or omissions) by the party being sued. District court judges, and even circuit courts, diverge from each other in how they interpret case facts and the applicable law in such cases, leading to a wide array of outcomes across the country. Therefore, understanding the broader impacts of prisoner litigation is best grounded in examinations of the specific local and temporal conditions in which the suits first emerged and in which they proceed over time (Schoenfeld, 2010). This includes understanding the local dynamics of the federal courts that review such petitions initially as well as upon appeal. Similar claims in front of different judges in different regions and circuits are and will continue to be treated in disparate ways, and some that might be denied after the initial review in one place may prevail in another.

Furthermore, even major national legal policy reform affecting prisoner litigation has its roots in local action. This was the case with the passage of the Prisoner Litigation Reform Act of 1995 (PLRA), which severely constrained prison inmates' access to federal courts and imposed substantial limits on the ability of federal courts to intervene in prison conditions cases. The idea for this legislation actually came from Samuel Lewis, the corrections director in Arizona at the time of its passage. Lewis was in a series of contentious battles over prison conditions with a federal district judge in Arizona, Carl Muecke, which prompted him to write to Arizona's Senator Kyl (one of the PLRA's cosponsors) with his wish list of reforms. Kyl then worked with Arizona Attorney General Grant Woods to craft the language of the federal law, which was modeled after Arizona's own prisoner litigation reforms (see Lynch, 2009, and Winslow, 2001 for more on this issue). Thus, in this case, the federal law, which has curtailed legal interventions into prison overcrowding problems and has created a more hands-off standard of review in regard to punitive living conditions around the nation (Hanson, 2010; Specter, 2010), initially was catalyzed by a localized conflict in Phoenix.

Finally, legislative changes (and other statutory innovations) that have contributed to mass incarceration often have emerged from local- and state-specific conditions and have taken on characteristics that are entrenched in local social and political culture (Barker, 2009; Lynch, 2009). Thus, laws are made in different jurisdictions in ways that are both highly idiosyncratic in regard to politics, styles and structures of governance, and even individual personalities of political actors (Barker, 2009; Gottschalk, 2006; Lynch, 2009). But at the same time, most criminal law innovations are not completely original and innovative; a significant amount of formal and informal interjurisdictional transfer of trends and ideas, knowledge about how to do things, and symbolic political messages occurs in the criminal justice realm (Nicholson-Crotty, 2009).

Even if we look to the federal system and criminal justice lawmaking in the era of mass incarceration, the localized roots of federal criminal law quickly become evident.

The ferocity of the federal "War on Drugs," particularly against crack cocaine, was in part the product of Boston Celtics' draft pick Len Bias's death in 1986. His death, which may have been related to cocaine ingestion, prompted Massachusetts congressman and House Speaker Tip O'Neill to push through hastily drafted quantity-based mandatory minimum legislation (Sterling, 1995). Also at the federal level, the flurry of federal sex-offender laws passed by Congress in the 1990s and 2000s—the *Jacob Wetterling Acts* (1994 and 1997), the *Pam Lychner Act* (1996), and the *Adam Walsh Act* (2006)—testify to the case-specific, local roots in their names (Lynch, 2002). One can look in the legislative records regarding criminal law reform from the 1980s onward in most U.S. jurisdictions to find how broad-based statutory change often is premised on and promulgated by a single, local, sensationalized criminal case.

The Movement of Law and Policy: Regional Effects

It also is through changes in subnational lawmaking that we can best trace movement across jurisdictional lines. As I have argued previously (Lynch, 2009), there is a distinct geographic pattern to the transformation of those conditions inherent to mass incarceration, just as there was in the adoption and diffusion of rehabilitative correctional policies and practices in the early to mid-20th century. Indeed, in some sense, these sets of transformations are in geographic opposition to each other in that the "penal welfare" (Garland, 2001a) innovations emerged first and strongest in the Northeast and industrial Midwest, whereas the mass incarcerative innovations were born primarily in the Sunbelt South and West (Lynch, 2009).

For instance, the "three strikes" sentencing policies that proliferated in the 1990s began in the West, and state adoption moved south and east from there. The best marker of geographic correlates of these laws, however, has been in their implementation. Most three strikes states have used the law sparingly, and only three states—Florida, Georgia, and California—had incarcerated more than 400 felons under such statutes by 2002.[10] Thus, it is how the contemporary sentencing reforms—determinate sentencing, mandatory minimums, "truth-in-sentencing," and three strikes laws—have been implemented rather than just the nature of the reforms themselves that have followed a regional pattern of dispersal. States in the South and Southwest have been much more likely to use such reforms to increase sentence lengths dramatically since the late 1970s than have states in the Northeast. Ultimately, as annual reports from the Bureau of Justice Statistics have indicated for decades, this trend has resulted in the clustering of incarceration rates by region. The South consistently maintains the highest rates, the West has the second highest rates, the Midwest comes in third, and the Northeast maintains the lowest rates. These patterns existed before the incarceration explosion and have persisted throughout the expansion

10. California's use has exceeded all others in that more than 42,000 offenders were incarcerated as under the three strikes law in the first 8 years (Schiraldi, Colburn, and Lotke, 2004).

(Lynch, 2009). Levels of racial disproportionality in prison admissions also vary by state and region; only in this case, the Midwest has the highest discrepancy between Blacks and Whites in incarceration rates compared with the other regions of the nation (Sorenson, Hope, and Stemen, 2003).

Again, the death penalty provides a stark, albeit corollary, illustration of regional effects and, in particular, indicates a strong role of path dependency in penal practices. Capital punishment as a legal sanction was disrupted when the U.S Supreme Court, in *Furman v. Georgia* (1972), declared it unconstitutional as implemented. Those states that enacted new death penalty legislation and those that have gone on to be the most active users of capital punishment are generally the same ones (concentrated in the South) that authorized and actively used capital punishment before *Furman* (Zimring, 2003).

Even the actual mechanisms of lawmaking that have been used to transform sentencing and punishment policy have regional roots and patterns. The "direct democracy" mechanisms of the state-level initiative and referendum are a Western phenomenon (Baude, 1998); many states in the West have included such measures in their constitutions since the turn of the 20th century. The initiative process began to be used regularly to pass "tough-on-crime" laws by the late 1970s, particularly in California, Oregon, Washington, and Arizona, and in some cases, those laws have dramatically reshaped criminal justice in those jurisdictions. California, in particular, has approved significant sentencing and criminal justice procedural reforms through such measures, including the three strikes law, the victims' "bill of rights," laws expanding the category of death-eligible offenses, and several laws that have shifted the balance of power to prosecutors in the state.

Within penal institutions, the 1990s "no frills" prison movement (Johnson, Bennett, and Flanagan, 1997), which stripped prisons of basic amenities and often imposed intricate rules on inmates, had its roots in southwestern states such as Texas and Arizona and spread first to other states in the region before moving north to states such as Wisconsin and Ohio. The trend of charging inmates for things like medical treatment and electricity is also an innovation born in the Sunbelt West. Nevada was the first state to implement a copayment for medical services within its prison system, beginning in 1981, followed by Colorado and then Arizona and California. By the beginning of 1996, 8 more states had joined the trend and 26 states either had approved legislation or had legislation in the works to charge inmates for medical care (Gipson and Pierce, 1996).[11] Likewise, one hallmark of the contemporary mass incarceration penal system—the "supermax"— was first put into use by a sunbelt state (Arizona), and its most concentrated use has been observed in the West (King, 1999).

11. County jails around the country have implemented similar policies and now typically charge for services that are directly related to local jail operations, such as transportation as well as room and board for work-release inmates.

Thus, mass incarceration is shaped by regionally significant historical, political, and cultural factors, which leads to distinct regional patterns of imprisonment rates and punishment practices. Beyond region, a particularly prolific kind of diffusion of criminal justice policy seems to persist in the "tough-on-crime" era, thereby making mass incarceration a national phenomenon as well as a local and regional one (Nicholson-Crotty, 2009). Indeed as Nicholson-Crotty (2009) recently argued, criminal justice policy making has the characteristics that make it the most likely to diffuse quickly and with the least amount of informed deliberation because of the high salience of crime issues and the low technical complexity of the policies themselves.

Of course, the widespread and rapid diffusion of tough-on-crime policies has also been helped along by several federal incentive programs that have proliferated during the past few decades beginning with the *Law Enforcement Assistance Program* in 1968 (Blumstein, 2008; Nicholson-Crotty, 2004). States have been enticed with major grants and funding streams if they mandate sex-offender registries and notification programs (Lynch, 2002); ensure "truth-in-sentencing" for violent offenders (Sabol, Rosich, Kane, Kirk, and Dubin, 2002); and target, prosecute, and punish drug law offenders (Nicholson-Crotty, 2004). In such cases, however, the federal government generally joined the bandwagon after state-level innovation on such policies and then encouraged their broad adoption through the use of financial "carrots" and "sticks" (Welch and Thompson, 1980).

Furthermore, the federal incentives generally only account for a modest share of the incarceration explosion (Gottschalk, 2009; Spelman, 2009). For instance, in the case of the short-lived federal truth-in-sentencing grant program, the federal funding opportunity was not a key driver in the state-level adoption in most states that have implemented such laws, nor did it dramatically increase either prison capacity or population in those states that adopted truth-in-sentencing laws (Turner, Greenwood, Fain, and Chiesa, 2006). Rather, the direct catalysts for mass incarceration generally are located in regional, state, and local conditions—historical and contemporary—whereas their proliferation appears to be enhanced by more macro-level factors.

Remediation: The Pathways Out of Mass Incarceration

This article has attempted to lay out an integrated approach to understanding the causes of mass incarceration by linking the intellectual traditions of law and society (or sociolegal studies) scholarship with criminological scholarship, advocating for the use of both quantitative and qualitative empirical research methods, looking at multiple levels of explanation, and moving away from simple causal models. As such, I am (admittedly) proposing a relatively messy approach to questions about the increase of mass incarceration. Nonetheless, some clarity can, and does, emerge from this quagmire, which has both theoretical and policy reform implications.

Although more empirical work that focuses on the processes and mechanisms of change rather than on just the outcomes (particularly state- and local-level inquiries) is

clearly necessary, the existing body of work—both in the more traditional quantitative criminological tradition and the more qualitative historical work—points to several factors that help explain the increase of American mass incarceration as well as the significant subnational variation in criminal justice within the United States. These insights are not only important for theory building but also are the key to strategizing about how to scale back our reliance on imprisonment. I conclude in this section by outlining the lessons relevant to policy reform as I see them.

First, the historical rootedness of rehabilitation within the locale seems to be a strong indicator of its current commitment to mass incarceration both qualitatively and as quantified by incarceration rates. Thus, in places with at least a historical commitment to rehabilitation, part of a reform strategy could include an invocation of that past, as some evidence indicates that solutions are sought not only from outside but also through looking inwardly to historical processes (Lynch, 2009). Although rehabilitation has new meanings in the era of mass incarceration (Robinson, 2008; Travis, 2004), its contemporary viability as a renewed focus likely will be tied to its historical role in any given jurisdiction.

There are prevailing and enduring narratives and conceptions about the role of state governance in every given locale that shape the universe of possibilities for reform. To borrow from Swidler's (1986) conceptualization, cultural "toolkits," which include ideologies, belief systems, and worldviews about the way things are and should be, shape official responses to problems and crises such that solutions are not necessarily equally viable across disparate locales. In the case of prison reform, what might sell to both the populace and the political elites in Maryland or Massachusetts—places with at least a historical investment in the notion of rehabilitation—would have little resonance in Arizona or Nevada, where an overt or even crass appeal based on fiscal frugality would strike a chord (Lynch, 2009).

Relatedly, efforts to remediate the racially disparate impacts of mass incarceration are strengthened by attending to the particular structural and cultural trajectories of race relations in a given locale. While a substantial record has been amassed about the racial disproportionality of who bears the brunt of punitive criminal justice intervention (Mauer, 2006; Roberts, 2006; Tonry, 1996; Western, 2006), the particular mechanisms that underlie the disproportionality will vary significantly as a function of local history, sociopolitical culture, and legal norms and structures. Interventions that might work to remediate Black-While inequalities in Rustbelt states, for instance, may have less applicability or resonance in Southwest border states where historical and contemporary White-Latino relations will matter, or Southern states where the legacy of slavery and Jim Crow might well be considered in reform efforts.

The degree to which post-World War II population growth and its attendant destabilization of communities has occurred in a given place also appears to be correlated with the relative intensity of mass incarceration in a given locale. This connection is likely in part a result of the social anxiety and turmoil that accompanies rapid change, as well as the weaker social ties, fewer interdependencies, and decreased sense of community that comes

with population instability. In any case, in jurisdictions with trajectories of major population growth and turnover, one can expect that the governance styles will have adapted to this feature. As Vanessa Barker has argued (2006), states characterized by low (and cynical) levels of civic engagement with the political arena, which is typical of locales with unstable populations that experience significant influx and outflow of residents, are expected to be more punitive than those with activist and engaged citizenry. Thus, successful policy reform needs to be tailored to those specific styles and structures of the targeted locale. In such locales, it might be that the actual elements of policy change and the political rhetoric about the change can be and may need to be more incongruous with each other (and disingenuous in rhetorical content) than in places with more engaged and stable citizenship.

Along similar lines, the structure of lawmaking in a given jurisdiction matters to reform efforts. States that allow for referenda and initiatives offer an open avenue to reform that will not be available in jurisdictions without such direct democracy measures. Indeed, although it seems that in the states that have used the initiative process to alter criminal justice policy, the results for the most part have contributed to the mass incarceration problem; a recent trend indicates a turning tide on this issue. During the past 15 or so years, numerous states have functionally decriminalized marijuana, and some of those states have done so for other drug types through the initiative process (O'Hear, 2003). Although California's November 2010 ballot initiative that would have authorized full state legalization of marijuana did not pass, it opened up a serious policy conversation in the state about the future possibility of legalization and its revenue-generating potential.

Attention to appropriate referent jurisdictions also matters in promoting policy change at the state level. To the extent that polities view themselves as distinct and different from certain others, especially when that view is a point of pride and distinction, citing those "other" jurisdictions as examples of how to do criminal justice might backfire. Such was the case in Arizona in which several political figures suggested in interviews with me that their criminal justice system was the polar opposite of Minnesota's and asserted Arizona's clear superiority on fiscal and punitive grounds. However, the state had no issue with looking to Texas for guidance and advice (Lynch, 2009). This was true during the prison buildup and seems to remain so today as the state tries to scale back its reliance on prison through sentence reform. The first person to testify at the most recent hearing of the House Committee on Sentencing, held in May 2010, was a state representative from Texas to share how his state had decreased its prison population through a variety of small policy changes. He has been the only outside state political figure invited to testify in either hearing that has been held by this committee. So, although Texas might not objectively be the best state to look to for a model of scaling back (New York or New Jersey would have been [Greene and Mauer, 2010]), it has been and continues to be an acceptable referent state for political actors in Arizona.

Furthermore, as the recent report by Judith Greene and Marc Mauer (2010) aptly illustrated, successfully "downscaling" prisons is a piecemeal project that necessarily differs

by locale given different statutory constraints, institutional policies, and practices. Thus, they described in detail how four states have had success in scaling back their prison populations, with each using a combination of all or some of the following: sentencing statute reforms, investment in and implementation of alternative programs for prison-eligible felons, sentence reductions for those in custody, expanded parole-release policies, and reformed parole revocation policies. It is clear from this work that reform efforts must be attuned to the specific legal structures, political norms, and governance traditions of the state jurisdictions in which they are being attempted.

Another key, microlevel intervention that must be developed and implemented more fully deals with the fundamental structural problem that allows counties to send offenders to prison without any fiscal responsibility for those outcomes. As a result, prosecutors can voraciously pursue prison sentences (and judges can sentence offenders to prison) with no fiscal risk but high-reward potential. Politically, little can be lost in the "tough-on-crime" era by sending eligible offenders to prison, and with shrinking local resources, few alternative programs, overcrowded local jails, and overburdened probation departments, it makes financial sense for the county as well.

Thus, reforms that incentivize counties to treat and manage their felony offender populations at the local level have the potential to dramatically reduce the inflow of people into prisons. Such an incentive-based diversion strategy has been implemented successfully in a pilot program for nonpayment of child-support felony offenders in selected counties in Ohio, whereby the state corrections department provides funding to allow those offenders to stay in local facilities and even continue to work. In Arizona, a law enacted in 2008 authorized the state to reward county probation offices for the cost savings generated by avoiding revocations (where a violator would have been sent to prison) or new prison-eligible offenses through local efforts. Counties are required to calculate those savings estimates and a portion of that is supposed to go back to the local jurisdiction for the savings on prison costs. Probationers, under the law, are rewarded for good behavior with shortened probation terms, so the incentives flow from the state to the counties and the offenders. According to a Pew Center on Courts report (2011), this measure saved the state $36 million dollars and reduced revocations and commitments to prison by about 30%. Just as the federal government's financial "carrots and sticks" have reshaped state-level criminal law and policy, so can states innovate to come up with options to partner with counties to divert defined prison-bound offenders to more appropriate local alternatives from the start. This kind of scheme, however, presumably would require that local jurisdictions are provided with resources to manage and treat those offenders effectively and are otherwise de-incentivized from overusing prison as a sentencing option.

Finally, from a grassroots social-change perspective, significant room might be available to reshape micro-level practices to slow the flow of prison-bound felons. As detailed previously, county-level courts not only played a huge role in the incarceration buildup, but also they vary considerably from each other, even within states, in terms of how they mete

out felony sentences. Thus, strategies that challenge locally elected criminal justice actors—particularly prosecutors—to pursue more balanced and policy-effective approaches in their responses to crime have a great deal of potential to make many small dents in the huge mass incarceration machine. As I have argued elsewhere (Lynch, 2011), local community-based strategies offer several advantages. Community-based reform efforts invite a cooperative and collaborative, rather than an adversarial, mode of resolution that can be defined rhetorically as inclusive of the interests of all in the community. Local politics are generally more pragmatic in style and process than state and federal politics, and therefore, calls for alternative or innovative approaches to the problem of crime are often more resonant for local leaders. Because crime, in particular, is prone to symbolic state and national politics, serving as a simplistic "valence issue" for grandstanding elected officials and candidates (Scheingold, 1995a: 166), efforts at reform are much more challenging as the reform target moves away from the local. As Miller (2008) has illustrated, this helps explain why minorities and the poor—who are both disproportionately victimized by crime and targeted by punitive policies—are relatively uninfluential at those higher levels of the political process. Indeed, her work suggests that local-level criminal justice policy reform efforts have the best chance of success if the larger goal is to achieve fair and effective crime-control policy.

Political scientist Stuart Scheingold (1995b) has also suggested that fewer incentives, and more risks, are present when politicizing crime at the local level, opening up space for pragmatic and cooperative reform efforts. Local politicians who go the "tough-on-crime" route run a high risk of it backfiring by making promises they may not be able to keep, hurting the local economy by inciting fear of crime, and inflaming racial tensions as the politicization of crime is typically very racialized (Scheingold, 1995b: 280).

Finally, a local action strategy can highlight the "we" of community in its articulation of the need for reform by highlighting how the failures of the status quo policy harm community members. This strategy allows advocates for change to frame group identity as inclusive and diverse as well as made up of the entire community, and can facilitate empathy for those harmed by punitive policies and practices (Lynch, 2011). Consequently, empathy also can lead to increased strength and cohesion in social-change efforts through the reconfiguring of group boundaries. This kind of locally based strategy has been used by prison reform activists in Los Angeles (Gilmore, 2007), where mothers of incarcerated people highlight the harms done by mass imprisonment to their families and their neighborhoods to put a face on the human costs of our current policies. Such a strategy becomes more difficult to employ as the social, demographic, and geographic distance between those who have the power to change policy and those negatively impacted by its increases.

It actually might be good news that the project of moving away from mass incarceration must happen with localized, multiple, and smaller scale interventions. Moving political and institutional actors to make specific fixes with projectable payoffs (in population reductions and cost savings) is much more feasible in the short term than is focusing exclusively on

tackling the huge and nearly intractable social and economic conditions that also underlie the mass incarceration problem. As Gottschalk (2009: 107–108) suggested:

> Criminal justice reform is fundamentally a political problem—not a crime and punishment problem. The real challenge is how to create the political will and political pressure at all levels of government—local, state, and federal—to pursue new sentencing policies and to create alternatives to incarceration that will end mass imprisonment in the United States sooner rather than later.

I fully concur with Gottschalk (2009) that this approach does not mean that those large problems should be ignored; rather, much can be gained for the larger projects of social, racial, and economic justice if we can make notable inroads into the mass incarceration problem through more immediate and feasible policy reforms. Indeed, a retreat from our overreliance on the prison as a social-policy solution ideally will open the door to more rational, thoughtful, and just policy making on several challenging social issues that underlie the problem of crime.

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Addressing the political environment shaping mass incarceration

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Mona Lynch (2011, this issue) has provided a comprehensive overview of the range of legal and policy changes that have occurred over several decades, resulting in mass incarceration in the United States. Although the national outcome is clear and dramatic, the variety of ways through which this has been established in policy and practice clearly has been influenced by local and regional decision-making bodies and political cultures. In this regard, Lynch continues her important scholarship of assessing the mixture of social, psychological, and political dynamics that produce policy outcomes. In doing so, she also points the way to thinking about what type of reform strategy can begin to address these unprecedented developments. There are many good ideas out there for a vision of a more balanced approach to public safety. The challenge is to develop a political strategy to make those visions a reality.

As useful as this analysis is, its emphasis on state-level distinctions and specific policy changes risks losing sight of the bigger picture. Lynch (2011) is certainly aware of these broader analyses, but she seems to be understating their significance. Although policy reform generally proceeds incrementally, unless we can affect the political climate in which these policies are fashioned, the scale of change may be inherently limited.

In this essay, I will address three issues. First, a critique of Lynch's (2011) argument regarding variations among the states in their commitment to mass incarceration. Second, a challenge to the contention that mass incarceration has been the result of a "ground-up" process rather than a "top-down" one. And finally, an elaboration on the useful strategies for reform that Lynch has sketched out.

Variation in the Experience of Mass Incarceration

In her analysis, Lynch (2011) describes the regional policy developments that differentiate the states in regard to the prison population explosion. Perhaps foremost among these

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differences is the broad variation in the use of imprisonment among the states, from a low of 150 per 100,000 population in Maine to a high of 881 per 100,000 population in Louisiana, as of 2009. She also notes that current variations generally mirror differences that existed prior to the advent of mass incarceration.

But although such distinctions are important to note, they should not obscure the fact that the prison population explosion in fact *has* been a national phenomenon. Although Lynch (2011) approvingly states, for example, that since the advent of the sentencing guidelines system in Minnesota in 1980 the state has been "among the most resistant to mass incarceration," a close look at the data suggests otherwise.

If we examine the 30-year period of 1979–2009, we can only conclude that not only has prison expansion proceeded across the country, but arguably it has done so at an even more dramatic pace in the lower incarceration states. Looking at the five highest imprisonment states in 1979 (Florida, Georgia, North Carolina, Nevada, and South Carolina), we see an increase in the rate of imprisonment ranging from 45% to 150% by 2009 (Bureau of Justice Statistics, 1981; West and Sabol, 2010). But among the five lowest imprisoning states[1] in 1979 (Minnesota, New Hampshire, North Dakota, Pennsylvania, and West Virginia), the increase ranged from 271% to as much as 744% in North Dakota. In Minnesota, for example, the state's 1979 rate of incarceration was more akin to that of Sweden than that of Texas. But by 2009, its rate of incarceration had increased 271%, outpacing the increase of 231% in Texas. So although it remains generally the case that the lower incarceration states of three decades ago retain that status, the rate at which they imprison also has increased in unprecedented ways.

In other policy areas as well, the line between what might be perceived as tough or lenient may not be as obvious as appears on the surface. For example, as a demonstration of the regional commitment to punishment Lynch (2011) documents the leading role of Texas and three other states in carrying out executions since the 1970s. True, but in California—typically socially liberal and more often than not electing Democrats to statewide office—there have been relatively few executions, but nonetheless more than 700 people await an execution date on Death Row.

Beyond this it also is important to examine the racial dynamics of incarceration. Several states, for example, despite maintaining rates of incarceration below the national average, imprison African Americans at astounding rates. Figures for combined prison and jail populations in 2005 in such states show a Black rate of incarceration of 4,200 per 100,000 in Iowa, 3,797 in Vermont, 2,522 in Washington, and 3,096 in Kansas (Mauer and King, 2007). For the purposes of comparison, these rates are in the range of 20–35 times that of overall rates among European nations.

1. Massachusetts is omitted from this group because of the lack of data comparability for the 2 years.

The Political Dynamics Producing Mass Incarceration

Although Lynch (2011) is consciously not addressing the broader structural drivers of mass incarceration in her analysis, she does contend that "law. . . is the engine" that produces mass incarceration and that mass incarceration is "explored more fruitfully as a ground-up process, rather than as a top-down process." Her argument focuses on the myriad changes in law, policy, and practice that take place at a county or state level. These initiatives have resulted in mass incarceration, but also they have led to significant distinctions in the rate of imprisonment around the country. A secondary argument is that these developments are sometimes circumstantial, such as the impact of the death of basketball star Len Bias in accelerating legislative momentum leading to the notorious crack cocaine mandatory sentencing policies in 1986.

Although the detailed evolution of mass imprisonment clearly is important to assess, a focus at this level may obscure the broader political dynamics that are in fact the driving forces of this change. We can see this by examining how the political environment essentially has functioned as a "top-down" mechanism to create the structure of mass incarceration. Furthermore, although some of these developments may be idiosyncratic, they are very much driven by images and considerations of race.

One means of assessing the broad nature of the forces driving mass incarceration is by examining the policies and practices that states have in common, as opposed to the variations in how each may have adopted a tough-on-crime agenda. In this regard, it seems clear that the commonalities are much more significant than the differences. We can see this most clearly in the areas of sentencing policy and the war on drugs. Throughout this period, every state has expanded its drug offender population in prison dramatically, virtually all have adopted some form of mandatory sentencing, almost all have made it easier to try juveniles in adult court, and all have increased the number of life sentences imposed to record levels. This broad picture does not suggest that distinctions among the states are necessarily trivial. For example, jurisdictions with less zealous drug law enforcement or court programs that serve as diversion mechanisms clearly hold the potential to make a difference in criminal justice populations and sentencing outcomes. But at the moment, such initiatives play only a modest role in resisting the broad sweep of harsh policy change.

Furthermore, some of the seemingly disparate developments that Lynch (2011) catalogues become less distinctive if we view them through a lens of race. For example, she notes that the federal crack laws were spurred on after the death of Len Bias because he had just been drafted by the Boston Celtics, the home team of then-House Speaker Tip O'Neill. This is certainly correct, but it also is likely that some mixture of harsh sentencing policies for crack cocaine would have been adopted relatively soon even absent such a high-profile death. As Reinerman and Levine (1997) have documented, among others, the racial imagery and media sensationalism attendant to the burgeoning crack epidemic pointed unambiguously to punitive responses at the expense of any focus on prevention or treatment.

Racial imagery and perspectives have framed policy developments not only in regard to perceived offenders but for victims as well. For example, Lynch (2011) is correct that the spate of sex offender laws adopted in the 1980s and 1990s requiring harsh punishment and/or registration requirements were often a result of a high-profile tragedy. But in almost all cases, such as Jenna's Law and Megan's Law, the victims in such situations were young White girls. These cases were tragic, of course, but so are the ones where the victims are young girls of color. Those cases, however, do not generally lead to high-profile legislation.

Let me also relate a personal experience that illustrates these racial dynamics. In 1994, a year of frenzied sentencing activity including the California three strikes legislation and President Clinton's $30 billion federal crime bill, I was invited to testify in Congress regarding the proposed federal three strikes legislation. Because of the high-profile nature of the proposal, a series of witnesses had been invited to offer testimony. Panels featuring practitioners and researchers were scheduled toward the end of the day, but the first panel of the day, accompanied by a raft of television cameras, consisted of six family members of crime victims. Each had a compelling personal story to convey, and most of these involved a family member victimized by serious violence. But curiously, all six panelists were White. Surely, as Blacks and Latinos are victimized disproportionately by violent crime, one or two such persons could have been found to communicate their stories as well. Whether these racial dynamics were conscious or not, the racial imagery of who are the "innocent victims" of crime seemed clear.

Strategic Approaches to Challenging Mass Incarceration

The need to alter the political climate in which criminal justice policy is developed can be seen in the bipartisan support for the tough-on-crime policies that have produced mass incarceration. Unlike other areas of social policy where one might see a partisan divide in perspective, the tough-on-crime movement has been very much one of bipartisan engagement. On the Democratic side, in 1994, for example, President Bill Clinton pushed hard for his $30 billion federal crime bill, one that was heavily oriented toward law enforcement and prison expansion. More recently, California Democratic Senator Dianne Feinstein has promoted federal anti-gang provisions that are heavy on harsh sentencing policies but light on gang prevention strategies. Republicans also have been prime supporters of similarly harsh measures. One only has to recall Ronald Reagan's call for a "war on drugs" or the record-setting pace of executions overseen by Governors Bush and Perry in Texas.

To shift the conversation, we need to create an environment that allows policy makers to support rational policy and to not be fearful that doing so will harm their political careers. A significant component of producing such an environment requires building a broad-based constituency for reform, including in particular, "unlikely allies." During the past year, for example, we have seen the launch of "Right on Crime," a coalition of conservative leaders who call for "more cost-effective approaches that enhance public safety" (Right on

Crime, 2011). The group features such prominent voices as Newt Gingrich, Ed Meese, and Grover Norquist, and their policy prescriptions echo much of what has come to be known as the "smart-on-crime" agenda of recent years. Perhaps most notable about the group's formation is the attention it has received in popular media, including feature stories in the *Los Angeles Times, Atlanta Journal-Constitution*, and other leading outlets.

Another attempt to reshape the agenda has been the efforts of Senator Jim Webb (D-VA) to establish a national commission to examine the criminal justice system "from top to bottom." Senator Webb, a moderate Democrat who is troubled by America's world-leading role in incarceration, gained strong bipartisan as well as law enforcement support for his legislation, which nearly was adopted by Congress in 2010. By framing the discussion as a high-profile national assessment, one would hope that such a commission could bring to the fore an analysis of effectiveness that is not primarily beholden to political considerations.

As described, much of the political environment regarding public safety is shaped by racial considerations, which influence the breadth of policy change being proposed. Absent significant grassroots pressure, political leadership is far too often excessively cautious about addressing these dynamics. Within the Obama Administration, for example, there has been little emphasis on targeting investments through the stimulus package or job creation for communities of color in particular. Many observers speculate that as the nation's first African American president, Obama is in some ways more constrained from making race-based policy arguments in order to avoid being identified as "giving in" to the interests of the Black community.

Nonetheless, from campaigns to end racial profiling to reforming the crack cocaine sentencing disparity, the evidence in recent years demonstrates that focused attention to unfair practices within the criminal justice system can produce policy change. Although these campaigns typically are led by African American legislators along with the support of civil rights organizations, in these and other notable cases they have succeeded in gaining majority support from both the public and policy makers.

Encouraging as some of these developments may be, we should not lose sight of the scale of the challenge involved in confronting racial injustice. Much of this challenge stems from criminal justice policies that are on the surface "race neutral" but nevertheless have profound racial effects. For example, in the area of drug policy not only have such policies as crack cocaine sentencing produced dramatic racial disparities, but so too have many "school zone" drug laws as well. Because such policies enhance punishments for drug offenses committed near a school building, these penalties are more likely to be employed in the densely populated urban areas where many people of color live than in more dispersed rural or suburban neighborhoods.

Similar effects can be seen in the common practice of employing sentencing enhancements based on prior criminal convictions, whether implemented through habitual offender laws or use of judicial discretion. While there are legitimate philosophical arguments and rationales for imposing such enhancements, they too have an almost inevitable racially

skewed effect. This results from the fact that African American defendants on average are more likely than other groups to have a prior record, whether as a result of greater involvement in crime or through biased law enforcement practices. And in an era of "three strikes" penalties, the disparities produced by such policies are now particularly extreme.

One means of challenging such outcomes is to engage in policy research that assesses these dynamics both prospectively and retrospectively. For example, in 2008 both Iowa and Connecticut adopted racial impact statement legislation authorizing that a legislative analysis of such effects be conducted prior to adoption of any sentencing policies that might produce unwarranted disparities. Similarly, the 2009 adoption of the Racial Justice Act in North Carolina provides death row inmates with the opportunity to challenge their sentences by providing statistical evidence documenting patterns of racial disparity in the imposition of capital punishment. In each of these areas there is the potential of both addressing discriminatory outcomes as well as heightening public debate on racial justice.

It also is now clear that the fiscal crisis provides an opportunity for advancing sentencing reform, particularly at the state level where budgets exceedingly are constrained. Currently, virtually every state is assessing its level of incarceration, and attendant costs, and a variety of reforms have been enacted to produce fiscal savings. Some seem to be more substantial than others, and the full extent of these impacts will not be known for some time. But clearly there is an opportunity to take advantage of the evolving reform climate to advocate for policy changes that can produce a more sustained impact. A key consideration in the potential success of such initiatives relates to the degree of public resources devoted to nonincarcerative sentencing options. Just as budget cuts are being contemplated for prison operations, so too are they for drug treatment and reentry services in the community. Advocates for more rational sentencing policies will need to promote policies that can redirect a portion of prison cost savings into such justice reinvestment frameworks.

Finally, it is important to note that although the fiscal climate has been a driving force for the reexamination of sentencing and corrections policies, the reform movement predates the current crisis. For more than a decade, bipartisan support has been growing for reentry initiatives, justice reinvestment, graduated sanctions, and other measures that hold the potential for a more substantial shift in our approach to public safety. Whether this potential will be realized remains to be seen, but it will depend on the success of both the state-level strategies that Lynch (2011) analyzes as well as the broader movements to affect the national political climate.

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Leaving mass incarceration

The ways and means of penal change

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For nearly 30 years, a vast body of literature has examined the "get-tough" era, or what some have referred to as mass incarceration (Jacobson, 2005) or a punitive policy experiment (Raphael and Stoll, 2009). In examining the policies that have defined this era (e.g., War on Drugs, minimum mandatory sentencing, habitual offender statutes, three strikes, and truth-in-sentencing), the literature has been both incisive and comprehensive in its coverage. Various trends have been documented, effectiveness has been analyzed and disputed, explanations have been proposed and debated, and social implications have been identified and interpreted.

As the ability to sustain "get-tough" measures has now been constrained [by fiscal crisis], a different political tone and policy focus is emerging. Much of the penal research has shifted as well, turning to issues of offender reentry or to new insights about the trajectory of mass incarceration. Lynch's (2011, this issue) work clearly falls into the latter category by challenging the prior literature and its conventional argument about the locus and direction of penal change. Her work has relevance then for understanding not only mass incarceration in particular but also reform policy in general, including offender reentry.

Lynch (2011) identifies four legal factors as the "engine that propelled mass incarceration." These factors include legislative and other statutory changes to penal codes, federal case law related to litigation on overcrowding, postsentencing law and policy related to parole, and the day-to-day sentencing and punishment practices of local courtrooms. However, rather than adopting an aggregated or nationalized view of the scope and impact of these factors, Lynch offers a more nuanced take based on local social and political contexts. She maintains that, although the capacity or opportunity for mass incarceration might have been established at the macrolevel, the realization of mass incarceration was contingent on local or regional responses to state or federal initiatives.

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Given the autonomy afforded by a decentralized criminal justice system, Lynch (2011) suggests that a "ground-up" or "on-the-ground" approach to studying mass incarceration would be equally, if not more, illuminating than one that ignores this structural reality. Although the claims of the more prolific "top-down" research are not wholly rejected, Lynch does assert that the emphasis on national-level data and explanations has produced an overly "homogenized" account of mass incarceration. Consequently, remedial policies based on this account alone might miss the intended mark. Policies that reduce reliance on incarceration need to be, in Lynch's words, "multiple, varied, and smaller in scope."

My given task for this essay is to expound on these policies, which Lynch (2011) alternately terms "pathways out of mass incarceration" or "lessons relevant to policy reform." The pathways she identifies operate at the local and state level and constitute a two-pronged approach to facilitating change—a change that incidentally is already underway. One approach can be categorized as rhetorical/sentimental in its makeup, whereas the second approach is more legal/justice system based.

The former approach is most evident in the suggestion that crime-control narratives comport with the history and sentiments of the local population. For example, jurisdictions with a history of rehabilitative commitment are instructed to invoke their past as a way to shape their future (away from mass incarceration). For jurisdictions that lack this historical commitment, stories of fiscal crisis can be told to appease a conservative base.

This rhetorical approach is observed again in the suggestion that political narratives heed the level of social stability and civic engagement in a particular jurisdiction. Citing Barker's (2006) finding that areas characterized by low levels of social stability and civic activism tend to be more punitive, Lynch (2011) advises that, in such areas, a tougher crime-control message could be communicated, although a softer crime-control policy actually would be implemented. The inference, I presume, is that if a local population is sufficiently transient and disengaged, then the message–policy disparity will go unnoticed.

Assuming the inclination is to engage, Lynch (2011) highlights the value of "we"-based activism. In this scenario, advocacy groups are recognized as a local resource that can reshape the politics of social identity. Through such activism, officials would be awakened to the shared ground between "them" (i.e., offenders) and "us" and therefore the shared harms of mass incarceration. In this rhetorical/sentimental pathway, appeals to empathy and reminders of the universal costs of incarceration are the key.

The state-level recommendation for careful use of "referent jurisdictions" also relies on the power of rhetoric to reverse mass incarceration. Lynch (2011) contends that a reversal can occur as long as the appropriate form of group think or peer pressure is applied. That is, one can implore conservative, get-tough states to get softer [smarter] by pointing out what all of the other conservative former get-tough states are doing. This tactic is at work in the "Right on Crime" movement launched by the Texas Policy Foundation. The movement, which has also taken in root in Florida, upholds conservative principles on punishment, but supports less incarceration as a matter of fiscal prudence. The signatories to this "smart

justice" movement include former Speaker of the House Newt Gingrich, former Drug Czar Bill Bennett, and former Attorney General Edwin Meese.

These various rhetorical pathways are accompanied by proposals that also involve legal/justice system processes. Particular attention is given to direct democracy measures, such as state referenda and citizen initiatives. According to Lynch (2011), the promise of these law-making mechanisms is based on their potential, but only of late, to affect change in a less punitive direction (i.e., decriminalization of marijuana and other drugs). A second legal/justice system pathway pertains to the often ignored divide between the sentencing practices of the local courts and the state's financial responsibility for those practices. Lynch recommends a system of state-based incentives to control costly reliance on prison institutions.

Considering the theoretical paradigm that informs Lynch's (2011) analysis, I find these proposals to be practical and thoughtfully constructed. In fact, after additional scrutiny, the concept of "pathways" itself is somewhat revealing. First, it implies that multiple, distinct, and/or converging routes can be taken. This is not a reference to the simple and typical notion of state legislators alone exercising more than one policy option (i.e., directly implementing or modifying a set of laws) but a reference to the idea of placing reform into various and intersecting hands. Individual citizens, advocacy organizations, local elected officials, and state-elected officials all would have a role to play in staging the way out (of mass incarceration).

The construct of "pathways" also implies that the way out and the way in might be the same. Indeed, the examples provided by Lynch (2011) indicate that the pathways out of mass incarceration are the same pathways that led to mass incarceration. Words, messages, narratives, and outcry thus are established as the essential tools of policy, whether they are used by elected officials to influence, pacify, or deceive the citizenry; by the citizenry to inform, pressure, or bypass elected officials; or by elected officials of one state or county to convince the elected officials of another. In effect, the pathways to change are politically and rhetorically paved no matter what direction policy is heading.

In this regard, the bottom-up strategies envisioned by Lynch (2011) bear a close correspondence to the top-down or macrolevel theories that have dominated the literature. For example, Beckett (1997) asserted that the get-tough zeitgeist was politically engineered through fear-based narratives. Fear of crime and the "dangerous classes" was successfully spread by "New Right" Republicans to divide the electorate and grow their base of support (see also Dyer, 2000). Now, a "smart justice" narrative is being successfully spread by "Right on Crime" Republicans largely to maintain their base of support (see Tonry, 2004, for a review of all top-down theories). Likewise, just as advocacy groups and citizens were advancing the get-tough agenda (Victims of Crime and Leniency, Stop Turning Out Prisoners, and California Citizens for Law and Order), advocacy groups and citizens now can be deployed against it (Mothers Against Mandatory Minimums and Families with Loved Ones in Prison).

The point of all of this musing about pathways is as follows. Lynch (2011) appropriately recognizes the politicized environment that surrounds penal policy and therefore identifies pathways that are viable and pragmatic for those who must navigate this environment at all levels of government. Yet the pathways also reflect a kind of political coaching that encourages short-term exit strategies rather than long-term strategies for developing rational policies. In other words, the pathways are suited to take advantage of the current climate, as opposed to transcending the climate, despite the political season.

Lynch (2011) is not alone in this message-crafting approach. The Pew Center on States, in conjunction with Public Opinion Strategies and the Benenson Strategy Group, has been explicit in its political coaching. Based on what The Pew Center also calls "lessons learned" or "key takeaways" from its public safety survey, it offers specific advice on framing the crime-control message. Aside from documenting public support for community-based alternatives for first-time and/or nonviolent offenders, the authors of The Pew Center report explicitly state the following in their presentation: "Voters are moved by language that suggests they could be getting more bang for their investment in corrections" (The Pew Center on the States, 2010:20).

Although this message might be the right one, it might only be the right one for right now; it is doubtful that rhetorical, in-the-moment strategizing of this or any kind will eradicate the rash and short-sighted culture of penal policy making. For this reason, the criminological literature generally has sought to depoliticize policy making by exposing officials to the more neutral and constant message of "evidence-based research." This campaign by the academic community has enjoyed some success of late, as demonstrated in the various practitioner training sessions on evidence-based practice, and any number of practitioner-targeted reports on evidence based practice (National Institute of Corrections, 2004), U.S. Congressional testimony on best practices in youth correctional education, and the development of scientific advisory boards for the U.S. Department of Justice and the National Institute of Justice and Bureau of Justice Statistics more specifically (Lucken and Blomberg, in press). Undoubtedly, this apparent interest in research on the part of various public and elected officials reflects the fact that, when financial resources diminish, the demand for proven practice increases (Lucken and Blomberg, in press). Nonetheless, the aim of the academic community is that impulsive and reactionary style policy making would no longer be the rule.

A less politicized option might exist in the form of state-based incentives. However, it is less politicized only in the sense that it removes the citizenry and the centrality of rhetoric from the process and enables a more technical and bureaucratic means of addressing prison populations. Lynch (2011) recommends incentives specifically to divert prison-bound felons and to halt the flow of prison-bound felons. These incentives would target the prosecutorial and judicial phases of the process, but beyond this suggestion, it not indicated how they should operate.

The idea of incentives in general warrants continued discussion as it seems to be gaining traction across states and policy circles without much question or deliberation. For example, probation- and parole-based incentives have been recommended by the Council of State Governments, Bureau of Justice Association, The Pew Center, and the Public Welfare Foundation in a collectively authored report titled *The National Summit on Justice Reinvestment and Public Safety* (see Clement, Schwarzfeld, and Thompson, 2011). Whether an incentives-based strategy can make a difference or is even appropriate, however, is contingent on who receives the incentives and on what types of incentives are dispensed.

Building on the issue of who receives incentives, it seems important that they not be limited to one sector of criminal justice; yet this seems to be the tendency thus far in states using incentives (i.e., Kansas and Texas). If incentives do not work in tandem by addressing the policies, practices, and capacities of community corrections, prosecutors, and judges simultaneously, then imbalances created by unilateral incentives might lead to various forms of accommodation. For example, if judges are incentivized to divert prison-bound offenders into community alternatives, but community corrections agencies are not funded accordingly, then higher caseloads will diminish the quality of supervision and/or create a greater willingness or need to violate offenders. It can be problematic as well if prosecutors are given incentives to halt the flow of prison-bound offenders, but judges are not incentivized to divert prison-bound offenders. This issue could create conflict within the courtroom workgroup if judges and prosecutors are working toward opposite ends. Also, if fewer prison-bound offenders are coming into the courtroom, judges might feel less encumbered by the prospect of overcrowded prisons and remand those who are eligible for prison to prison more often and for longer periods of time than they would have been previously. Finally, if incentives only target community-based program revocation policies, then the pattern of net widening or business as usual with regard to judicial and prosecutorial use of prison will remain, thus nullifying or reducing the intended effects of the incentive.

The type of incentive given is also an important consideration in the diversion of prison-bound offenders and in the reduction of the flow of prison-bound offenders. Common sense suggests that the type of incentive offered must hold value to those in related leadership positions as well as to those who must execute the decisions that affect the receipt of the incentive. Yet this necessary linkage is inherently problematic. Financial incentives can be dubious given their capacity to create the wrong impression (i.e., payoffs) or to compromise appropriate discretion and accountability in dealing with offenders.

For example, in Arizona, a bill was passed in 2008 that imposed a performance-based funding mechanism for probation departments. The state gives counties that successfully reduce crime and probation revocations 40% of the cost savings produced by these reductions; the savings are to be reinvested in victim services, substance abuse treatment, and strategies to improve community supervision and reduce recidivism (Clement et al., 2011).

In the 2 years after the law's enactment, statewide probation-to-prison revocations had declined by 28% and revocations to jail had declined by 39%. The number of probationers convicted of a new felony also declined statewide by 31% (2011). Similarly, the Kansas Department of Corrections awards funds to community corrections agencies that can reduce their revocation rates by 20%. Since the enactment of the provision in 2007, revocations declined by 25% in just 2 years. In that same time, the number of offenders that successfully completed probation increased by 29% (2011).

In reflecting on the rapid results of these incentives, one cannot help but wonder how reductions (or increases) are achieved and distributed, whether in these states or elsewhere. With regard to how [revocation] reductions are achieved, it is assumed that risk classification instruments are employed to guide discretionary decisions or to set standardized policy. Yet, to what extent can risk classification fairly or accurately determine which rule violations by which offenders should be overlooked or not acted upon through traditional custodial means?

With regard to the question of distribution, which jurisdictions can use these incentives to their advantage without much risk to public safety? For counties that are in desperate need of funds, which is probably most of them, a definite motivation or a pressure is present to produce the desired results of lower crime or revocations. If a county, [on average], has a low crime rate and a less serious offender population, then a no-revocation decision carries fewer risks and greater benefits. Is a cap in place on how low a jurisdiction can go in generating fewer revocations or how high it can go in terms of receiving compensation? However, in highly urbanized counties, where crime [on average] is likely to be more prevalent and severe, a policy inclined toward not revoking probation carries much higher risks, particularly once (not if) word spreads among offenders that revocation policies resulting in jail or prison have been tempered. Yet it is in these areas where added funding for various services and programs might be most needed.

It is certainly possible that a financial incentive system can be sufficiently structured so that mishandlings are minimized or nonexistent. However, an alternative strategy that is less affected by these complications might be found in exercising the occasional stick rather than the continuous carrot. To illustrate, one of the more compelling and widely used statistical comparisons in the penal literature involves general population, crime, and correctional population rates over time (see Blomberg, Bales, and Reed, 1993; Blumstein, 1995; Irwin and Austin, 1997). In the 1980s and 1990s, the disproportionate gaps between these rates prompted considerable discussion about the relationship between crime and punishment or, rather, the lack thereof. Most notably, Irwin and Austin (1997) reported that, nationally, between 1980 and 1994, probation populations increased by 165%, jail populations increased by 199%, prison populations increased by 219%, and parole populations increased by 213%. Meanwhile, the adult population only increased by 18%, adult arrests increased by only 46%, and reported index crimes increased by a mere 4%. More recently, Austin (2008) provided similar figures in a report titled *Reducing America's*

Correctional Populations: A Strategic Plan. He documented that, between 1980 and 2007, prison populations increased by 373%, probation populations increased by 284%, and parole populations increased by 274%. However, the U.S. population increased by a mere 35%, and reported index crimes and index arrest rate per 100,000 declined by 16% and 30% respectively.

These calculations provide the basis for a law that requires states and jurisdictions to maintain proportionality between their crime and punishment rates. Such a mandate would be akin to a balanced budget amendment in that punishment rates would not be permitted to outpace or vastly exceed crime rates. The figures necessary to make these calculations are available at state and local levels and can be compiled and assessed on a regular basis or every few years. This system enables states to identify and penalize, perhaps through graduated sanctions (e.g., admonishment and corresponding budget reductions), jurisdictions that deviate from their expected norm. This norm would be determined by local conditions, such as reported felony index crimes, felony arrests, felony convictions, and demographic information. This process allows prosecutors, judges, and community corrections agencies to base decisions on salient and fluctuating local realities rather than on monetary compensation tied to revocation and crime reduction—the latter of which is often beyond a probation officer's or the criminal justice system's immediate control. In combination with evidence-based practice, a requirement for a balanced punishment system could help to insulate policy from the politics and crises of the day and the swings and extremes in policy that these factors engender.

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Putting politics in penal policy reform

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Despite the consistent finding that a high level of incarceration is not the most effective way to increase public safety (Stemen, 2007) and that it produces negative fiscal and social consequences (Pattillo, Weiman, and Western, 2004), academic scholarship on the causes, consequences, and effectiveness of mass incarceration in the United States, after nearly 20 years, has had little impact on policy making (Greenberg, 2006; Petersilia, 2010). Yet, recently, lawmakers around the country have enacted (or are debating) policy changes aimed at reducing prison populations (Katel, 2011; Pew Center on the States, 2010; Porter, 2011). In an attempt to reassert the relevance of current academic research for penal policy reform, the editors of *Criminology & Public Policy* have dedicated three issues (including this one) to the topic of mass incarceration (see *Criminology & Public Policy* February 2009, February 2011, and May 2006 and *Justice Research and Policy*, Vol. 12, Issue 1, 2010).

Lynch (2011, this issue) integrates a sociolegal understanding of incarceration growth with recent policy developments in a way that helps answer how theoretical frameworks proffered by academics can aid on-the-ground efforts to reverse the course of mass incarceration. Her approach bypasses explanations that focus on macrolevel factors, such as changes in the economy- or state-level demographics that are not within the gamut of policy makers' influence. Instead, she redirects attention to causes that are more easily manipulated within the policy process, which leads her to infer that "moving away from mass incarceration must happen with localized, multiple, and smaller-scale interventions."

With this conclusion, Lynch (2011) adds an important academic perspective to a chorus of criminal justice policy experts and organizations who have suggested ways to reduce incarceration at the state level. This essay argues that Lynch's and other theoretical

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frameworks are invaluable for answering *not only* "what policies are needed to reduce incarceration?" but also, more importantly, *how* to create lasting reform that successfully dismantles mass incarceration. This essay addresses these questions by first highlighting Lynch's contributions to the academic literature on mass incarceration, including a focus on policy, implementation, and incentives. Second, the essay situates recent policy reform advocacy and efforts within Lynch's framework. And, finally, using new research on the politics of penal policy, the essay sketches an answer to the question of *who* will be able to take on successful penal reform and *how* it will be accomplished. It concludes by offering a counterpoint to the prescription for small-scale interventions. Namely, that remediating penal overindulgence will require a coordinated campaign that challenges, not just policies, but the racialized ideas and assumptions that sustain the current system.

Sentencing Policy, Implementation, and Incentives

In arguing that explanations of mass incarceration need to foreground legal changes and their interpretation at the local, state, and regional level, Lynch (2011) makes three important and policy-relevant contributions to the academic literature on mass incarceration. First, she recenters *policy as the driving force behind mass incarceration*. Although criminologists have made this relatively simple observation previously (Blumstein and Beck, 1999, 2005), the fact is that penal overindulgence is first and foremost a result of too many people entering prison and staying there for too long (see also Harcourt, in press). Or as Clear and Austin (2009: 308, emphasis in original) stated in a more objective tone, the "iron law of prison populations" states that "the total number of prisoners behind bars is purely and simply a result of two factors: *the number of people put there and how long they stay*." As Lynch explains, these two factors are determined by locale-specific sentencing, probation, and parole policies, which in themselves are grounded in state history, culture, politics, and policy-making structures, including states' history of racial strife and racial hierarchies (Lynch, 2009; Perkinson, 2010; Schoenfeld, 2009).

Second, Lynch (2011) reminds us that *the implementation of policy also matters*, and that this implementation happens *at the local level*. Not only do sentencing structures vary across states, but how they are used in practice varies across locales (Barker, 2009; Zimring, Hawkins, and Kamin, 2001). In other words, policy alone does not increase prison populations. Rather, it is the behavior and practices of criminal justice actors that ultimately shepherds a criminal defendant through the system toward prison. Although Lynch focuses on parole practice and "local court adjudication of felony cases," this point logically extends to actors at every decision-making point in the criminal justice system—from police, prosecutors, and judges to probation and parole officers. In fact, recent analyses consider how each stage in the criminal justice process contributes differently to the incarceration rate depending on the type of crime and time period (Sabol, in press). For example, police practice that dramatically increased drug offense enforcement accounted for a significant

portion of incarceration growth in the 1980s, but more recently, changes in prosecutorial practice (leading to more felony convictions) are what sustain growth (Blumstein and Beck, 1999, 2005; Raphael and Stoll, 2009; Sabol, in press).

Third, Lynch (2011) points out that agenda-setting penal policy often takes root in particular states or regions, but it diffuses quickly across the nation because of the "high salience of crime issues." In other words, "the short-term electoral benefits" of tough-on-crime legislation simply outweighs the potential "long-term costs" (Nicholson-Crotty, 2009: 202). The point about diffusion thus underscores that *political incentives matter for policy enactment and implementation*. The political use of penal policy (and its ties to the politics of race) is now well established in the literature, especially at the federal (Beckett, 1997; Provine, 2007; Weaver, 2007) and state levels (for a review of quantitative analyses, see Jacobs and Jackson, 2010). However, as Lynch notes, few studies address how political incentives influence prosecutorial or judicial decision making at the local level (although see Campbell, in press, for the role of prosecutors in penal policy making).

Furthermore, Lynch's (2011) point about incentives calls attention to the lack of research on other types of incentives that shape criminal justice actors' behavior. We have no qualitative data, for example, that could address how mandatory minimum sentencing statutes incentivize prosecutorial behavior (Ulmer, Kurlychek, and Kramer, 2007). Lynch mentions one important incentive structure that has been recognized for a long time by criminologists (Zimring and Hawkins, 1991), but it is ignored by sociologists who have not considered how federalism facilitates incarceration growth (for an exception, see Miller, 2008)—that county-level actors make decisions about imprisonment without having to pay for the cost of prisons. As a result, imprisoning a service-needy defendant shifts the cost (and therefore political) burden of that defendant from the county to the state.

The Content and Form of Policy Reform

If the prison population is the result of state-level policy that is locally implemented and responsive to incentives, then, Lynch (2011) concludes, large-scale interventions in the social structure or political economy are not necessary to reverse the course of mass incarceration. In contrast, her framework makes it clear that mass incarceration is effectively on autopilot, and as such, a reduction in the prison population will require changes in policy and practice at both the state and local levels. Spurred by the recent fiscal crisis (or the political opportunity the fiscal crises has created), in the past 5 years, a growing chorus of criminal justice analysts have proposed policy reforms with the explicit goal of reducing state prison populations (Austin, 2010; Austin et al., 2007; Clear and Austin, 2009; Jacobson, 2005; for a deterrence-based approach, see Durlauf and Nagin, 2011; Kleiman, 2009). Although these policy prescriptions include many viable options, Lynch's framework calls attention to a few "policy principles" that bear repeating.

First, as Lynch's (2011) framework warrants, many of these policy proposals take into account how localized policies determine the source of inputs to the prison system

(Austin, 2010, Clear and Austin, 2009). For example, the Council of State Governments (CSG) Justice Center "Justice Reinvestment Project" has worked with states as diverse as Arizona, Connecticut, Louisiana, and Ohio to break down what is driving incarceration growth in their specific state with the goal of targeting policy interventions appropriately. Thus, policy solutions for Connecticut reflect findings that prison population growth was the result of "huge numbers of technical probation violations and . . . the elimination of good time" (Jacobson, 2005: 198), whereas policy solutions for Michigan reflect the state's limited use of parole and long prison terms (Council on State Governments Justice Center, 2011; Greene and Mauer, 2010).

Second, these initiatives are also cognizant of localized policy-making structures and culture. Many try to take advantage of the existing "structure of law-making in a given jurisdiction" (Lynch, 2011). For example, Lynch mentions that the Ohio Department of Rehabilitation and Correction is using a Community Corrections law already on the books to incentivize alternatives to prison for defendants convicted of nonpayment of child support. In addition, these initiatives attempt to engage with the relevant interest groups applicable to the state. The CSG's "justice reinvestment strategy" begins with consulting "a broad range of stakeholders in the jurisdiction," including law enforcement, service providers, victim advocates, etc. (Council on State Governments Justice Center, 2011). In other words, strategies for reform "must confront and surmount local obstacles to reform" (Jacobson, 2005: 175).

Finally, some policy recommendations and policy reforms include strategies that challenge or change localized incentive structures. In Arizona and California, for example, the legislature passed probation reforms that allow counties to recoup part of the cost savings achieved by lowering probation revocations and reoffending rates (Petersilia, 2010; Pew Center on the States, 2011). Conversely, in Connecticut, widespread reforms of probation policy failed to sustain a reduction in the prison population in part because the reforms relied on the "Governor's power of persuasion" (rather than on formal incentives) to convince prosecutors to shorten prison terms for probation violators (Jacobson, 2005: 202). In fact, as I will address subsequently, the lack of attention by policy analysts on how political incentives influence the policy process severely limits the prospects of successful penal reform.

The *Who*, *How*, and *What* of Successful Penal Policy Reform

Although new policy ideas, such as localization or attention to incentives, can be cause for optimism, the reality is that other well-intentioned reform efforts have historically failed to stem the growth of incarceration. My own research on Florida revealed that policy makers enacted the state's 1983 sentencing guidelines to *decrease the prison population* (Schoenfeld, 2010). In fact, the history of penal development in the 20th century demonstrates that the implementation of policy reforms has been uneven at best or, at worst, has produced negative unintended consequences (Gottschalk, 2006, 2009; Rothman, 2002; Rotman,

1995; Schoenfeld, 2010; Weisberg and Petersilia, 2010). Finally, as penal policy became political fodder in the 1980s and 1990s, subsequent policies, such as mandatory minimum sentences for low-level drug offenses, undermined well-intentioned reforms. More recently, the need to close state budget deficits threatens to undermine penal reform efforts that shift resources from prisons to programs meant to help defendants avoid prison (Grissom, 2011).

Given this history, successful policy reform that significantly reduces the prison population will require not only enacting effective policy measures but also ensuring that they are implemented in a manner consistent with intentions and defending them against new policy that would undermine decarceration goals. As discussed previously, Lynch's (2011) framework and current policy prescriptions provide the content and form of policy reforms. Yet they do not address *who will advocate for, monitor, and defend these policy recommendations*. Frequently, policy-oriented treatises assume an imaginary "they" who are committed to reversing the course of mass incarceration and who have the resources to "move political and institutional actors to make specific fixes." Nor do policy treaties typically address *how they should go about* passing, monitoring, and defending reforms. In particular, policy prescriptions fail to incorporate Lynch's point that penal policy making and its implementation respond to *political* incentives. Thus, to answer who and how, policy analysts need to engage with recent theoretical frameworks and academic research that expose the primacy of politics in crime control.

Specifically, recent research suggests that dismantling mass incarceration will require a network of *state-level political coalitions with ties to citizen-based groups* across multiple localities *to build a movement and engage in the political process.* Coalitions are necessary because, on their own, civil society organizations or other reformers are unable or unwilling to take on the currently dominant players in the "penal field" (Page, 2011). Those most impacted by crime and crime control—poor Black and Hispanic men and women living in urban areas—have experienced a further depletion of their political capital as incarceration grew (Clear, 2007; Roberts, 2003–2004). Traditional civil rights organizations have shied away from advocating on behalf of those labeled criminals (Alexander, 2009: 216). Civil liberties organizations have prioritized constitutional conditions of confinement over substantive justice (Feeley and Swearingen, 2004). Victims' groups have mainly advocated for punitive instead of restorative policies (Gottschalk, 2006). And reform-minded criminal justice administrators and bureaucrats have succumbed to organizational imperatives or the whim of political forces (e.g., Greene and Mauer's, 2010 discussion of New Jersey's former Corrections Director Devon Brown).

Despite these obstacles, in many states, like-minded crime victim, faith-based, civil liberties, advocacy, professional, and union organizations that oppose mass incarceration do exist. But they have not formed or sustained an "oppositional bloc" or coalition that can challenge the current configuration of power in penal policy making (Page, 2011: 208). In other states, "those wishing to reduce imprisonment" (Clear and Austin, 2010) will need to reach out to potential allies with the goal of expanding the number of organizations that

claim a stake in penal policy reform. For example, my research on Florida demonstrates that prisoner rights lawyers and reform-minded corrections administrators could have formed alliances with educators, social service organizations, and health-care providers that stood to lose state funding to prison building (Schoenfeld, 2010). Furthermore, coalitions need to be willing to incorporate unlikely allies. For example, in the current economic and political environment, fiscally conservative organizations might support decarceration as a way to reduce deficits (e.g., Right on Crime, a new organization whose tagline reads as follows: "The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers").

As crime-control policy mainly plays out at the state level, coalitions will primarily need to marshal state-level political power through state-level organizations. However, as a network, these coalitions should draw on and join forces with federal-level organizations (and national foundations) to advocate for federal policies and resources that facilitate coalition building and reform at the state level (e.g., the Smart on Crime Coalition and Pew Charitable Trust's support for the Justice Reinvestment Act). In addition, state-level coalitions should include local groups of citizens most impacted by crime policies, who have been traditionally excluded from policy discussions at the state level (Miller, 2008). The local ties are particularly important because local citizen groups are more likely to offer a perspective that advocates "broad-range problem solving on crime" (Miller, 2008: 186). Furthermore, local groups can play an instrumental role in monitoring the implementation of reform at the local level and, as Lynch (2011) mentions, putting an inclusive human face on the harms done by mass incarceration.

Finally, some research and experience suggest that these coalitions need to be substantively narrowly focused to access policy making at the state level (Miller, 2008). In addition, a narrow agenda can help coalitions act quickly and forcefully when political opportunities develop. For example, New York State's "Drop the Rock" coalition worked to build allies and resources and to shape the nature of the debate for more than 12 years before the 2008 Democratic takeover of the New York Legislature made repealing the Rockefeller drug laws possible (Greene and Mauer, 2010).

Most importantly, to enact, monitor, and defend penal reform, coalitions *need to be political players*. As Page (2011) demonstrated through his research on the California prison officers union, challengers in the penal field that seek to change the penal status quo and decrease the prison population will need to "acquire the *means of political production*," including "political action committees (PACs), full-time lobbyists, and media/political consultants" (2011: 208). Yet, criminal justice reform organizations, such as Vera Institute of Justice, the Sentencing Project, or the National Council on Crime and Delinquency have traditionally focused on research, technical assistance, and policy assessment rather than politics. The recent call for "evidence-based" policy and practice has only reinforced reform organizations' assumption that rational legislators and bureaucrats will (at some point) want to implement "what works." Yet years of research on the politics of crime control

belies this assumption. Put simply, knowing what is effective (for crime control or reducing incarceration) matters little if no one is willing to fight for it in the political arena.

Conclusion

In her recent examination of the legal and social systems that support mass incarceration, civil rights legal activist and scholar Michelle Alexander (2009: 223) writes that the best policy reform work is "consciously done as movement building work." Her statement implicitly acknowledges that, for successful penal policy reform, leaders and organizations must not only enact policy but also build coalitions, draw in adherents, and shape a new public consensus. Yet in many ways, this stands in marked contrast to the notion that mass incarceration can be chipped away, bit by bit, through small-scale interventions. In Alexander's opinion, piecemeal criminal justice reform will never be able to dismantle mass incarceration because it is unlikely to address the "deeply flawed public consensus" at the heart of current penal policies (2009: 221). This consensus includes various *ideas* and *assumptions* that have yet to be challenged in any systematic way, including that law enforcement should have unlimited access to prison capacity; that all victims support punitive crime measures; and that criminals are other, evil, or less than human (Page, 2011). Furthermore, as Alexander highlighted, this consensus is sustained through racial and social inequalities and a publically accepted "indifference" to the experience of poor people of color (2009: 221). In this alternative framework, remediating penal overindulgence will require a social movement to uncover and overturn the "conscious and unconscious biases that have distorted our judgments over the years about what is fair, appropriate, and constructive" crime-control policy (Alexander, 2009: 225).

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The local and the legal

American federalism and the carceral state

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In this issue, Mona Lynch (2011) has drawn our attention to two central features of American politics that are crucial for understanding and reforming American criminal justice and the mass incarceration it has spawned—(1) the decentralized, fragmented, *localized nature of policy change*, particularly on issues like criminal justice, which remain highly sensitive to local conditions and local actors; and (2) the specific *legal forms and mechanisms* that have driven policy in such punitive directions. Indeed, Lynch correctly highlights the importance of understanding local contexts and conditions for reform efforts, as well as the particularities of legal change that have resulted in the unprecedented high rates of incarceration in the United States. Without attention to the local contexts in which policy is made, the incentive structures for decision makers, and the mechanisms for legal change, reform efforts are likely to fail. Lynch argues that "mitigation of mass incarceration must emerge from an understanding of, and intervention into, the specific and intertwined catalysts that brought it on in the first place."

Lynch (2011) maps the following primary forms of legal change that have been essential engines of the emerging carceral state[1]: legislative and other statutory revisions to the penal code, case law at the federal level, postsentencing policy change, and microlevel practices with respect to courtroom activities. Lynch argues persuasively that close attention to such specifically *legal* changes necessarily moves us beyond the conventional national explanations and draw us to the local—local courts, cops, customs, and conventions.

Lynch's (2011) emphasis on the legal and the local are important for several reasons. First, as Lynch notes, scholars have tended to focus on national explanations for a phenomenon that is surprisingly nuanced across the nation. Although incarceration rates

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1. I use the term "carceral state," per Gottschalk (2006) and others, who refer to the substantive growth of state apparatus with respect to arrest, prosecution, incarceration, surveillance, and so on.

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have increased across all 50 states during the past 30 years, the rate of that increase varies enormously, as do the racial composition and disparities and the willingness of states and localities to use the death penalty and other extreme forms of state power or, conversely, to decarcerate and use alternatives to imprisonment. Thus, no effort to enact reform or alter policy that addresses mass imprisonment in the United States can be complete without some attention to how and why states vary substantially in these processes and outcomes.

Second, by emphasizing the legal, Lynch (2011) draws us away from narratives of meaning and representation and toward causal mechanisms and analyses of how power is *actually* mobilized and deployed. Although analyses of the law's meaning and the use of punishment for symbolic ends is worthwhile, those interested in policy change require that we link deep understanding of the meaning of mass incarceration to the precise nature and form of legal institutions that can leverage reform. Thus, we need to pay attention to change over spatial, temporal, and institutional dimensions and to the specific actors and interests that make change possible. This issue necessarily brings us to local variation and legal contexts.

My primary response to Lynch's (2011) article is to suggest that, although she identifies essential aspects of mass incarceration to which we must attend if reforms are to occur, we can go even farther in situating these aspects in the broader context of American politics. Here, I suggest two key addenda to her forms of legal change that press deeper into the terrain of the local and the legal, specifically, the idiosyncratic nature of American federalism and the particular politics of American law. By building on Lynch's emphasis on institutional obstacles to reform, I hope to place into even sharper relief the opportunities for policy change that can reduce the social harm of mass incarceration as well as promote safer and more robust communities.

First and foremost, we need a deeper account of the *politics of the local* as it is situated in the American federal system. Lynch (2011) notes, rightly, that "prevailing and enduring narratives and conceptions are available about the role of state governance in every given local that shapes the universe of possibilities for reform." But equally as important, both localities and states are part of the larger structure of American federalism, which not only provides narratives and conceptions about the role of the state but, more importantly, actually structures real, day-to-day political activities and the ability of local publics to hold lawmakers accountable for their decisions. Lynch's case study of Arizona, in which lawmakers apparently have become increasingly unmoored from any fiscally sustainable policy, should prompt questions about why such policies have not come under more scrutiny and pressure from broad publics concerned with real policy outcomes.

As it turns out, if all politics are local, much of the accountability is as well, at least when it comes to issues such as crime and violence and for the constituencies most affected by them. This conclusion is in part because many policy issues—including crime and punishment—are on the legislative agendas of local, regional, state, and national lawmakers simultaneously,

but lawmakers on the higher rungs of the American federal system are less likely to feel real constituent pressure to produce actual changes in outcomes.[2] As a result, groups with daily concerns about broad public interest issues, such as public safety and community development, face daunting collective action problems. As scholars of rational choice have demonstrated, it turns out to be exceedingly difficult to sustain political mobilization on public interest issues, and this difficulty is exacerbated when decision making regarding law and policy is diffused across so many different venues, as in federal systems (Chong, 1991; Lijphart, 2008; Olson, 1965).

Lynch (2011) asks whether the problem, in part, is that the American political structure provides local criminal justice actors with the power to incarcerate but no responsibility for bearing the costs of those decisions. But it is not local criminal justice actors who ratcheted up sentence lengths, eliminated parole and probation, or instituted mandatory minimums. In fact, in some venues, local criminal justice agents face pressure to resist the more punitive and symbolic policy content that is popular in national discourse (Scheingold, 1991). Another way of asking the question is whether the problem is with the fact that state and national lawmakers can press forward with ever more punitive programs, independent of whether they worked or how much they cost, because they frequently have little accountability to neighborhoods and communities that face the most serious crime. In other words, crime and violence are stratified across American publics by race and class, and those most victimized have the least capacity to hold lawmakers accountable for *actually reducing crime*.

The problem with the politics of the local, then, might be the problem of *accountability* in a political system that diffuses policy issues across a wide range of venues, allocating fiscal resources and budgetary power to the higher levels of government but providing virtually no channels of accountability for whether the manner in which that power is exercised actually ameliorates crime and violence in local communities. The result? State and national lawmakers can imprison until the cows come home so long as it does not substantially affect median voters in their states or districts. Given how racially skewed incarceration rates are and the asymmetrical access to electoral pressure across race and class, few state lawmakers have incentives to oppose more and harsher punishments until such policies threaten vested interests or budgetary collapse. Increasingly high rates of incarceration, supervision, and surveillance, however, might be more difficult to sustain if lawmakers were held accountable for whether such policies actually reduced crime, ameliorated violence, and promoted community development. Such accountability requires overcoming the substantial collective

2. I have referred to this as the federalization of policy issues (Miller, 2007). The term "federalization" is used primarily by legal scholars who have observed the growth of criminal statutes, penal codes, criminal court activity, and so on at the federal level. However, all of this activity has done little to diminish the corresponding activity at the state and local level, and the multilayered nature of law and policy making has implications for which interests are most likely to be influential (see Miller, 2008, for a more detailed discussion).

action problems that plague broad public interest groups, which is made more difficult by the many layers of government that are stacked between day-to-day neighborhood problems and the lawmakers who are positioned to intervene.

My second observation is related to this point. In addition to greater attention to the *politics of the local*, serious reform will require attention to the *politics of the law*. Lynch (2011) rightly calls attention to the specific mechanisms of legal change that have been the driving force behind increased incarceration. But legal institutions, norms, and rules are not value free, nor do they write themselves or pass themselves through legislatures. In fact, they embody political interests and are highly sensitive to the very power dynamics that reformers want to upend. Lynch notes, for example, that the historical rootedness of rehabilitation "seems to be a strong indicator of its current commitment to mass incarceration," and her analysis clearly indicates that a great deal of variation in this issue occurs across jurisdictions. As she notes in Arizona, court orders to reduce prison overcrowding led to building new prisons rather than to simpler, more cost-effective strategies of nonprison alternatives for low-risk offenders and early release of nonviolent offenders.

But why do some jurisdictions have a historical foundation of rehabilitation or pursue alternatives to prison, whereas others do not? Policy reform in criminal justice that better reflects budget realities, human rights, recidivism, and reentry challenges cannot happen without an understanding of what is at stake for different sets of interests and how well or poorly those interests are reflected and responded to in the public sphere. Lynch's (2011) analysis of sentencing reform in California in the 1970s and active mobilization of the parole officers' lobby raises questions about the interests at stake in criminal justice reform, how differently situated groups might be arrayed in relation to power brokers and decision makers, and whether and how those dynamics vary across states and localities.

One answer lies with the intersection of interest group politics and American federalism. Recent work on interest groups has revealed the heavily skewed nature of representation and voice in American politics that can easily overrepresent the interests of narrow but highly preference-intense groups (Fiorina, 1999; Miller, 2008; Strolovich, 2007; see also Schattschneider, 1960). My own work (Miller, 2007, 2008) has illustrated how this dynamic is influenced by the fragmented nature of American federalism. In my analysis of political mobilization around crime issues across local, state, and national legislative venues, I found that highly resourced groups, such as criminal justice agencies and single-issue interests like the National Rifle Association or Mothers Against Drunk Driving, frequently have specialized units that focus specifically, if not entirely, on lobbying legislatures or at least on focusing legislative attention on their interests. Community organizations, citizen groups, and other interests that are organized around improving communities, often have difficulty simply finding a time and place to meet, much less the resources to attend legislative hearings, take lawmakers out to lunch, or participate in framing state and national priorities for the next legislative session.

To make matters worse, the policy environment for legal change at the state and national levels is often highly specialized, formal, and narrowly focused in ways that suit single-issue group interests more readily than broad-based, public-interest groups. Ironically, even when reform-oriented groups, such as the American Civil Liberties Union (ACLU), are able to be highly active across the fragmented landscape of U.S. federalism, they often winnow complex, controversial issues, such as the role of police in urban neighborhoods, into dichotomous legal choices (e.g., more or less police accountability) that cannot do justice to the pressing needs for community development, educational transformation, economic investment, and so on that high-crime communities mobilize around at the local level (see Miller, 2008: ch. 4).

This is not to demonize the real needs and interests of criminal justice agencies, single-issue citizen organizations, or legal reform groups. But the asymmetry of access and influence is striking. The causes and solutions to crime and violence surely go well beyond what police, prosecutors, corrections officials, or judges can do, and singularly focused groups that target policies such as guns and drugs often have specific policy goals that mesh well with those of agency budgets. For example, both the National Rifle Association and district attorneys have an interest in increasing penalties for those who commit a felony with a firearm. Similarly, the Partnership for a Drug-Free America and Mothers Against Drunk Driving can join police organizations and prosecutors in supporting longer sentences for drug offenders.

But Lynch's (2011) focus on the legal reveals (and my work on local crime and punishment politics illustrates) that the range of possible solutions and policy proposals to address criminal offending and violence is much broader and deeper than these narrow interests suggest and that genuine reform cannot come about without these other interests having a voice in the policy process. As suggested previously, however, the fragmented nature of American federalism makes coordination, mobilization, and collective action in the interest of these broader reforms difficult.

State policy processes, however, vary substantially, and another important aspect of Lynch's (2011) article is to draw attention to the fact that reform does happen and is happening, and by paying attention to the political and legal institutions in those states, as well as to the interest mobilization and chains of accountability, we can better understand the causal mechanisms driving reform. As Vanessa Barker (2009) noted, different state political cultures, legal arrangements, and mobilized interest groups have facilitated or hindered reform efforts. Knowing which state you are in and what specific challenges you face is critical in generating policy reform. What is possible in New Jersey, Michigan, and New York, for example, might face more obstacles elsewhere (see Greene and Mauer, 2010, for a discussion of reductions in incarceration rates in four states).

Successful policy reform efforts, then, must not only observe and be attentive to the translocal variation that Lynch (2011) points out but must also directly confront collective action problems of public interest groups and seek to overcome them or at least to mitigate their effects. Such efforts might draw on existing models, such as the American

Friends Service Committee, Families Against Mandatory Minimums, Living Cities, or other national organizations that have local chapters and mobilization capacities, address a wide range of quality-of-life issues and work to hold lawmakers accountable for the policies they enact.

Relatedly, Lynch (2011) makes a brilliant observation about the forces of policy diffusion that makes states more likely to adopt policies similar to those developed in states in close geographic proximity, particularly where political partisan interests align. The challenge, however, goes beyond finding like-minded reformers that the electorate in a punitive-minded state will respect. It also requires *resources* to engage reform efforts in the public interest across state boundaries. Such resources are difficult to find even simply across localities within the same state, to say nothing of cross-state collaboration. Few criminal justice reform organizations coordinate the mobilization of citizens across states and localities to pressure lawmakers to enact reforms, but without such organizations, local efforts will have to be repeated across localities and states—a difficult task.

Paradoxically, many people within the criminal justice system are frustrated with current practices and incentives and are eager for change. Reform-minded policy makers and citizens might exploit that interest, along with the current need for fiscal austerity, by promoting state-level chapters of groups like The Sentencing Project or Families Against Mandatory Minimums that could deliberately coordinate strategies across like-minded states. Policy learning does not need to go in the punitive direction, after all. Success stories, such as the reductions in incarceration in New Jersey and New York in recent years, might be models tailored to local conditions for change elsewhere. Indeed, rather than such organizations working independently and focusing their energy on different battles, they might identify a few key policy goals that they will work for across states. I have three modest suggestions, which include the following: (1) no new prisons, (2) eliminate most low-level drug prosecutions in favor of drug court alternatives, and (3) significantly reduce the disparity between Black and White high-school graduation rates.

Of course, the likelihood of success will be greatly enhanced if reformers also could tap into the wellspring of political mobilization and political competition around strategies for reducing crime that inhere in many urban communities. Translocal organizing and state-level chapters of reform organizations might not resolve all the problems, but this two-pronged strategy could substantially disrupt the flow of punitive policies that go largely unchallenged at the state and congressional levels.

On a final note, I would caution us against regarding the punitive developments of the past 30 years as the result of irrational policies. Lynch (2011) refers to the need to understand the "specific irrationalities" in state responses to crime and suggests that mass incarceration is not so much about "sound crime policy than . . . other social, cultural, and political forces." Like Zimring and Johnson (2006), I am inclined to see fear of crime and hostility toward offenders as a normal part of the human condition, not as late 20th-century aberration, particularly as the policy developments of the past 30 years came directly on

the heels of dramatic increases in violent crime (LaFree, 2002). If we treat contemporary policy as a function of irrationality, then we risk misunderstanding its causes and will have greater difficulty in identifying its solutions. Indeed, as my observations about the local and the legal suggest, it is not at all irrational for criminal justice agencies to seek to grow their budgets, for family members of child victims to demand greater protection from the law, or for gun advocates to exploit the nature of American federalism to press their policy goals. The problem is not irrationality but, I would argue, the lopsided nature of the pressure. Lawmakers routinely hear from the punitive side of the public opinion scale, but reform-minded interests are muted, in part by the nature of the local—the challenges of accountability and the resources that can be brought to bear on the causes of crime by different levels of government—and in part because of the nature of the law—whose interests are represented and how. Reform requires ideas, but equally as important, it requires an understanding of the interests, representation, resources, and access to power that can overcome the problems of the local and the legal.

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EXECUTIVE SUMMARY

PRISON OFFICER UNIONS

Prison Officer Unions and the Perpetuation of the Penal Status Quo

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An unintended consequence of mass imprisonment is the growth of prison officer unions. This article shows how successful corrections unions in states like California and New York obstruct efforts to implement sentencing reforms, shutter prisons, and slash corrections budgets. They impede downsizing-oriented reforms by generating or exacerbating fear among voters and politicians. Policy makers in key states must overcome resistance from prison officer unions to downscale prisons. Through a combination of accommodation and confrontation, policy makers can relax opposition from the officer organizations and undertake prison downsizing efforts without busting the unions.

Keywords
prisons, *unions*, *crime victims*, *California*, *New York*

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On March 17, 2010, the nonpartisan, nonprofit Pew Center on the States released a report that began with a triumphant tone—"For the first time in nearly 40 years, the number of state prisoners in the United States has declined" (Pew Center for the States, 2010: 1). It continued optimistically, "the decline in 2009 could be a harbinger of a prolonged pattern" (6). The report reflected (and undoubtedly inspired) cautious optimism that policy makers would implement sentencing and prison reforms capable of substantially reducing penal populations and correctional spending over the long run.

Propitious economic decline and backbreaking budget deficits are the main factors driving lawmakers to reconsider the penal policies, practices, and priorities that undergird "mass imprisonment."[1] Prison systems in many states are dangerously overcrowded, money to build additional facilities is scarce, and voters are reluctant to pass bond measures for prison expansion. Few resources are available for rehabilitation programs, medical and mental health care, and other prison-based services, eroding the already poor quality of life on the inside as well as leaving states vulnerable to court intervention (not to mention prisoner unrest). Moreover, sky-high criminal justice spending decreases resources for other vital, but underfunded, social services such as education (Austin et al., 2007; Jacobson, 2005; Greene and Mauer, 2010; Pew Center for the States, 2009, 2010; Steinhauer, 2009). These signs are not positive, but some believe that, in light of the dire economic environment and

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1. As defined by Garland (2001: 1), mass imprisonment has two characteristics. First, it is a "rate of imprisonment and a size of prison population that is markedly above the historical and comparative norm for societies of this type." And, second, it is a "social concentration of imprisonment's effects." The growth and effects of the U.S. prison boom are concentrated within economically disadvantaged groups, particularly African Americans.

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long-term drops in crime (particularly murder), policy makers will work to shrink America's enormous penal system (Simon, 2010: 373–374).

Recent analyses suggest that the dip in imprisonment might be a short-lived event rather than the beginning of a long-term process. Marie Gottschalk (2010: 345–348), for example, argued that persistent economic decline might "foster public punitiveness" because politicians tend to scapegoat "others" (e.g., immigrants and the "marauding underclass") in periods of financial free-fall and criminalize social protest of class inequality. Cracking down on crime is one way for the government to demonstrate that it is doing something to increase security and stability for working- and middle-class individuals teetering on the edge of financial disaster. That "something" might include hardening penal sanctions (including those targeting immigrants) and/or resisting sentencing reform, prison closures, and cuts to correctional budgets.

A related reason for tempering optimism about the possibilities for upending mass imprisonment is that states have slashed resources for prison- and community-based service programs (Weisberg and Petersilia, 2010: 131). Therefore, considerable risk persists that parolees or individuals diverted from prison to probation or other community programs will return to crime. Without allocating sufficient resources to help ex-offenders obtain work, housing, and other necessities, the system raises the risk of parolees and probationers reoffending or violating the terms of their supervision. In addition, if recidivism rates remain high (or worse, substantially increase), then opponents of alternative penal strategies will argue that trying to undo mass imprisonment is a dangerous fool's errand.

This article encourages a measured view on the prospects for extensive, long-term sentencing and prison reform capable of rolling back mass imprisonment. It argues that, in key states, prison officer unions and their allies have fiercely and effectively resisted—and will likely continue to resist—major efforts to *downsize prisons*. "Downsizing" is more than "decarceration," or the reduction of a penal population.[2] It also includes shedding prisons and related carceral infrastructure, reducing workforces, and slashing spending. I show that the California Correctional Peace Officers Association (CCPOA) grew alongside the prison population, becoming an effective and powerful union. As it gained members, wealth, and political capital, the CCPOA became an influential actor within a coalition of actors that props up mass imprisonment, even as state leaders attempt to decrease the state's penal system.

I focus on the CCPOA because it is the most successful and politically influential prison officer union in the United States, and likely the world. In this regard, it is an extreme case that shows the *potential* effects prison officer unions can have on penal policy, especially on efforts to reform or eliminate the laws and practices that fuel the prison boom (Flyvbjerg, 2006: 229). California is a particularly important case because of its incredibly

2. I borrow the concept "downsizing prisons" from Jacobson (2005). I use the terms "downsizing prisons" and "downscaling prisons" synonymously.

large, costly prison system. The state has approximately 165,000 people behind prison bars and an annual corrections budget of roughly $10 billion. Unlike other states, which *want* to downsize their prison systems (largely to save money), California *has* to achieve this goal. Federal judges have ordered the state to decrease its prison capacity from 190% to 137.5% within 2 years. Hence, understanding roadblocks to downsizing prisons is essential for scholars and policy makers alike.

To enhance our understanding of how prison officer unions obstruct downsizing-oriented reforms, I examine recent events in New York—another state trying to shrink its penal system in the face of incredible budget deficits. As with California, New York has a large, wealthy prison officer union. However, the CCPOA is far more powerful than its East Coast counterpart. As shown in the subsequent sections, the New York union has not obstructed efforts to reduce the prison population; however, it has effectively frustrated attempts to close state prisons and decrease correctional spending. Examining the New York case, then, helps us to understand how a prison officer union that does not enjoy the CCPOA's political clout affects efforts to downscale prisons.

Although the California and New York unions differ in power and effectiveness, they use similar methods to reach their goals; in conjunction with other actors, they engage in campaigns that drum up fear of changing the penal status quo. They insist that reducing correctional populations, closing prisons, and shedding staff will compromise public safety, destroy local economies (particularly in prison towns), and enhance general insecurity. Moreover, they strike fear in politicians who might support downsizing prisons but do not want to be opposed by law enforcement, crime victim, and related organizations in fuure elections.[3]

This article unfolds in five sections. The first situates the analysis within research that seeks to understand the varied consequences of the prison boom and obstacles to shrinking the penal system. The next section describes the rise of the CCPOA and the union's pivotal role in a power bloc within the penal field, and the third section presents examples that show how the CCPOA and its allies frustrate efforts to change California's sentencing laws—the bedrock of mass imprisonment in that state (Krisberg, 2008; Little Hoover Commission, 2007; Zimring, Hawkins, and Kamin, 2001). The subsequent section examines the counterfactual case of the New York prison officers union, demonstrating how a union with far less political acumen and power still can obstruct efforts to downscale

3. The data for the California case are drawn from my larger study on the CCPOA and transformation of criminal punishment in California from the end of World War II to 2009. The study included nearly 100 interviews, direct observation, and archival analysis (for a detailed description of the study, see Page, 2011: Methodological Appendix). To bring the case up-to-date, I gathered additional data from media and government reports, CCPOA documents, informal interviews with CCPOA leaders, and observation of CCPOA events such as the union's 2010 convention. The data for the New York case are from secondary sources, media and government reports, and an in-depth interview I conducted in 2002 with a former president and vice president of the New York State Correctional Officers and Police Benevolent Society.

prisons. Drawing lessons from the case studies, the final section lays out four propositions that might help policy makers who face resistance from prison officer unions as they struggle to reform sentencing laws, release prisoners, close prisons, and cut correctional spending.

Extending the Consequences of Mass Imprisonment

A large body of research investigates the "unintended" (also called "collateral") consequences of mass imprisonment. Studies demonstrate how the prison boom negatively affects prisoners and ex-convicts, families, communities, state priorities, civic participation, and patterns of racial and class inequality (Braman, 2007; Clear, 2007; Comfort, 2008; Manza and Uggen, 2006; Western, 2006; Wildeman, 2009). This scholarship implicitly (and, at times, explicitly) argues that mass imprisonment creates or exacerbates conditions that perpetuate it. For example, Todd Clear (2007: 5) argued that "[c]oncentrated incarceration in. . . impoverished communities has broken families, weakened the social-control capacity of parents, eroded economic strength, soured attitudes toward society, and distorted politics; even, after reaching a certain level, it has increased rather than decreased crime." Persistence of high crime in these impoverished areas, then, justifies policies and practices at the heart of mass imprisonment. A cyclical process exists in which the consequences of mass imprisonment sustain the penal status quo.

Another influential, unintended consequence of America's prison boom is the development of powerful organizations with interests in maintaining existing penal arrangements. This article demonstrates, for example, that prison officer unions did not factor centrally in the prison explosion in the large states of California and New York (both in terms of general and prison populations). These organizations were small and politically weak when the carceral population shot upward (the CCPOA was not even an official union when California began its prison binge). Instead, the unions grew alongside the prison population; increased membership rolls translated into greater financial resources, which the unions could use to gain political capital and influence penal policy. Put simply, the prison boom provided prison officer unions with the essential resources to become major players in the political and penal fields. Mass imprisonment was a necessary but not sufficient condition for the development of powerful interest groups (in this case, prison officer unions) that promote the "tough on crime" penal status quo.

Like earlier research on the consequences of mass imprisonment, this analysis contends that the factors that sustain the prison boom are not necessarily those that caused it.[4] Hence, downsizing prisons requires that we understand both the factors that sparked mass imprisonment and those that continue to breathe life into the phenomenon. Several recent studies recognize that prison officer unions in key states are obstacles to downsizing the penal

4. In making this argument, I am drawing on the following analytical insight articulated by Gottschalk (2006: 14): "Identifying the political factors that help us understand the construction of the carceral state beginning in the 1970s is not the same as identifying all the factors that sustain it today."

system; Jacobson (2005: 69) wrote that "correction unions" pose a "formidable obstacle to downsizing-oriented reforms," and Gottschalk (2006: 242) contended that the groups have become a "significant factor" in sustaining the carceral state.[5] This article extends this line of thought by examining *how* these organizations obstruct efforts to downsize prisons. It goes beyond identifying unions as hurdles to delineate a set of propositions that might aid public officials and other actors who must overcome pushback from prison officers unions as they try to reform sentencing policies, implement early release programs, or shutter penal facilities. Through a combination of accommodation and confrontation, it is possible to soften resistance from groups like the CCPOA. However, doing so will take major political will. Policy makers will have to become as committed to downsizing prisons as they once were to building and filling them.

Building a Power Bloc

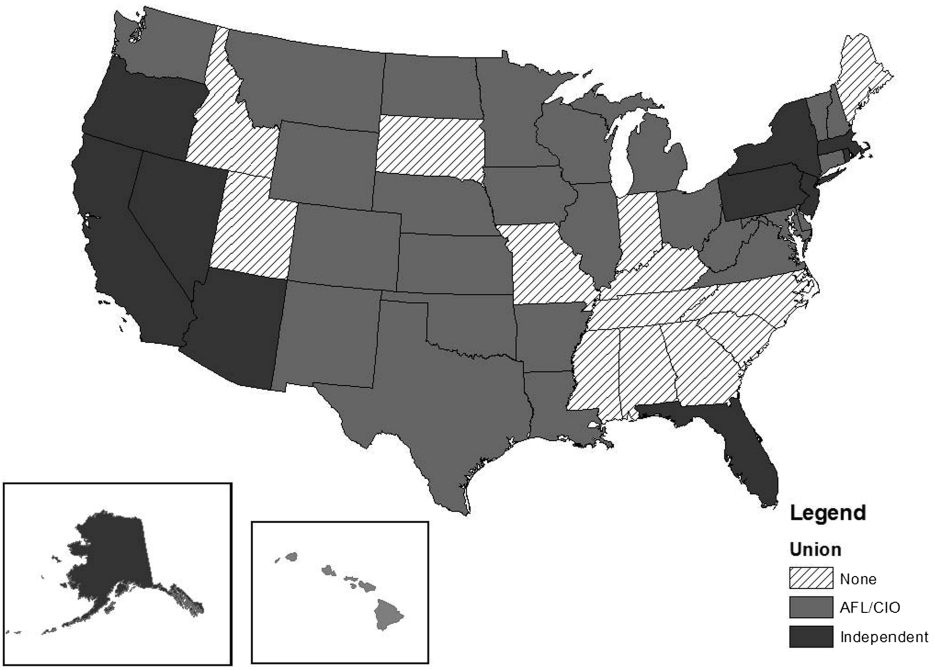
Prison officer unions in the United States developed as part of the larger public sector labor movement that gained steam in the 1960s (Aronowitz, 1998). As shown in Figure 1, prison officers have formed unions in 38 states. With the exceptions of Missouri and Maine, all states that do not have prison officer unions are "right-to-work" states; workers in these states do not have to join a union or pay dues or an agency fee as a condition of their employment. In general, unions in states with right-to-work laws tend to be weaker than unions in states without the laws (Fantasia and Voss, 2004: 51). Also depicted in Figure 1, most prison officer unions are affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), but a growing number are independent (i.e., not affiliated with the AFL-CIO or Change to Win Coalition). I discuss the significance of independence versus affiliation in a subsequent section.

Prison officers in California did not form their union until 1982. They had a professional organization dating back to 1957; however, the government did not provide collective bargaining rights to state workers until 1981. One year later, the CCPOA won a fierce battle against The Teamsters and the California State Employees Association to represent prison officers and other correctional employees such as medical technical assistants (hybrid nurses and officers) and parole agents (Page, 2011: Chapter 2). From the start, the CCPOA was atypical. It was a fiercely independent association that defined itself in opposition to the "labor movement"; its leaders and members were prison officers, not union bureaucrats. Unlike other state worker unions, which allied almost solely with Democrats, the CCPOA was nonpartisan, forming strong relationships with both law-and-order Republicans and labor-friendly Democrats (Page, 2011: Chapter 3).

5. Several studies critique the CCPOA's political action, positions on sentencing legislation, and influence on prison operations and management (Carassco, 2006; Center for Juvenile and Criminal Justice, 2002; Petersilia, 2006). However, they do not specifically analyze efforts by the union and its partners (particularly crime victims' groups the union effectively created) to obstruct policy changes designed to loosen the state's commitment to mass imprisonment.

FIGURE 1

Prison Officer Unions in the United States



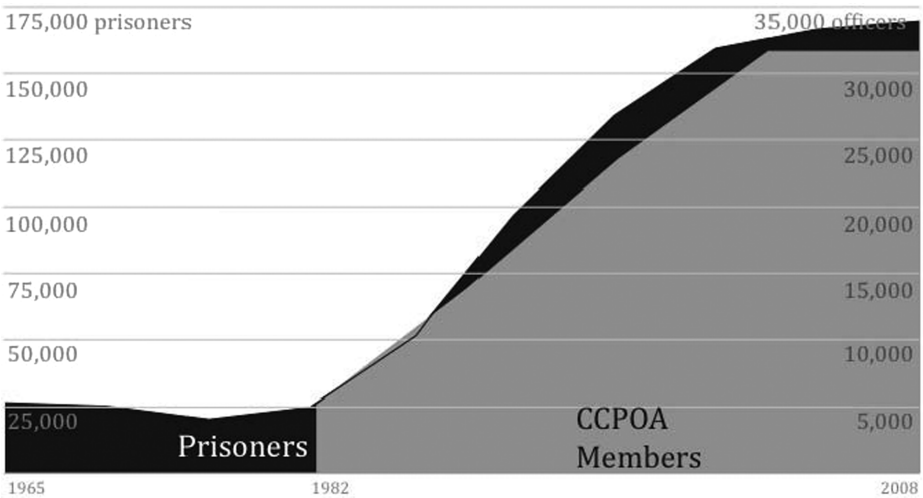
Note. Essam Sater and I collected the data on prison officer unions in the United States, and Sarah Shannon created the map.

Also from the start, the CCPOA opposed rehabilitation and supported "punitive segregation" (Page, 2011: 125)—an orientation that promotes long sentences in austere prisons as well as extensive and intensive postrelease supervision as the proper responses to crime (Garland, 2000). However, the CCPOA did not spark California's prison boom. When Governor Jerry Brown signed legislation in 1976 to end indeterminate sentencing, the CCPOA was not even a union, and when the legislature passed laws that greatly lengthened prison terms and mandated imprisonment for an ever-increasing list of crimes, the union was in its infancy. When mass imprisonment began in California, the CCPOA had only 5,000 members and a budget of approximately $462,000. As Figure 2 illustrates, the CCPOA grew along with the prison population. From 1982 to 2002, the organization's membership increased by approximately 600% (from 5,000 to 31,000). By 2002, the union had a budget of approximately $19 million (Page, 2011: 48).

The CCPOA used its abundant resources to develop an impressive political apparatus. Its leaders understood early on that public-sector unions are fundamentally political entities. The governor (not a CEO or board of directors) signs the checks, and legislators approve

FIGURE 2

California Adult Prison Population, 1965–2008, and CCPOA Membership, 1982–2008



Source. California Department of Corrections (1980); California Department of Corrections and Rehabilitation (2005, n.d.); Center for Juvenile and Criminal Justice (2002); 2008 membership total provided by J. Bauman, personal communication, August 2009

the contracts. To become a serious political player, the union hired lobbyists and developed political action committees, which it used to reward its friends and punish its enemies (Page, 2011: 51). By the 1990s, the CCPOA was one of the state's largest contributors to political candidates. In 1998, the union set a state record by contributing $1.9 million to Democratic and Republican candidates for the state senate and assembly (Warren, 2000). The next year, the CCPOA broke its own record, contributing $2.3 million (Yamamura, 2002).

Along with building its political infrastructure, the CCPOA used its resources to enhance the image of prison officers and the union. It spent millions making the case that prison officers are professional public servants who work "the toughest beat in the state." This contention rested on the presumption that California prisons were incredibly dangerous and that inmates were inherently manipulative, violent, and for the most part, irredeemable (Page, 2011: 72). Only well-trained, professional officers were capable of taming this beat and, ultimately, of protecting public safety. Along with media campaigns, the union advanced legislation to professionalize the occupation. CCPOA-sponsored laws improved officer training and enhanced hiring standards (Page, 2011; Petersilia, 2006).

As it grew in numbers, financial resources, and political clout, the CCPOA worked to strengthen its organization in several ways. First, it greatly improved its members' take-home; the average pay of California prison officers is slightly more than $73,000—58% more than the national average (Bureau of Labor Statistics, 2008). Moreover, these workers have a fantastic pension plan that allows them to retire at age 50 with up to 90% of their salary (Petersilia, 2006: 23). Second, the union used the collective bargaining process to enhance its members' on-the-job autonomy and authority in matters ranging from shift and post assignments to personnel investigations and discipline. As these changes took effect, prison administrators, newspaper editorialists, and even some politicians insisted that the union and its members effectively ran the prisons, and a federal judge argued that, by decreasing managers' capacity to investigate and discipline officers, the CCPOA promoted a "code of silence" that made it nearly impossible to sanction "rogue officers." The union responded that it simply promoted members' due process rights and protected them against vindictive managers (Page, 2011: Chapters 7–8).

Third, the union has worked to gain and maintain support from female officers and officers of color. In its formative years, the CCPOA strongly opposed affirmative action policies designed to hire and promote women and people of color as well as groups that formed within the Department of Corrections to advance the interests of female and minority officers. The union was considered a "good old boy" organization, and its leaders were publicly accused of sexual harassment (MeCoy, 1985: A1; Page, 2011: Chapter 1). In the 1990s, however, CCPOA officials sought to change the association's image and appeal to its increasingly diverse membership (more gender and ethnic–racial diversity is present among prison officers than any other law enforcement workforce in California). They established the Minorities in Law Enforcement political action committee (MILE PAC) and financially supported other ethnic- and gender-based criminal justice organizations, including the Association of Black Correctional Workers, the Chicano Correctional Workers Association, and the Women Peace Officers Association of California. The CCPOA also has come to promote Hispanic and African American officers to its own leadership positions. For example, the CCPOA's current president is Hispanic and its legislative director is African American. Although no female members are present on its executive council, women serve as chapter presidents and committee leaders. By promoting ethnic–racial and gender diversity, the union now seeks to maintain organizational unity and strength, allowing it to focus on winning legislative and contractual battles, rather than on continually putting out fires within its ranks (Page, 2011: 49).

The CCPOA also tapped into its financial windfall to establish and maintain ties with other organizations that could help it achieve its goals. Most notably, the union effectively created the following crime victim rights' groups: Crime Victims United of California (CVUC) and the Doris Tate Crime Victims Bureau (CVB). The CCPOA committed extensive resources to their development, providing the groups with office space, lobbying staff, attorneys, and seed money (78% of CVB's and 84% of CVUC's initial funding)

(Shapiro, 1997: 13–14). Harriet Salarno, president of CVUC, is forthright about the importance of CCPOA's financial assistance, "I could not do this without CCPOA, because we didn't have the money to it" (quoted in Page, 2011: 86). Along with material resources, the CCPOA taught the victims' groups how to play the political game. Salarno explains that former CCPOA President Don Novey "steered us in the right direction, opened the door, and taught us what to do. He educated us" (Center for Juvenile and Criminal Justice, 2002: III–13).

The union developed these organizations principally for strategic purposes, which is not to say that CCPOA's leaders do not genuinely care for and want to assist victims and their families—they do. But, the victims' groups also help the CCPOA achieve its goals from *outside of its ranks* in three main ways. First, they validate the CCPOA's claims that prison officers are uniquely skilled professionals who work the "toughest beat in the state." Second, they legitimate the CCPOA's claims that the union serves universal purposes (rather than its individual, pecuniary interests) by supporting crime victims and bolstering public safety. Third, the victims' groups provide political cover for their patron by taking public positions on controversial crime and punishment policies the CCPOA sidesteps, fearing public officials and the media will label the union "self-interested" (Page, 2011: Chapter 4).

Together, the union and victims' groups are a formidable political force. The CCPOA has financial resources, political acumen, and connections, and the victims have the moral authority. To foster their strong alliance, the CCPOA and victims' organizations routinely team up with the California District Attorneys Association and other law enforcement groups such as the California Police Chiefs Association, the California State Sheriffs Association, and the California Coalition of Law Enforcement Associations. Together, these organizations constitute a power bloc in the penal field (Page, 2011: Chapter 5).

As used here, a bloc is an association of actors with similar interests who work toward shared goals. Blocs are not formal organizations with membership rolls (although they might become formal organizations). Actors in a bloc do not always work together to accomplish particular tasks (such as passing a piece of legislation); however, their collective efforts advance the actors' shared interests and worldviews. As examples in the following section demonstrate, the CCPOA is the anchor of the bloc rather than simply one participant among many. In campaigns against policies that would seriously decrease the prison population, other actors in the bloc expect the CCPOA to play the roles of financier and strategist. The union generally comes through.

Circumscribing Change

Since the early 1990s, interest groups and wealthy individuals have used California's ballot initiative process to go around the legislature to implement "tough on crime" penal measures, including the state's notoriously expansive Three Strikes and You're Out law (Barker, 2009; Zimring et al., 2001). In recent years, others have tried to use that same tool to reform

sentencing laws and to reduce prison and parole populations. This section shows that these efforts have faced rigid, effective resistance from the CCPOA and its allies—the power bloc in California's penal field.

In 2004, opponents of the criminal punishment status quo in the Golden State sought major reforms to Three Strikes. Passed in 1994, the law mandates that individuals with a record of one "serious" or "violent" offense who commit any additional felony receive a sentence twice as long as the current offense term. Additionally, these "second strikers" must serve 80% of their prison sentence before they are eligible for release. The third-strike enhancement is reserved for offenders with two prior convictions of "serious" or "violent" crimes and a third conviction for *any* felony. Third strikers receive prison sentences of 25 years to life and are not eligible for parole until they serve 80% of the 25-year term (Zimring et al., 2001: 8).

Three Strikes casts a wide net. As of April 2009, 43,000 of the state's 171,500 prisoners (roughly 25%) were sentenced under the law (California State Auditor, 2009). Of this total, 8,500 are serving 25 years to life (Bazelon, 2010). On average, "striker" inmates serve sentences that are 9 years longer than nonstrikers. The state will pay roughly $19.2 billion in additional costs because of the current striker population's extended sentences. Remarkably, the convictions that triggered the Three Strikes law for more than half of the total striker population were nonserious and nonviolent (California State Auditor, 2009: 23, 27), and approximately 3,700 prisoners are serving 25 years to life for nonserious and nonviolent offenses (Bazelon, 2010).

The fact that people received 25 years to life for nonserious and nonviolent crimes became increasingly known in the early 2000s. The media profiled individuals who received Three Strikes convictions for crimes like stealing pizza from a group of children (Leonard, 2010). Some former supporters of Three Strikes felt duped, arguing that they would not have backed the law had they known that people like the "pizza thief" would receive life sentences. In 2003, two of these former supporters launched a campaign for a ballot initiative that would drastically narrow the scope and reduce the effects of Three Strikes.[6] Specifically, their proposal would require that all strikes be serious or violent and that the state must resentence offenders serving indeterminate life sentences under Three Strikes if their third strike was nonviolent or nonserious. The initiative also would mandate that the state try

6. Critics of Three Strikes unsuccessfully tried to reform the law through the legislative process on seven separate occasions between 1996 and 2003 (Page, 2011: 122). As former Assemblywoman Jackie Goldberg, the sponsor of several of those reform bills, attested, the CCPOA and related groups fiercely opposed the legislative attempts. "So what has happened is you have an enormous amount of [political] intimidation. People who are in assembly races know that they're term-limited [to two terms], know that they may want to run in a senate race a few years from now, and know that certain groups like police and prison guard unions, district attorneys, and crime victims' organizations will pay for [or against] campaigns" (quoted in Domanick, 2004: 249). Reformers have turned to the ballot initiative in large part because of the limited success of implementing major penal reforms through the normal legislative process.

eligible offenses in separate trials for each offense to be counted as a strike (the original Three Strikes law allowed for a defendant to receive multiple strikes in a single trial).

The reform initiative received the required number of signatures to qualify for the 2004 statewide election. "The Three Strikes and Child Protection Act of 2004" (Proposition 66) provided voters with an opportunity to change Three Strikes and, in doing so, to constrict a source of prison growth and signal a move away from the state's rigid commitment to incapacitation and retribution.[7] For the initiative to become law, however, its proponents would have to win what would prove to be a fierce, expensive battle against a powerful coalition of actors.

The CCPOA organized opposition to the initiative. It hired Nina Salarno-Ashford, daughter of the president of Crime Victims United, Harriet Salarno, to coordinate an alliance of law enforcement and victims' groups ("Californians United for Public Safety" [CUPS]) opposed to Proposition 66 (Page, 2011: 124). CUPS established a political action committee called "Californians United for Public Safety, Independent Expenditure Committee" (CUPS-IEC). CUPS would serve as the organizational base for the anti-66 campaign.

As of mid-October 2004, the CCPOA had spent more than $250,000 on the "No on 66" campaign—$199,000 of which went into CUPS-IEC (California Secretary of State, 2006). With funds from the CCPOA and several other contributors, CUPS conducted a relatively minor public relations campaign against Proposition 66. For example, on September 21, 2004, the coalition launched its "Felon A Day" campaign against Proposition 66 (see Figure 3). The press release for the campaign read as follows:

> "Every day between now and the election, we'll be releasing at least one mug shot and rap sheet of a felon who will be released early by Proposition 66," said campaign spokesperson Cam Sanchez, president of the California Police Chiefs Association. "These are very dangerous people—serial child molesters, rapists, murders [sic] and career criminals with long histories of serious crime," said Sanchez. "They and thousands more like them will be back on the street if Proposition 66 becomes law." (Californians United for Public Safety, 2004a, 1)

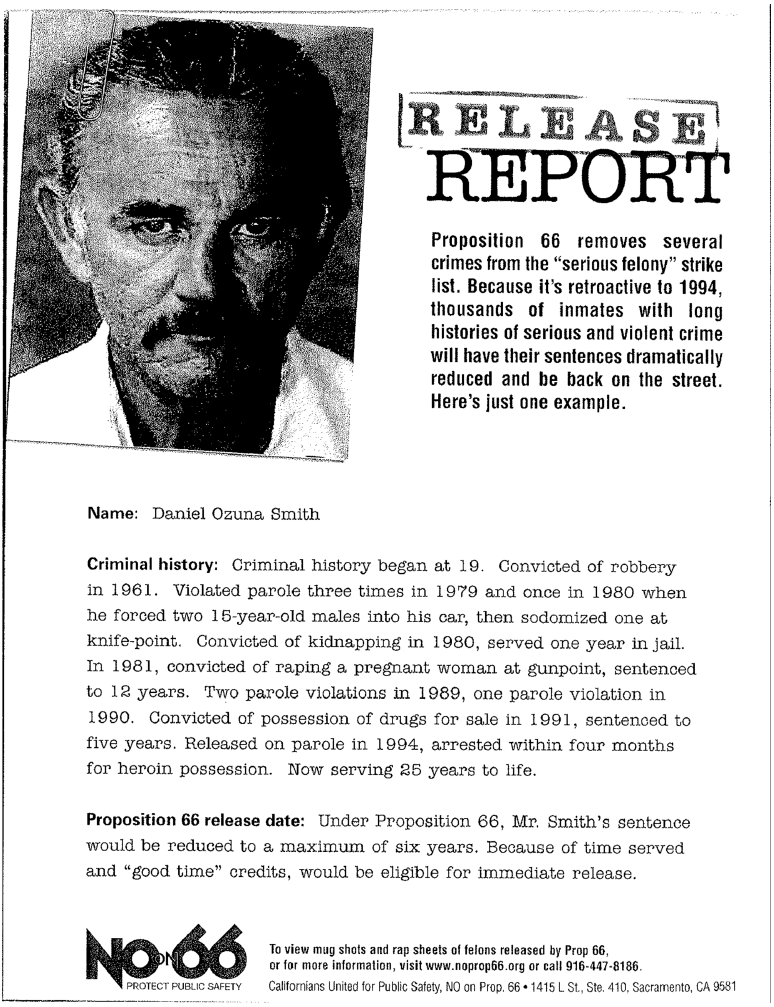
CUPS also sent out press releases announcing that major law enforcement officials and organizations opposed Proposition 66.

Even though CUPS's efforts received media attention, they did not change public opinion, which favored reforming Three Strikes. As shown in Table 1, 65% of likely voters supported Proposition 66 on October 13, just over 2 weeks before the election. As it began

7. "Child Protection" was included in the initiative's title because the proposal, along with reforming Three Strikes, would increase prison sentences for offenders convicted of sexual crimes against children under the age of 14 years. The sexual crimes provision was a transparent effort to prevent accusations that the proposition was "soft on crime."

FIGURE 3

Felon A Day



to appear that the critics of Three Strikes would celebrate on election night, CUPS received a major infusion of cash for a full-scale media campaign. During the last week of October 2004, Henry T. Nicholas III, founder of Broadcom Corp. and Orange County billionaire, contributed $1.9 million to the "No on 66" campaign. Nicholas would chip in an additional $1.6 million to the anti-Proposition 66 efforts for a total of $3.5 million (Garvey, 2004).

Nicholas's family background sheds light on his personal opposition to Proposition 66. In 1983, his sister was murdered by her ex-boyfriend. In response to the murder, Marcella Nicholas Leach (Henry's mother) cofounded Justice for Homicide Victims and later

TABLE 1

Trend of Voter Preference Regarding Proposition 66 (Among Likely Voters)

Dates (2004)	Yes	No	Undecided
May	76%	14	10
June	76%	14	10
August	69%	19	12
October 13	65%	18	17
October 21–27	55%	33	12

Source. The Field Poll (2004a, 2004b).

became vice chair of CVUC. Newspaper reports suggested that Nicholas was a rich, bereaved brother who unexpectedly rescued the "No on 66" campaign, rather than a rich, bereaved brother who was related (literally) to CVUC and, by extension, the CCPOA.

Right after Nicholas pledged to help bankroll a media blitz against Proposition 66, former Governor Pete Wilson pulled then Governor Arnold Schwarzenegger headfirst into the initiative fight. Wilson convinced Schwarzenegger to put money and effort into defeating Proposition 66. The *Los Angeles Times* reported, "On Oct. 22, the day after Wilson's call, Schwarzenegger made 'No on 66' the top priority of his ballot measure campaigning. On Oct. 23, the governor spent the afternoon making TV advertisements opposing the initiative in a Los Angeles studio. He also converted TV time he had bought to fight two gambling measures into time for 'No on 66' ads" (Mathews, 2004: B1).

Schwarzenegger's "California Recovery Team," a fund he developed to pay for ballot initiatives, contributed more than $2 million to the fight against Proposition 66, and the CCPOA added another $500,000 to the cause. The union had paid the public relations firm McNally Temple Associates to develop a couple of anti-Proposition 66 commercials. Now the "No on 66" coalition used its financial windfall to air the ads throughout California.[8]

As in the "Felon a Day" fliers, the anti-66 television and radio commercials warned of impending doom. Using harrowing music and images of reviled criminal types like sex offenders and career criminals, the anti-66 advertisements communicated a simple yet powerful message; the initiative would lead to chaos and destroy communities and families. For example, the television commercial, *He Raped Me*, featured a White middle-aged victim. As eerie music played in the background, the woman said, "He had a knife at my throat and said he was going to kill me. Then he raped me." A mug shot of the rapist, a White man with his head hanging listlessly to the side, appeared on screen as the woman continued, "He killed two women. Now Prop. 66 will set him free." The camera panned over mug

8. CUPS paid McNally Temple Associates at least $1,282,492 for commercials and other expenses (e.g., bumper stickers and "fax bursts") (California Secretary of State, 2006).

shots of convicts (the same mug shots used in the "Felon a Day" campaign) as the narrator intoned, "Proposition 66 creates a loophole that will release 26,000 dangerous felons." The advertisement ended with David Paulson, a member of the California District Attorneys Association, standing in front of what seems to be a courthouse to say, "These aren't petty offenders. They're career criminals with long histories of serious crime." As the advertisement concluded, the collage of mug shots reappeared with a large red "No on 66" stamped across it. The narrator ended simply: "Protect your family. No on 66" (Californians United for Public Safety, 2004b).

Contemporary political tacticians (including those who worked on the campaign against Proposition 66) routinely frame penal policies to stir up voters' fears and anxieties not just about crime but also about an assortment of other issues such as family stability, economic security, access to quality education, availability of health care, demographic diversity, and international developments (e.g., terrorism and the "war on terror") (Garland, 1990: 264–265). If voters feel a penal policy will intensify disorder and insecurity in their lives, then they are apt to oppose it (Frieberg, 2001: 269; Tyler and Boeckmann, 1997: 255–256). The "No on 66" campaign capitalized on this political reality.

The strategy worked. As I noted previously, most of the likely voters favored Proposition 66 until late October 2004, but support for the proposition fell quickly as the public campaign against the measure gained steam. It continued to fall in the final days leading up to the election. The initiative enjoyed an early lead on election night, but that lead dropped propitiously, and Proposition 66 failed 53% to 47%. Voters seemed to support reforming an extremely costly and, according to Proposition 66's proponents, broken law until they were repeatedly told that such reform would cause chaos in a social world marked by rapid, major changes, making their lives dangerous and unmanageable.

Media reports primarily credited Governor Schwarzenegger and Henry Nicolas for Proposition 66's defeat. In doing so, they missed the critical role that CCPOA and its allies had played in "No on 66." As discussed earlier, the union organized "Californians United for Public Safety," the campaign's infrastructure, and it pushed along an ailing anti-66 operation when other opponents (including Governor Schwarzenegger) were missing in action. *Los Angeles Times* reporter Joe Matthews (2004: B1), who closely followed the Proposition 66 fight, said simply, "The anti-66 campaign had been kept alive since the spring by the California District Attorneys Assn. and the state prison guards union, which hired the campaign's political consultants and paid for focus groups." Along with contributing more than $850,000 to defeat the measure, the CCPOA brought together various like-minded groups to oppose Proposition 66 with one voice (California Fair Political Practices Commission, 2010: 42). Finally, the CCPOA, with the assistance of talented public relations professionals, developed images and arguments that attempted to frighten the public into voting against the initiative. The union would play similar roles in defeating another reform initiative in 2008.

Four years after Proposition 66 went down, reformers championed a ballot initiative to change drug-related sentencing laws and parole policies. Proposition 5, The Nonviolent Offender Rehabilitation Act (NORA), was the brainchild of the Drug Policy Alliance, which purports to be the "nation's leading organization promoting policy alternatives to the drug war" (Drug Policy Alliance, 2010). With financial backing of billionaire businessman George Soros, Proposition 5 qualified for the 2008 general election.

The initiative was designed to shrink the prison population primarily by targeting so-called nonviolent, nonserious drug offenders. Individuals without prior records of violent or serious crimes who were convicted of drug possession would be eligible for diversion from prison to treatment. People convicted of nonviolent, nonserious crimes (e.g., theft) while under the influence of drugs also would be eligible for diversion (unless a judge decided that the person was unworthy of diversion). NORA also would have made marijuana possession an "infraction," so marijuana possessors would receive citations rather than incarceration or community sanctions such as probation. Finally, the measure would have allowed for certain drug and nonviolent property offenders to earn additional "good time" credits for participating in programs, thereby reducing their sentences. (The initiative also called for drastic expansion of rehabilitation services, providing prisoners access to programs that would allow them to earn the good time credits: Legislative Analyst's Office, 2008.)

Along with trying to reduce the prison population at the front end (i.e., at the point of sentencing), Proposition 5 sought to shrink it at the back end by reforming parole policies. Specifically, it would have decreased the length of parole for "nonviolent, low-risk parolees" from 3 years to 1 year and diverted parolees who violated the terms of their parole or committed misdemeanor offenses from prison. NORA also would have provided resources to ensure that parolees received services to aid their reentry (Legislative Analyst's Office, 2008). California's nonpartisan Legislative Analyst's Office (2008) concluded that Proposition 5 "would eventually result in savings on state operating costs, potentially exceeding $1 billion annually, due mainly to reductions in prison and parole supervision caseloads. Specifically, this measure could eventually reduce the state prison population by more than 18,000 inmates and reduce the number of parolees under state supervision by more than 22,000."

Shortly after Proposition 5 qualified for the November ballot, district attorneys, law enforcement organizations (e.g., the state police chiefs' association), and crime victims' organizations formed a coalition, "People Against Proposition 5," to oppose the measure. The CCPOA, however, did not immediately take a position on NORA or join the anti-Proposition 5 coalition. The architects of NORA believed that the initiative had a decent chance of passing if the CCPOA stayed on the sidelines; without the CCPOA, the "No on 5" campaign did not have the funds to launch a media onslaught (D. Abrahamson, personal communication, August 1, 2008).

When the CCPOA gathered in Las Vegas for its convention in September 2008, it still had no formal position on Proposition 5. The election was a little less than 2 months

away, and the "No on 5" alliance was getting desperate; it still did not have enough money to conduct a widespread media campaign against NORA. Three leaders of the anti-Proposition coalition, Jerry Dyer (president of the California Police Chiefs Association), Jan Skully (district attorney of Sacramento County), and Jeff Denham (Republican state senator), traveled to Las Vegas to plead for CCPOA to join their fight. They made an impassioned presentation to the convention delegates, calling NORA the "Drug Dealers' Bill of Rights" and "the worst anti-public safety measure we have ever seen." The speakers ended by warning that NORA likely would become law (they claimed it was "polling at 60%") if they did not raise enough money to spread their message.[9] After the "No on 5" presenters left the convention, President Jimenez signaled that the union would oppose NORA.[10]

Approximately 3 weeks after the convention, the CCPOA joined the campaign to defeat Proposition 5. According to union official Lance Corcoran, they wanted to "maintain our focus on protecting public safety" (California Correctional Peace Officers Association, 2008). On November 15, 2008, the union contributed $1 million to the "No on 5" political action committee, and 9 days later, it spent another $830,000 to air commercials opposing NORA. No other group contributed nearly as much money to defeat Proposition 5 (California Secretary of State, 2008).

The "No on 5" group produced a commercial (financed primarily by the CCPOA) featuring Democratic U.S. Senator Dianne Feinstein that lambasted the initiative as the "drug dealers' bill of rights" and a "get out of jail free card." With tense music playing in the background, the ad warned that NORA would "shorten parole for meth dealers from 3 years to just 6 months" and would "let drug dealers, drunken drivers, child abusers, burglars, thieves, con artists, embezzlers, and others stay on the streets" (People Against the Proposition 5 Deception, 2008). The initiative, the ad maintained, would fill the streets with convicted felons, sacrificing public safety just so convicted criminals could enjoy their "rights" and freedoms.

The voters rejected Proposition 5, 60% to 40%. The extent to which the CCPOA-backed media campaign contributed to this result is unknowable. However, that campaign was chiefly responsible for framing a sensible penal reform as a scary, potentially life-threatening risk—clearly one that voters were unwilling to take.

The Proposition 66 and Proposition 5 cases exemplify the roles that the CCPOA plays in frustrating large-scale efforts to chip away at mass imprisonment. It is the central strategist and financer within a larger bloc of individuals and organizations with similar perspectives on crime and punishment. But although the CCPOA brings material, political, and organizational resources to the table, it is not a particularly good messenger for several

9. I did not find polling data on Proposition 5. Therefore, I do not know whether the speakers' claim was accurate or just a tactic to get CCPOA onboard.

10. Unpublished field notes, 2008 CCPOA Convention, Las Vegas, Nevada, September 18, 2008.

reasons. First, since the early 2000s, the union has been roundly criticized in the press for its cozy relations with politicians (particularly former Governor Gray Davis) and lucrative contracts (Page and Heise, 2011). Second, Republicans and some Democrats now routinely blame public-sector employees and labor unions for budget shortfalls, underperforming state programs and agencies, runaway pension costs, and political gridlock (Smith and Haberman, 2010). Third, the public image of prison officers has been traditionally negative; movies and other forms of popular entertainment routinely depict these workers as inept, uneducated, and abusive (Keinan and Malach-Pines, 2007: 382). For these reasons, the CCPOA smartly puts actors with moral authority (such as crime victims, police chiefs, and district attorneys) in front of the cameras.

As seen with Propositions 66 and 5, the CCPOA and its allies make it extremely difficult to pass major, long-term sentencing reforms through the ballot initiative process. When faced with a "yes" or "no" question, voters predictably choose what they perceive to be the least risky option (i.e., the option that seems to pose the least risk of making their lives more precarious, unsafe, or disorderly; Tyler and Boeckmann, 1997). The union and related groups make sure that voters view measures like Proposition 66 and Proposition 5 as extremely hazardous and scary.

To be clear, I do not believe the CCPOA was the sole reason why these ballot initiatives failed. Rather, I maintain that policy makers and other actors who seek to take advantage of the current window of opportunity to roll back mass imprisonment in California must develop strategies for overcoming resistance from the CCPOA and its allies. Even though crime rates are down (and have been down for years), these groups and their political allies continue to "govern through crime" (Simon, 2007), stoking fear of a downsized penal system.

New York: A Counterfactual Case

The CCPOA is uniquely influential. Prison officer unions in other states—either alone or with coalition partners—hold far less sway over penal policies and priorities and represent smaller obstacles to rolling back mass imprisonment. Nevertheless, these unions still challenge policy makers seeking to shutter penal facilities and cut corrections budgets. This section turns from California to New York to show how a prison officer union with far less political power than the CCPOA affects efforts to downsize prisons.

New York's prison population shot up near the end of the 20th century from 12,579 in 1970 to 71,446 in 2000 (an increase of more than 550%) (Wagner, 2002). By 2000, the Empire State spent $2.8 billion on annual prison expenditures, ranking second behind California ($4.2 billion) (Stephan, 2004: 2). New York, at that point, could not afford its large, incredibly expensive prison system. With annual state budget deficits of more than $10 billion, New York sought to implement substantial downsizing-oriented reforms (Jacobson, 2005: 35).

Scholars increasingly point to New York as a model case of such downsizing (Gartner, Doob, and Zimring, 2010; Greene, and Mauer, 2010; Jacobson, 2005: 58). In the years between 1999 and 2009, New York decreased its prison population by 20% from 72,899 to 58,456. In that same period, the state's imprisonment rate declined by 23% from 400 per 100,000 to 307 per 100,000 (Greene and Mauer, 2010: 5–6). The following factors contributed to the decline: falling crime rates in New York City, changes in law enforcement policies (e.g., decreases in felony arrests and indictments), diversion of drug offenders from prison to treatment, reforms to the state's notoriously harsh Rockefeller drug sentencing laws, and early release of prisoners convicted of drug and other nonviolent crimes (Greene and Mauer, 2010: 5–25; Jacobson, 2005: Chapter 4). The New York Department of Corrections (2010a: 1) has projected that these factors will keep the prison population on a downward slope.

New York has reduced its prison population, but it has had little success closing prisons and shrinking corrections spending, which is where the prison officer union comes into play. New York's prison officers have been unionized since 1953 (Jacobs and Crotty, 1978: 10), but they did not receive collective bargaining rights for another 14 years (Jacobs and Crotty, 1978: 45). Although prison officers in California formed their own, independent union, their counterparts in New York joined American Federal, State, County, and Municipal Employees (AFSCME), a large union that represents a diverse array of public employees and is part of the AFL-CIO. The officers became part of a unit within AFSCME called "Council 82." Although other public "security" workers were part of the council (e.g., state capitol police and museum caretakers), prison officers dominated it (Jacobs and Crotty, 1978: 20).

As in California, the prison officer labor force grew along with the incarcerated population. From 1978 until 1998, the number of officers grew from 5,500 (Jacobs and Crotty, 1978: 10) to approximately 26,000 (Conover, 2000: 15), an increase of more than 450%. Although large, the New York officers' union did not play a major role in toughening penal policy or promoting mass imprisonment. For the most part, AFSCME Council 82 concentrated on "bread-and-butter" issues (e.g., wages, benefits, job security, and job safety) and professionalization matters (e.g., training and hiring standards) (Conover, 2000; Jacobs and Crotty, 1978). But, although the union was not a central force behind prison expansion, it did alter the prisons' "internal management and organization." Transferring power from administrators to rank-and-file workers, the union "brought the guards more job security, more control over their work assignments, and more say in decision making at all levels" (Jacobs and Crotty, 1978: 41).

In 1998, New York prison officers left AFSCME and formed an independent union in the mold of CCPOA. Long-time CCPOA activists even advised their New York peers in their drive to decertify from AFSCME and establish a new labor organization, The New York State Correctional Officers & Police Benevolent Association (NYSCOPBA) (Page,

2011: 78).[11] The New York officers left AFSCME because they felt that the organization limited their capacity to influence penal and labor policy. They were frustrated that they had little control over how their dues were spent, and there were tensions between officers' political and social views and those of their union. As former NYSCOPBA Vice President Carl Canterbury explained in a 2002 interview,

> Independence is the only way. . . . I can't see sending money someplace else, so somebody else's political agenda can be followed. I mean you look at AFSCME; they're a very liberal organization. Their money goes basically towards Democrats and liberals *all the time*. Okay, correctional officers are a little different, they're law enforcement, many times [they are] Republican and conservative. So you had your dues money going somewhere else, supporting candidates from say Washington or Oregon, and it's like "Why?" "Why you wasting good money?" So people had enough of that umbrella.

NYSCOPBA's leadership needed independence to develop a formidable political action operation—the key to CCPOA's success in California.

The New York union has become more politically aggressive in the last 10 years. NYSCOPBA did not contribute to New York's prison boom (the organization was established just before the state's prison population began its steady decline), but it currently is fighting efforts to downsize the system. More specifically, it is obstructing efforts to close prisons and to decrease the correctional workforce. Former Governor David Paterson's 2010–2011 executive budget called for closing three facilities, shutting down a large section of a fourth, and eliminating 637 positions. Addressing custody staff, the Department of Corrections says it "anticipates offering a fillable vacancy to every affected uniformed employee. . . . Each month, approximately 84 security staff employees leave the payroll statewide to retire or pursue other opportunities. Attrition should create fillable vacancies for the majority of affected staff" (New York Department of Correctional Services, 2010b). The closures and cuts would save an estimated $59 million over 2 years (Matthews, 2010).

NYSCOPBA has fought prison closures by lobbying legislators, organizing protests, and conducting an intensive (and expensive) media campaign. Although information on the exact costs of the media offensive is not publicly available, NYSCOPA President Donn Rowe has claimed his organization would spend several hundred thousand dollars to make

11. The CCPOA has influenced prison officer unions throughout the United States. CCPOA activists have helped prison officers in other states form independent unions and establish their political action operations (Page, 2011: 78–80). Also, the CCPOA is a central figure in an organization called Corrections USA, which brings together prison officers and prison officer unions from across the nation to fight prison privatization, improve the image of prison officers, and advocate for laws at both the state and federal levels that benefit rank-and-file prison staff (Corrections USA, 2011).

its case (Matthews, 2010).[12] The union presents five arguments. First, shutting the prisons "is a direct threat to the public safety of all New Yorkers" (the union does not elucidate how the actions would compromise public safety) (Rowe, n.d.: 1). Second, closing prisons "will jeopardize the safety of the inmates and the brave men and women who serve as New York's correctional officers." This is related to the third argument: The prison system is "overcrowded and understaffed," and therefore, sufficient space or security personnel to maintain order are not available (Rowe, n.d.: 1). Fourth, the state of New York in general and prison towns in particular cannot afford to lose the facilities' jobs and tax revenue. Finally, the state should save money by reducing the "top-heavy bureaucracy within the [prisons] agency." In other words, the newly elected Cuomo Administration should eliminate managers and administrative buildings rather than officers and prisons (Rowe, n.d.: 1).

The union's media push includes television and radio commercials and direct mailings, all of which seek to generate or exacerbate fear. Echoing the central message of the campaign against California's Proposition 66, NYSCOPBA insists that closing the prisons will increase insecurity and disorder. For example, the narrator in the union's professionally made television commercial, "Keeping Us Safe," says the following in a low voice:

> Correction officer. It's a thankless and dangerous job. Working day and night in overcrowded prisons, guarding the most violent offenders, keeping us safe. But Albany politicians want to balance the budget by laying off our hardworking officers instead of cutting department of corrections bureaucrats. That's a dangerous choice, and it could mean the difference between life and death. Tell Albany to cut management, not correction officers. Our safety depends on it. (New York State Correctional Officers and Police Benevolent Association, 2010a)

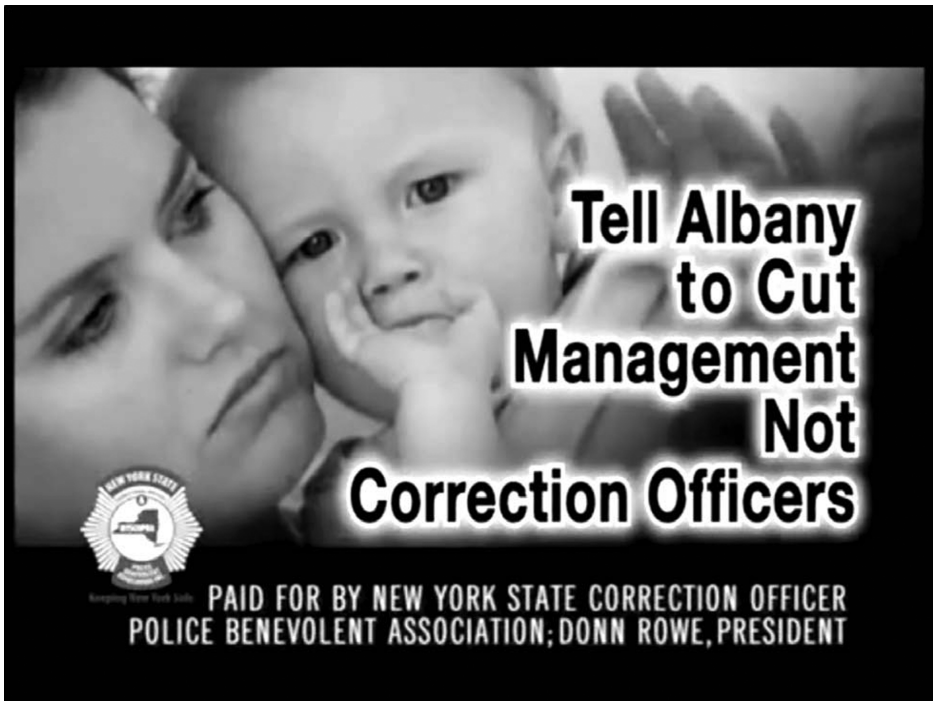
When the narrator says "keeping us safe," the screen shows a fearful, young, White girl looking through a staircase banister. At the end of the ad, as the narrator remarks "our safety depends on it," the viewer sees a concerned White woman holding a cute White baby boy with his fingers in his mouth. The woman strokes his head to comfort him (see Figure 4). The message is clear: Closing prisons will allow for New York's prisoners (who primarily come from New York City and surrounding areas and are disproportionately Black and Latino) to be released from prison and harm White suburban and rural women and children.

The union insists in its mailers that prison closures not only threaten people's physical safety, but they also threaten economic security. Bold text reads as follows: "Endangering

12. Rowe's estimate should be viewed with caution because interest groups tend to exaggerate their resources and willingness to spend those resources to enhance perceptions of their organization's power and threat to adversaries (see Page, 2011).

FIGURE 4

Keeping Us Safe



our families and big job losses are simply not an option" (New York State Correctional Officers and Police Benevolent Association, 2010b). Closing the prisons undoubtedly would eliminate jobs. In some counties, New York's prison system is the main employer (Gramlich, 2009). However, NYSCOPBA discounted the government's claims that it would facilitate the "reuse of the closed facilities. . . by another State or local government or private industry" (New York Department of Correctional Services, 2010a). The union skillfully fused a message of economic insecurity with a message of physical security, making prison closures seem like "life-and-death" choices.

The NYSCOPBA has not been alone in its fight against the prison closures. Local and state politicians have worked with the union. The *New York Times* describes a "powerful alliance of upstate lawmakers and correction officers' unions" that "guard their constituents' and members' state-financed jobs" (Confessore, 2007: B, 4). This alliance's efforts have paid off. In July 2010, the Department of Correctional Services Commissioner Brian Fischer sent a letter to NYSCOPBA's president and local lawmakers; the state would not close two prisons. The last sentence of the letter read, "Any decision regarding the future of Moriah and Ogdensburg Correctional Facilities will be left to the next administration" (Fischer,

2010: 1). Clearly, the Paterson Administration and Department of Correctional Services were no longer up to fighting NYSCOPBA and its allies. Downsizing New York's prison system will be a long, slow process.

Unionized Opposition

When commentators refer to the power of prison officer unions, they typically point to the CCPOA. The CCPOA is unquestionably a formidable organization that heavily influences penal policies and priorities in a state with an incredibly large and costly prison system. However, the CCPOA is exceptional. No other prison officer union is as influential as the California outfit. Two principle differences explain the CCPOA's incredible achievements and political authority. First, it developed a distinctively independent, intensely political model of public-sector labor unionization in the early 1980s. This process included establishing mutually beneficial alliances with like-minded groups, some of which the union effectively created (e.g., the state's two most powerful crime victims' rights organizations). Unlike those affiliated with the AFL-CIO (as the New York union was until the late 1990s), the CCPOA and other independent prison officer unions develop their own agendas (without approval from a parent organization) and can use all of their money to generate influence and advance their goals rather than those of the AFL-CIO or labor more generally. (As shown in Figure 1, more than one third of all prison officer unions in the United States are independent.) Second, California's neopopulist political culture and institutions (e.g., the ballot initiative) allow for interest groups like the CCPOA to shape penal policy directly and indirectly (Barker, 2009). Because of these two factors, the CCPOA could help to entrench mass imprisonment and now helps to obstruct efforts to downsize California's prison system.

New York is an instructive comparative case. NYSCOPBA (and AFSCME Council 82 before it) is far less successful and powerful than the CCPOA. The prison officer union in New York was not an important actor in that state's prison expansion, nor did it stand in the way of reforms that have led to a 20% drop in the state's prison population. NYSCOPBA has been less influential than the CCPOA largely because it did not become an independent, politically savvy organization until 1998, which was about the time New York began downsizing its prison system. Also, New York's political system is insulated and expert-driven, making it more difficult for interest groups to dominate penal policy as they do in California (Barker, 2009).

Although NYSCOPBA does not enjoy the same influence as the CCPOA, it is now an important political player that obstructs efforts to downscale the prison system even more. The two unions simply struggle against downsizing at different points in the process; the CCPOA is working to block major reforms to decrease the prison population over the long term, whereas the NYSCOPBA is fighting against closing facilities and decreasing the workforce. (The CCPOA will undoubtedly resist downsizing California's prison infrastructure if and when the Golden State seriously reduces and keeps down its

incarcerated population.) In their efforts, both unions use *fear* to achieve their goals. More specifically, they seek to generate or exacerbate fear of change in the penal status quo. They insist that reforms will add insecurity and disorder in people's lives. In addition, they strike fear in politicians, threatening to brand lawmakers who support reforms as responsible for and insensitive to voters' anxieties about physical, economic, and other harm.

The unions have sufficient resources to carry out their campaigns because of their size (between 20,000 and 30,000 dues-paying members), and the unions are so large because of the prison boom. In this respect, imprisonment provided the raw materials that the organizations use to resist downsizing prisons. A consequence of the prison boom, then, was the empowerment of actors with a material stake in and ideological commitment to the penal status quo. In sum, neither the CCPOA nor NYSCOPBA (or its predecessor) sparked mass imprisonment in their respective states, but the unions are now obstacles to rolling back that phenomenon. Therefore, the factors that started mass imprisonment are not necessarily the same factors that sustain it.

Overcoming the obstacles to downsizing prisons featured in this article will not be easy. In this final section, I delineate four propositions, which encourage both accommodating and confronting prison officer unions, that might help policy makers and other actors as they attempt to implement sentencing and prison reform, shutter penal facilities, streamline workforces, and rein in correctional budgets.

Proposition 1: Maintain Commitments

Corrections unions' resistance to downsizing prisons stems in large part from the officers' fear of losing their jobs. In states like California and New York, these jobs pay well, have solid benefits, and provide excellent retirement packages—all evidence of union success. They are solid middle-class jobs. With the withering of the manufacturing sector, working as a prison officer is one of an increasingly limited number of jobs that provide upward social mobility to people who lack advanced educational credentials. This situation is particularly true in the rural counties where many prisons (particularly in California and New York) are located. Prison officers and their families justifiably fear that downsizing prisons might close one, if not the only, path they have into the middle class.

People who live in prison towns also worry about downsizing the penal system. Since the 1980s, government officials and local leaders have propped up prisons as powerful, sustainable engines of economic development (King, Mauer, and Huling, 2004: 455–456). However, studies indicate that the economic promises of prisons have proven largely illusory. King et al. (2004), for example, demonstrated that placing prisons in rural counties in New York did not significantly reduce unemployment (much of the prison staff, particularly prison officers, lived elsewhere) or decrease poverty. Studies in California (Gilmore, 2007), Missouri (Thies, 1998), and Washington (Carlson, 1992) have reached similar conclusions. Making matters worse, evidence suggests that prison sitings produce environmental harm

(Braz and Gilmore, 2006; King et al., 2004: 475–476) and rural prison towns "may be closing themselves off to other options of sustainable development" (King et al., 2004: 477).

Although the economic benefits of prisons to counties might not be real, fears associated with losing prisons likely are. The prisons provide hope for potential economic development. As King et al. (2004: 455) stated, "the existence of the finished product, a hulking institution, gives residents the perception that opportunities are abundant." Residents likely think that once the prisons go, all employment possibilities will vanish, and as shown in New York, politicians and prison officer unions play into these fears.

Actors who seek to downsize prisons, then, must recognize and deal with the anxieties of officers and residents alike. Jacobson (2005: 177) rightly argued that states should decrease correctional workforces through attrition whenever possible. In other words, positions should be shed through retirement or voluntary termination. This is one way to allay fears of layoffs. In New York, Department of Corrections officials maintain that they will not lay off officers but will put them in "fillable vacancies." They must make good on that promise or face even more intense resistance when they try to close additional facilities in the future. Jacobson (2005: 177–178) wrote that officers "will be much more cooperative and might well participate in efforts to retrain and reassign officers if they understand that their ranks are not going to be forcibly reduced by layoffs." Helping to ensure workers remain employed (even if in different occupations) is a way to accommodate officers and the unions that represent them.

The state also might set up retraining programs or pay for officers to take classes that would allow them to find other sources of work within and outside the prison system (e.g., officers could train in drug and alcohol counseling, assuming the treatment field will grow as states divert drug offenders from prison to counseling). If officers could move out of their current positions and into new jobs, then they would create additional vacancies, helping the state to refrain from laying off custody staff.

State governments also will need to invest in communities that would lose prisons. By bringing governmental entities or private business into towns with prisons slated for closure, the states can ease community opposition as well as alleviate fears and possible resistance when they attempt to close more prisons in the future. Again, it is imperative that state governments make good on assurances to help prison officers and others negatively affected by prison closures. If they do not, then they will intensify opposition to downsizing-oriented reforms, and the unions' messages of fear will continue to resonate with community members and their leaders.

Proposition 2: Challenge the Dominant Narrative

Clearly, prison officer unions resist downsizing the penal system for material reasons. A fundamental purpose of unions is to promote job security. Moreover, shrinking the correctional workforce will reduce union membership and dues. That being said, prison

officer unions (at least in California and New York) do not oppose downsizing solely for material reasons. Their resistance is also ideological. They believe that "prison works"—particularly for serious and violent offenders. They believe "tough" sentencing laws like Three Strikes decrease crime through deterrence and incapacitation. In addition, although the unions recognize that the prison systems could do more to rehabilitate prisoners, cut wasteful spending, and shed unnecessary bureaucracy, they are committed to the penal strategy of punitive segregation (Page, 2011). Therefore, it is a mistake to think only in economic terms.

The prison officer unions' perspective on crime and punishment fits within a larger narrative that permeates public and political discourse. Fear-based campaigns reflect and reinforce popular representations of offenders and imprisonment, which maintain that prisons are filled with extremely violent, manipulative, rapacious offenders ("career criminals," "sexual predators," "gang bangers," etc.) who will automatically reoffend if set free. Comprehensive efforts to downscale prisons must challenge the dominant narrative of crime and punishment, which undergirds mass imprisonment.

Public officials must play central roles in challenging the dominant narrative. For most of the last 30 years, politicians and Department of Corrections officials have either supported "tough on crime" policies or remained on the sidelines of debates over penal policy (Gilmore, 2007; Miller, 2008; Simon, 2007). This stance is no longer possible. Instead, they can help to reeducate the public by countering popular perceptions that mass imprisonment makes us safer and decreasing prison commitments compromises public safety. They can make the case that mass imprisonment actually makes us less safe because it drains money from prevention, in-prison rehabilitation, and reentry programs. Moreover, it cannibalizes funding for education, job creation, and social services. When policy makers decrease the size of the prison system without jeopardizing public safety, they must tell voters. Bragging about successes is a great way to counter the doomsday scenarios described in the campaigns against Propositions 66 and 5 in California and prison closures in New York.

State executives and Department of Corrections officials need not make their case alone. Some actors with extensive moral authority oppose the penal status quo but, for the most part, have not participated in public campaigns to downsize the penal system. For example, some judges oppose laws that eliminate discretion and force them to impose laws they view as unjust, some district attorneys oppose locking up drug users and other nonviolent offenders for long periods of time, and some crime-victim advocates support restorative justice, believing that punitive laws and the death penalty do not lead to "closure" (but simply cause more suffering).

California's newly elected attorney general, Kamala Harris, is in a particularly good position to challenge the dominant narrative about imprisonment. Harris opposes the death penalty and strongly supports reentry programs, and she is a critic of the Golden State's sentencing policies. In her book, *Smart on Crime*, she states the following:

> For several decades, the passage of tough laws and long sentences has created an illusion in the public's mind that public safety is best served when we treat all offenders pretty much the same way: arrest, convict, imprison, parole. . .. What the numbers say loud and clear, however, is that most nonviolent offenders are learning the wrong lesson. . . are becoming better and more hardened criminals during their prison stays. (quoted in *Sacramento Bee*, 2010: 12A)

It is possible that Harris will use her office as a bully pulpit, advocating for policy changes that might roll back mass imprisonment. Her focus, however, is on "nonviolent offenders." Other statements she has made indicate that she supports current punitive sentencing laws targeting "violent" and "serious" offenders (Harris, 2009). Therefore, she might not back (or even might oppose) policy changes that would reduce prison terms for offenders convicted of violent or serious crimes. As Jonathan Simon (2009) asserted, major, long-term reductions in imprisonment will require reducing sentences for all offenders—not just those convicted of "nonviolent" or "nonserious" crimes.

Of course, California's new governor and former attorney general, Jerry Brown, also has an ideal platform to challenge the dominant narrative about imprisonment and institute alternative penal policies. However, he has given no indications that he intends to support actions to make substantial cuts in mass imprisonment. Brown's actions in recent years show he does not support sentencing reforms that seriously would reduce prison terms; he actively campaigned against both Propositions 66 and 5 (Page, 2011). Although it is doubtful that Governor Brown will use the authority of his office to make a case against mass imprisonment, California's incredible budget deficits, pressure from the federal courts, and the lack of resources to make prisons anything other than mere warehouses might move the governor toward sentencing reforms capable of greatly decreasing and maintaining a lowered prison population.

In short, by participating in public relations campaigns, engaging in legislative debates, and taking stands on key policy initiatives, policy makers and other authoritative actors can challenge the "prison works" narrative (or, at least, publicize alternative narratives). In doing so, they might make it more difficult for prison officers and related groups to frighten voters (and voters' representatives) into opposing measures designed to shrink the penal system.

Proposition 3: Make It Personal

Ensuring prison officer jobs and altering the narratives about downsizing prisons likely would not be enough to keep unions like CCPOA and NYSCOPBA from opposing efforts to shrink the penal system. It needs to be in unions' self-interest to not oppose meaningful reforms, prison closures, and so on, no matter how strong their ideological attachment to punitive segregation.

To do so, policy makers will need to use confrontation and *make it personal* (i.e., they need to argue publicly that the unions are stonewalling out of self-interest). As argued

earlier, I personally do not believe that unions oppose downsizing efforts simply to save jobs and maintain union power; however, their competitors can make that argument. Students of public-sector unions demonstrate that these organizations bolster their cases by showing how they serve the public interest; after all, they are paid with taxpayer dollars, and their contracts are matters of public policy (Johnston, 1994; Lopez, 2004). Prison officer unions routinely state that they serve the public good, but proponents of downsizing prisons could argue that prison officer unions actually are opposing reforms that are in the public interest. By flipping the discussion, reformers could assert that the unions care more about power and their pecuniary interests than what is good for the taxpayers and are therefore unworthy of solid contracts.

To some extent, actors in California have implemented this tactic. In the last several years, the media (particularly newspaper editorial boards), former Governor Schwarzenegger, and federal judges have branded the CCPOA as a self-interested enemy of reform that promotes lawlessness behind bars, controls politicians and prison administrators, and increases the state's bloated correctional budget. Moreover, the Schwarzenegger Administration refused to grant the CCPOA a new contract, claiming that provisions of previous labor agreements compromised prison management and cost the state too much money (Page, 2011: Chapter 8).

This intense pressure has forced the union to soften its rhetoric and policy positions (Page, 2011: Chapter 8).[13] Whereas CCPOA officials used to celebrate prison expansion and castigate prisoners publicly, the union's current president, Mike Jimenez, has suggested he and his union are committed to rolling back mass imprisonment. For example, in a speech at the 2007 California Democratic convention, Jimenez stated the following:

> To borrow from Martin Luther King, Jr., as well, today I have a dream. I have a dream that the bricks and mortar that were planned to build new prisons will instead be used to build new schools. Today I have a dream that not one of these cells will ever be occupied by the child of a person in this room today. Today I have a dream that an ounce of prevention will be embraced instead of a pound of cure by the California legislature and this administration. (quoted in Page, 2011: 196)

Along with changing its rhetoric, the CCPOA has put out two "blueprints for reform" that advocate for an advisory sentencing commission, improved rehabilitative programming, additional reentry facilities to help decrease recidivism, and shorter periods of parole for some

13. Change in CCPOA leadership also contributed to the union's slight change in direction. In 2002, Mike Jimenez replaced Don Novey as the union's president. Novey led the organization since its inception. He is strongly committed to punitive segregation and did not engage groups or ideas associated with prisoners' rights. Jimenez is much less ideologically rigid and far more open to meeting with individuals and groups traditionally deemed CCPOA enemies. Therefore, he is amenable to supporting reform as a means of advancing the interests of the CCPOA and its members (Page, 2011, Chapter 8).

ex-offenders (California Correctional Peace Officers Association, 2010a). It also officially endorsed legislation that would have allowed for juveniles sentenced to life in prison without parole to petition courts for a reduced sentence (the legislation failed). In addition, the CCPOA filed a brief on behalf of the Prison Law Office (a former foe) supporting a federal court ruling to reduce prison overcrowding (California Correctional Peace Officers Association, 2010b) as the result of two class action lawsuits (*Coleman v. Wilson*, 1995; *Plata v. Davis/Schwarzenegger*, 2003). The court ruled that overcrowding made it impossible for the government to provide prisoners with constitutionally adequate mental and medical health care, and it ordered the state to decrease prison overcrowding from 190% design capacity to 137.5% design capacity, which is an overall population reduction of roughly 40,000 prisoners (Three-Judge Court, 2009).

Importantly, the CCPOA has become less isolationist vis-à-vis other state workers' unions. Because of former Governor Schwarzenegger's hostility toward public-sector employees (and the national trend of blaming state workers for government problems), the CCPOA teamed up with the California Teachers Association and other labor unions to oppose measures that would have reduced the influence of the unions (e.g., one proposition would have forced the unions to receive permission from each member to use dues for political purposes) (Matthews, 2006). Moreover, the CCPOA allied with other unions to help Jerry Brown win the 2010 governor's race. The CCPOA's proreform rhetoric at least partly might be a result of the prison officer unions' alliances with fellow state workers' unions. Whether the CCPOA continues to work with these other unions now that Brown, a friend of labor, is in office is an open question.

In recent years, the CCPOA has undoubtedly changed; it has sought common ground with individuals and groups it previously deemed enemies such as academics, prisoner rights' attorneys, and unions affiliated with the AFL-CIO; changed its rhetoric from virulently antiprisoner and proprison growth to proreform; and signaled support for some measures that could make a dent in the state's penal population. However, the union also has taken actions that question the extent of its transformation. For example, after it began to talk about sentencing and prison reform in 2007, the CCPOA bankrolled the opposition to Proposition 5 and fought a proposed sentencing commission that would have had the authority to change the state's sentencing laws (Moore, 2009). In 2008, it backed Proposition 9 ("Marsy's Law"), which, among other things, made it more difficult for prisoners with life sentences to receive parole and forbade the state from using early release to alleviate prison overcrowding (Page, 2011: 202).

Additionally, the CCPOA encouraged its partners (particularly CVUC) to oppose policies that the union itself claimed to support. As mentioned previously, the CCPOA registered support for a bill that would have made it possible for some juveniles serving sentences of life without the possibility of parole to reduce their prison terms. At the union's 2010 membership convention, President Jimenez addressed criticisms, claiming that the

CCPOA only supported the measure after union officials knew it had no chance of passing. After Jimenez finished, a representative of CVUC took the podium. She explained that the CCPOA had instructed victims' rights groups like hers to defeat the bill and provided the resources to do so: They gave us the resources and the ability to defeat that bill."[14] In short, the CCPOA publicly endorsed the bill and privately helped CVUC defeat it.

The CCPOA took a similar approach when it filed the legal brief in favor of the federal court's ruling to decrease overcrowding in the state's prison system. Although the CCPOA expressed support for the federal court's actions, the CVUC was suing the state of California for increasing the amount of "good time" credits "nonviolent" prisoners might earn to reduce their sentences (Lagos, 2010). The organization argued that this policy violates a provision of Marsy's Law that forbids the government from using early release to alleviate overcrowding. The same CVUC representative who spoke at CCPOA's 2010 convention explained to the union's delegates that CCPOA funded the lawsuit. When union members protested that, in filing the legal brief, the CCPOA supported shortening prison sentences, she assured delegates the CCPOA's support of her group's suit was evidence that the union did not really support early release. CCPOA officials did not disagree with her claim.[15] (In fact, the union accurately states in its legal brief that overcrowding can be reduced effectively through prison expansion, sending state prisoners to county jails, and other means that do not decrease the prison population; California Correctional Peace Officers Association, 2010b.) The union's legal brief, then, was an attempt to demonstrate to the federal judges that the union is not an enemy of reform and therefore should have a seat at the table during deliberations over how to decrease overcrowding. It was also an effort to draw attention to the disastrous consequences of overcrowding for prison staff (not just prisoners) and need to hire more officers (California Correctional Peace Officers Association, 2010b).[16] It was not a sign of support for shortening sentences or early release.

Taken together, "making it personal" forced the CCPOA to budge; yet, the union and its allies (particularly CVUC, which is almost solely funded by the CCPOA) continue to fight against major efforts to downsize prisons, particularly those that would lead to early release or shorter prison sentences for many offenders. It is incumbent upon policy makers and other actors seeking to shrink the penal system to confront unions that say one thing and do another. In addition, if unions continue to obstruct downscaling efforts, they must hold the organizations accountable (and keep "making it personal"). By doing so, they can make it in the unions' self-interest to stop fighting efforts (either directly or through proxies) capable of truly shrinking the penal system.

14. Unpublished field notes, 2010 CCPOA Convention, Las Vegas, Nevada, November 7, 2010.
15. Unpublished field notes, 2010 CCPOA Convention, Las Vegas, Nevada, November 7, 2010.
16. Unpublished field notes, 2010 CCPOA Convention, Las Vegas, Nevada, November 7, 2010.

Proposition 4: Don't Scapegoat the Unions

Governors and other policy makers only should confront prison officer unions if they are fully committed to downsizing prisons, not to make prison officer unions scapegoats for their own inability or unwillingness to promote real penal change. After all, as previously noted, politicians now regularly blame state workers and their unions for an array of governmental problems (Smith and Haberman, 2010). Unless politicians are willing to take hard positions to shrink the prison system, they should not blame prison officer unions for the failures to enact serious reforms.

Lawmakers and state officials routinely argue that they cannot make major policy changes because of "special interests." This claim often seems like an excuse for not taking politically unpopular positions. State officials should not use the need for downsizing prisons as justification to weaken unions. "Making it personal" is only a strategy for getting unions not to oppose reforms. Indeed, if unions refrain from opposing sentencing reform and prison closures, then they should be rewarded with good contracts that professionalize prison officer work, provide solid wages and benefits, and offer job security. In other words, incentives should be given for cooperation, not just disincentives for noncooperation. After all, research indicates that, by enhancing training, increasing professionalism, and decreasing turnover, prison officer unions improve the quality of life for staff and inmates alike (Crewe, Liebling, and Hulley, in press).

Conclusion

Policy makers made choices that created mass imprisonment, and they will have to make choices to downscale prisons. Public officials might be tempted to ship state prisoners to private facilities, enact symbolic reforms, blame prison officer unions and other "special interests" for their lack of action, or claim that "the public" does not want different penal policies. However, to create meaningful, lasting policy change capable of keeping crime down without locking up millions of people, lawmakers and other leaders have to insist publicly that such change is necessary, possible, and desirable. Moreover, they need to confront interest groups that generate or exacerbate fear of altering the penal status quo. If they are unwilling to engage in this kind of struggle, then fear-based campaigns organized by prison officer unions and their allies will continue to resonate with the electorate, and the current window of opportunity for implementing substantial, long-term reforms capable of downscaling the penal system will close, further empowering organizations that support and benefit from mass imprisonment.

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Downsizing the carceral state

The policy implications of prison guard unions

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As the growth of this nation's corrections apparatus threatens to bankrupt state governments across the nation, and as mass incarceration continues to tear at these same states' poorest communities of color, scholars have begun to question not only how we have come to be in this carceral crisis but also how policy makers might end it. Joshua Page (2011, this issue) offers several policy prescriptions for shrinking the carceral state in his article, "Fear of change: Prison officer unions and the perpetuation of the penal status quo." As he views it, prison officer unions erect significant barriers to existing as well as any new "efforts to implement sentencing reforms, shutter prisons, and slash corrections budgets." Therefore, policy makers must commit themselves to neutralizing the negative impact of these unions, both by confronting them to make the public aware of the ways in which their self-interest can work against the interests of the broader society and by making sure that their reasonable desire to be treated fairly as workers is accommodated.

Page (2011) is correct that policy makers interested in downsizing the carceral state must confront directly and aggressively those who have a direct interest in maintaining and/or expanding that same state. He is also right that policy makers must commit themselves to tackling the misleading and inaccurate crime and punishment narratives that these same self-interested parties regularly spin for voters to secure their "buy in" when it comes to keeping laws punitive and the number of Americans who are incarcerated sky high. Ultimately, however, Page's policy focus on prison guard unions is misguided. Specifically, he exaggerates the correction officers' advocacy for prison jobs at any price, as well as their desire for ever more draconian penal policies. Therefore, he overestimates how committed prison guards in fact are either to maintaining the carceral state as it currently exists or to bloating it further. In addition, Page overstates how pivotal prison guard activism has

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been in determining whether state carceral systems have expanded or shrunk in the last few decades. Ultimately, then, Page misreads the potential positive impact that targeting such unions would have in terms of downsizing of the carceral state writ large. Still, Page's policy recommendations have enormous potential. By tweaking them slightly and substituting his focus on prison guard unions for those whose level of political power and degree of economic self interest *do* in fact serve as a serious barrier to downsizing the carceral state, Page's prescription could have a tremendous positive impact on changing the penal status quo.

As Page (2011) points out, one of the main by-products of the rise of the carceral state and, more specifically, the advent of mass incarceration, has been an upsurge of guard interest in joining a union and, in some states, an increase in the number of guards who actually succeeded in their efforts to secure union representation. In that sense, then, Page is right to view guards unionization as "an unintended consequence of mass imprisonment"—those in the business of meting out punishment certainly never intended for guards to mobilize so fervently against the terrible working conditions that were virtually guaranteed once such staggering numbers of Americans were locked up.

State governments and private prison corporations certainly should have predicted such an outcome, however, because prison guards had protested vigorously and had sought union representation every time their working conditions deteriorated and their level of exploitation increased. During the 20th century, throughout the postwar period, American prison guards organized because they were consistently paid less than workers in other institutions, such as factories and schools, while they were equally exploited on the job and endured far more on-the-job injuries. These injuries stemmed from working in overcrowded prisons where the inmate–guard ratio was dangerously high. They occurred as well because guards were forced to manage and oversee inmate labor in prison factories that were completely unregulated and often treacherous. Indeed, as labor scholars Lynn Zimmer and James B. Jacobs (1981: 532) stressed, not only did prison guards "work under conditions of constant danger. . .. Like coal miners, loggers, and longshoremen," but also like such other workers, poor working conditions had led guards as well "to frustration, discontent, and collective protest."

Indeed, this nation was rocked routinely by the labor activism of prison guards throughout the 1940s and 1950s, and from the mid-1960s onward, as states increasingly embraced laws and policies that, in turn, dramatically increased prison populations, such guard labor activism only grew. As one analyst wrote about the guard upheaval of the 1970s, "[i]n most states guards are lowest on the public protective service pay scale, behind police and firefighters as well as parole and probation officers and the state patrol. . .. At the same time, however, guards work under tight conditions of security that have been strained.. . . Compounding the complexity of the guard's job in Ohio are the large size of the prisons and high staff-inmate ratios" (Staudohar, 1976: 178). The problem of prison

overcrowding had become such a pressing workplace safety concern for Ohio's guards by the late 1960s that between 1969 and 1975 alone, they initiated 10 separate work stoppages (p. 181).

Page (2011) recognizes that prisons became increasingly unsafe workplaces for guards as the carceral state expanded, and he concedes willingly that guard efforts to unionize netted significant improvements that they sorely needed. Union formation and activism, he notes, "greatly improved its members' take-home" pay as well as gave them "a fantastic pension plan." What is more, he suggests, collective bargaining was an important tool for helping prison guards unions "to enhance its members' on-the-job autonomy and authority in matters ranging from shift and post assignments to personnel investigations and discipline." Still, Page argues, if the nation is serious about diminishing its political and economic reliance on imprisonment, the power and influence of these very unions must be put in check. Although guard unions are clearly good for their members, in Page's estimation, they are not good for society as a whole because their own self-interest—to keep prisons full and to keep the public tough on crime—makes them a determined and effective adversary in every serious attempt to downsize the carceral state.

The contention that what is good for guard workers is bad for the nation needs additional examination. To be sure, there are key examples where certain, and specifically two guard organizations—the California Correctional Peace Officers Association (CCPOA) and New York State Correctional Officers & Police Benevolent Association (NYSCOPBA)—have taken political positions that, when successfully adopted, led to greater rates of incarceration and, thus, to an expansion of the carceral state. Most guard unions have played a far smaller role in the political arena than either CCPOA or NYSCOPBA, however, and where they have decided to enter that fray, guard unions have often opposed state efforts to save money by closing prisons primarily because such closures are not accompanied by a similar reduction of inmate populations, which only makes other prisons even more crowded and even more dangerous. As even NYSCOPBA noted recently, closing prisons in New York quickly meant that this state's remaining penal institutions were "at 122 percent capacity" with increasing numbers of the inmates in them "double-bunked." Such severe overcrowding, in turn, resulted "in a dramatic increase in violence in prisons" (NYSCOPBA, 2011).

Prison guard unions have also tended to be vocal opponents to state efforts to maintain the penal status quo if that means the privatization of state penal institutions. This is significant because the only way that many states have been able to maintain the penal status quo has been by turning to private companies. Importantly, almost all recent growth of the carceral state has been in the private sector at taxpayer expense. In Tennessee, for example, even while state officials have been under increasing pressure to reduce the financial burden of mass incarceration, Republican Governor Bill Haslam recently managed to secure "nearly $31 million in recurring money to keep open [Corrections Corporation of America's]

privately run prison in West Tennessee" and did so by "making deep cuts to other areas such as TennCare and higher education" (Schelzig, 2011).[1]

Unions representing prison employees have in fact been fairly clearheaded that it is in their interest to resist the expansion of the carceral state even though corporations such as Corrections Corporation of America, Wackenhut, or GEO group might provide them with more jobs. To them privatization too often has translated into low pay, paltry benefits, and seriously unsafe working conditions—the exact injustices that they exist to fight. Indeed, unions like AFSCME Corrections United (ACU) have stated emphatically that "The imprisonment of human beings should not be driven by the bottom line" (AFSCME, Don't be a Prisoner). The union representing prison employees in California, SEIU 1000, has been equally firm that it does not support prison expansion, even when it is funded by public dollars, just to provide its members jobs. In 2007 when Governor Schwartznegger sought to bolster corrections with an infusion of 10.9 million dollars, "The Service Employees International Union Local 1000 responded that the state should focus on expanding rehabilitation and re-entry programs rather than adding new bed space" (Furillo, 2007).

Not only do guard unions often resist the notion that it is in their self interest to expand the carceral state, but substantial evidence suggests that guard unions can also be quite critical of the specific draconian penal policies and practices that have put record numbers of people behind bars and have made life prison conditions so restrictive and punitive. In short, these too have had a negative effect on the quality of their working conditions. As one guard union official put it bluntly when speaking of how inmates should be treated in 2008, "[s]afer places for their loved ones to live in mean safer places for our members to work" (Abramsky, 2008). Even the former president of NYSCOPBA, Richard Harcrow, found himself leery of restrictive policies that clearly made correction officers' time on the job more difficult. As he pointed out, one of the reasons why so many guards gravitated toward the NYSCOBA and away from the older AFSCME union they had long been affiliated with back in the 1990s was because the new labor organization took a more vocal position against the increasingly dangerous workplaces that guards had begun to face thanks to new levels of overcrowding and to a reduction in things like recreation—both direct by-products of get-tough ideology and policy (R. Harcrow, personal communication, August 12, 2004).

Notably, this pragmatic view that punitive punishment practices deteriorate working conditions is often accompanied by the strong feeling that current prison policy is unnecessarily inhumane as well. As Brian Lowry, president of the Council of Prison Locals of the American Federation of Government Employees (AFGE), pointedly told lawmakers in 2010, it was time that prison officials find "new ways to foster the fair treatment of prison

1. TennCare is Tennessee's managed care program for those who quality for Medicaid in that state.

inmates and to improve the[ir] outcomes." According to Lowry, prison guards and staff represented by the AFGE feel strongly that inmates should be protected from immediate abuses such as prison rape as well as given the long-term tools they needed to help them "reenter and remain in our communities," and yet they are rarely heard. In their view, it is the Federal Bureau of Prisons that has made it "virtually impossible to properly implement the Prison Rape Elimination Act of 2003" or to roll back recidivism because it never was willing to fund "the additional staff positions and staff training that are necessary to accomplish these tasks" (American Federation of Government Employees [AFL-CIO], 2010).

Ultimately, then, placing prison guards at the forefront of conservative efforts to expand the carceral state and to make it more punitive, or even viewing them as reliable allies in such efforts, is problematic. They do not all, nor is there any evidence to suggest that most of them, believe, as Page (2011) suggests, that today's punitive prisons work and must be defended. Still, the two prison unions that Page studies in detail mobilized in the 1990s and earlier 2000s to maintain high levels of incarceration as well as to promote more punitive carceral policies. And, even though both of these unions have, in recent years, altered many of their earlier positions and have, as one observer put it, come to perceive that "more prisons are a bad idea" (Abramsky, 2008), they did at one time work hard to support measures such as Three Strikes and were known to resist many efforts to reduce the carceral state. So, *when* prison guard unions have mobilized to bolster the carceral state, is Page right to assume that at least *their* actions were central to ensuring that negative outcome? Do Page's powerful stories about the early conservative activism of the CCPOA or NYSCOPBA provide sufficient evidence to then argue that tackling prison guard unions would pave the way for positive reform outcomes?

One way to assess this is to look more closely at how the presence of a guard union does or does not in fact correlate with a state's commitment to keeping its carceral apparatus large. It turns out, when one maps this nationally, that there is little correlation between the presence of guard unions, even the presence of large guard unions who have had a militantly conservative history like the CCPOA and NYSCOPBA, and the fate of a given state's carceral apparatus. As it happens, only three of the six states that experienced the most substantial *increase* in prison populations in 2008 (Pennsylvania, Florida, Alabama, Indiana, Arizona, and Tennessee) had a serious guard union presence (Kirchhoff, 2010). And, of the five states that succeeded in making the biggest *dent* in their institutions of punishment that year (Massachusetts, Texas, Nevada, Wisconsin, and Georgia), several also had particularly powerful guard unions (Kirchhoff, 2010). In fact, by examining trends nationally and more carefully observing which states have successfully downsized prisons, as well as which have failed to do so, there is scant evidence to support that the presence or absence of strong guard unions is at all determinative.

That said, Page (2011) is very much correct that a key consequence of "America's prison boom" was the "development of powerful organizations with interests in maintaining existing penal arrangements" and that taking on such groups could well assist reformers

in their efforts to downsize the carceral state. In states that have a high saturation of prisons—those that have time and again managed to resist efforts to reduce expenditures in the criminal justice arena—there were key parties at work namely private companies, that have spent extraordinary resources to influence the political arena as well as to shape the legal and policy arena and have very clearly been instrumental in seeing their conservative law-and-order visions to fruition. His focus on prison guard unions has, however, obscured who the most crucial players are in this regard. Indeed as one comprehensive report on the expansion of the carceral state reminds us pointedly, "[i]n addition to those working directly in institutions, many more jobs are tied to a multi-billion dollar private industry that constructs, finances, equips, and provides health care, education, food, rehabilitation and other services to prisons and jails" (Kirchhoff, 2010).

Notably, private prison corporations are not the only businesses that profit from the expansion of the carceral state and, thus, expend great energy on promoting the right political environment and on advocating for the right legal apparatus to secure their access to such profits. Myriad corporations that have nothing to do with building or running prisons themselves are nevertheless deeply invested in providing such institutions with both goods and services. From manufacturing bath towels, bedding, and binoculars, to selling padlocks, paper products, and restraining devices, to providing laundry, telephone, and medical services, private companies directly benefit when a state's carceral apparatus is large and growing. These organizations also feel the pinch directly when states move to shrink that same carceral system. (Bender, 2000). Today, in fact, so many companies have come to rely on a large and growing carceral state, and so many now have strong economic incentives to make sure that prisons populations are not reduced, that they have their own trade show. Each year, they come together to hawk their wares at the American Correctional Association's huge conventions, and the rest of the year, they rely on the "American Corrections Marketplace" to make sure their goods and services continue to sell well. Such companies also work together to promote legislation and policies that serve their economic interests in the carceral state via conservative groups such as the Association of Private Correctional and Treatment Organizations and the American Legislative Exchange Council (ALEC).[2] As one reporter discovered as she was investigating the recent boom in private prison growth, "[a]t least one executive with the Corrections Corporation actually sat on the [ALEC} committee that drafted get-tough-on-crime legislation" ("Transcript," 2008).

Ultimately, then, Page (2011) is correct that policy makers need to pay closer attention to those in our society who are "self-interested" when it comes to keeping the carceral state large, and he is also right that they will need "to use confrontation and *make it personal*" or, as he says more specifically, that they will "need to argue publicly" that such groups are merely "stonewalling out of self-interest." Clearly, however, the groups most deserving

2. See the "Web Sites" section at the end of the essay for more information on these organizations.

of such public condemnation are not the nation's prison guard unions. Not only do most guards not view prison expansion and punitive penal practices as desirable, but even in the flashy instances where guard unions have used their resources to stump for law-and-order measures, their support paled in comparison with that offered by wealthy corporations and conservative financiers. Consider, for example, that it was billionaire Henry T. Nicholas III's multimillion-dollar commitment to defeat Proposition 66, which not only allowed "its opponents to broadcast TV commercials for the first time" but also gave Governor Pete Wilson the confidence that he could actually defeat this measure that by all accounts was set to pass. As he put it, "[t]his was the cavalry coming over the ridge" (Mathews, 2004). The fact is that forces for repealing the most punitive elements of Three Strikes had less than $100,000 to spend, whereas forces against Proposition 66 had nearly $5 million.

That *corporate* self-interest is what most often determines how likely it is that new law-and-order legislation will pass or that new bricks will be laid to expand the carceral state is particularly obvious to the legislators of prison-filled districts. As Colorado State Representative Buffie McFadyen put it bluntly, "[s]ay, for example, you have a bill on reducing sentencing in a state legislature like mine—and it's time to look at it, you won't hear the private prison industry or the for-profit industry talking against the bill. But you'll see about four to six [of their] lobbyists in the room making sure that bill fails" ("Transcript," 2008). In short, then, it is *their* "narratives about crime" that most need challenging and their "[f]ear-based campaigns" that need to be ended (Page, 2011). As for the guard unions, most of them already are well aware that "mass imprisonment actually makes us less safe," and most of them are already vocally supportive of everything from "in-prison rehabilitation" to local "reentry programs" (Page, 2011).

It is clearly important to Page (2011) that, despite his call to rein in prison guard unions, policy makers do not find themselves unduly "scapegoating unions." However, because Page's own analysis misreads the role that prison guards play in our nation—both by exaggerating prison guard support of higher rates of incarceration as well as of more draconian penal policies and by overestimating how important and conclusive guard union activism is in the cases when it has veered in that direction—his policy recommendations might read as doing just that. Page has misunderstood which political actors actually need the sorts of policy interventions that he suggests. Each one of his four policy recommendations makes tremendous sense, but only when it is applied to those economic actors who clearly have the largest stake in keeping the carceral state bloated and who have played the most pivotal role—politically as well as economically—in preventing efforts to downsize it. Yes, some law-and-order zealots work as corrections officers, and yes, prisoner guard unions have, in some specific and high-profile moments, partnered with various right-leaning power brokers to try to determine the outcome of important legal and political battles. Overwhelmingly, however, prison guards and the unions that represent them spend most of their time simply trying to keep prison workplaces safe and trying to make sure that they are not exploited by the state, federal, and private entities that employ them. Indeed,

for these reasons, prison guards are not the policy problem. They are, in fact, a grassroots *antidote* to the policy problem created by conservative politicians as well as corporations who have an ideological and an economic stake in keeping the carceral state fat and healthy. Targeting these players—rather than prison guard unions—in the comprehensive policy ways that Joshua Page's article recommends, might finally tip the balance in favor of those who wish to downsize—rather than bolster—this nation's carceral state.

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Web Sites

American Correctional Association, aca.org/.

American Corrections Marketplace, correctionsmarketplace.com/.

American Legislative Exchange Council (ALEC),
alec.org/AM/Template.cfm?Section=Public_Safety_and_Elections&Template=/CM/HTMLDisplay.cfm&ContentID=15654/.

Association of Private Correctional and Treatment Organizations, apcto.org/news/releases.cfm/.

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American imprisonment and prison officers' unions

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One of the most notable aspects of American state prison imprisonment rates is that, as Newburn (2010) recently reminded us, they have for some time varied dramatically both over time and across states. For example, in the early 1970s,[1] state prison incarceration rates[2] varied from a low of 25 prisoners per 100,000 residents in North Dakota to a high of 166 in North Carolina.[3] By 2007–2009, rates had increased so dramatically that the lowest state imprisonment rate was 150 prisoners per 100,000 residents (in Maine) and the highest was 861 (in Louisiana). In absolute terms, Maine's increase of 105 prisoners per 100,000 residents (from 45 prisoners per 100,000 in 1971–1973 to 150 prisoners per 100,000 in 2007–2009) was the smallest increase and Louisiana's increase of 756 (from 105 to 861) was the largest.[4] For Gottschalk (2006), what is most interesting about this growth in imprisonment in the United States is not, however, its size but the fact that it occurred in the prison systems of all 50 states. With each state in control

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1. We averaged the imprisonment rate for the years 1971, 1972, and 1973 to avoid basing our descriptions on a single year. For the more recent period (2007–2009), we again averaged the rate across 3 years.
2. These rates are based on population counts, not on admissions. Because Page (2011, this issue) deals only with state *prison* incarceration, we look at state prison rates, excluding jails and, of course, federal prisons.
3. Data on state imprisonment rates were obtained from Maguire (online and various annual printed editions).
4. Stated in terms of percentage increases and using the average of the 1971–1973 rates as a base, every state more than doubled its rate of state imprisonment by 2007–2009. The smallest increase (122%) occurred in North Carolina, where the rate rose from 166 to 367; the largest increase (906%) was in Delaware, where the rate rose from 47 to 468.

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of its own criminal law and its administration, this is a rare instance of unanimity in U.S. politics.

The uniformity of the increase in imprisonment rates from the early 1970s until 2009 should not be read as suggesting that decreases, if they are to occur, will take place simultaneously or by way of the same mechanisms. Nor does the fact that all states increased their prison populations dramatically mean that the proximal causes of this growth can be reversed easily. As we have argued in our study of the 27% decrease in California's imprisonment rate in the late 1960s under Governor Ronald Reagan (Gartner, Doob, and Zimring, 2011), substantial reductions in imprisonment rates are likely to require several simultaneous, somewhat independent, but interacting changes in the politics, economics, and public acceptance of imprisonment.

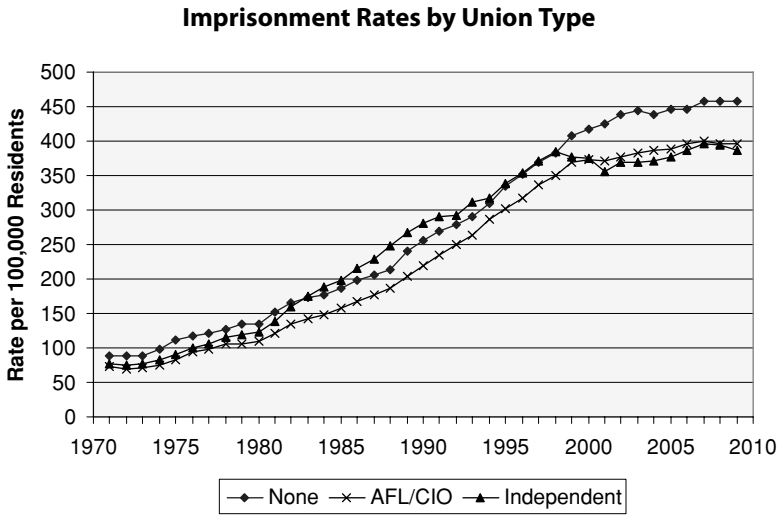
As a starting point, then, we are hesitant to assume—as Page (2011) has in this issue—that institutions as varied as state prison officers' unions have simple "main effects" on state imprisonment levels. Instead, we argue that the relationship between the presence of prison officers' unions and state imprisonment rates suggested by Page's analysis is far from apparent. Our analysis questions whether, in general, state prison officers' unions—independent or American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) affiliated—have distinctive effects on levels of state imprisonment and, in particular, whether the activities of the California Correctional Peace Officers Association (CCPOA) have played a major role in the inability of California to comply with a 2009 federal court order to reduce its prison population.[5] To be clear, we are not challenging Page's narrative about the activities of the CCPOA in California (or the independent prison officers' union in New York). Instead, we address a simple question: What evidence is there that unions have been particularly important in influencing the size of prison populations?

Prison Officers' Unions and Imprisonment Rates

Although Page's (2011) article is largely a description of some of the history of the CCPOA (and to some extent the independent prison officers' union in New York), its title and four propositions for "accommodating and confronting prison officer unions" can be read as suggesting that such unions, *in general*, play an important role in maintaining high state imprisonment rates. Indeed, early in his article, Page presents a map of all 50 states in which he categorizes them into three groups: those without unions, those with independent unions, and those with unions affiliated with the traditional union

5. It is important to note that Page (2011) states clearly that he does not think that unions, including the CCPOA, were responsible for the sorts of increases in imprisonment that we have just described. However, Page does hold the independent CCPOA at least partially responsible for the inability of California to rein in its prison population.

FIGURE 1



umbrella organization, the AFL-CIO (see Page, 2011: Figure 1).[6] Again, the implication is that prison officers' unions in states besides California and New York "have fiercely and effectively resisted—and will likely continue to resist—major efforts to *downsize prisons*."

We begin our analysis by comparing trends in imprisonment rates for the three groups of states Page (2011) identifies in his Figure 1. In our own Figure 1, we have plotted the average imprisonment rates for each year from 1971 through 2009 for states without unions, states with AFL-CIO unions, and states with independent unions (including California and New York, which are the focus of Page's article).[7]

What is notable about this figure is the similarity in the size of and trends in imprisonment rates for all three categories of states until 1998 when rates in the union states tended to level off somewhat, whereas rates in the nonunion states continued to increase. Said differently, at the beginning of the period, the three groups of states were similar in their levels of imprisonment, and up until the late 1990s, the three groups of states also were similar in their trends in imprisonment. Imprisonment rates in states with unions (of either type) and states without unions did begin to diverge after that; however, it was in states without unions that imprisonment rates continued to rise.

6. Page does not indicate the period when this determination was made, so we have assumed it was probably contemporaneous with the writing of the article and use Page's characterization of the union status of the 50-state prison systems.

7. We have treated each state as a unit of analysis, independent of its population. Hence, for example, there are 28 states with AFL-CIO unions. Each data point for the AFL-CIO curve in Figure 1 is, therefore, the (unweighted) average of the imprisonment rates for these 28 states.

TABLE 1

Average Imprisonment Rates for States with No Unions, States with AFL-CIO Unions, and States with Independent Unions, 1988–1997

Union Status	*N*	Mean	Standard Deviation	Minimum	Maximum
No union	13	290.9	103.6	114.6	476.0
AFL-CIO Union	26	260.1	120.1	77.2	508.2
Independent Union	11	307.1	102.4	162.1	464.9
Total	50	278.5	112.0	77.2	508.2

To examine in more depth the similarity of the imprisonment trends until the point of the apparent divergence of the curves shown in Figure 1, we present in Table 1 the mean imprisonment rate for each of the three groups of states in the 10 years ending in 1997. The differences in the average imprisonment rates for the three groups of states are not significant ($F < 1.0$). However, what is more notable is the variability among the states within each of the three groups. If "union status" was a useful way of characterizing states in terms of their imprisonment policies, one might expect there to be relatively little within-group variability. We do not see that: The variability within each "union status" group is large and relatively similar in size (judged by the standard deviations).

Page's (2011) argument is, in effect, that in recent years, unions—as exemplified by the CCPOA—have opposed prison population reductions. This implies that if unions were effective in their lobbying, then union states—or more specifically, states with independent unions—would have higher imprisonment rates than nonunion states in recent years; in addition, we also might expect similarity in imprisonment rates within each "union status" group. However, we find no evidence of this: The three groups of states do not differ in their imprisonment rates ($F < 1.0$) for the period 2005–2009 (Table 2).[8] Again, what is striking is not the variability among the means for the three groups, but the variability within each group.

Another hypothesis suggested by Page (2011) is that independent unions—or the CCPOA in particular—were instrumental in inhibiting reductions in imprisonment rates in the first decade of the 21st century. If Page is correct, then either imprisonment rates in the union states should be increasing more than those in the nonunion states during this period or imprisonment rates in the independent union states should be increasing more than those in the AFL-CIO states and nonunion states.

To examine this hypothesis, we calculated a regression line for each state for the 11 most recent years (1999–2009) using "year" as the only predictor. For each of the 50 states, the

8. We also carried out a similar analysis for the years 1998–2009. The effect of "union status" was not significant ($F < 1$).

TABLE 2

Average Imprisonment Rates for States with No Unions, States with AFL-CIO Unions, and States with Independent Unions, 2005–2009

Union Status	*N*	Mean	Standard Deviation	Minimum	Maximum
No union	13	453.2	145.5	149.0	701.0
AFL-CIO Union	26	395.1	153.6	181.4	845.4
Independent Union	11	388.0	113.1	219.0	546.0
Total	50	409.0	143.3	149.0	845.4

TABLE 3

Average Unstandardized Regression Coefficients Describing Linear Changes in State Imprisonment Rates, 1999–2009, for Three Groups of States

Union Status	N	Mean	Standard Deviation	Minimum	Maximum
No union	13	4.9	5.2	−2.2	14.8
AFL-CIO Union	26	3.2	5.2	−9.9	15.2
Independent Union	11	2.6	7.0	−8.5	12.2
Total	50	3.5	5.6	−9.9	15.2

unstandardized regression coefficient can be considered an estimate of the average annual change in imprisonment rates (assuming a linear relationship between imprisonment rate and year for this period). A positive coefficient indicates an increase in the imprisonment rate, whereas a negative coefficient indicates a decrease.[9] Once again, we found no difference between the three categories of states ($F < 1.0$) as shown in Table 3. Furthermore, the high level of variability within "union status" groups—in particular the states with independent unions—suggests that "union status" tells one little about recent trends in imprisonment rates.

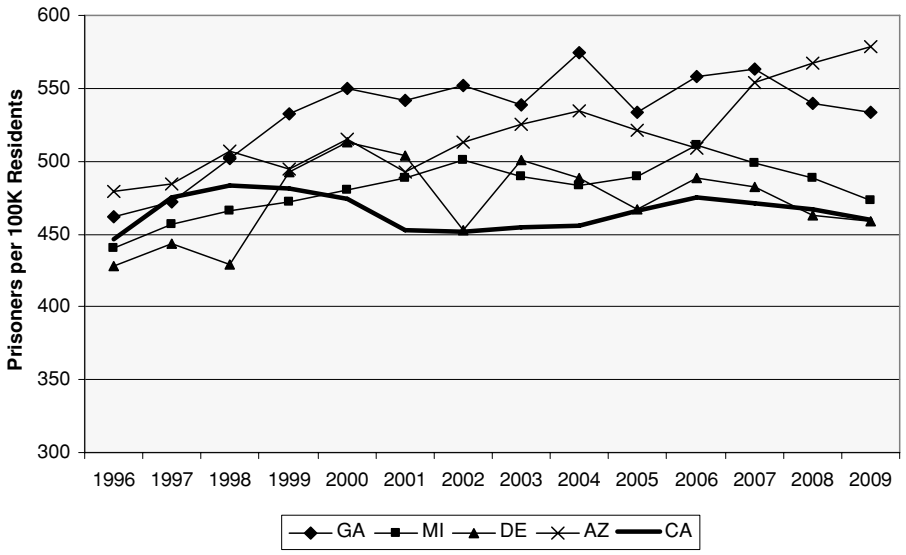
The CCPOA and California Imprisonment Rates

To this point, we have focused on levels, trends, and variability in imprisonment rates for three groups of states categorized by the union status of their prison officers' associations. Because Page's (2011) primary focus is the CCPOA and imprisonment in California, we turn now to the specific case of California and whether it was in any way unique in its inability to reduce imprisonment in the first decade of the 21st century. To address this question, we compare trends in imprisonment rates in California with trends in imprisonment rates for four other states with comparable levels of imprisonment. We began by calculating

9. This is slightly different from computing the average change from 1999 to 2009 for each state because the regression coefficients are a function of all 11 years rather than of the only the first and last years. Nevertheless, these two approaches are highly correlated ($r \geq 0.91$) for the three groups of states.

FIGURE 2

California and States with Comparable Imprisonment Rates, 1996–2000



the average imprisonment rate in California for the years 1996–2000; these years are the starting point for the decade that is the focus of much of Page's discussion. California's average imprisonment rate for these 5 years was 472 prisoners per 100,000 residents. We then chose the two states with the closest but lower imprisonment rates: Delaware with a rate of 461 and Michigan with a rate of 463. These two states have unions represented by the AFL-CIO. We also chose the two states with the closest but higher imprisonment rates: Arizona with a rate of 496 and an independent correctional officer union, and Georgia with a rate of 504 and no correctional officer union. Trends in the imprisonment rates of these five states between 1996 and 2009 are shown in Figure 2.

It is difficult, from the trends shown in Figure 2 of states with similar imprisonment rates for the period 1996–2000, to maintain the view that the California union's activities were uniquely or unusually successful in maintaining high imprisonment rates during the first decade of the 21st century. Said differently, in comparison with these four states, California's imprisonment rate does not look distinctively high.

To be clear, we are not disputing Page's (2011) conclusion that during the first decade of this century the CCPOA was unenthusiastic about reducing imprisonment. When faced with workforce reductions, unions often attempt to defend the size of their workforces. Rather, the question we raise is whether the CCPOA should be given credit, or blamed, for the fact that California's imprisonment rate was relatively stable from 1996 through 2009 and did not show the decrease that many people had hoped for.

Our conclusion is obviously somewhat different from that offered by Page (2011) who states, "[n]o doubt exists that the CCPOA is a formidable organization that heavily influences penal policies and priorities. . .. It is also clear that the CCPOA is exceptional. No other prison officer union is as influential as the California outfit." We would suggest that whatever impact the CCPOA had on state policies, recent trends in California's imprisonment rates show little evidence of it. Indeed, 37 states had greater increases in imprisonment rates over the period 1999–2009 (based on the same measure used in the analysis shown in Table 3). California's coefficient was essentially zero (–0.2), and 4 of the 12 states with lower coefficients than California's (NY, NJ, MA, and NV) were states described by Page as having independent unions.

The CCPOA, Page observes, "now helps obstruct efforts to downsize California's prison system." In this context, it is worth noting that there are at least two types of prison system downsizing. The first is to reduce the number of prisoners. The second is to reduce the number of prisons or prison cells (and, by implication, the number of prison officers). However, California would have to reduce its number of prisoners substantially before it could tackle the challenge of closing prisons. At midnight, April 6, 2011, California had 146,511 felons (and "others") in its own institutions, even though the "design capacity" on that date was 84,096 (a shortfall of 61,810).[10] Closing prisons, therefore, does not appear to be immediately possible in California, regardless of the CCPOA's position on prison closures.

The New York State Correctional Officers & Police Benevolent Association (NYSCOPBA) and New York Imprisonment Rates

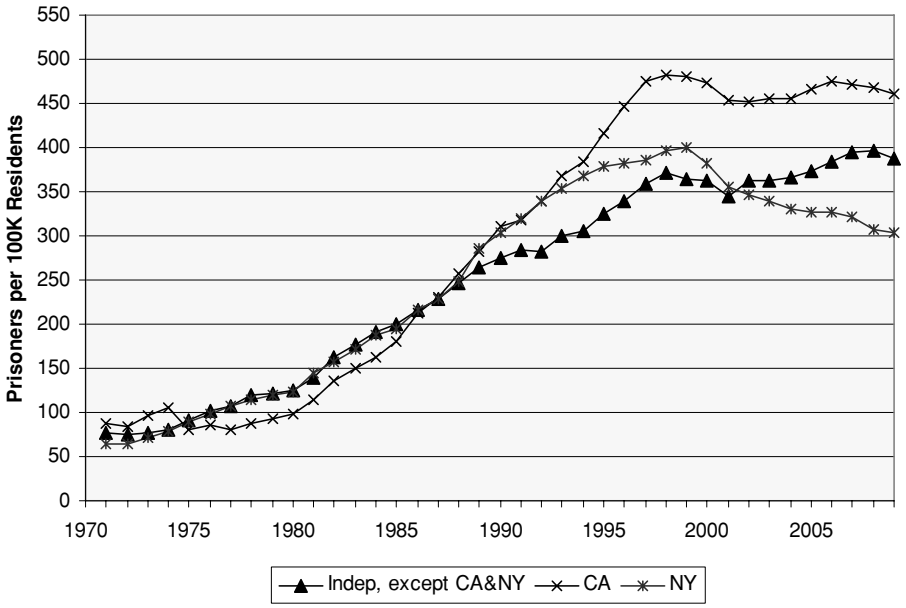
As Page (2011) notes, New York often is pointed to as a model case of prison downsizing, despite the existence of the NYSCOPBA, an independent union like California's CCPOA. As shown in Figure 3, the incarceration trajectories of these two states began to separate in the early 1990s and thereafter differed substantially from each other and from the average trajectory of the other 9 "independent union" states.

In late 1999, New York's prisons held 71,472 prisoners, but by late 2010, that number had dropped to 56,315 (Fischer, 2011). Expressed as rates per 100,000 population, that number constitutes a drop from 400 in 1999 to 304 in 2009 and to roughly 287 in late 2010. In 2008 and 2009, New York eliminated 3,885 prison beds, some permanently, through a combination of closing housing units or annexes at some facilities and closing some facilities completely. However, in mid-2010, the process of prison closures was halted, which Page

10. In total (counting prisoners transported out of state as well as those 'in-state' but in 'contract beds' or in hospitals) there were 162,598 people under the control of the California Department of Corrections and Rehabilitation in institutions at midnight on April 6, 2011. www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad110406.pdf (downloaded 15 April 2011).

FIGURE 3

Imprisonment in California, New York, and in the Other "Independent Union" States



(2011) attributes to the efforts of the NYSCOPBA and its political allies. "Clearly, the Patterson Administration and Department of Correctional Services," Page states, "were no longer up to fighting NYSCOPBA and its allies"; consequently, "[d]ownsizing New York's prison system will be a long, slow process."

Nevertheless, on February 9, 2011, the Commissioner of the New York Department of Correctional Services announced that Patterson's successor, Governor Cuomo, had set up a "Prison Closure Advisory Task Force comprised of experts and legislators to recommend the closure of specific prisons" (Fischer, 2011: 1). The terms of reference for the task force are clear: "The task force will recommend the closure of specific minimum and medium security facilities after it has engaged the community and received input from a variety of stakeholders" (p. 1). The reasons were also clear: The estimated excess capacity "of at least 3,500 beds in the prison system . . . impose an unnecessary cost on the State taxpayers" (p. 1). In other words, whatever success the NYSCOPBA might have had at obstructing efforts to downsize the New York prison system in 2010—a success possibly attributable to the impending gubernatorial election—it seems likely to be a short-term one. Thus, although Page (2011) documents the ways in which NYSCOPBA fought prison closures in New York, his claim that the NYSCOPBA "is now an important political player that obstructs efforts to downscale the prison system" might be an overstatement.

Conclusion

The question we addressed in this essay was as follows: What evidence is there that unions have been particularly important in influencing the size of prison populations? Based on the data we have presented, our conclusion is that the evidence that unions—independent or otherwise—have been important impediments to reducing imprisonment rates in the United States is thin. This does not mean we question whether prison officers' unions work to preserve jobs for their members, oppose attempts to cut correctional budgets, or assert the importance of imprisonment as a response to crime. Instead, what we question is whether focusing on prison officers' unions is likely to be an important strategy for reversing the growth of prison populations in the United States. We suggest that those working to reduce imprisonment would do well to search for more important impediments to their efforts.

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EXECUTIVE SUMMARY

MASS IMPRISONMENT AND CHILDHOOD BEHAVIOR PROBLEMS

Mass imprisonment and racial disparities in childhood behavioral problems

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Research Summary

This essay provides estimates of the influence of mass imprisonment on racial disparities in childhood well-being. To do so, we integrate results from three existing studies in a novel way. The first two studies use two contemporary, broadly representative data sets to estimate the effects of paternal incarceration on a range of child behavioral and mental health problems. The third study estimates changes in Black–White disparities in the risk of paternal imprisonment across the 1978 and 1990 American birth cohorts. Our research demonstrates the following:

1) *The average effect of paternal incarceration on children is harmful, not helpful, and consistently in the direction of more mental health and behavioral problems.*
2) *The rapid increase in the use of imprisonment coupled with significant racial disparities in the likelihood of paternal (and maternal) imprisonment are linked to large racial disparities in childhood mental health and behavioral problems.*
3) *We find that mass imprisonment might have increased Black–White inequities in externalizing behaviors by 14–26% and in internalizing behaviors by 25–45%.*

Policy Implications

Our results add to a growing research literature indicating that the costs associated with mass imprisonment extend far beyond well-documented impacts on current inmates. The legacy of mass incarceration will be continued and worsening racial disparities in childhood mental health and well-being, educational attainment, and occupational

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attainment. Moreover, the negative effects of mass imprisonment for childhood well-being are likely to remain, even if incarceration rates returned to pre-1970s levels. Our results show that paternal incarceration exacerbates child behavioral and mental health problems and that large, growing racial disparities in the risk of imprisonment have contributed to significant racial differences in child well-being. The policy implications of our work are as follows:

1) *Estimates of the costs associated with the current scale of imprisonment are likely to be severely underestimated because they do not account for the significant indirect effects of mass incarceration for children, for families, and for other social institutions such as the educational system and social service providers.*
2) *Policies that reduce incarceration rates for nonviolent offenders with no history of domestic violence will most dramatically reduce the effects of mass incarceration on childhood racial inequality. More research is needed to detail other important factors (e.g., crime type, criminal history, or gender of parent) that condition the effect of paternal incarceration on children.*
3) *Paternal incarceration effects target the most disadvantaged and vulnerable of children and are likely to result in long-term behavioral health problems. We propose a strengthening of the social safety net—especially as it applies to the poorest children—and programs that address the complicated needs of children of incarcerated parents.*

Keywords

parental imprisonment, *mass incarceration*, *race*, *inequality*, *mental health*, *behavioral problems*

Mass imprisonment and racial disparities in childhood behavioral problems

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Introduction

The sevenfold increase in the incarceration rate between the early 1970s and 2010 is implicated in race differences in, among others, health (Massoglia, 2008), marriage rates (Western and Wildeman, 2009), earnings (Western, 2006), and civic engagement (Manza and Uggen, 2006). In this article, we suggest that the prison boom also likely transfers some share of these disparities to the next generation. More than 3% of the adult population in the United States is under correctional supervision (Glaze and Bonczar, 2009; Sabol, West, and Cooper, 2009), and roughly the same percentage of children have a parent incarcerated on any given day (Western and Wildeman, 2009: 236), with the number of children experiencing parental incarceration at some point during childhood much larger (Western and Wildeman, 2009; Wildeman, 2009). As with incarceration more generally, the likelihood of experiencing parental incarceration at any point in childhood is staggeringly disparate with respect to parental race and educational attainment.

Although early studies of the effects of parental incarceration suggested children, on average, were harmed by the experience (Kampfner, 1995; Phillips, Erkanli, Keeler, Costello,

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and Angold, 2006; Sack, 1977), many reasons exist to think that children should benefit (or at least not suffer) from the loss of a criminally active parent. First, myriad criminological studies highlight similarities between parents and children in antisocial behavior and mental health problems (Bijleveld and Wijkman, 2009; Farrington, Coid, and Murray, 2009; Kerr, Capaldi, Pears, and Owen, 2009; Smith and Farrington, 2004). These associations and several theories of crime causation (Gottfredson and Hirschi, 1990; Nye, 1958; Sutherland, 1939) suggest that children would benefit (or at least not suffer) from the loss of a criminally involved parent. Second, even when harm is associated with parental incarceration, netting out the mechanisms through which parental incarceration might influence children is no small task. These mechanisms are often difficult or impossible to measure and might result from numerous environmental and genetic factors or an interaction between the two (Caspi, 2005; Guo, Roettger, and Cai, 2008). Thus, although the removal of criminally active parents should affect children (Hagan and Dinovitzer, 1999; Hagan and Palloni, 1990), it remains unclear whether and to what extent the incarceration of parents *causes* poor outcomes for their children (Murray and Farrington, 2008; Wakefield and Uggen, 2010; Wildeman and Western, 2010).

These difficulties were drawn out in great detail in this volume not long ago. The November 2006 issue of *Criminology & Public Policy* included a special section on parental criminal justice involvement. The message taken from that forum was that studies of the effects of parental incarceration on children suffered from the lack of longitudinal data as well as from the use of biased samples (Johnston, 2006). Thus, the difficulty associated with providing something resembling a causal estimate remained a substantial obstacle to understanding the effects of mass imprisonment on racial inequities among American children. Yet if we are interested in the macrolevel consequences of large increases in the American imprisonment rate since the mid-1970s, then we also need to know how many Black and White children can expect to have a parent go to prison and how the disparities in these risks have changed over time. Research at the time of publication of the November 2006 issue of *Criminology & Public Policy* could have told us little about these risks except that more children experienced parental incarceration at that time than in the 1970s and that large inequities in the daily risk of parental incarceration existed (Mumola, 2000).

That we did not know roughly 5 years ago how having a parent go to prison influenced the outcomes of already marginalized children or what share of children could expect to have a parent imprisoned was troubling in large part because it meant that we had only a vague idea of what the consequences of mass imprisonment for future inequality would be. Research showed that the lifetime risk of imprisonment for adult men increasingly was distributed unequally (Pettit and Western, 2004) and that these inequities had substantial implications for inequities among adult men in various domains (e.g., Western, 2006). However, we had little sense of how these inequities would play out in the next generation.

A lot can happen in 5 years. Although obstacles persist in identifying a causal relationship between parental incarceration and child outcomes, researchers have made

great strides in identifying how having a parent go to prison influences child outcomes (Geller, Garfinkel, Cooper, and Mincy, 2009; Murray and Farrington, 2008; Wakefield and Uggen, 2010; Western and Wildeman, 2009; Wildeman and Western, 2010). Findings from this new generation of research suggest that having a parent go to prison exacerbates preexisting behavioral problems (and other poor outcomes) among children. New estimates of the risk of paternal imprisonment also emerged. These estimates show that the risk of paternal imprisonment for Black children is large and has grown tremendously in recent decades, whereas the risk of paternal imprisonment for White children remains modest (Wildeman, 2009).

In this article, we build on some of this new research to answer the following question: How much might mass imprisonment influence racial inequities not just among adult men but also among their children? In doing so, we extend current research by providing the first insight into how large the long-term consequences of mass imprisonment might be for the intergenerational transmission of racial inequality. This information is especially important because it suggests that the prison boom might have long-term consequences for racial inequities even if the imprisonment rate were to return to its 1970s level today. To do so, we combine three existing studies in a novel way. The first two studies provide estimates across two excellent longitudinal data sets of how much having a father go to prison harms children's behavioral and mental health problems (Wakefield, 2007; Wildeman, 2010). The third study provides estimates of the risk of paternal imprisonment for White and Black children born in 1978 and 1990 (Wildeman, 2009).[1] By combining these causal and demographic estimates, we gain insight into the possible long-term consequences of mass imprisonment for racial inequality among children.

We highlight the influence of paternal incarceration on childhood well-being. We focus on broad measures of mental health and behavioral problems for several reasons. First, childhood mental health and behavioral problems are common to both data sets and allow causal estimates for a wide age range of vulnerable children and adolescents. Second, although many observers point to the number of current inmates with parents who also served time (Hagan and Palloni, 1990; Uggen and Wakefield, 2005), not all (or even most) children of inmates will be incarcerated. A narrow focus on criminal justice involvement therefore obscures significant social harm as well as relegates the experiences of female children to the background. Third, although they are strong predictors of crime and delinquency later in the life course (Moffitt, 1993; Nagin and Tremblay, 2001), mental health and behavioral problems also predict a variety of other outcomes, including

1. We confine our analysis to a comparison of Black and White children for two reasons. First, the contrast in incarceration rates is most stark between Blacks and Whites, with incarceration rates for Hispanics (and most other racial groups) falling between the two. Second, as a practical matter, Hispanics are inconsistently counted in historical incarceration data, making it difficult to calculate the risk of parental incarceration for this group. We anticipate that the results we discuss here would apply in much the same direction (if not magnitude) to Hispanic children.

educational and occupational attainment as well as family formation (Foster and Hagan, 2007, 2009; Hagan and Wheaton, 1993; McLeod and Kaiser, 2004; South, 2002). Our analysis thus offers broad insight into how the children of today's inmates might fare in the future.

We close by discussing the implications of our results for public policy. In doing so, we focus on three issues. First, because the effects of parental imprisonment on children might vary by offense type and level of domestic violence, we suggest that policies focusing on the low-hanging fruit of nonviolent offenders who have not engaged in domestic violence might diminish the effects of mass imprisonment on childhood well-being. This discussion is not to suggest, of course, that we should lock up everyone else and throw away the key but that removing nonviolent offenders might hurt families most. Second, our results suggest that the children of the prison boom now coming of age might have additional behavioral (and attendant) problems that represent unanticipated (and often invisible) consequences of the prison boom as well as that racial inequities in these problems might be larger than previously recognized. Thus, we propose a strengthening of the social safety net—especially as it applies to the poorest children. We close by drawing attention to the possible spillover effects of incarceration. Specifically, although we focus our attention on the effects of paternal incarceration, the demographic concentration of mass incarceration also suggests strong effects within families and high-imprisonment rate communities. We argue, therefore, that imprisonment influences not just the lives of children who have imprisoned parents but also the lives of marginalized American children who do not.

Data Sources, Measures, and Analytic Strategy

Data Sources

For the analyses of individual-level outcomes, we use data from the Project on Human Development in Chicago Neighborhoods (PHDCN) (Earls, Brooks-Gunn, Raudenbush, and Sampson, 2002) and the Fragile Families and Child Wellbeing Study (FFCW) (Reichman, Teitler, Garfinkel, and McLanahan, 2001). Both studies are longitudinal surveys of young children, adolescents, and their primary caregivers. The PHDCN followed roughly 6,000 children, adolescents, and young adults in Chicago over three waves of data collection from 1994 to 2002. The FFCW followed roughly 5,000 children born between 1998 and 2000 in 20 large cities. The initial interviews for the FFCW were conducted with parents in hospitals shortly after they gave birth. Parents were interviewed again approximately 12, 36, and 60 months later.

We focus on the PHDCN and the FFCW data because we think that they strike the best balance among available data sets between representing the experiences of the children of the prison boom and providing a variety of high-quality, repeated measures of childhood disadvantage, childhood behavioral and mental health problems, and paternal incarceration. Thus, although some other studies, such as the Cambridge Study in Delinquent Development, include more nuanced measures of criminal justice contact (and

a substantially longer follow-up period) and others, such as the National Longitudinal Study of Adolescent Health, are more broadly representative, the PHDCN and the FFCW offer both representativeness (which allows our point estimates to apply to a broad range of the population) and a high quality of repeated measures (which makes us confident that our point estimates are as close to representing causal estimates as possible using observational data).

Measures

In PHDCN analyses, well-being indicators are measured with the Child Behavior Checklist (CBCL) (Achenbach, 1991). The CBCL can be scaled in a variety of ways; we focus here on the summary scales measuring internalizing problems (such as depression or somatic complaints[2]), externalizing problems (such as aggression or delinquency), and total behavioral problems. In the FFCW analyses, the measure is a narrower gauge of children's physically aggressive behaviors, which includes how often the child destroys things that belong to other people, gets into fights, and physically attacks people. Although narrow, this measure corresponds closely with measures thought to be intimately tied with criminality in adolescence and adulthood (Nagin and Tremblay, 2001). The control variables differ slightly across data sets, but both include controls for demographic characteristics (race, gender, and age), socioeconomic circumstances, and family structure.

The PHDCN and the FFCW do not allow for sophisticated analyses of mother incarceration because of small sample sizes, and they do not provide information on the length of the prison sentence or a detailed criminal history.[3] The analyses therefore estimate the average effects of *paternal* incarceration on children and include men who served a few days in jail as well as those with lengthy prison sentences.[4] Despite these weaknesses, the PHDCN and the FFCW represent the best available survey data to study the effects of paternal incarceration on children for several reasons. First, the incarceration of a father can be fixed at a particular point in time, limiting the extent to which preexisting disadvantages are conflated with the effects of paternal incarceration.[5] Second, the sampling frames, although different across data sources, ensure a large and diverse sample of children of incarcerated fathers and similarly situated peers for comparison. Third, these sources taken

2. Somatic complaints are physical complaints, such headache or upset stomach, that are unexplained by an underlying medical problem and generally thought to be caused by stress.

3. This fact does not suggest that maternal incarceration is unimportant. Several studies link maternal incarceration to harm, most notably in increases in social-service caseloads (Johnson and Waldfogel, 2002; Kruttschnitt, 2010; Wakefield, 2007).

4. Because our measures of paternal *incarceration* using individual-level data do not align perfectly with our measures of paternal *imprisonment* using macrolevel data, it might introduce bias. Nonetheless, if one assumes that the effects of paternal prison incarceration (imprisonment) are at least as large as the effects of paternal jail incarceration, then the results presented here are somewhat conservative.

5. See Appendix A for a discussion of the selection effects and modeling strategies and Appendix B for descriptive statistics on the PHDCN.

together provide estimates of the average effect of paternal incarceration on children across a broad range of ages from young children to adolescents. Finally, and most notably, the estimates of paternal incarceration effects are similar across the two sources, even though the sampling frames, control variables available, and age ranges differ.

Analytic Strategy

The central challenge of the microlevel analysis is that assignment into prison is nonrandom. Entry into prison is predicted by many factors (age, race, income, employment status, low self-control, broken or weak social bonds, etc.), most of which likely are causally related to behavioral problems for children. Our analysis proceeds by prioritizing repeated measures of the independent and dependent variables and subjecting the analyses to successively more restrictive models.[6]

After presenting estimates of the effects of paternal incarceration on children's behavioral and mental health problems, we then combine them with demographic estimates of the risk of paternal imprisonment (Wildeman, 2009) to describe the effects of mass imprisonment on racial inequities in childhood behavioral and mental health problems. In choosing point estimates of the effects of paternal incarceration on children's total, externalizing, and internalizing behaviors, we opted for the mean of the high and low estimates shown in Table A1. Relying on other point estimates led to somewhat altered effects on inequities. Nonetheless, the tenor of results remained consistent regardless of the estimate used. Simply put, the effects of mass imprisonment on racial inequities in child behavioral and mental health problems are too large to ignore regardless of the point estimate used.

Empirical Results

How Much Harm Does Paternal Incarceration Cause?

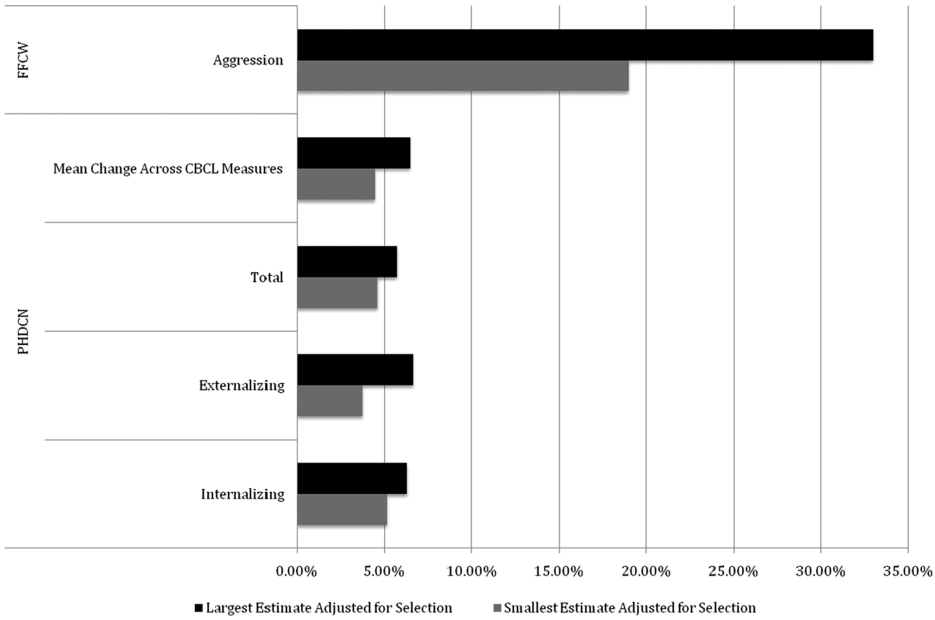
It should come as little surprise that, in both the PHDCN and the FFCW, children of incarcerated fathers were worse off (on many dimensions) than their similarly situated peers who had no father incarcerated even before experiencing the event. The fact that incarceration draws primarily from disadvantaged segments of the population and that the children of the incarcerated experience a host of deficits (and would even in the absence of contact with the penal system) are both well known. Thus, the bar for assessing whether paternal incarceration caused any of the gap between children of incarcerated and other children is exceptionally high.

In Figure 1, we present the average effect of paternal incarceration on children's mental health and behavioral problems based on multiple modeling strategies (see Appendix A).

6. The average effect of paternal incarceration on children is drawn from propensity score, lagged dependent variable, and difference-in-differences (or fixed-effects) models. The estimates are substantively similar across all modeling strategies in both the PHDCN and the FFCW. All models and results are described in Appendices A and B. See Wildeman (2010) for models using the FFCW data. In Figures 3 and 4, we use the average parental incarceration effect (across all modeling strategies).

FIGURE 1

Percentage Change in CBCL Scores Across Modeling Strategies



The FFCW result refers to young boys, whereas the PHDCN results reflect older children and adolescents of both sexes. Across all age groups, the effect of father incarceration is in the direction of increasing aggression and other behavioral problems. The effects of father incarceration seem to be global, increasing both externalizing problems (such as aggression and delinquency) as well as internalizing problems (such as anxiety and depression). Although young boys are especially prone to aggression after the incarceration of a father (Wildeman, 2010) and although adolescent girls are more likely to exhibit internalizing problems (Wakefield, 2007), across all models and data sources, the effects of father incarceration are in the direction of increasing mental health and behavioral problems. Paternal incarceration results in approximately a one-third to one-half standard deviation increase in difficulties in all four problems considered (standardized results not shown; see Appendix A for details). It is also worth noting that the differences shown here were statistically significant at the .05 level or better in all cases.

The results shown in Figure 1 indicate that paternal incarceration worsens well-being across all outcomes, but how big are the effects? The most conservative estimates show that father incarceration is harmful for children across a variety of measures of well-being. The magnitude of the effects, however, is relatively small once preexisting disadvantages are taken into account. Applying the smallest effect sizes across all models using the PHDCN data, father incarceration results in an approximately 4% increase in mental health and

behavioral problems. The most stringent models, however, might underestimate the true causal effect of paternal incarceration (by "overcontrolling" for risk factors possibly caused by incarceration), so it also is worth noting that the largest effect sizes suggest an approximately 6% increase in mental health and behavioral problems.[7] In the FFCW data, the percent change in physically aggressive behaviors attributable to having a father incarcerated is also substantial, increasing the level of physical aggression between 19% and 33%.[8]

Although certainly not overwhelming, these effects are not inconsequential. When considering the relative importance of mental health and behavioral problems that result from paternal incarceration, it is useful to recall that children of incarcerated fathers typically were having difficulty prior to their father's incarceration. Father incarceration has the effect of additionally burdening already vulnerable children; for some, the increase in mental health problems reaches clinical levels. For example, Achenbach, Howell, Quay, and Connors (1991) found that 18% of all children were in need of medical or therapeutic intervention based on their internalizing problem behavior scores. In the PHDCN sample, approximately 50% of the children who had a father incarcerated had internalizing problem scores that suggested intervention might be needed, and more than one third of these children had CBCL scores at or above the clinical level. Because CBCL scores are highly predictive of future life outcomes, both the increase in problems and the starting point for children of incarcerated fathers are important. Paternal incarceration therefore burdens children who already have significant problems; as a result, a 4–6% increase in the CBCL renders these problems clinically significant for many children of incarcerated fathers.[9]

Who Does Paternal Incarceration Harm?

The previous analysis demonstrates substantial and statistically significant harmful effects of paternal incarceration on children. We next investigate the meaning of these results in light of racial disparities in the risk of paternal imprisonment. Figure 2 compares the risk of paternal imprisonment by age 14 years for Black and White children born in 1978 relative to those born 12 years later (Wildeman, 2009),[10] showing stark racial disparities in the risk of paternal imprisonment. According to these estimates, Black children born in 1990 had a 25.1% risk of having their father imprisoned. This figure is staggering when compared with

7. Also, although fixed-effects models cannot address unobserved changes that might predict behavioral problems and propensity score models cannot account for unobserved heterogeneity, the robustness of the results is reassuring.

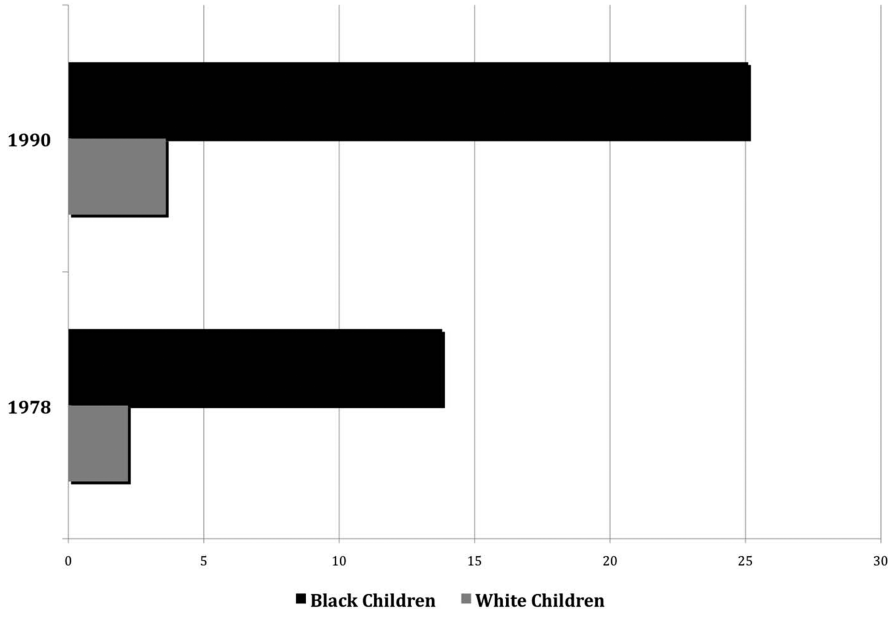
8. Although this result might seem like a much larger effect than the results demonstrated using the PHDCN data, this larger percent change reflects the lower mean level of physical aggression in these data rather than a much larger effect of paternal incarceration.

9. Because no clinically recognized cut points are available for children's physical aggression, this section of the article focuses only on the outcomes from the PHDCN.

10. Although the analysis on which Figure 2 is based also focuses on class disparities (Wildeman, 2009), we focus only on racial disparities because these estimates better fit our interest in the effects of mass imprisonment on racial inequities in child well-being.

FIGURE 2

Racial Disparities in the Risk of Paternal Imprisonment by Age 14 Years for the 1978 and 1990 Birth Cohorts



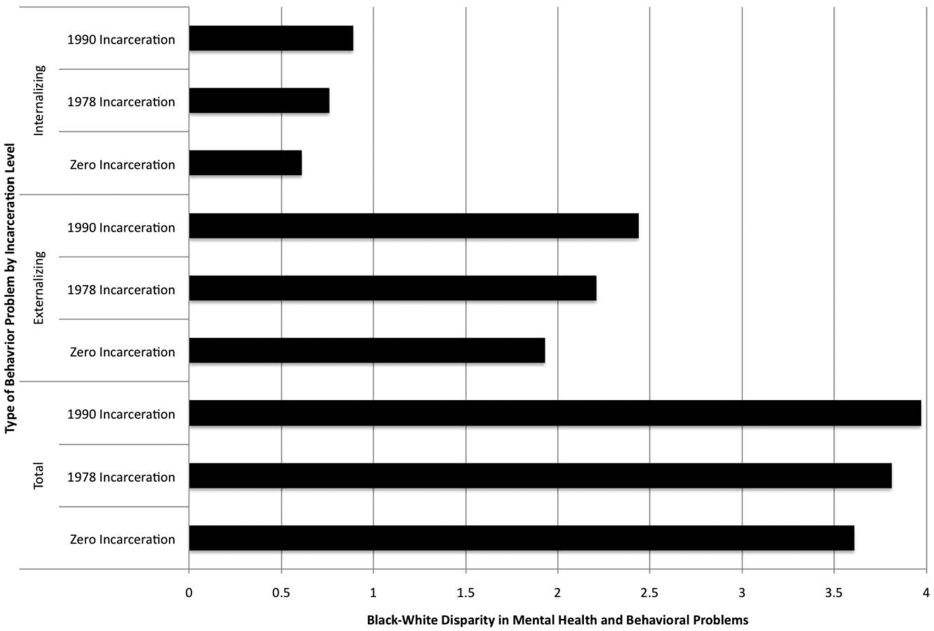
the risk for White children born in that same year. For those children, the risk of paternal imprisonment was just 3.6%. Thus, dramatic increases in the risk of paternal imprisonment have been concentrated heavily among Black children, suggesting that mass imprisonment might have substantial implications for racial inequities in childhood behavioral and mental health problems, as speculated earlier.

How Much Does It Matter for Racial Inequities in Childhood?

For mass imprisonment to have substantial consequences for racial inequities in children's behavioral and mental health problems, it must be (a) increasingly common, (b) unequally distributed by race, and (c) have negative effects. It also must have either a similar effect on White and Black children or more negative effects on Black children relative to White children to cause substantial racial inequities in childhood mental health and behavioral problems. In analyses (not presented here but available from the authors), we tested to see whether the effects of paternal incarceration on children's behavioral problems differ by race. In no case were the paternal incarceration–race interactions statistically significant; more often, they were in the direction of larger effects for Black children than for White children. In light of these findings, we feel comfortable assuming uniform effects for Black and White children—at least for these outcomes—in this stage of the analysis.

FIGURE 3

Growth in the Racial Disparity of Childhood Well-Being by Changing Levels of Incarceration



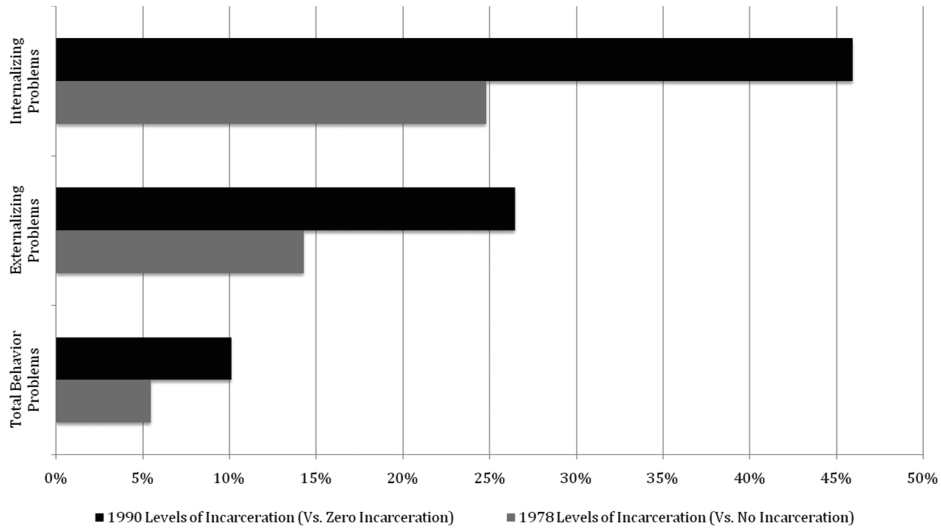
Figures 3 and 4 provide insight into how much the prison boom might have influenced racial inequities in child behavioral and mental health problems. Figure 3 shows, possibly most importantly, that racial inequities in these behavioral problems likely would be substantial even absent mass imprisonment.[11] This finding is important to note because it suggests that programs that seek to diminish racial disparities in these problems should not focus solely on the penal system (Wildeman and Western, 2010). Nonetheless, increases in the risk of paternal imprisonment have taken their toll on Black children in discernible ways. According to the estimates presented here, the disparities between Black and White children in behavioral problems are much larger as a result of the huge increase in the risk of paternal imprisonment than they would have been otherwise.

Figure 4 converts the estimates in Figure 3 into the percentage change in Black–White gaps in childhood behavioral problems potentially attributable to mass imprisonment by comparing racial disparities assuming zero incarceration, incarceration risk for the 1978 birth cohort (reflecting the midpoint of the prison boom), and incarceration risk for

11. We generated estimates of racial disparities in these problems by using the estimated differences between Black and White children whose parents had never been incarcerated in the PHDCN data. (See Wakefield, 2007 for more information.)

FIGURE 4

Percentage Increase in Racial Disparities in Childhood Well-Being by Levels of Incarceration (PHDCN)



the 1990 birth cohort (reflecting the high end of the prison boom). The estimates thus provide a range of estimates of the effect of mass incarceration on Black–White differences in childhood well-being. The results from this exercise again demonstrate that racial differences in total, externalizing, and internalizing behavioral problems all would have been substantially smaller absent increases in the risk of paternal imprisonment. The effects on externalizing and internalizing behavioral problems are especially pronounced. According to our estimates, Black–White disparities in internalizing behavioral problems would have been 25–45% less in the absence of incarceration; Black–White gaps in externalizing behaviors would have been approximately 14–26% smaller. These substantial effects suggest that mass imprisonment will likely increase racial (and class) inequities for years to come.

Discussion and Public Policy Implications

During the past 15 years, a burgeoning research literature has defined the scope (Blumstein and Beck, 1999), causes (Beckett, 1997; Garland, 2000; Greenberg and West, 2001), and consequences (Wakefield and Uggen 2010; Western 2006) of mass incarceration. Our analysis expands these findings to include effects on an often-neglected group—the children of incarcerated fathers. We suggest that the problems associated with mass incarceration extend far beyond those observed for individual inmates and are unlikely to abate soon because of their intergenerational and long-term influence even if incarceration were scaled back to 1970s levels.

Because most inmates are parents (Mumola, 2000), the influence of criminal punishment on children is an important area of study. We have shown that the overall effect of paternal incarceration on children is harmful and that these effects are disproportionately borne by children who are already disadvantaged. Children of incarcerated parents were not doing well prior to the imprisonment of their father, and they are worse off as a result of it. Moreover, the resulting harm is likely to include several other critical domains of adjustment—school success, occupational attainment, and family formation, to name a few—because childhood mental health and behavioral problems tend to accumulate and spread over time.

Having described numerous recent studies that document the negative effects of mass incarceration on children, it is useful to ask what might explain these effects. Before doing so, however, it is worth noting that recent research also suggests that, for some children, having a father incarcerated does enhance their well-being. Qualitative interviews, for example, with children of incarcerated fathers highlight considerable complexity and variability in their experiences (Wakefield, 2007). Most notably, the children of violent sex offenders and those with a history of domestic violence might benefit from the removal of a father to prison. Wildeman (2010) showed the same effect with quantitative data; paternal incarceration harms children only in the absence of a history of domestic violence and only when the father was not incarcerated for a violent crime. Of course, some children and families benefit substantially from paternal incarceration, and we do not dispute this fact. Nonetheless, the overwhelming evidence is that paternal incarceration is a net harm for children. As such, the substantial costs of incarceration for children should not be ignored—especially in an era of fiscal stress and growing evidence that further increases in the incarceration rate will yield little return for public safety (Raphael and Johnson, 2006; Western, 2006).

If we assume that most fathers who are incarcerated were involved in criminal activity at some point, then how it is that mass incarceration is so bad for children? We believe that an analysis of the sorts of offenders who most contributed to the massive incarceration rate explain why children, on average, *do not* benefit from paternal incarceration (and why continuing to increase the incarceration rate also is not a boon for public safety). Several studies show that the prison boom resulted largely because of increases in the likelihood that nonviolent drug and property offenders would receive a prison sentence (Blumstein and Beck, 1999). Mass incarceration has not resulted from greater efficiency on the part of police in catching violent offenders (Blumstein and Beck, 2005), nor is the incarceration rate a response to ever-increasing crime rates (Blumstein and Beck, 1999; Garland, 2000). Instead, sentencing policy shifts and the politicization of crime resulted in the imprisonment of those who might not have been incarcerated in the past and in longer sentences for those who would have been. Similar shifts in the monitoring of former inmates and a greater risk of reincarceration resulted in significant "churning" of offenders from prison to community (Clear, 2007; Petersilia, 2003). Imprisonment today might be characterized better as a cycle of experiences, creating sustained individual-, familial-, and community-level disruptions.

The reason that the average effect of paternal incarceration on children is harmful is because the average inmate incarcerated today is much less likely to be a serious, high-rate, and violent offender than in the past.

It is also notable that the negative effect of paternal incarceration is observed *only* for the children of fathers with no domestic-abuse history. A pure selection interpretation of our findings (and the findings of others) would predict just the opposite. In other words, if all observed effects of paternal incarceration were solely the result of selection bias, then we might expect the children of violent fathers to exhibit the highest level of behavioral problems. Instead, we observe little harm for these children after the incarceration of their fathers. Moreover, just as most inmates are not abusive and neglectful, neither is the average incarcerated father. Rates of domestic violence in the FFCW, for example, are generally higher than in the general population but certainly not the norm, even among couples in this high risk group that includes many incarcerated fathers (Wildeman, 2010: 291). Similarly, in a study of nonresident fathers, for example, Garfinkel, McLanahan, and Hanson (1998: 8; first quoted in Hagan and Dinovitzer, 1999) remarked that "while many young fathers have trouble holding a job and may even spend time in jail, most have something to offer their children" and that "the overwhelming impression of these young men conveyed by the literature is one of immaturity and irresponsibility rather than pathology or dangerousness." Current and classic criminological research supports this view of today's incarcerated parent, noting that even parents who are greatly involved in crime rarely share this information with their children (Hirschi, 1969; Nye, 1958), have good parent–child relationships despite their criminal involvement (Garfinkel et al., 1998), and contribute economically to the maintenance of the family (Edin and Lein, 1996; Hagan and Coleman, 2001).

The policy implications of our results (and those of other research on mass incarceration) are simply that the ever-increasing push for imprisonment yields significant (and often unrecognized) social costs; chief among these costs is the harm for children and the intergenerational transmission of inequality. Future research must do more to distinguish "helpful" incarcerations for children from the more typical effect of harm. For example, although Comfort (2008) described spells of incarceration as a useful "time-out" and suggested that some spells might strengthen romantic relationships (and, by extension, families), Western (2006) showed that incarceration might worsen relationships and increase the risk of domestic violence as a result of added strain. We find that at least some types of offenders have children who would benefit from their return home. The absence of a domestic violence history represents one such contextual influence (Wildeman, 2010), but surely more exist, and the heterogeneity of effects is a critical guide for policy makers.[12] We also know little about the long-term effects of paternal incarceration on children. Our

12. For example, the relative harm for children that is associated with short spells in jail versus long prison sentences is not known and the data to address the question do not yet exist.

analysis implies long-term harm because behavioral problems are linked to outcomes in other important domains (e.g., educational attainment or family formation), but the effects described are still short term in nature. In addition, relatively little clarity is available with respect to the effects of maternal incarceration (Kruttschnitt, 2010). Our research represents a vital but tentative step, and we hope that our results underscore the importance of the research area.

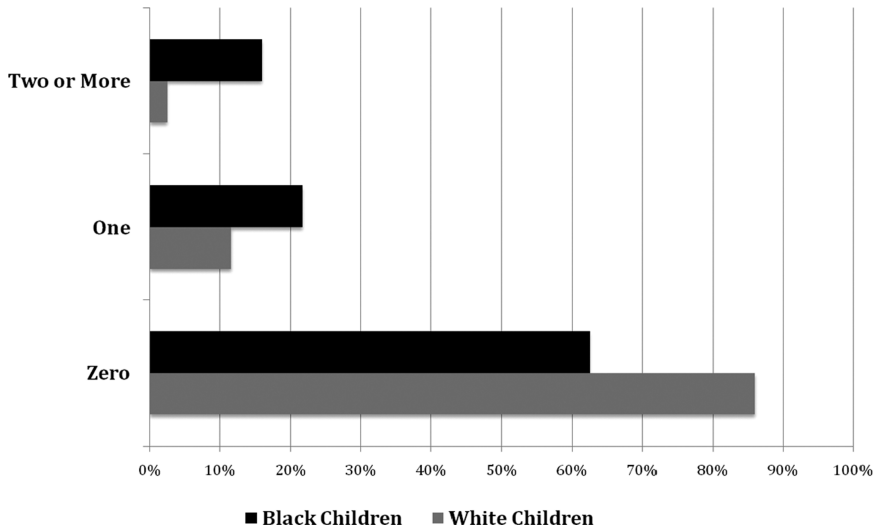
The best evidence produced thus far links paternal incarceration to childhood mental health and behavioral problems, problems that are strongly linked to difficulty in school, trouble finding work, and becoming involved in crime. Paternal incarceration increases behavioral problems by one third to one half a standard deviation and is global in nature, influencing both externalizing behaviors and internalizing behaviors in roughly equal measure. Not surprisingly, criminologists emphasize the relationship between aggression in childhood and later criminal behavior (and incarceration), but the effects detailed here for internalizing behaviors also should be alarming to policy makers. Dekovic, Buist, and Reitz (2004), for example, argued that, although externalizing problems might be more visible or have more direct negative consequences for the community, internalizing problems such as depression are a strong predictor of later suicidal ideation, which is a leading cause of death among adolescents. Even if most children of incarcerated parents do not end up in prison themselves, they are unlikely to avoid significant and long-lasting difficulty. Put succinctly, the problems we describe have broad implications for entrenched racial disparities in educational and occupational attainment, as well as for well-being, in adulthood.

Although the estimates regarding behavioral problems generally should attract the attention of policy makers, we believe that the racial disparity in these effects is potentially more important (as well as the effect of mass incarceration that remains by far the least understood by the general public). Using conservative estimates and a variety of stringent modeling strategies, we show that the influence of mass incarceration has increased racial disparities in externalizing problems by up to 26% and in internalizing problems by up to 45%. Although our estimates are necessarily approximations, they are best conceived of as a thought experiment on the effects of mass incarceration for a host of significant social outcomes for years to come. More importantly, even if our estimates are inflated to some degree, in few cases do we find that incarceration is beneficial for children and they remain an important and consequential facet of the mass incarceration era.

The results we present regarding racial disparities are large, disconcerting, and consequential, and yet, paternal incarceration is just one facet of the influence of the prison boom on children. Incarceration is heavily concentrated, and its influence extends far beyond parents to entire families and neighborhoods. As a result, although our estimates are large, they are almost certainly an *underestimate* of the effect of mass incarceration on children and inequality. Figure 5 compares Black and White children with respect to the

FIGURE 5

Racial Disparities in the Concentration of Incarceration in Families (PHDCN)



number of family members incarcerated at the final wave of the PHDCN.[13] Although most observers highlight the difference between Black and White children in the experience of the incarceration of one family member (37% vs. 14%, respectively), Black children are much more likely to experience the incarceration of multiple family members. For example, just 2% of White children had two or more family members incarcerated relative to more than 16% of Black children. The racial disparity in incarceration coupled with high racial residential segregation also means that imprisonment is concentrated in places. The disruptive influences of mass incarceration are conferred on all children in high incarceration neighborhoods, not just those who are related to an inmate. Although most current research (including this article) is focused on racial differences with respect to father incarceration, the concentration of incarceration in the most disadvantaged families and communities (Clear, 2007; Gonnerman, 2004; Sampson and Loeffler, 2010) is likely to affect well-being not only for the children of the incarcerated but also for all marginalized children.

Taken together, our analysis coupled with those on other effects of the prison boom show that incarceration is less efficient and more costly than previously realized. Research

13. These estimates are likely an undercount of the differences in familial incarceration for several reasons. First, they represent cross-sectional differences and do not account for the number of family members ever incarcerated. Unfortunately, it is not possible to distinguish all family members who were incarcerated at some point throughout the entire data series because an "uncle" jailed at Wave 3 might not be the same "uncle" who was in jail at Wave 1 or Wave 2. Second, children with two or more family members might be especially likely to have entered foster care (a population not followed in the PHDCN) or to have dropped out of the survey for other reasons.

detailing the costs of mass incarceration coincides with growing public discussion about the use of imprisonment in the United States. The Great Recession, for example, has exacerbated preexisting capacity and budgetary constraints in many states and several cost-saving initiatives target punishment policy. California, a state with a crushing budgetary crisis and high unemployment as well as incarceration rates, recently shifted to nonrevocable parole for nonviolent offenders to reduce returns to prison as a result of technical violations (and the attendant "churning" that prior monitoring systems encouraged). In another example, federal sentencing disparities for crack versus cocaine possession were reduced recently largely as a cost-saving measure. This change is expected to reduce both overall prison populations and racial disparities in punishment. Although public discussion of incarceration is focused on its direct costs, our research addresses concerns about the prison boom by rendering visible its substantial indirect costs.

Incarceration rates recently stabilized after decades of unencumbered growth, and recent commentary suggests that the costs of mass incarceration have become too high to bear (Economist, 2010; Pew Center on the States, 2008). The costs to children add to a growing list of concerns about continued reliance on a punishment strategy that incarcerates such a large percentage of the American population. Beyond the direct costs of mass incarceration to already strained state budgets, the indirect costs of incarceration to the labor market, to communities, and to children are significant. The importance of these indirect costs relative to public safety and other interests is for policy makers to decide; our research urges policy makers to consider the substantial and often invisible harms and disparities that are produced by mass incarceration, especially those that are transmitted to the next generation, as they seek to reduce the direct costs of imprisonment now and in the future.

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Appendix A: Description of Methods, Model Results, and Robustness Tests

Estimating the effect of paternal incarceration is difficult because fathers are not randomly assigned to prison and the factors that predict paternal incarceration also predict poor child outcomes. The results discussed in this article are based on several methods to estimate the effect of imprisonment; similarity in the direction and magnitude of paternal incarceration effects across varying modeling strategies, data sets, and measures represents one important robustness test. Here, we briefly describe the analytic methods used to produce our estimates and provide a much more detailed description of results for interested readers (Tables A1 and A2).

Selection Bias, Temporal Ordering, and Observational Data

A simple ordinary least-squares (OLS) regression analysis of paternal incarceration and mental health is inappropriate for several reasons. First, OLS regression using cross-sectional survey data suffers from the fact that causal ordering of mental health outcomes and paternal incarceration is unclear. Second, many factors that predict paternal incarceration are also likely to affect mental health outcomes for children. OLS regression approaches might include "controls" for factors such as age, gender, race, employment, or social class. However, important variables might be omitted (or unmeasured in the survey data), and this omission can seriously bias the estimates of incarceration effects. We first begin with a simple bivariate model that estimates the baseline effect of paternal incarceration on mental health and behavioral outcomes.[14] We then include controls for important factors influencing selection into prison and proceed to more complicated estimation procedures, including lagged dependent variable, difference-in-differences, and propensity score models. Each of these strategies represents a substantial (although imperfect) advance in the estimation of causal effects using observational data over simple regression models.

Lagged Dependent Variable Models

The simplest strategy to address the issues detailed earlier is to use longitudinal data and to include a prior measure of the dependent variable. In this way, the method provides estimates for the effect of paternal incarceration on the change in behavioral problems and accounts for preexisting differences among children prior to experiencing paternal incarceration.

Difference-in-Differences (or Fixed-Effects) Models

Difference-in-differences and fixed-effects models follow a similar logic as lagged dependent variable models. The difference-in-differences estimator takes advantage of longitudinal data by measuring mental health outcomes for both treatment (father in prison) and control groups (father not in prison) and then compares the difference between the treatment and control groups in terms of change (or difference) from time 1 to time 2 (hence, the difference-in-differences model). (Fixed-effects models work in a similar way, so the two are virtually interchangeable.) The major contribution of the model is that all variables that are related to selection into treatment and mental health that remain stable over time are netted out. It is important to note, however, that any variable that changes over time and is related to paternal prison entry and child mental health outcomes still will bias the results. The major assumption of these sorts of models, then, is that the average change in mental health for both groups would be the same in the absence of treatment.

14. The baseline model does establish temporal ordering in which parental incarceration precedes the measure of mental health and behavioral problems.

Propensity Score Models

Propensity score models are designed to ensure an appropriate comparison among children by adjusting the sample to eliminate comparisons between children whose fathers had no chance of incarceration with those whose fathers had a high chance of incarceration (Rosenbaum and Rubin, 1983; Winship and Morgan, 1999). Propensity score models were developed to improve on previous matching methods designed to compare similar groups. Previously, a researcher could match persons in the treatment and control groups on a characteristic (such as race, age, gender, employment status, etc.) in an effort to compare "apples to apples" in which the only difference between the two persons was their treatment status. Propensity score models improve on this method by directly estimating a probability for each person in the sample of being in the treatment group. These probabilities then are used as covariates directly in a regression model or to create treatment (father incarcerated) and control (father not incarcerated) groups across which behavioral outcomes are compared. Put simply, propensity score models more appropriately compare the mental health of children with fathers who have a high (or low) likelihood of entering prison *and actually did* with children whose fathers had a high (or low) likelihood of entering prison *and did not*.

Once the propensity scores are estimated, a variety of matching methods can be used to compare the mental health and behavioral outcomes of the children of fathers with similar propensity scores but differential exposure to treatment (in this case, imprisonment). Treated and untreated participants who have no match are dropped from the analysis so that the outcomes of unmatched persons do not bias the estimates of the treatment effect.[15] To the extent that propensity score models create a matched set of treated and untreated participants, the estimate of the treatment effect of paternal incarceration on children can be generalized to the population level, and the remaining differences between treated and untreated cases in actually experiencing prison is assumed to be random (the "ignorable treatment assumption") (Morgan and Harding, 2006; Rosenbaum and Rubin, 1983; Winship and Morgan, 1999). This finding is particularly important with respect to more dynamic factors that might change over time as well as might be related to paternal incarceration and children's mental health outcomes. For example, suppose that a major difference between children of incarcerated fathers and other children concerns the parenting styles of their caregivers (some research in this area indeed suggests that this situation is likely to be the case). In other modeling specifications, this difference (unmeasured in the survey data) is accounted for only when differences in parenting styles remain stable over time. If, however, the arrest and incarceration of a father contribute to deteriorating parenting and poorer mental health outcomes, then the estimates of other models will be biased.

15. The PHDCN results presented here used kernel marching. We estimate the treatment effect on the treated using the ATTK module in Stata (StataCorp, College Station, Tex; Becker and Ichino, 2002) as well as the more conservative Hodges–Lehman estimates (Rosenbaum, 2002). Results are robust across nearest-neighbor and caliper methods, with and without replacement, as well as with and without a common support restriction.

In contrast, however, to the extent that the propensity model is balanced across measured covariates and appropriate matches are made, dynamic differences among children can be treated as random.

TABLE A1

Comparison of Paternal Incarceration Effects Across Models Types (PHDCN)

CBCL Scales	1: OLS Bivariate Model	2: OLS Model with Controls	3: Lagged Dependent Variable Models	4: DID Models	5: Average Treatment Effect on the Treated (Becker and Ichino, 2002)
Total internalizing problems	2.64**	3.44***	3.29***	3.21**	2.69*
	(.96)	(1.00)	(.84)	(1.31)	(1.70)
Total externalizing problems	3.49***	3.44***	1.97**	1.47†	2.60**
	(.83)	(.88)	(.67)	(1.16)	(.98)
Total behavior problems	7.26***	8.24***	5.85***	4.86*	6.04*
	(2.10)	(2.21)	(1.72)	(2.93)	(3.07)

Notes. All models except Model 1 include controls for child race and gender, parental education and employment, household income, parental criminal history, baseline CBCL score, and relationship to primary caregiver. For models on which these estimates are based, see Wakefield (2007). For models using FFCW data, see Wildeman (2010: 294–295, 297, and 300). †$p < .10$; *$p < .05$; **$p < .01$; ***$p < .001$.

TABLE A2

Rosenbaum Bounds Sensitivity Analysis of Propensity Score Treatment Effect Estimates

Odds of Differential Assignment Due to Unobservables	Internalizing Behavior Problems	Externalizing Behavior Problems	Total
Equal odds Hodges–Lehman Estimate	1.94*	3.23***	5.64**
10%			
Lower bound	1.63†	2.94**	4.80**
Upper bound	2.37*	3.47***	6.36**
20%			
Lower bound	1.39	2.69**	4.06**
Upper bound	2.70**	3.72***	7.15***
30%			
Lower bound	1.14	2.39**	3.58*
Upper bound	2.98**	3.94***	8.06***
40%			
Lower bound	.87	2.18*	2.98#
Upper bound	3.36**	4.13***	8.82***
50%			
Lower bound	.63	1.96*	2.56
Upper bound	3.52***	4.39***	9.21***

†$p < .10$; *$p < .05$; **$p < .01$; ***$p < .001$

Appendix B: Descriptive Statistics

TABLE B1

Wave 1 and 2 Descriptive Statistics for Cohorts 6–15 (PHDCN)

Variables	n	Mean/Percent (SD)
Child well-being		
CBCL: internalizing behavior problems at Wave 2	2,467	8.85 (7.88)
CBCL: externalizing behavior problems at Wave 2	2,467	7.90 (6.83)
CBCL: total behavior problems at Wave 2	2,467	22.38 (17.24)
Paternal incarceration		
Father currently in jail at Wave 2	64	1.97
Father incarcerated since Wave 1	73	2.79
Father incarcerated since Wave 2	60	2.36
Father incarcerated in Waves 1, 2, or 3	174	5.23
Age		
Biological mom at Wave 1	3,089	35.89 (6.65)
Biological dad at Wave 1	3,646	39.12 (7.95)
Subject child at Wave 2	3,324	10.27 (3.36)
Race of child		
White	475	14.32
Black	1,165	35.13
Hispanic	1,547	46.65
Other race	129	3.73
Gender of child		
Male	1,660	49.94
Female	1,664	50.06
Education of biological mother at Wave 1		
Less than high school	1,427	45.27
High-school diploma	432	13.71
Some college	1,028	32.61
College degree or more	265	8.41
Education of biological father at Wave 1		
Less than high school	1,335	46.92
High-school diploma	535	18.80
Some college	692	24.32
College degree or more	283	9.95
Employment of primary caregiver at Wave 2		
Employed (FT/PT)	1,886	89.85
Unemployed	213	10.15

(Continued)

TABLE B1

(Continued)

Variables	n	Mean/Percent (SD)
Household income at Wave 2		
Less than $5,000	292	10.20
$5,000–$9,999	310	10.83
$10,000–$19,999	576	20.12
$20,000–$29,999	550	19.21
$30,000–$39,999	398	13.90
$40,000–$49,999	269	9.40
$50,000 or more	468	16.35
Per capita income	3,078	6,131 (5,084)
Biological parents divorced since Wave 1	67	2.02
PC is biological mom or dad	3,045	92.41
Paternal incarceration		
Father currently in jail	64	1.97
Father incarcerated since Wave 1	73	2.79
Father incarcerated since Wave 2	60	2.36
Father incarceration Wave 1 to Wave 3[a]	174	5.23

Notes. [a] A few fathers were incarcerated multiple times throughout the data series. The comparison table for the FFCW data can be found elsewhere (Wildeman, 2010: 291).

The incarceration ledger

Toward a new era in assessing societal consequences

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It is not much of an oversimplification to say that criminologists once focused almost exclusively on the deterrent and incapacitation effects of imprisonment (what I will call Era 1), whereas in the last decade the tide has turned to a widespread focus on the negative or "criminogenic" effects of imprisonment (what I will call Era 2).[1] The shift in attention from selective incapacitation to what is now labeled "mass incarceration" has been sharp, with a large recent literature asserting that the effects of imprisonment on societal well-being are corrosive. Era 1 was about *crime control*, in other words, whereas the current Era 2 is about *crime production*.[2]

Wakefield and Wildeman (2011) are firmly trained in the logic of Era 2. Their contribution to the debate is to focus on the intergenerational effects of parents' incarceration on the individual-level outcomes of their children. Using two longitudinal data sets, the paper estimates that having a father incarcerated produces harmful effects on children's behavioral and mental health problems. Thus their innovation is twofold: the paper goes well beyond crime outcomes and estimates the reach of incarceration into the next generation. These are important moves given the lessons that life-course criminology has taught us. Children are the future, after all, so we can ill afford to set aside how our social policies, of which crime is a central player, influence early development.

Having claimed the intergenerational transmission of disadvantage due to imprisonment itself, the authors take the further step of using cohort differences in the risk of

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1. Exemplars of each era are Blumstein et al. (1978) and Western (2006), respectively.

2. I should disclose that I am on record as having argued for the criminogenic effects of imprisonment at both the individual and macro levels (Sampson, 1995; Sampson and Laub, 1997; Sampson and Loeffler, 2010).

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parental incarceration to argue that mass imprisonment has increased black-white disparities in externalizing and internalizing behaviors. This "demographic" move is also innovative and highlights the larger consequences of incarceration. The authors conclude that because mass imprisonment is criminogenic, especially when offenders do not have a history of domestic abuse or violence, policy should selectively reduce incarceration to reduce racial disparities in child well being.

In the following essay I respond to the proposed implications of Wakefield and Wildeman's (2011, this issue) analysis for what this journal is all about—policy. But given the linkage of Wakefield and Wildeman's study with the recent literature on mass incarceration, I believe my assessment has broader implications for policy. Drawing on the research insights born of both Eras 1 and 2, I argue that the next phase of innovation, or Era 3, should turn to the more rigorous study of the heterogeneous effects of incarceration that take into account the multiple and complex pathways through which incarceration transmits its influences. More specifically, if incarceration has simultaneous null, positive, and negative effects on crime depending on the pathway or population subgroup in question, and different time horizons of influence (ranging from instantaneous to long run over the course of lives), then it is incumbent on criminologists to think in terms of the social ledger of incarceration's effects. I am not referring to meta-analysis or an averaging across studies, but rather a societal-level account of causal pathways. As I discuss below, the interaction of multiple and countervailing influences is a social level phenomenon that is problematically related to any single outcome or "effect" and even more so to any single or discrete policy.

Are the Results Believable? Yes, but with Necessary Qualifications

Let me first emphasize the strengths of the paper and the basis of the causal claim. Wakefield and Wildeman (2011, this issue) execute a sophisticated analysis using two well known data sets that contain many theoretically relevant measures—the Fragile Families Study and the Project on Human Development in Chicago Neighborhoods.[3] Because this is a policy journal I do not undertake a detailed methodological critique, and besides space limitations preclude such a move. But of course the authors' policy conclusions cannot be divorced from their method, so it is there I begin.

Overall I think the quantitative analysis is well done. I have no major complaints about technique but causal estimates of the kind executed in this paper are only as good as the measures that are posited to tap key concepts. In the present case, the incarceration measures are survey reports that I would have liked to have seen interrogated in greater depth. More important, as the authors forthrightly note, their method of analysis cannot overcome what is missing—what social scientists call "omitted variable bias." I worry most about the omission of parental *behavior* in the analyses as described, in particular parental

3. I should disclose as well that I have worked on the Chicago study for many years and was Scientific Director of the original design. None of my comments here turn on the PHDCN analysis.

violence or more generally what developmental psychologists label "antisocial behavior." Wakefield and Wildeman's Table A1, for example, lists standard background variables and not behavioral tendencies of the parent, many of which vary over time. The problem is that the analyses do not adjust for time-varying factors like paternal violence, drug use, or child maltreatment. And by definition the "propensity" models rely on observed indicators, again mainly of background family characteristics. As a result it cannot be ruled out that Wakefield and Wildeman's estimated effects of incarceration are instead being driven by correlated pre-existing characteristics of the father.

The authors are well aware of the problems with omitted measures that are confounded with both incarceration and children's problem behaviors, and they also recognize conditional treatment effects depending on father's violence (more on this below). Although some critics will not believe Wakefield and Wildeman's results because they are nonexperimental, I am not one of them and think a more productive approach is to ask: if the estimates are correct, do the proposed policy implications follow? Such a question would apply even if the result was experimental, and so is general in nature. I thus grant the authors the benefit of the doubt for this journal and assume that the estimates are correct in order to evaluate the logical connection of empirical results to policy implementation.[4]

Do the policy implications follow? It depends and in compound ways

The main policy claim of Wakefield and Wildeman's study is that we should reduce incarceration to reduce disparities in child outcomes by race, especially for drug offenders and for those with no history of domestic abuse. (As is well known, much of the run up in incarceration rates is attributable to drug offense charges.) I might personally favor such a policy, but there are several logistical and analytic questions that need to be resolved before we can have confidence in how to proceed.

To begin, Wakefield Wildeman's analysis is silent on the effects of the father's incarceration on individuals other than the sampled child. Crimes toward others that were averted *or* produced by his incarceration are thus not accounted for one way or the other. Consider, for example, that any crime enhancement (or well-being deficits) due to a father's imprisonment on a particular child may be offset by crime reduction effects (or well-being gains) that apply to other adults or children both inside and outside the household. This issue is central because many of the families most at risk of incarceration are fatherless *prior* to incarceration, increasing the exposure of absent fathers to the wider community.[5] Even

4. An independent paper using the Fragile Families survey data and using additional measures of father's behavior comes to similar conclusions on the effect of incarceration on child outcomes (Geller et al., Forthcoming), lending further support to the Wakefield and Wildeman argument.

5. See the review in Geller et al. (Forthcoming). The evidence reveals that more than half of fathers in state prison were nonresident prior to incarceration. It is not clear how involved incarcerated fathers were in the lives of children and adolescents before getting sent to prison.

if involved in the lives of his children despite being outside of the home, the counterfactual balance sheet for one male offender alone is potentially made up of interactions with hundreds of people and thus a wide variety of crimes committed or averted.

A second key fact to evaluating the paper's policy claim is that crime and especially violence have declined dramatically in the U.S., to the point where we are now experiencing record low rates last seen in the middle part of the 20th century (Zimring, 2007). Some scholars claim large effects of imprisonment in contributing to this decline (approaching half of the reduction) while others view the data are too flawed to say anything. Although there is obvious dispute about the causal effect of imprisonment in bringing about the crime transformation, it is difficult to argue that incarceration has played no role. Excellent reviews have recently been conducted by Nagin and colleagues (Durlauf and Nagin, 2011; Nagin, Cullen and Jonson, 2009). Although these authors focus on deterrence, which they discount as a mechanism linking incarceration to lower crime rates, as I read the evidence and their assessment of it, we cannot rule out significant incapacitation effects in explaining crime reductions (see also Levitt, 2004). If I were forced to make a bet based on evidence to date, I would estimate that approximately 10–15% of the large crime decline is attributable to imprisonment, a figure on the lower end that even critics of mass imprisonment have suggested as reasonable (Western, 2006; Zimring, 2007). Although this is not the triumph of incapacitation (or deterrence) that crime control advocates often claim, such a magnitude is far from trivial by social science standards and so cannot be lightly dismissed.

I raise this issue because the evidence suggests that (a) crime exerts substantial costs on society, and (b) most pertinent to the present paper, violence is a major cause of lowered child well-being. Any prior reductions in violence due to incapacitation, even if modest at the aggregate level, will have reverberating effects in life domains of exactly the sort that Wakefield and Wildeman wisely bring to our attention. Sharkey (2010), for example, found that exposure to homicide leads to a substantial reduction in cognitive ability. Exposure to violence in general is a leading public and mental health problem with potential life-long consequences. Consider further that child and juvenile homicide rates declined up to 50% in the 1990s on average, but proportionately more among black juveniles than white juveniles (OJJDP, 2010: Chapter 2). Violence reductions in general and not just homicide have disproportionately benefited minorities (Lauritsen and Heimer, 2010). Observed racial disparities in child exposure to violence have thus *declined rather than increased*. It is not clear to me how these declining society-wide disparities are to be balanced with the simulations offered in Wakefield and Wildeman's article. Nor is it clear how to weigh reductions in violence arguably attributable to incarceration against individual effects of incarceration in evaluating of how penal policy influences the development of children.

Presumably the argument implied by Wakefield and Wildeman is that crime would have declined even more had incarceration not increased at the rate it did. Or perhaps that incarceration of drug offenders compared to the counterfactual of drug treatment for the same offenders led to more crimes, all else equal, despite the net secular decline in violence.

These are reasonable claims and relevant to policy, but they are not evaluated based on the data presented. The counterfactual of the present study is a child exposed to having a father incarcerated versus the same child having that father not incarcerated. How the estimated effects unfold over the long run further complicates matters—a drop in crime in the 1990s via concurrent incapacitation mechanisms might be offset in substantive terms a decade later due to children coming of crime-prone ages who were raised in an era of mass incarceration. The Wakefield and Wildeman estimates suggest a sleeper effect of exactly this sort.

Challenges of Prediction and Offender Versatility

Suppose the above issues were resolved, however, and that we had precise estimates of all the moving parts. In my judgment there are still major logistical problems with the implementation of a selective incapacitation policy, which is at bottom what Wakefield and Wildeman recommend. Lessons from the criminal career research produced in Era 1 are particularly relevant (e.g., Blumstein et al., 1978), most notably the hard reality of large rates of false positives and false negatives that result from selective incapacitation predictions. As a general rule, prospective prediction *among offenders at risk of criminal justice sanctions* is demonstrably poor (Laub and Sampson, 2005). Better predictions are always possible, but probably not enough to offset legal or scientific concerns.

It is also not at all clear what it means operationally to say that nonviolent offenders should be differentially imprisoned, or drug offenders. We know that the charge or offense leading to a specific incarceration decision is often arbitrary and depends on issues of evidence. From the classic work of Wolfgang, Figlio, and Sellin (1972) to the most recent criminal career studies (Piquero, Farrington and Blumstein 2003), it is also known that the current offense that one commits is a very poor predictor of the next offense. Troubling questions arise. Who then is a violent offender on substantive grounds? Is a drug offender one who is addicted or one who is (arbitrarily?) arrested for a drug offense? Is someone who commits violence infrequently a violent offender? Are we to adjudicate domestic violence offenders based on official records alone? A related point is that "minor" offenders at one point in time often commit "major" crimes at a later point. Criminological research is replete with examples of the versatility of offending, which should give us pause to the idea of proposing a policy typology of offenders presumed to reflect distinct behavior profiles. The idea of "violent offenders" plays well as a narrative but empirically it has always been difficult to reliably differentiate such offenders *ex ante* by the operational practices or data used by the current criminal justice system.

Moreover, "wide net" policies of law enforcement may be disagreeable on philosophical or civil liberty grounds (as they are to me) but that does negate potential crime reduction benefits. A major claim of the New York City Police Department for the city's impressive crime decline is precisely that it resulted from a widening of the definition of what it took to be arrested—in short, their theory was that today's turnstile jumper is tomorrow's violent offender (see also Zimring, 2007). Misdemeanor arrests thus soared in NYC and crime

declined, the hypothesized reason being that low level offenders in fact commit a wide variety of crimes. Whether or not the NYC story is true (criminologists disagree), the policy recommendation that only serious offenders should go to prison, while intuitively plausible and longstanding, runs into hard problems at the level of theory and implementation. Perhaps more relevant and directly counter to Wakefield and Wildeman's position, Kuziemko and Levitt (2004: 2043) report that "incarcerating drug offenders is found to be almost as effective in reducing violent and property crime as locking up other types of offenders."

Era 3: The Incarceration Ledger and Rethinking Policy Implications

The foregoing brings me logically to the idea of a social ledger for incarceration. I am far from a policy expert, but if I were in the trenches of making decisions I would want to know the full ramifications of incarceration's costs *and* benefits, especially of the unintended variety. I believe the evidence from eras 1 and 2 has greatly improved our cumulative knowledge but at the price of complexity and a kind of stalemate of dueling advocates that view incarceration either as "good" or "bad." The beginnings of what Era 3 might look like are apparent in recent efforts that elide such narratives and attempt to sort out the kinds of complexities inherent to incarceration (Cook, Ludwig and McCrary, 2012; Durlauf and Nagin, 2011; Raphael and Stoll, 2009; Western, 2006; 2008).[6] Costs and benefits extend well beyond dollars, of course. The broader point is that some effects of incarceration can be argued to be positive for society (crime victims averted, which arguably cannot be monetarily calculated) but likewise some are negative for the individual offender and for the human capital development of children, as Wakefield and Wildeman reasonably posit and which again are difficult to peg to a dollar. Some effects are also instantaneous and time bound, like incapacitation, while others take years to unfold, once again making comparisons difficult. If learning is cut short by violence at an early age, for example, cumulative deficits may continue for long periods of time, perhaps a lifetime. Or locking up an offender today might eliminate offenses he would have otherwise committed in the next few years, but upon release in 5 years his expected rate of offending might be higher compared to a counterfactual comparison of a 2 year sentence.[7]

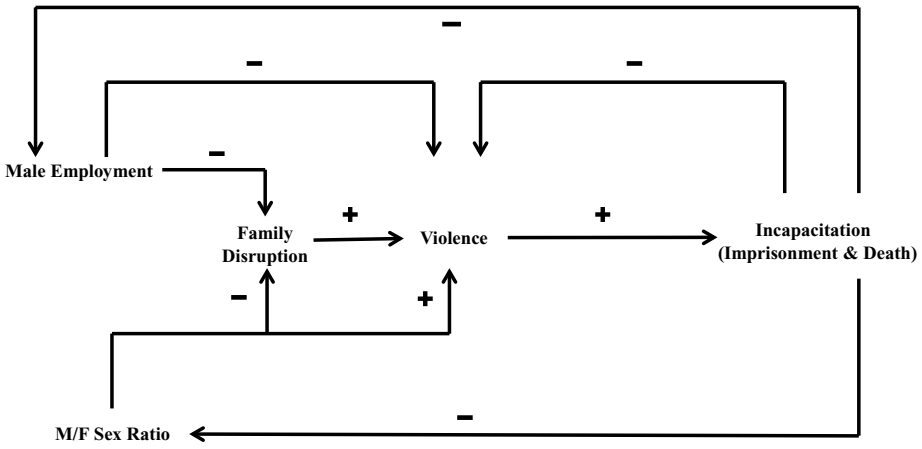
Sixteen years ago I presented a conceptual model of what some of incarceration's pathways might look like based on research examining rates of black and white violence (Sampson, 1995). I repurpose this framework in Figure 1. Looking back, I think this remains

6. This list is not meant to be exclusive but rather illustrative. Western (2008), for example, attempts to net out the costs of a new prisoner reentry program relative to prison costs, whereas Cook et al. (2012) and Donohue (2009) examine the crime rate decline and estimate the costs and benefits of incarceration relative to other policies.

7. Or the effect of prison length might be on average zero, as suggested by the most recent study I am aware of. Loeffler (2011) uses randomization of judges to cases and finds no causal effect of prison on recidivism. Given the large financial and other potential costs of incarceration, a null effect is just as important an entry in the social ledger as either positive or negative effects.

FIGURE 1

Multiple Pathway Model of Criminogenic and Crime Control Effects of Incarceration



Source: Adapted from Sampson (1995).

a plausible model, positing that crime is both increased and decreased by incarceration through the mechanisms drawn in the figure, most of which I examined empirically. Note that there are several unintended consequences of incarceration. Although incapacitation may reduce violence through the removal of offenders from the community, for example, my results suggested that removal also decreased the ratio of males to females, which increased family disruption and in turn rates of violence. I also argued that imprisonment had negative effects on employment, especially the marginalization of black men from the labor market, again indirectly leading to future crime through its disruptive effect on black family structure. My conclusion then but which seems to have stood up over time, was that "it is time to question received wisdom on crime-control policy based on a more complex and long-term perspective regarding the links among crime policies, employment, family structure, and the social organization of inner-city communities" (1995: 251).

Based on the theory underlying my effort, estimating only one of the pathways, say from incarceration to lower crime via incapacitation, is incomplete without knowledge of the path from incarceration to increased family disruption and hence increased violence. The logic of this model is consistent with the conclusion of Durlaf and Nagin (2011: 24) on complex interaction effects: "aggregate crime rate and aggregate imprisonment rates are equilibrium outcomes, so their relationship will depend on the way that the individual and the institutional factors that determine outcomes on an individual level aggregate across a population." If we add the results of Wakefield and Wildeman's study, an

important new consideration comes into focus, that of the intergenerational transmission of incarceration's legacy to children of the next generation. Yet such a pathway complicates matters greatly because emergent effects from aggregation across different behaviors and institutional decisions are not only likely to be nonlinear and complex, in this case they span multiple generations and time scales. How these aggregation effects come about, at what scale and at what time, are the big unknowns. Once again, the implication is that a policy inducing differential effects on multiple dimensions and time scales cannot be judged by its effect on one outcome alone.

Even if we had concrete and valid estimates of the full causal matrix in an updated Figure 1, policy decisions are about tradeoffs in a world of limited resources. Suppose, for example, that Wakefield and Wildeman are right about the long run and that some children are harmed by incarceration, with full manifestations yet to come, *and* that at the same it is also true that 15% of the reduction in the violence rate was attributable to incarceration, with some number of children alive today that would not be otherwise. How does one evaluate ensuing trade-offs? What metric is to be used? How do we value these different outcomes? The social ledger in this case cannot be about dollars alone and the weights for different entries are quite possibly incommensurable.

A new kind of social ledger is therefore called for—this is the challenge of Era 3. Criminological research does not provide easy answers to this challenge, which is why research, no matter how credible, is problematically related to policy recommendations. Indeed, the role of science in policy is inevitably tied to politics (or values) and for that reason alone the assumptions underlying Wakefield and Wildeman's move from evidence to policy recommendation, along with criminology in general, need to be interrogated. I believe this is a deep issue worthy of future investigation.[8]

Conclusion

Wakefield and Wildeman highlight an important pathway that must be reckoned with and for that alone their paper is a novel contribution that moves the field forward and into Era 3. I especially like their demographic move that builds on survey evidence, which as noted above I take to mean a serious engagement with population level processes and the causal effect of incarceration flows interacting across multiple life domains. Like Western's (2006) more macrolevel focus, this kind of thinking is a needed corrective to the simplistic mindset that criminal justice sanctioning is only about crime. Incarceration is very much about society writ large and children are our most vulnerable members. But in the end I disagree with the notion that a clear-cut policy implication is (at present) evident. This is not a deficit of Wakefield and Wildeman's study so much as the multiple social contexts within which crime policy operates and potentially influences. Only by taking a dynamic

8. For a more general but beginning framework for rethinking social policy and its evaluation from a systemic or holistic perspective, see Sampson (2011: chapters 15–17).

macrolevel approach and better estimating "net harms"—which Wakefield and Wildeman ultimately endorse—can we ultimately understand what incarceration has wrought, for better or for worse—or quite possibly for naught.

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MASS IMPRISONMENT AND CHILDHOOD BEHAVIORAL PROBLEMS

Is the devil in the details?

Crafting policy to mitigate the collateral consequences of parental incarceration

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Wakefield and Wildeman (2011, this issue) have presented us with the next step in a growing body of research that demonstrates the widespread and long-term human costs of the U.S. imprisonment binge. As they note, this research includes prisoners' diminished earnings (Western, 2002), their reduced odds of marriage (Western and McLanahan, 2000), their declining health (Massoglia, 2008), and their limited opportunities for civic engagement (Uggen and Manza, 2002). Because this incarceration binge has affected young Black males disproportionately—with roughly one in three African American men having a felony conviction (Wakefield and Uggen, 2010: 389)—these human costs will perpetuate, if not exacerbate, many of the racial disparities that already exist in the United States. Not only will the social and economic trajectories of these individuals be disadvantaged, but also, as others have noted, there is a high probability that there will be intergenerational costs as well (Hagan and Dinovitzer, 1999; Wakefield and Uggen, 2010; Western and Wildeman, 2009).

Although research on the effects of paternal incarceration on the well-being of their children has grown substantially, much of it has been limited by sampling constraints and the problems attendant to the nonrandom assignment of individuals to prison (see Murray and Farrington, 2008). Attempting to overcome some of these problems, Wildeman and Wakefield (2011) use two longitudinal data sets that encompass young children and adolescents (Fragile Families and Project on Human Development in Chicago Neighborhoods) and propensity score models to assist in reducing the differences between fathers who experience imprisonment and those who do not. In their first set of analyses,

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they find that paternal incarceration increases the risk of mental health and behavioral problems among children. In a second set of analyses, they estimate how much of this effect will impact racial disparities in the next generation. Here, they build on the work of Foster and Hagan (2009: 187), who suggested that the detrimental effects of parental incarceration on children's educational attainment would impact minorities disproportionately given their unbalanced representation in prisons. By estimating a range of effects based on different scenarios of imprisonment (no increase, the midpoint in the prison boom, and the high end of the prison boom), they arrive at a rather devastating conclusion: "Black–White disparities in internalizing behavioral problems would have been 25–45% less in the absence of incarceration; Black–White gaps in externalizing behaviors would have been approximately 14–26% smaller."

Policy Fallout

What should policy makers do with these findings? One approach is to follow Wildeman and Wakefield's (2011) suggestions and go for what might be considered the "low hanging fruit": reduce incarceration for nonviolent offenders with no history of domestic violence, including drug offenders and individuals reincarcerated for technical violations while on parole (see also Wildeman and Western, 2010). Furthermore, they argue that in the current context of fiscal constraint, where imprisoning large numbers of offenders has become a monetary liability, there is more "public discussion about the use of imprisonment in the United States" and a greater incentive to reduce prison populations. But is this really the case? Gottschalk (2010: 62) considered the question of whether the current economic situation in the United States provides the "opportunity to rethink the direction of U.S. penal policy," and she concluded that there is little evidence that this has happened or will happen in the future. As she explains, between 2008 and 2009, the prison population in the United States edged downward in 27 states, but it continued to grow in 23 other states. And California, which is often considered the paradigmatic example of this situation, reported a $24 billion budget shortfall in 2009 and, simultaneously, was under federal court order to reduce its overcrowded prisons. Yet the reaction of the voters to a bill that would have released some nonviolent offenders was a "political firestorm" (Gottschalk, 2010: 70; see also Tonry, 2011).

Another approach would be to appeal to the issue sketched out so carefully by Wildeman and Wakefield (2011): the growing racial disparities across generations. However, given the role of race in the development of American penal policy, it is hard to imagine race-based policies would hold much sway with legislators (see, e.g., Beckett, Nyrop, and Pfingst, 2006; Pettit and Western, 2004; Tonry, 2008). Instead, focusing on the children of imprisoned parents as "an issue of society-wide, rather than race-specific, significance for Americans" may be more palatable to policy makers (Foster and Hagan, 2009: 181).

However, before we can make the case that this is a society-wide issue of significance, we need to understand who is most likely to be affected by parental imprisonment and

what *processes* are responsible for the effects we observe. As Wildeman's (2010) work demonstrated, some children— notably those with an abusive father—benefit when a parent is removed from the home (see also Giordano, 2010). Furthermore, current explanations for why children of imprisoned parents seem to fare worse than other children, in terms of school failure, delinquency, unemployment, mental health, and drug problems, are usually attributed to four factors (Hagan and Dinovitzer, 1999; Murray and Farrington, 2008):

1. Insecure attachment
2. Economic strain
3. Stigma
4. Social learning

Although each of these is an important source of disadvantage children of imprisoned parents might face, they often are treated as additive effects and are largely decontextualized. We might ask, for example, in what situations are children most likely to be stigmatized by parental imprisonment, and how does the learning of criminality from a parent take place when most parents attempt to conceal their illegal activities from their children? As Sampson (2000: 712) noted more than a decade ago, behavioral changes "are mediated by proximate and time-varying social processes grounded in life transitions, situational interactions, routine activities and turning points." As such, if we want to understand why parental incarceration is an important risk factor in the development of behavioral problems in some children, we need to understand the conditions under which it becomes a tipping point for problematic outcomes, and how this may change over time and vary across individuals.

In what follows, I consider briefly two lines of inquiry that might bring us closer to providing policy recommendations that could help to mitigate the collateral consequences of parental incarceration:

1. What factors are responsible for the differential effects of parental incarceration on children; or, put differently, is there a set of key familial and/or compositional characteristics that predicts poor behavioral outcomes among the children of imprisoned parents?
2. Are there temporal or prison-related moderators, or does the timing of the imprisonment or the parent's institutional experiences affect children's outcomes?

Substantial evidence indicates that parental criminality and imprisonment often co-occur with other risk factors such as family poverty, substance abuse, and mental health problems (La Vigne, Brooks, and Shollenberger, 2009; Phillips, Erklani, Keeler, Costello, and Anglo, 2006). Wildeman and Wakefield (2011) used propensity-matching scores precisely to deal with this difficult issue of addressing some of the confounding and negative covariates that might characterize the lives of children of incarcerated parents, but of course, this method can control only the observable variables in their data sets. An

important and emerging line of research pertaining to problem behavior in youth draws attention not just to multiple risk factors that can co-occur across different contexts (family, school, and neighborhood) but also to the specific composition or configuration of those risk factors (Copeland, Shanahan, Costello, and Angold, 2009; Lanza et al., 2010). The work of Copeland and his colleagues is particularly important here as they considered the role of parental criminality in combination with other risk factors in determining a child's psychiatric status. Using latent class analyses, on data from The Caring for Children in the Community Study and the Great Smoky Mountain Study, they found that the youth in their sample fell into five different replicable groups (2 low/no risk, 2 moderate risk, and 1 high risk), each with a different composition of risk factors. Parental criminality appeared in one of the moderate-risk groups and in the high-risk group, but its effects on children differed depending on the presence and nature of other risk factors. Parental criminality in combination with poverty conferred a moderate risk (as did single parenthood and poverty), but when parental crime was combined with parental mental illness, parent–child conflict, and interparental conflict, it conferred a high risk of psychiatric disorder. These kinds of profiles also can be extended to include the risks children can encounter in their neighborhoods and schools (Lanza et al., 2010), and they suggest that we might be able to identify effectively those children who are likely to have the greatest number of problems when a parent is imprisoned.

Related to this notion of the composition of risks to which children are exposed is the question of what happens to children who lose both parents to imprisonment. Some evidence suggests that youth who have both parents arrested, or only their mother arrested, are at much greater risk of being arrested themselves (Dallaire, 2007; Eddy and Reid, 2002; Huebner and Gustafson, 2007). This maternal outcome likely is related to the fact that women offenders often partner with male offenders or are single heads of households (Kruttschnitt, 2010); when they are arrested, their children are particularly vulnerable to state intervention and many are, in fact, placed in foster care prior to their mother's final imprisonment (Brazzell, 2008; Ehrensaft, Khashu, Ross, and Walmsley, 2003). This important situational correlate of the widening carceral state is ripe for policy intervention. In these situations, the role of the guardian becomes extremely important, and it addresses directly why the effects of maternal incarceration are not always transparent (see, e.g., Cho, 2009). In an extremely important piece of research on urban Black adolescents, Hanlon Carswell, and Rose (2007) found that those children who were living with their mothers *and* grandmothers prior to their mothers' imprisonment, and who viewed their grandmothers as their primary caregivers, adapted well despite their exposure to multiple risk factors (residing in economically deprived, high-crime neighborhoods and maternal addiction). This finding directs our attention to both the quality of the guardian and the question of what policies are in place to determine whether a child who loses both parents has an adequate guardian. Although state-specific guidelines probably vary greatly in this regard, some evidence from California suggests that such protections are weak or

nonexistent. Specifically, a study of law enforcement agencies revealed that only one in eight agencies required the police to ask criminal suspects if they have children at the time of arrest, and even when the child is present at the scene of the arrest, only 42% of officers inquired about who would take care of the child (Nieto, 2002).

Growing evidence indicates that we need to pay more attention to the timing of parental incarceration when estimating its impact on children. Despite the blossoming of life-course research, scholars have generally ignored the potential developmental effects of parental imprisonment on children of different ages (cf. Phillips and Erkanli, 2008). But a handful of qualitative studies paint an impressively consistent picture: Young children who lose a parent to incarceration often are confused and saddened, and they want their parent returned regardless of the quality of parenting they provided for the child. Older children, however, are more reflective about their parents, what they have done, and how their lives have been affected by their absence (see, e.g., Davies, Brazzell, La Vigne, and Shollenberger, 2008; Giordano, 2010). For some children, this includes anger and grief, which may be compounded by "parentification" or the process by which the children take on adult roles in the absence of maternal care giving (see Hissel, Bijleveld, and Kruttschnitt, 2011).

Policies could be enacted that would do much to help alleviate some of the grief and confusion that is caused by parental absence because of incarceration, particularly among young children. We know that in 2007, roughly one half of all children with an incarcerated parent were less than 10 years of age and more than one half of parents in state correctional facilities (and 84% in federal facilities) were housed more than 100 miles from their residence at the time of arrest (The Sentencing Project, 2009). Furthermore, we also know that the frequency of contact between children and incarcerated parents has dropped substantially since 1997; in fact, by 2004, more than one half of the parents housed in state correctional facilities reported never having a personal visit from their child(ren) (The Sentencing Project, 2009). No doubt, some part of this decrease in contact between incarcerated parents and their children is a result of the passage of the Adoption and Safe Families Act (ASFA). ASFA had an admirable goal at the outset, which was to reduce the number of children residing in unsafe homes (characterized by abuse and neglect) and the number of children who were being placed in foster care. However, because the law requires that states initiate proceedings to terminate the parental rights of parents whose children have been in foster care for 15 of the preceding 22 months, and because many parents are serving sentences of 2 years or more, ASFA has resulted in more incarcerated parents having their parental rights terminated (see Hanlon et al., 2007: 356).

Why should legislators care whether convicted felons see their children or even whether they have their parental rights terminated? After all, shouldn't they have considered the consequences of their actions and the repercussions it would have on their families? Probably, yes. But, policy makers may also want to consider that (a) maintaining the ability of parents to reunite with their children can reduce welfare costs and foster care reimbursements and that (b) parental reunification with children can also contribute to lower recidivism rates.

Petersilia (2003) demonstrated that convicted offenders are less likely to be rearrested when they have maintained contact with their families, and current findings from at least one of the reentry sites (Returning Home Study) provides some context for understanding why this is so. Based on the third and final follow-up with 300 male prisoners 12 months after their release from prison in Ohio, Visher and Courtney (2007) provided compelling evidence about the importance of families in the lives of prisoners reentering society. When asked before their release from prison what they thought would be most important to preventing their return to prison, most men mentioned the usual suspects: employment, finding housing, and abstaining from drugs. However, when asked the same question 1 month after release, the largest percentage of ex-prisoners reported it was support from family, even though the percentage of those who reported actually living with their children after release (by a comparison with before their imprisonment) had dropped substantially.

One last avenue that may hold some promise in reducing the affects of parental imprisonment on children pertains to the parents' conditions of confinement. In an intriguing study, reported by Murray, Janson, and Farrington (2007), the effects of parental incarceration on children were compared in England and Sweden. Youth in both countries were matched on sex, social class, timing of parental imprisonment, and timing of the children's outcomes. The effects of imprisonment on children were much stronger in England than in Sweden even after controlling for the number of parental convictions. Although the authors considered carefully the explanations for this outcome (including the possibility that the mechanisms linking parent and child criminality differ, that there are differences in sentence length, and that there are selection effects), they also pointed out the different policies surrounding imprisonment in the two countries. As they noted, Swedish prison policies are more "outward looking" and focus on maintaining contacts between prisoners and their families, including the possibility of home visits. Clearly, much more needs to be done in this area, but potentially, it holds much promise. Capturing the natural variation that exists among states in the United States might allow researchers to test the hypothesis that prison conditions (e.g., the availability of programs, visitation policies, and even sentence length) are associated with the outcomes of children whose parents who have similar offending histories. Unfortunately, in the United States, research on the conditions of confinement has all but disappeared (with the notable exception of the work being conducted on supermax prisons), but in the current climate of long-term confinement, it would seem to be particularly important in understanding the collateral consequences of imprisonment (see, e.g., Comfort, 2008).

Conclusion

This policy essay is not intended to equivocate about the quality of the evidence concerning the damaging effects of paternal incarceration on children, or even whether these effects will spur additional racial disparities in the United States. Indeed, Wildeman and Wakefield

(2011) provide arguably the best empirical evidence to date. Rather, it is a case of needing better, or more precise, evidence before we make policy recommendations. Some scholars have argued that we do not intervene enough in the policy arena (Uggen and Inderbitzin, 2010); I would argue, however, that we should intervene in this particular policy arena only when we have considered creatively and carefully what will be required to make a difference in the lives of children of incarcerated parents.

There is no question that it will take a long time to disengage from the carceral behemoth the United States has created and that detractors of downsizing will be fully supported by the enormous industry that has grown up around the building and staffing of prisons. However, focusing on the most important legacy of this mass incarceration movement—the children of these offenders—holds promise. We just need to make sure that our focus will produce achievable goals.

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MASS IMPRISONMENT AND CHILDHOOD BEHAVIORAL PROBLEMS

Taking children into account

Addressing the intergenerational effects of parental incarceration

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Wakefield and Wildeman (2011, this issue) provide compelling evidence that the effects of the incarceration boom experienced by the United States during the past 40 years extend well beyond the individuals behind bars. In doing so, they contribute to a mounting body of research answering the clarion call sounded more than 10 years ago for rigorous investigations into the "collateral consequences" of imprisonment (Hagan and Dinovitzer, 1999). By probing the repercussions of paternal incarceration on children's well-being, they bring to light the deleterious impact of the penal system on those who likely have never set foot in a correctional facility, or have done so only as visitors of their confined kin. Wakefield and Wildeman find that having an incarcerated father negatively affects children's behavioral and mental health and that "mass imprisonment might have increased Black–White inequities" in youths' "externalizing behaviors" (such as physical aggression) and "internalizing behaviors" (such as depression and anxiety). This is an innovative and important analysis of the intergenerational transmission of both class disadvantage and racial disparities resulting from the extraordinary and enormous spread of the penal net since the early 1970s. It enriches a growing literature on the secondary

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and tertiary impacts of U.S. penal policies by scholars attempting to map out the full scope and magnitude of the nation's rise to being the world's top incarcerator, and thereby to comprehend the extensive associated social costs (for a discussion of this literature, see Comfort, 2007).

The fact that Wakefield and Wildeman's (2011) research on this subject clearly documents the harmful effects on children's current well-being as well as the risks to their long-term educational and occupational achievement should spur policy makers into action in the following distinct areas: *preventing* families from being drawn into the carceral ambit through contact with police, courts, and correctional systems; *infusing* neighborhoods with high incarceration rates with the necessary resources to counterbalance the negative consequences of the absorption of their residents by the criminal justice system; and *protecting* children who experience parental imprisonment from its most traumatic and harmful effects.[1] In this essay, we build on Wakefield and Wildeman's policy suggestions in these areas, heeding Currie's (2011) invitation to avoid "spurious prudence" and instead engage in bold and expansive thinking about how to strip the layers of hardship piled on children as they suffer the fallout from a system that has largely failed to take them into account despite its heavy intervention in their families' lives. We frame our discussion in the context of "hyperincarceration" (Wacquant, 2010: 74) resulting from a U.S. criminal justice system that targets its populace "first by class, second by race, and third by place," meaning that serious efforts to rectify its ills must work to elevate the socioeconomic floor, identify and address racial and ethnic disparities at all levels of the criminal justice system, and rebuild the devastated and devastating inner-city neighborhoods from which the preponderance of the nation's incarcerated population is drawn. In doing so, we draw on the work of Roberts (2004: 1300), who highlights the importance of focusing on the community-level harm stemming from the disproportionate incarceration of African Americans as the cornerstone for "a radical rethinking of dominant justifications for prison policy and related crime control and sentencing reforms."

Prevention of Contact with the Criminal Justice System

In light of their findings, Wakefield and Wildeman (2011) recommend that incarceration rates be reduced, focusing specifically on "the low-hanging fruit of nonviolent offenders who have not engaged in domestic violence." We concur that this is a logical first step; fewer parents entering jails and prisons would translate into fewer children experiencing parental incarceration, thus diminishing the pool of those suffering detrimental effects on their behavior and mental health. Yet this recommendation cannot be enacted in isolation.

1. Although Wakefield and Wildeman (2011) restrict their analyses to paternal incarceration because of available data, we also address maternal confinement in light of the evidence of considerable disruption this can cause in children's lives, following the logic that, although effects on youth might be different depending on whether their mother or father is incarcerated, they are unlikely to be less harmful in circumstances of a mother's removal (Gibbs, 1971; Johnston, 1995; Kampfner, 1995; Poehlmann, 2005).

Many nonviolent offenses are committed out of unmet need in one form or another, such as drug addiction, lack of housing, or food scarcity (Durose and Mumola, 2004). Therefore, it is critical to provide support services to families simultaneously to address the underlying issues that provoke their criminalized behavior. Indeed, Wakefield and Wildeman note that "children of incarcerated parents were worse off (on many dimensions) than their similarly situated peers who had no parent incarcerated even before experiencing the event," which indicates that merely keeping fathers and mothers out of correctional facilities will not elevate their children to an optimal level of well-being.

One way of potentially accomplishing both goals is robust investment in diversion programs and initiatives to reduce recidivism, particularly those that engage kin in such efforts by treating the family as a holistic unit (Bobbitt and Nelson, 2004; Shapiro and Schwartz, 2001; Visher and Travis, 2003). Importantly, these types of programs can be instituted at and tailored to various points in the continuum of criminal justice involvement; for example, diversion programs that provide drug treatment or behavioral therapy in lieu of a stint behind bars are especially meaningful for juveniles as a way to prevent them from entering the correctional system in the first place, thereby not pulling youth into the near-inescapable quicksand of confinement, release on probation or parole, and rearrest that eventually leads them to the adult penitentiary (Pope and Feyerherm, 1993; Snyder and Sickmund, 2006). Alternatively, in-facility vocational training and substance-use treatment followed by job placement, housing assistance, and other postrelease support programs are critical for helping those who have recently exited the walls to leave incarceration behind and find footing as gainfully employed, civically integrated residents (Hagan and Coleman, 2001; Petersilia, 2003; Travis, 2005; Wilson, Gallagher, and MacKenzie, 2000).[2] Likewise, "preentry" and community justice courts can be useful in tamping down correctional escalation among probationers who have run afoul of the law and risk being sent to state prison (Kane, 2011; Tauber, 2011). These courts evaluate lawbreakers' personal circumstances—including whether they are primary caregivers for minor children—prior to sentencing and can impose community service, drug treatment, parenting classes, and other residential or nonresidential injunctions instead of incarceration.[3]

In addition to a greater utilization of alternatives to incarceration, reforms in the spatial targeting of policing and penalties for minor violations have the potential to reduce the numbers of people, particularly African Americans, placed under lock and key, and

2. It is imperative that such programs be accompanied by achievable outcomes such as safe and affordable lodging and jobs paying a sustainable wage. In the absence of these resources, "prerelease" and "reentry" programs risk becoming a farce, demoralizing participants by setting them up for failure in a society that offers them no assistance and thus actually prepares them only to "reenter" the carceral setting after a short hiatus (Lowenkamp and Latessa, 2005).

3. All of these initiatives, of course, connect to the even more daring—and yet commonplace in Canada and Western Europe—strategies of the medicalization rather than the penalization of addiction and mental illness (Tonry, 1999; Wacquant, 2007).

thereby to spare their children the experience of parental incarceration. Predominantly Black, impoverished neighborhoods bear the brunt of street-level enforcement of drug laws and "zero tolerance" policing, with the result being that vastly more African Americans are arrested for low-level offenses (Greene, 1999). The intensely punitive response to victimless crimes like drug use and public loitering cause months or years of life to be "lost" to incarceration (Drucker, 2002) and saddle colossally disproportionate numbers of young Black men with criminal records—and the stunted educational, employment, and civic opportunities that go with them (Bishop and Frazier, 1996; Miller, 1996; Pager, 2007; Western, 2006). Decreasing the excessive police surveillance to which poor African American neighborhoods are subjected and enacting reforms that scale back penalties for low-level lawbreaking would reduce the number of people pulled into the penal net, with particular salience for people of color and their children. One example in this vein is the Fair Sentencing Act of 2010, which reduced the federal crack versus powder cocaine sentencing disparity from 100:1 to 18:1, bringing the penalties for possession of a substance more frequently used by African Americans closer into line with those imposed for possession of a nearly identical substance more frequently used by Whites (Cummings, 2010).

Infusion of Resources into High-Incarceration Neighborhoods

In evoking the policy implications of their work, Wakefield and Wildeman (2011) note that "the demographic concentration of mass incarceration also suggests strong effects within families and high-imprisonment rate communities," drawing attention to not only children who experience parental confinement but also their peers who escape this plight yet still are affected by the "seepage" of the criminal justice system at the neighborhood level. Given hyperincarceration's strong relationship to space and place (Wacquant, 2010), rolling out services that target the impoverished districts from which the majority of the incarcerated population is drawn will function to elevate the social floor for all children, at once mediating negative effects for those who have lost a parent to the system and diminishing a host of factors that place poor juveniles at higher risk of criminal justice involvement themselves.

Public schools have the potential to serve as vehicles through which children could be connected with vital programs and services. Concerted efforts to end policies that lead to schools resembling minipenitentiaries (Devine, 1997) and an injection of resources to revitalize them with the books, supplies, and instructors necessary for a solid education would go far to reduce youth's lifetime risk of imprisonment (Western, 2006). Training teachers in public schools to recognize that students' behavioral problems could stem from distress over incarcerated parents and equipping them with specialists to whom they could refer these children would reduce stress in the classroom, provide traumatized youth with therapeutic help, and avoid converting normal responses to family turbulence into a pathway to the juvenile justice system (Ferguson, 2001; Foster and Hagan, 2007). Another step to support rather than to punish students for their parents' confinement would be for schools to enact attendance policies that excuse absences related to visiting incarcerated parents,

especially if children have to travel long distances to reach correctional facilities (Petsch and Rochlen, 2009).

As more children's mothers take on single parenting during a father's incarceration and other children move in with grandparents while a mother is behind bars (Hairston, 1999; Johnson and Waldfogel, 2004), subsidized day care and after-school care become indispensible. Again, these programs will be most effective if child-care workers are equipped to address their charges' emotional and behavioral reactions to parental incarceration and receive ongoing professional support and training related to this topic. Neighborhoods decimated by astronomical rates of incarceration also would benefit from free-access community centers where children could participate in sports, receive help with homework, learn stress-reduction techniques, and even join support groups or mentoring programs with other kids coping with mothers or fathers cycling through the correctional system. Equipping these centers with free or low-cost drug counseling and family therapy programs has the potential to reduce incarceration rates by addressing the underlying causes of addiction and domestic violence, as well as to improve the physical and mental health of children and their kin by reducing stress and conflict prior to, during, or after a parent's confinement. Therapeutic services are similarly critical for helping affected children adjust to changes in their own caregiver or guardian, the dissolution of their parents' relationship, or their mother's formation of a new relationship in the wake of a previous partner's removal (McLoyd, 1998; Osborne and McLanahan, 2007). And finally, pediatricians and emergency-room doctors treating children in the nation's impoverished neighborhoods could systematically screen for parental incarceration, both to contextualize stress-related illnesses or other somatic expressions of depression and anxiety, and as a means to refer youth to appropriate mental-health services, especially when there is a risk of self-harm. Although all of these measures would require monies that are currently unavailable, Mauer (2011) recently pointed to the use of fiscal incentives as a means of encouraging a shift of criminal justice funds to social policy initiatives that contribute to reducing crime. Indeed, given that investments in therapeutic treatment for justice-involved families have been determined to yield $13 in public safety benefit for every $1 spent (Justice Policy Institute, 2009), fertile possibilities exist for budget redistribution.

Another way government officials can support impoverished families and help keep parents out of custody is to prioritize bringing jobs into high-incarceration neighborhoods *and making these jobs available to people with criminal records*. The "Ban the Box" initiative adopted by several states (including Connecticut, Massachusetts, and New Mexico) and individual cities (such as Baltimore, Memphis, Oakland, and Philadelphia) prohibits employers from asking about a criminal history on initial job applications, reserving background checks for later in the hiring process (Cooper, 2010).[4] Actual living-wage

4. Processes for the eventual background check vary by location. In the city of Oakland, CA, for example, someone only undergoes the check upon becoming the top candidate for a job. If the individual has a

employment opportunities for the nonincarcerated caregivers of children and returning fathers and mothers should be accompanied by the lifting of restrictions on people with criminal records or drug convictions from receiving various forms of public assistance, such as food stamps or Section 8 housing. Denying this aid marginalizes vulnerable families and adds tremendous strain to relationships if "legally unblemished" members are forced to choose between severing ties with their justice-involved relatives or potentially losing scarce resources when they accept them back into the household (Mele and Miller 2005).

Protection against Traumatization and Harm

It is unlikely that policy solutions can completely mitigate the trauma children experience during the loss of a parent to the correctional system. Although Wakefield and Wildeman (2011) note that the underlying causal mechanisms of the harmful effects they document cannot be identified through their data, previous research has described negative consequences for children who witness the arrest of a parent (Mazza, 2002; Murray, 2007), enter the foster-care system because of parental incarceration (Perry, 2006; Phillips and Dettlaff, 2009), or simply must cope with the forced removal of a pivotal adult figure (Bernstein, 2007; Johnson, 2006; Miller, 2006). Other studies have documented the stresses and strains of jail and prison visiting that are transferred from incarcerated parents and their nonincarcerated coparents to children (Comfort, 2008; Hairston, 1998; Nurse, 2002). In addition, evidence suggests that the quality and frequency of parent–child contact during incarceration might moderate negative outcomes for children (Arditti, 2005; Parke and Clarke-Stewart, 2003).[5]

Against this backdrop, certain policy recommendations are clear. For example, any arrest that takes place in the presence of a child should follow a series of steps to minimize distress, from avoiding unnecessary force or threats of force to permitting parents to phone an alternative caregiver and ensuring that minors are left in the care of an adult who is known to them whenever possible (San Francisco Children of Incarcerated Parents, 2005). Similarly, children's needs—and attention spans—must be taken into account when designing jail and prison visiting policies; all facilities, including juvenile facilities, should permit children to have contact visits with their parents without physical barriers such as glass or grated windows; waiting times should be kept to a minimum; parents should have handcuffs removed before children see them; and visiting rooms should have clean and safe play areas with age-appropriate toys (Hairston, 1996). For children whose caregivers cannot take them

conviction that is unrelated to the position (e.g., embezzlement for a job as a park ranger), the hiring process moves forward. If the conviction charge is related to the position (e.g., embezzlement for an accountant), a hiring manager meets face to face with the candidate, explains why the hire cannot occur, and indicates for which city jobs the candidate is eligible. For more information, see the Web site of the national organizing initiative All of Us or None (allofusornone.org).

5. However, the converse can also hold true, with low-quality or sporadic visitation causing distress and disruption for children; see Hariston (1991).

to visit their incarcerated parent, programs like California's *Get on the Bus* (getonthebus.us) can facilitate contact, providing a ride to an often-distant prison, the day's meals, a teddy bear, a letter from the parent on the ride home, and postvisit counseling with a trained professional. Optimally, visiting programs for children should be integrated with programs for their incarcerated parent and the remaining nonincarcerated parent or caregiver. The Osborne Association in New York (osborneny.org) has been a pioneer for a long time in this regard, involving adults and children in parenting programs both during incarceration and after release. Such efforts can be particularly important for juveniles, who might be children of incarcerated parents and incarcerated parents of young children simultaneously (Nurse, 2002, 2004)[6] and be overwhelmed by the responsibilities of parenthood independent of the complications added by incarceration.

The promotion of active engagement by confined fathers in their children's lives should also include amendments to child support laws such as those proposed in President Obama's 2012 budget that permit men to suspend orders while behind bars and adjust their arrears debt upon release so that they can contribute to their children's lives without being financially flattened by untenable payment schedules (Nurse, 2002; Yoder, 2011). One example of such a policy is the recently established partnership between the California Department of Corrections and Rehabilitation and the California Department of Child Support Services that aims to educate incarcerated fathers about their child-support obligations and options with a goal to mitigate negative impacts to fathers upon their release, including license revocation and garnishment of wages (*CDCR Today*, 2011).

Conclusion

Wakefield and Wildeman (2011) have helped deepen our understanding of the profound and potentially long-lasting consequences of parental imprisonment that affect millions of impoverished children each year, largely outside of the mainstream public's notice. It is critical that policy makers be made aware of these effects on children's well-being and their implications for the intergenerational transmission of class disadvantage and racial disparities. To this end, we conclude with a recommendation that all penal policies be accompanied by a "Family and Children Impact Statement" that would explicitly describe the likely repercussions of criminal justice laws and practices on incarcerated people's kin, provide justification for the degree of harm imposed on children, and discuss how negative effects could be avoided or mitigated (see Mauer, 2007 for his proposal of racial impact statements, on which we base this recommendation). Laying these issues squarely on the

6. Estimates suggest that approximately 25% of incarcerated juvenile males are fathers (California Youth Authority, 1995). Although we do not have reliable national data on the number of pregnant or parenting girls in detention, it seems that they are overrepresented in the population as well. A 1998 California study conducted by Acoca and Dedel, for example, found that 29% of girls in juvenile custody had been pregnant at least once and that 16% of them had been pregnant while incarcerated (Acoca, 2004).

table and requiring that children be taken into account would mark a substantial step in reversing the tide so starkly illustrated by Wakefield and Wildeman.

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The consequences of incarceration

Challenges for scientifically informed and policy-relevant research

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The size of the penal system has grown so rapidly it now merits consideration alongside other key societal institutions. Consider that each year approximately as many men get out of prison as graduate college (National Center for Education Statistics, 2004), and that the number of people incarcerated (Glaze, 2010: 2) is roughly equivalent to the enrollment of all institutions that are classified as having high research activity (Snyder and Dillow, 2010: 326). Given this rapid and continued expansion of the "felon class" (Uggen, Manza, and Thompson, 2006), research on the consequences of incarceration is increasingly becoming a staple of sociological and criminological work, with a particular emphasis on the stratifying impact of the penal system. For instance, in the last 10 years, work has examined the impact of the penal system on a range of outcomes including wages (Western, 2002), health (Schnittker and John, 2007), infectious disease (Massoglia, 2008), childhood poverty (Wildeman, 2009), and political outcomes (Manza and Uggen, 2006).

Wakefield and Wildeman (2011, this issue) make an important contribution to this literature. They find that children with an incarcerated father have higher levels of internalizing and externalizing behaviors. Furthermore, they suggest that racial disparities in childhood behavioral problems are noticeably larger because of the huge risk of parental imprisonment for Black children. Two notable aspects are found in this research. First, it demonstrates the intergenerational effects of incarceration. In doing so, the authors advance research beyond the typical focus on offenders and their partners. Second, the authors

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suggest that the effects of incarceration might be so widespread and pervasive that they partially explain racial disparities in childhood well-being. The study design is convincing, and the findings are both powerful and important.

In reflecting on policy implications that flow from Wakefield and Wildeman's (2011) work, we first acknowledge the challenges inherent in conducting research and, by extension, the difficulties in making policy recommendations for current and former offenders. It goes without saying that incarceration is highly selective and serves a disadvantaged population. This concept extends beyond the individuals incarcerated, as Wakefield and Wildeman note that children of incarcerated parents "were not doing well prior to the imprisonment of their father, and they are worse off as a result of it." Programs that benefit a general population might have no effect on the inmate population. Thus, it is important to derive policy recommendations from methodologically rigorous and theoretically informed studies. The work of Wakefield and Wildeman is precisely this type of research. Yet science is incremental, and even such an excellent study allows for a consideration of how research can best inform public policy.

We organize our review as follows. First, we use the Wakefield and Wildeman (2011) article as a lens to consider issues we perceive as important to inform policy on the consequences of incarceration. In our view, the foundation for informed policy recommendations is rigorous scientific research, and we focus on the following general areas: (a) the substantive differences between jails and prisons, (b) appropriate comparison groups, and (c) potential scope limitations of research on the consequences of incarceration. We then discuss more specific policy recommendations and highlight what we see as gaps in the literature where future research is needed to inform correctional policies.

Measurement of the Independent Variable

In our view, analytic and conceptual clarity on the type of institutionalization under consideration is critical to making well-informed policy recommendations. Wakefield and Wildeman's (2011) analyses serve as a relevant example, as they treat a term of imprisonment as analogous to a jail spell. Although this approach is not entirely unique (see, e.g., Apel and Sweeten, 2010), treating jails as identical to prisons is likely problematic. Wakefield and Wildeman are sensitive to this issue, noting that the research designs of their data sets do not allow for a separation of parental incarceration in prisons versus jails, and they suggest that not making this distinction could be introducing bias into their models. Our point is not to preference work that examines incarceration in prisons over that which examines incarceration in jails. Rather, we are suggesting that prisons and jails are different social institutions, and by extension, the life-course implications of these two processes are likely different. As such, to inform public policy, a clear delineation between research focusing on prisons and jails is likely important.

Consider that, according to the Bureau of Justice Statistics, in 2008, the average prison stay was approximately 2 years, and slightly more than 3.5 years for violent offenders

(West, Sabol, and Greenman, 2010). Jail stays, however, are much shorter. On average, local jails have a weekly population turnover rate of more than 60% (Minton, 2010), and many individuals spend only a single night in jail. The differences extend beyond simply length of detainment; in many cases, individuals in jails have not been convicted of a felony. Furthermore, in 2009, 6 in 10 jail detainees were awaiting court action on a current charge (Minton, 2010). As such, many of the legally sanctioned and well-known "collateral" consequences that accompany a felony conviction are not applicable to those housed in jails. These consequences include restrictions on educational loans, federally subsidized housing, employment opportunities, and voting.

Aside from these important legal differences, other more nuanced considerations are also relevant. Although jails are located in virtually every county in the country, prisons often take individuals far away from their family and friends. Inmates disproportionately come from poor urban areas (Lynch and Sabol, 2004), but prisons are typically located in rural areas (King, Mauer, and Huling, 2004). When coupled with increased sentence lengths, such distances likely contribute to the difficultly inmates have maintaining stable family relationships (Lepoo and Western, 2005). This effect extends to communities as well, as up to 25% of the adult population is incarcerated in some areas (Lynch and Sabol, 2004). One could convincingly argue the stigma of a prison sentence is—on average—longer and more severe than that associated with detainment in a local jail. The totality of these circumstances suggests that prisons and jails are different in important ways, and they likely have different life-course consequences.

Before proceeding, a point of clarification is needed. We understand that some individuals housed in jails were convicted of felonies and that many individuals convicted of felonies do not end up sentenced to prison. Partly stemming from prison overcrowding, approximately 5% of federal and state prisoners are housed in local jails (West et al., 2010). Moreover, we also understand that considerable variation exists in the incarceration experience. Prisons differ in terms of institutional resources, housing capacity, security, and population housed. That said, a fair view of the correctional landscape suggests that our general point—that, relative to jails, prisons represent a different, and much more invasive, form of social control—seems a fair characterization of the institutional reality. Prisons and jails play fundamentally different roles in the criminal justice system. When attempting to understand the individual-level life-course consequences of incarceration, we believe that variation within prison pales in comparison with the variation between prisons and jails.

As such, analyses that treat jail spells as analogous to prisons confound the lasting impact of both institutions and are not optimally positioned to make policy recommendations. Consider the classic study on wage inequality by Western (2002). Recent work—with a younger sample—found the impact of incarceration less consequential (Apel and Sweeten, 2010). As such, these two articles could lead to divergent policy recommendations. However, strong evidence suggests that the measure of institutionalization used by Apel and Sweeten (2010: 457) predominately captures jail spells—the median length of confinement is

2 months—rather than prison spells. Thus, it is difficult to ascertain whether the inconsistent findings across the two studies reflect actual differences or stem from a function of measurement. As such, it seems that we should exercise caution when drawing conclusions based on direct comparisons between these two studies.

The Appropriate Comparison Group

The two studies discussed in the previous section, in addition to highlighting the importance of measurement, also speak to what we believe is a second important issue in research on the consequences of incarceration—who is the appropriate comparison group? This question is at the core of causal inference in social science research and is fundamentally important to inform public policy. At the onset, we again acknowledge the challenges presented by the scarcity of available data to speak to this issue, and we remain aware of this limitation throughout our discussion. Moreover, some of the most powerful research designs, such as random assignment, are obviously impractical for understanding the consequences of incarceration (but see Chiricos, Barrick, Bales, and Bontrager, 2007, for an exception). That said, finding the appropriate comparison group is of paramount importance for making scientifically informed policy recommendations. Absent a suitable reference group, any policy recommendations could be guided by findings that do not represent the true effect of incarceration.

In our view, the best research designs use inmates and ex-inmates as their own comparison group (see Schnittker and John, 2007; Western, 2002). Such designs compare inmates on a given dimension—functioning health (Schnittker and John, 2007) or wages (Western, 2002)—before and after a spell of incarceration. Any postconfinement differences can then be attributed to the incarceration experience. Because each individual acts as his or her own control, individual-level attributes that remain stable over time do not impact the parameter estimates. These individual-level attributes (for instance, criminal propensity or work ethic) are remarkably difficult to measure, and differences in these factors across persons can, and often do, bias parameter estimates. By accounting for these processes across persons, methods that focus on within-person change are well positioned to inform policy. Of course, the data requirements necessary for this approach can be daunting, to say the least. Although time-stable characteristics cannot bias the models, researchers need repeated measures of all relevant time-varying processes, including incarceration status. Such data requirements make widespread use of these models difficult. As such, we feel it is important to consider how other research designs can be used to capture a comparison group.

One such promising design involves comparing inmates with individuals convicted of a similar offense, but who are sentenced to probation rather than incarceration (Apel and Sweeten, 2010). Such an approach has the advantage of being able to account for a criminal conviction and make the comparison group as homogenous as possible, at least as it relates to correctional convictions. Researchers taking this approach, however, need to be sensitive to preexisting homogeneity within the probation group. Much goes into

the decision to incarcerate, and particular individuals convicted of similar crimes might have dramatically different backgrounds and different needs. Studies taking this approach would need to ensure that these preexisting differences are taken into account before making specific policy recommendations.

Researchers also can use statistical controls to account for differences between those who were incarcerated and those who were not. One well-known example in the social sciences is the use of regression models or covariate adjustment. Despite the widespread use of regression techniques, policy recommendations derived from these approaches should be conservative and made with appropriate caution. A particular concern is the inability to definitively rule out bias due to unobservable variables. As such, although regression models can and do inform policy, recommendations should be mindful of the well-known limitations of these models.

A second approach has been driven largely by statistical advances in the social sciences and uses statistical procedures to make a control group similar to those who were incarcerated, often referred to as matching or propensity score modeling (see, e.g., Massoglia, 2008, or Appendix B of the Wakefield and Wildeman, 2011, study). This approach offers several advantages over traditional regression models and, in particular, has an explicit emphasis on creating a comparable control group with which to make comparisons with the inmate sample. That said, these models typically require large samples and are heavily dependent on the quality of the data. Additionally, these models are not immune from bias because of omitted variables. Indeed, this issue can be particularly problematic when unmeasured processes are predictive of placement in the treatment status, which in this case is incarceration. Unless researchers are confident that they can adequately model the processes that lead to incarceration, policy recommendations could be misinformed.

The Scope of the Prison Boom

Perhaps now is a good time to revisit the work of Wakefield and Wildeman (2011). When assessing policy recommendations, two issues emerge. First, stemming from the sampling design, it is not clear whether the recommendations would benefit those who were housed in jails or those who spent time in prisons. Although it is possible, and in some cases likely, that a specific recommendation could benefit both groups, in an era of economic scarcity, little public or political tolerance exists for nonfocused policy initiatives. Second, short of advocating for a decrease in the use of incarceration, it is challenging from Wakefield and Wildeman's work to identify precisely what group(s) a given policy initiative is best directed toward.

Yet, what is clear from this study, and research on the consequences of incarceration more generally, is the need to think more broadly about the role of incarceration as an institution of stratification. This view challenges us to consider the social experiences of inmates and to look for comparable reference groups in other aspects of life. For instance, a forthcoming article on family instability examines the parallels between the detrimental impact of time spent separated from family for both soldiers and inmates

(Massoglia, Remster, and King, in press). Both inmates and soldiers spend considerable time separated from their families; yet inmates are stigmatized, whereas soldiers are not. Thus, by comparing these two groups, the authors gain the necessary leverage to examine whether stigma or separation is most consequential for understanding the mechanism that leads to high rates of divorce among incarcerated individuals. Examining individuals housed in other institutional settings—for instance, long-term care or mental health facilities—also might help us make clearer and more focused policy recommendations regarding incarceration.

Although these institutional comparisons can be helpful, policy-informed research must establish clear links between incarceration and social outcomes to derive conclusions strongly supported by the data. As research on the consequences of incarceration has expanded, so too has the scope of inquiry. Although many studies still focus directly on inmates and their partners, in recent years, incarceration has been related to childhood outcomes (Geller, Garfinkel, Cooper, and Mincy, 2009; Murray and Farrington, 2008; Wakefield and Uggen, 2010; Western and Wildeman, 2009; Wildeman and Western, 2010), community-level outcomes (Clear, 2007; Clear, Rose, and Ryder 2001; Hipp and Yates, 2009), and in the Wakefield and Wildeman (2011) article, racial disparities in childhood well-being. It is imperative that any policy initiatives stemming from this line of research clearly specify the processes linking incarceration to life-course outcomes. For instance, although Wakefield and Wildeman identify a relationship between incarceration and childhood outcomes, it is not clear whether this effect is a function of something unique to the incarceration experience, a result of having a parent absent from the household or perhaps even adjustment problems caused when the parent returns home. Differences between these mechanisms can lead to dramatically different policy recommendations.

Similarly, linking large societal phenomena, as Wakefield and Wildeman (2011) do, to incarceration rates raises fundamental questions about the reach of incarceration. Absent a remarkably strong methodological design, such research faces challenges in making causal claims because other factors might—at least in part—drive the findings. Although existing work has shown that the penal state has had large and sweeping impacts on American society, research needs to take caution to specify the impact of incarceration without overreaching to other widespread social changes, such as deindustrialization and widespread economic restructuring, that occurred during this time period but are not causally related to the expansion of the penal state. That said, Wakefield and Wildeman's analyses represent, in our assessment, one of the best attempts at linking incarceration to broad social outcomes.

In the end, focused and effective policy recommendations must flow from scientifically informed and methodologically rigorous research. Although we have used Wakefield and Wildeman's (2011) article as a lens to discuss some larger issues that we feel limit the policy relevance of some research, it is also clear that they make a significant contribution to the field. We now use the insights from their piece to note where well-informed policy recommendations could have the greatest potential impact, while focusing on areas where additional research is needed to inform public policy.

Policy Implications of the Consequences of Incarceration

Although the previous discussion urges caution in the conclusions regarding the consequences of incarceration, it is hard to ignore the weight of the evidence across a variety of outcomes. Because much of the increase in the U.S. incarceration rate was policy driven (Raphael, 2007; Spelman, 2000), many people point to the policy implications of the "collateral" consequences of incarceration. Wakefield and Wildeman (2011) do not shy away from this debate, arguing for a shift in correctional policies that would reduce the use of imprisonment for nonviolent first-time offenders with no history of domestic abuse. This is a good example of a well-informed recommendation for several reasons. First, the prison boom was driven largely by an increased risk of incarceration for nonviolent drug and property offenders (Blumstein and Beck, 1999). Moreover, it seems, as Wakefield and Wildeman suggest, that in some respects children in these families suffer more harmful consequences of incarceration than children whose parents are incarcerated for violent offenses (see also Wildeman and Western, 2010). Indeed, despite widespread agreement that strong families are a source of social support and can inhibit criminal behavior in children, correctional policies in the United States have resulted in more vulnerable families and thus have contributed to a breakdown of the family in some communities (Wildeman and Western, 2010).

Wakefield and Wildeman (2011) rightly point out that efforts need to be made to curb our reliance on incarceration as a form of social control. After decades of unprecedented growth, the incarceration rate has more recently stabilized, and policy makers would be wise to follow up this stabilization with concerted efforts to reduce our prison population—in particular for first-time, nonviolent offenders—which would have a host of economic and social benefits. Yet little social or political support has been given to decrease the size of the penal system dramatically, and policy recommendations—on some level—need this type of support if they have any hope of being implemented. Although even a small reduction in the prison population would save billions annually and result in numerous positive social outcomes, we consider it unlikely and look to politically feasible alternatives

Focusing policy recommendations on the approximately 700,000 individuals released from prison each year might be a more effective approach. In our view, ample opportunity exists to consider policy changes that might help this population. We now briefly review some key dimensions of the reentry process, focusing on established research before concluding with areas where more research is necessary to inform policy. In doing so, we highlight the following steps of the criminal justice process where we believe correctional policy could encourage successful reintegration: reentry preparation and postcorrectional supervision.

The successful reintegration of former offenders does not begin at release. Rather, it begins while the offender is still under state control. Unfortunately, however, widespread shifts in correctional policy that accompanied the prison boom have decreased the correctional emphasis on preparation for life after release. As prison populations swelled, the money allocated to support rehabilitation programs did not follow suit (Petersilia, 2003),

which has resulted in less institutional programming for inmates. At the same time, research has shown that the rate of prison program participation has declined since the early 1990s (Lynch and Sabol, 2001). Although we understand that correctional administrators often face budgetary struggles in even attempting to maintain institutional security, we feel that, by failing to prepare individuals for reentry, correctional policies are likely contributing to the significant "churning" of offenders between prison and the community.

Part of the issue seems to stem from a long-standing view that postrelease supervision (e.g., parole) should oversee the successful reintegration of individuals back into society (Wilkinson, 2001). However, as the yearly release cohort continues to grow, more and more returning offenders encounter postrelease realities in which programs are underfunded and have fewer resources available. Thus, any progress correctional authorities can make in preparing offenders for reentry could ease the burden placed on postrelease programs and improve offenders' chances for success. Indeed, as others have pointed out, improving the prospects of returning offenders can have positive ripple effects throughout the correctional system and society in general (Travis, 2005).

Although a greater institutional commitment toward preparation for release would certainly better prepare individuals for life after prison, the reality is that the time immediately after release is more consequential in determining long-term successful reintegration. Unfortunately, the current reality suggests that many postcorrectional policies serve to increase the odds of reintegration failures (Travis, 2005). Two disconcerting trends seem to characterize best the current postrelease reality that many ex-inmates face. First, just as incarceration policies have become more punitive, postrelease supervision strategies have shifted away from long-standing models of support and assistance toward a greater emphasis on surveillance and control (Petersilia, 2003; Travis, 2005). This shift, not surprisingly, has led to an increased number of technical violations and recommitments. For example, the Bureau of Justice Statistics followed more than 270,000 ex-inmates and found that approximately half were reincarcerated within 3 years, of whom more than half were for technical violations such as a missed meeting or failed drug test (Langan and Levin, 2002). Thus, the adoption of punitive postcorrection policies inevitably uncovers individual failures that only serve to increase the number of "churners" in the general prison population.

Second, emphasis on surveillance comes at a cost, as now a much smaller "safety net" exists to help inmates navigate through their reentry process and successfully transition back into society. In fact, for a sizeable portion of those released from prison there is no safety net to help ease the transition back to society. Between 1970 and 2000, a fivefold increase was noted in the number of unconditional releases—meaning without correctional support or supervision—from prison (see Travis and Lawrence, 2002:10). As a result, each year, correctional authorities offer virtually no assistance or oversight to more than 100,000 ex-inmates, leaving them with no institutional bridge to help with employment, family, educational, or heath deficits. This emerging laissez-faire approach to the problems inmates face upon release is also problematic in its own right.

In our view, public policy would be best served by striking a balance between these two trends, with an emphasis on shifting postcorrectional policies back toward assistance and reintegration. Not only could this reduce the number of technical violations, but a more complete transition back into society could lessen the harmful effect that incarceration has on a variety of domains, including employment and wages (Pager, 2003; Western, 2002), civic engagement (Uggen et al., 2006), and health functioning (Massoglia, 2008). For instance, policy shifts that focus on employment might be particularly beneficial. We know that steady employment is an important dimension in desistance from criminal activity (Sampson and Laub, 1993; Shover, 1996; Uggen, 2000). Yet studies of ex-offender employment programs have yielded inconsistent findings (Piliavan and Gartner, 1984; Rossi, Berk, and Lenihan, 1980; Saylor and Gaes, 1997; Uggen, 2000). Part of the problem might be in the unfocused job training and placement programs that are common in many correctional jurisdictions. Specific and focused job training coupled with careful matching of released inmates to appropriate jobs might help produce the positive social outcomes associated with employment in adulthood. Furthermore, the impact of a job can extend well beyond the offender. Stable employment would likely ease hardships on the partners and children of ex-inmates. Moreover, jobs can embed ex-inmates in larger social and community organizations, which also would have prosocial benefits.

Inmates also seem to benefit when they have easy access to social service agencies (Zhang, Roberts, and Callanan, 2006). Hipp, Petersilia, and Turner (2010), for instance, found that parolees with social service agencies nearby were less likely to recidivate. However, they also noted that many of these agencies are overburdened by the number of ex-inmates who seek assistance, which can offset their protective effect. In this respect, a simple call to reinvest in programs and agencies with a track record of success seems critically important.

Finally, several areas also remain in which additional research is needed before scholars can make scientifically informed policy recommendations. For example, immediately upon release, many ex-prisoners are faced with serious challenges in finding stable housing, which is a key component of the reentry process (Bradley, Oliver, Richardson, and Slayter, 2001). Clearly, some former inmates return home to their families. For others, however, securing stable housing is extremely problematic, and many inmates reside in homeless shelters or on the street (see the review in Travis, 2005: 236).

The limited research that does exist does not paint a favorable picture for ex-inmate housing prospects (Clear, 2007). Hipp, Turner, and Jannetta (2010) found that, in California, sex offenders who moved after prison tended to settle in more disadvantaged areas, likely reflecting the particularly harsh restrictive and exclusionary practices that sex offenders face (see Travis, 2005: 224). Evidence also suggests that residential instability increases the likelihood of rearrest (Meredith, Speir, Johnson, and Hull, 2003; Steiner, Makarios, and Travis, 2011). Yet, in our view, we still know comparatively little about the long-term residential patterns of inmates upon release, which is a critical gap in our knowledge base. Public policy could be well served by a closer examination of the relationship

between residential mobility and recidivism. Doing so would involve building bridges with the criminological literature, where it has been found that ex-inmates who reside in disadvantaged neighborhoods are more likely to recidivate (Hipp et al., 2010; Kubrin and Stewart, 2006). Researchers should strive to develop a better understanding of the neighborhoods that ex-inmates reside in over time, as well as the implications that patterns of residential mobility have regarding the well-known consequences of incarceration.

Ultimately, filling these research gaps is critically important to both understanding the ever-widening consequences of incarceration and for making informed policy recommendations. Although we have identified some challenges researchers face, we also believe that this line of research can be a great resource to help guide future correctional and postcorrectional policy.

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Countering the carceral continuum

The legacy of mass incarceration

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A resounding call has been made for a 21st-century human rights movement that will respond to the damage that mass incarceration has done to the collective realization of our American ideals of opportunity, fairness, and equality (Alexander, 2010). The intergenerational transmission of inequality should be the centerpiece of this future movement. Wakefield and Wildeman (2011, this issue) fulfill the increased demand from policy makers for criminologists to demonstrate how and why parental incarceration profoundly impacts children. Their article does a great deal to extend our understanding of the long-term consequences of the recent prison boom in the United States, especially if we consider the downright staggering racial disparities in those who personify the collateral damage in our nation's protracted, yet failing, War on Drugs. After briefly summarizing the results and policy implications of their article, I will present my thoughts on America's racial–spatial concentration of imprisonment, the concomitant social reproduction of disadvantage, and the *malign neglect* of the incarcerated and their progeny. In fact, the tainted legacy of mass incarceration is about all that these children stand to inherit in the current era.[1]

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1. Recent books by Alexander (2010), Hagan (2010), Peterson and Krivo (2010), and Sugrue (2010) are only a small sample of research that has pushed me toward thinking the plight of African Americans is particularly different from many other racial and ethnic groups on the dimensions of inequality and criminal *injustice* and could be the mark of a new racial caste (in accordance with Alexander's bold arguments in *The New Jim Crow*). Therefore, I respectfully disagree with Wakefield and Uggen's (2010) assertion that the social exclusion of all prisoners and former prisoners "rarely approaches caste-like levels"; instead, they believe current and former prisoners are "perhaps best characterized as a Weberian status group sharing similar life chances determined by a common and consequential mark of [dis]honor" (388).

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Wakefield and Wildeman's (2011) two-pronged examination of child well-being indicators from the Project on Human Development in Chicago Neighborhoods and the Fragile Families and Child Wellbeing Study estimates the average effects of paternal incarceration on a large and diverse sample of children of incarcerated parents in comparison with similarly situated peers. They find that paternal incarceration worsens well-being across all outcomes based on the significantly positive association of incarceration with measures that examine internalizing problems (e.g., depression), externalizing problems (e.g., aggression), and total behavioral problems. The results, which we can assume to be somewhat conservative because the sample includes children whose fathers might be spending only a few days in jail as well as those with longer sentences, reveal that parental incarceration serves to exacerbate preexisting behavioral problems among children who are already disadvantaged. Wakefield and Wildeman persuasively conclude that many of these children were not doing well before parental incarceration and that they are worse off as a result of it. Furthermore, although little is known about the long-term consequences of maternal incarceration, much of the evidence reveals that it is often more harmful than paternal incarceration. This finding portends even more ominous outcomes because maternal incarceration has more than doubled during the past 20 years (Wildeman, 2009).[2]

The long-standing issue of racial inequality looms large when digesting these results and their consequent policy implications. Wakefield and Wildeman (2011) find that the Black–White disparities in behavioral problems increase significantly as a result of the racially disparate risk of paternal incarceration. Thus, racialized mass incarceration has racially disparate consequences on childhood behavioral and health indicators and leaves us pessimistic about how these children might fare in the future because these outcomes are linked to adverse outcomes in other central social domains (educational attainment, employment outcomes, criminal behavior, mental health problems, family formation, etc.).

Wakefield and Wildeman's (2011) article provides an opening to discuss concrete policy objectives that would positively shape the lives of children of the incarcerated. My first recommendation is that the "Bill of Rights for Children of Incarcerated Parents" be adopted—beyond the handful of local/state jurisdictions that have recognized and developed responsive policies and practices—at the federal level. Those rights (in boldface), written in 2003 and revised in 2005 by members of The San Francisco Children of Incarcerated Parents Partnership, and their corresponding policy recommendations, include the following:

> **1. Right to be kept safe and informed at the time of my parent's arrest.**
>
> The traumatic impact of a parent's arrest is well documented in the literature. Clear protocols at this stage of criminal justice intervention must be developed

2. Wildeman (2009: 272) reported, "For blacks born in 1978, the risk of maternal imprisonment ranges from 1 in 100 to 1 in 50. By 1990, the risk of maternal imprisonment had increased substantially. For black children of high school dropouts, the risk of maternal imprisonment was 5.0%."

and consistently implemented both to protect children and to ensure that they will be cared for in the absence of their parent. Moreover, children and their caregivers should be given basic information about the processes that follow arrest.

2. Right to be heard when decisions are made about me.

Children, although still marginalized in our society, should be allowed to voice their needs and concerns as agents who will be impacted by their parent's plight. Police officers, lawyers, judges, social workers, and any other staff of institutions that will determine the path of these young people's lives should be prepared to listen and respond to their needs.

3. Right to be considered when decisions are made about my parent.

I join the call of Megan Comfort (2008) and others who advocate for viewing the incarcerated as individuals who are situated in a vast web of familial and community relations. The inclusion of family impact statements in presentence investigation reports as well as reviewing sentencing guidelines in terms of their impact on families are necessary steps in fulfilling this right.

4. Right to be well cared for in my parent's absence.

Children are best supported when their caretakers are supported. With the aim of family preservation, we should no longer allow kin guardians to be paid nothing or less than nonkin guardians.

5. Right to speak with, see, and touch my parent.

The literature also supports the contention that both parents and children benefit from the creation and maintenance of child–parent relationships during parental incarceration (with the exception of the plight of children of violent sex offenders and those with a history of domestic violence). Reduce the cost of maintaining relationships by reducing out-of-state transfers of prisoners and exorbitantly expensive phone call charges to and from prison. Child-friendly visitation rooms that are conducive to bonding also must be designed.

6. Right to [have] support as I face my parent's incarceration.

Therapists, counselors, and mentors should be provided to children of the incarcerated as external sources of support during this tumultuous time. More generally, teachers and other adults who work with young people should be trained to recognize and address the needs of this even more vulnerable population.

7. Right to not be judged, blamed, or labeled because my parent is incarcerated.

Children of the incarcerated face a great deal of social stigma and are more susceptible to peer pressure and risky behavior. These children should have the opportunity to connect with each other through community and school-based networks that will allow them to support each other.

8. Right to a lifelong relationship with my parent.

The inextricable linkage between the prison system and the child welfare system is clear (Roberts, 2002). President Clinton's 1997 Adoption and Safe Families Act must be reevaluated because it requires states to terminate the parental rights to children who have been in foster care for 15 of the prior 22 months (subject to limited exceptions). However, the mean maximum sentence length for drug offenses in 2006 was 31 months, which exceeds the threshold for maintaining parental rights (Bureau of Justice Statistics, 2009). This makes difficult all efforts toward family preservation and reunification. This timeline must be relaxed, and alternatives like subsidized legal guardianship will do more toward supporting family preservation/reunification. Moreover, foster care agencies should be required to have explicit policies for proper support of children with incarcerated parents.

These rights correspond to actionable items that address a significant portion of the needs of these children. I strongly argue for policy interventions that would specifically aim to grant the daily needs (e.g., food, shelter, care, and support) of the children of the incarcerated, as well as provide them with resources that would make their schools and communities viable places that facilitate learning, living, and healthy development in accordance with the aforementioned bill of rights. If implemented, these policy recommendations, should, at least, moderate the negative outcomes Wakefield and Wildeman (2011) show children of the incarcerated tend to exhibit.

Researchers also need to undertake far more longitudinal studies so that politicians and policy makers can no longer deny the visible harms that mass incarceration wreaks on these ostensibly *invisible* populations. Indeed, Wakefield and Wildeman (2011) extend this concept to warn us that the racial inequities in the problem of behavioral (and related) issues might be larger than previously recognized. As they state, "not all (or even most) children of inmates will be incarcerated," which makes the narrow focus on future criminal justice system involvement in much of the policy circles problematic. Instead, Wakefield and Wildeman more productively suggest that we strengthen the social safety net for the poorest children in our communities, thereby addressing the spillover effects of mass incarceration. This suggestion must be taken seriously because the demographic concentration of mass

incarceration within high-imprisonment-rate communities "influences not just the lives of children who have imprisoned parents but also the lives of marginalized American children who do not."

Sampson and Loeffler (2010) have already demonstrated how mass incarceration is a phenomenon that is experienced locally, follows a stable pattern, and can be systematically predicted by key social characteristics—such as racial isolation, poverty, unemployment, and family disruption, even after controlling for community-level rates of crime—resulting in a vicious self-reinforcing cycle (see also Clear, 2007). For instance, in 2008, "more than 50 percent of the people sent to prison in New York City hailed from 27 of the city's 200 zip codes." Only 18% of the city's adults reside in those areas (*Misplaced Priorities*, 2011: 37).

Reducing our reliance on incarceration, especially that of nonviolent offenders who are not perpetrators of domestic violence, and addressing the immediate and long-term pain of parental incarceration will greatly reduce the direct costs of mass incarceration now and in the future. New York City is again illustrative. Of the $870 million budget used to incarcerate residents from all 200 NYC zip codes, approximately half was used to imprison residents from the aforementioned 27 zip codes—with $29 million used to incarcerate residents sent from a single zip code in the Bronx, another $25 million for a single zip code in Brooklyn, and another $23 million for a single zip code in Manhattan (*Misplaced Priorities*, 2011: 37). The implementation of effective social policies that will discontinue *arresting development* and instead meet the most basic developmental needs of these children is necessary (Shedd, in press).

However, the acceptance of these programs will be increasingly difficult in light of the present fiscal crisis. Currently, we observe public funding toward social programs being reduced at both the federal and state levels, whereas our state budget priorities overwhelmingly reveal the (monetary) value placed on "overincarceration" at the expense of "undereducation," with children of color most detrimentally impacted (*Misplaced Priorities*, 2011)—all of which is happening at a time when Americans show the least anxiety about race relations. A March 2011 Gallup poll showed that, out of 14 social and policy issues, race relations was the only one about which a majority of respondents were "only a little" or "not at all" concerned. By contrast, 7 in 10 respondents stated they "worry about the economy a great deal."[3]

Top-down policy reform is only the beginning of this movement to "radically restructure" America's approach to criminal justice. Michelle Alexander (2010: 246) reminded us that the human rights movement that Dr. Martin Luther King Jr. believed had revolutionary potential would happen only if we "raise certain basic questions about the whole society." Our nation's criminal justice system, and how we treat the most vulnerable

3. See gallup.com/poll/146708/americans-worries-economy-budget-top-issues.aspx.

who are ensnared in its ever-expanding grasp, is the standard by which we should gauge our realization of the ideals of American democracy.

The traditional greeting among the Masai tribe in Kenya is *Kasserian Ingera*, meaning, "How are the children?" The traditional answer given is, "All the children are well." The shameful irony is that none of us living in the wealthiest nation in the world could give that reply in light of the worsening racial disparities among children in health, educational attainment, employment opportunity, and overall well-being. This disparity is particularly true for the children of the incarcerated. We are failing them and ourselves.

Do we want our 21st-century legacy to be the wholesale relegation of children of a certain race, place, age, and class of men (and increasingly, women) to even greater disadvantage than they would confront without the additional structural invasion of the American prison system into their consciousness, homes, neighborhoods, and schools? For these young people, like all of us, their visions of the future are shaped to a great extent by their experiences in the present. This moment is critical in which these children figure out who they are within the constraints of a world that sees them for what they are destined to be, and that assumed trajectory is increasingly negative (Shedd, 2011). The DuBoisian (1999 [1903]) concept of "double consciousness," the process in which one sees oneself through the eyes of contemptuous others, is highly relevant if we can all acknowledge that young people are unquestionably characterized "as a problem." This is especially true for the children that are literally *left behind* when a parent is incarcerated. Instead of turning young people into a problem, we have to examine the problems that young people face.

My research reveals that youth are highly attuned to the unequal distribution of opportunity and inequality (Shedd, in press). Young people are also aware that their "pathways of opportunity can be modified, arrested, or deflected by social interventions, including the actions of government and the leaders of key social institutions" (Cullen and Wright, 2002: 15). Therefore, we must begin to consider the treatment of children and the reconciliation of their experiences, particularly when they negatively interact with the justice system personally and vicariously, as worthy of both serious scholarly attention and increased social/economic support. Otherwise, they risk fulfilling our society's low expectation of them as the "children of the prison generation" to become criminal and marginalized men and women who are studied from the inside of cellblocks instead of from neighborhood blocks and school corridors.

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