

## Is Mass Incarceration Here to Stay?

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Beginning in about 1970, both federal and state governments in the United States embarked on a shift in penal policies that led to an enormous increase in the number of incarcerated individuals. With the exception of some recent modest changes, these harsh policies have largely continued. As a result, over 2.2 million people are currently in jail or prison in the United States, roughly a 500 percent increase over the last 50 years. At present, however, even though this country contains only about 5% of the world's population, it houses 25% of the world's prison population. It also holds 40% of the world's population serving life sentences and 83% of the prisoners serving life without the possibility of parole. Because of its move toward long prison sentences and other harsh policies, the United States now incarcerates so many people that it has become an outlier not just among developed democracies, but among all nations, including highly punitive states such as Russia and South Africa.

The United States has also become an outlier in comparison to its own long-standing practices. The present incarceration rate is currently five times higher than the norm prevailing throughout most of the twentieth century. Further, 206,000 prisoners are now serving life sentences, more than the size of the entire prison population in 1970. In 24 states, more people are serving life sentences than were in the entire state prison population in 1970. In an additional nine states, the life imprisonment total is within 100 of the 1970 prison population. In sum, the United States has a serious over-punishment problem, which has given rise to the term "mass incarceration," meant to provoke shame about the fact that the world's wealthiest democracy

imprisons so many people even at a time when crime rates have diminished, and crime is not one of the country's major social problems.

The human costs of mass incarceration are incalculable. There is a striking association between mass incarceration and increased inequality. We imprison the poor and the uneducated at rates that are distressing even if we ignore race. But once we consider race, the rates are truly horrific. About 44 percent of the incarcerated population is African-American, almost four times the 12 percent African-American share of the general population, and 19 percent is Hispanic, compared to 12 percent of the general population. Close to forty percent of the 2.2 million prisoners are African-American males. One in nine African-American males between the ages of twenty and thirty-four is now in prison, and at this rate one-third of all Black men will be imprisoned at some point in their lifetime.

Further, incarceration has an enormously harmful effect on the life prospects of those imprisoned. Released prisoners suffer a 30-40 percent loss of income, their domestic partnerships are often ruptured, and their marriage prospects reduced. They suffer a profound social exclusion making it more likely that they will fall into recidivism and reenter prison. In addition, mass incarceration divides minority communities as the experience of pervasive imprisonment is confined to those who do not have a college education. Mass incarceration also disrupts inner city neighborhoods and tears apart families living there. Young men grow up thinking that prison is a normal part of experience. In sum, mass incarceration produces a massive underclass, disproportionately made up of racial minorities. This represents a serious problem for American democracy.

The financial costs of mass incarceration are also substantial. Annual spending on the federal prison system between 1980 and 2013 rose 595%, from \$970 million to more than \$6.7

billion in inflation-adjusted dollars. Expenditures on the prison system grew from 14 percent of the Justice Department's budget to 23 percent. State correctional spending varied depending on how intensely the state committed itself to harsh policies but generally increased dramatically and in some states exceeded the amount spent on education.

Moreover, the evidence is considerable that the huge punishments meted out in the years after 1970 contributed very little to a decline in crime. Crime rates began to decline in about 1990. A report by the Brennan Center's Justice Program entitled "What Caused the Crime Decline" concluded that incarceration played a very small role, approximately 5 percent, in the drop in crime between 1990 and 1999 and had almost no effect between 2000 and 2013. According to Inimai Chettiar, director of the Justice Program, "all of these policies were enacted because people believed that they were going to bring down crime," referring to the policies that contributed to the ballooning prison population such as mandatory minimum sentences and the laws that comprised the War on Drugs, "but they didn't actually bring down crime." Ultimately, the report determined that incarceration had diminishing returns, the more it was used the less effective it became. As Chettiar explained, locking up everyone turned out not to be very effective.

Given that mass incarceration has caused so much harm and has been ineffective in reducing crime, one wonders how the policies that led to it came about. Scholars have answered this question in various ways. But as a brief review of the literature suggests, none of them suggests a way out of this continuing catastrophe.

Some scholars place the rise of mass incarceration within the context of a tightening political economy. In The Culture of Control: Crime and Social Order in Contemporary Society, the sociologist David Garland emphasizes the crisis of governance that the United States faced in

the last decades of the twentieth century as global competition, deindustrialization, and de-unionization threatened standards of living and fueled anxiety. Unable to respond effectively, political leaders increasingly relied on punitive criminal justice and public assistance policies in an effort to convince the public that by taking decisive action against undesirables, government was effective. Criminal offenders and welfare recipients also provided convenient scapegoats for a broad range of grievances.

Loïc Wacquant, also a sociologist, takes a position similar to Garland's. In Punishing the Poor: The Neoliberal Government of Social Insecurity, Wacquant argues that the punitive turn in American penal policy was a response to social insecurity generated by a precarious job market and the shakeup of the racial hierarchy caused by the civil rights movement. It wedded economic neoliberalism with the expansion of the carceral apparatus, particularly targeting Black men and women.

The legal historian James Q. Whitman, author of Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe, focuses on the dramatic difference between practices in the United States and Western Europe, where countries imprison far fewer people and for far shorter periods of time and treat offenders with much more respect. Whitman attributes the difference in approaches to divergent beliefs about equality and state power. He argues that, although the United States is more egalitarian than European countries with their histories of nobility, hierarchy and class stratification, the American brand of equality is a harsh one that includes little respect for personhood. He contends that Europe's less punitive approach came about because the respect accorded the nobility was gradually extended to others whereas in the United States, individual conduct rather than personhood was the critical determinant of respect, and offenders came to be seen as inferiors deserving of harsh treatment. As an example,

Whitman cites the federal sentencing guidelines which place great weight on treating offenders equally but treat all offenders very harshly. Whitman also argues that America's animus towards a strong state has led to more control over punishment by politicians and less by a career bureaucracy, and that this too has led to greater harshness.

In her bestselling book The New Jim Crow: Mass Incarceration in the Age of Colorblindness, the law professor Michelle Alexander sees race as the key to mass incarceration pointing to the disproportionate rate of African-American imprisonment. In Alexander's view, locking up African-Americans provided an outlet for white resentment regarding the gains made by Blacks as the result of the civil rights movement and was designed to reinstate black subservience.

Another law professor, John Pfaff, downplays sociology and focuses on the behavior of district attorneys. In his book, Locked In: The True Causes of Mass Incarceration – and How to Achieve Real Reform, Pfaff also minimizes the significance of the tough on crime laws passed in the 1980s and '90s such as the Sentencing Reform Act of 1984, which eliminated federal parole and authorized the draconian federal sentencing guidelines, the Anti-Drug Abuse Act of 1986, which imposed extremely harsh punishments on offenders involved in crack cocaine, and the 1994 crime bill, which authorized \$9.7 billion for new prisons, as well as so-called state truth in sentencing laws which eliminated state parole and the right of offenders to earn credit for good behavior while in prison ("good time"). Rather, Pfaff argues, the pre-1990 increase in imprisonment resulted from higher crime rates, and the post-1990 increase from county prosecutors' increased aggressiveness in charging felonies. He argues that without the support of prosecutors, the prison population cannot be substantially reduced and that, because they are all elected at the county level, regulating their conduct is next to impossible. As he puts it, "you

have to figure out how to go county by county and either elect DAs who have less punitive attitudes, or you can try to sort of change the incentives DAs face at the state level. But it's very tricky.”

Significantly, none of the scholars discussed above offers a clear way out of the mass incarceration predicament. In fact, all of them suggest or imply that a solution to the problem may be hard to come by. The cultural, political, economic and attitudinal developments that Garland, Wacquant, Whitman and Alexander see as causal are not easily changed. And Pfaff, himself, recognizes the difficulty of changing the conduct of district attorneys.

On a more optimistic note, in recent years, public opinion regarding criminal justice has changed. The law professor Michael Tonry believes that people are beginning to understand that incarcerating so many people is doing more harm than good and that “a broad-based political consensus is emerging that fundamental changes are needed.” He hopes that “circumstances may be auspicious for remaking American sentencing into something that is fairer, more effective, and more just.” Further, a 2002 Peter Hart Poll confirms that rehabilitation has regained legitimacy, and that the public is increasingly concerned about government addressing the underlying causes of crime rather than focusing only on enforcement and punishment. It is also significant that the 2020 Democratic presidential candidates condemned mass incarceration, and that a number of candidates including Joe Biden, Michael Bloomberg, Kamala Harris and Amy Klobuchar had to explain or walk back the “tough on crime” policies they once espoused.

These changed attitudes have had an impact on policy, although a modest one. The U.S. Sentencing Commission and Congress have approved changes contributing to a 14 percent drop in the federal prison population in the last six years. And, states have enacted a variety of decarceration initiatives, with eight achieving reductions in imprisonment of at least 20 percent.

Yet the 1.2 percent decline in the national prison population that occurred in 2017, for example, is minimal when set against the backdrop of an eightfold increase between the early 1970s and the early 2000s. And, in the past decade, twenty-five states actually experienced a net increase in the size of their prison populations.

Conceptually, the task of substantially reducing the number of incarcerated individuals is not difficult. It means sending fewer people to prison and for shorter periods of time. Reformers have made numerous proposals designed to accomplish this goal either directly or indirectly. Professor Tonry, for example, offers a blueprint for reforming sentencing. His plan includes repealing or narrowing laws calling for mandatory minimum sentences and life sentences without parole, substantially reducing all maximum penalties, re-establishing parole, and requiring a reduction of the prison and jail population by 50 percent by a specified date. Many Black activists focus on the police, arguing that increased police budgets mean more arrests which in turn mean more incarceration. Some lawyers emphasize improving indigent defense systems, pointing out that many states fail to comply with their Sixth Amendment obligation to provide competent counsel for indigents. The Sentencing Project proposes capping all sentences at twenty years, revamping the federal sentencing guidelines, and ending probation revocations for technical violations. Elizabeth Warren advocates an increased use of pardons and clemency at federal and state levels and repeal of the Antiterrorism and Effective Death Penalty Act which all but eliminated the once great writ of habeas corpus. Other reformers propose eliminating cash bail.

Inspired by litigation in California in which chronic overcrowding of prisons led to a court order requiring the state to reduce its prison population by at least 38,000, law professor Jonathan Simon proposes that if states do not take steps to alleviate the combination of

overcrowding and poor mental and medical health care in prisons federal courts order them to do so. After the Supreme Court upheld the order, California adopted a bold plan reducing the prison population and turning over much of the decision-making regarding the release of prisoners to local governments which also bore some responsibility for the costs. Some predicted a public safety disaster, but the reductions were achieved with little or no impact on crime rates. Litigation also played an important role in reforms in Alabama, New Jersey and North Carolina.

All of these approaches have merit, but one need not be a political savant to doubt whether many of these initiatives are likely to be enacted anytime soon. And this brings us to the matter of obstacles. There are several real barriers to the project of decarceration. Generally speaking, they are of two types. The first involves the sheer scope of the problem and is a matter of numbers, albeit very large numbers, and the second largely concerns politics and leadership.

Andrew D. Leipold, Professor of Law at the University of Illinois College of Law, explains the scope of the problem. Consider what would be necessary if the goal were to bring the United States to the point where it no longer incarcerated a greater percentage of its population than any other country in the world with a large economy. It is reasonable to compare the United States' incarceration rate to those of other countries with large economies because such countries are complex societies like the United States, and many are also democracies. The United States now incarcerates 655 out of every 100,000 citizens. The average rate in the other countries with the ten largest economies is 147 inmates per 100,000 citizens, and the country with the next highest rate, Russia, imprisons 411 for every 100,000. The rate in Japan is 45 per 100,000, in Germany 78 per 100,000, in France 102 per 100,000, in Italy 96 per 100,000 and in Canada 114 per 100,000. Thus, even to get to the big economy

average, the United States would have to reduce its rate by more than 75 percent. As Professor Leipold points out, this would be a monumental achievement that will not happen in our lifetime.

Put differently, the United States could cut its incarceration rate in half and still have a higher rate than 24 of the 25 countries with the largest economies (every country except Russia). Consider also a comparison to the United States's own past rates. From 1925 until the mid-1970s the rate of incarceration in the United States was approximately 100 prisoners per 100,000 people. Returning to that rate today would be impossible. Even a return to the 1990s rate would require a 20 to 25 percent reduction and would be extremely difficult. Further, the United States could release 25 percent of current inmates and still have the seventh highest incarceration rate in the world and the second highest number of prisoners. In sum, no realistic amount of sentencing and criminal law reform is going to change the distinctive space that the United States now occupies.

The second major barrier to substantially reducing mass incarceration is political, and it includes a number of aspects. Probably the most significant dimension of the problem is what law professor Michael O'Hear calls in his book, Wisconsin Sentencing in the Tough on Crime Era, "penal populism." Penal populism, according to O'Hear, is an exaggerated fear of crime and criminals and a belief that more imprisonment is almost always better for society. Although penal populism has diminished in recent years as people have become more aware of the evils of mass incarceration, it remains a potent political force. O'Hear points to recent polling in Wisconsin, a heartland state that can reasonably be regarded as emblematic of American public opinion, in which 62 percent of respondents expressed the belief that courts are too lenient. Sixty-six percent believe that the justice system is not doing a good job of ensuring that people who commit crimes receive the punishment they deserve, and only 37 percent agree that many

prisoners could be safely released. While these results may well reflect a misunderstanding of the facts and the criminal process, they nevertheless make clear that politicians seeking to score points can draw on a deep well of suspicion of criminals and the justice system.

At a minimum, such attitudes encourage timidity on the part of legislators and a hesitance to pursue bold decarceration initiatives. It is significant that Congress has not repealed or attempted to repeal any of the disastrous tough on crime legislation of the 1980s and 1990s. Nor has any state repealed or attempted to repeal the truth in sentencing laws which, as stated, eliminated parole and good time and also established harsh rules calling for revocation of probation for relatively minor violations. In fact, as two Canadian scholars put it, legislative efforts to reduce mass incarceration have, so far, amounted to little more than “nibbling at the edges.”

Unfortunately, judges can be just as timid as legislators. Mass incarceration is often attributed to mandatory minimum sentences, the implication being that if judges had discretion they would impose much more lenient sentences. There is considerable evidence, however, that this view is inaccurate. Wisconsin preserved judicial discretion to a much greater extent than many other states but still experienced an above-average increase in imprisonment in the era of mass incarceration. As Professor O’Hear explains, the Wisconsin experience makes clear that judges do not need legislative mandates in order to send an ever-larger number of offenders to prison for ever-longer periods of time. This may be in part attributable to the fact that in Wisconsin, as in many states, judges are elected. Concerns about electoral prospects may lead them to impose tough sentences in the same way that such concerns prompt legislators to enact harsh laws.

Sadly, even judges who have life tenure often turn out to be very tough sentencers. Evidence of this can be found in the aftermath of the Supreme Court's 2005 landmark Booker decision that struck down the mandatory feature of the federal sentencing guidelines and made the guidelines advisory. Unfortunately, federal district judges dashed the hopes of reformers by failing to take advantage of the decision to ameliorate the harshness of the federal sentencing system. Judges slightly reduced the length of sentences, from 47.9 months in fiscal 2003 to 44 months in 2018. Shockingly, the number of offenders receiving prison-only sentences actually increased, from 83.3 percent in fiscal 2003 to 87.8 percent in fiscal 2018. The only inference that can be drawn from these numbers is that, notwithstanding the punitive and prison-oriented nature of the guidelines, judges are not troubled by them. It may be that judges have become so used to the guidelines that relying on them seems normal and appropriate. Possibly, the answer lies in the psychological phenomenon known as anchoring, the tendency of someone who must decide an inherently subjective question and is given a numerical baseline, to give great weight to the baseline regardless of its merit. Also, judges are people who follow rules and may, therefore, tend to follow guidelines even if they don't have to. Finally, judges may well share the punitive attitudes that are common in the United States.

Penal populism is a particularly serious obstacle to achieving large scale reductions in mass incarceration when one recognizes that in order for such reductions to take place, it will be necessary to offer leniency to a significant number of offenders who have committed a violent crime. The notion that American prisons are full of non-violent offenders, particularly drug law violators, and that the prison population could be substantially reduced without considering anyone who has committed a violent offense, is just not true. The majority of imprisoned offenders in the United States have committed some violent act. However, as law professor

Andrea Roth points out, conceptualizing non-violent drug law violators as qualitatively different from other offenders creates a false distinction. Many crimes labeled violent are not especially harmful, and many are either motivated by drug addiction or related to drug sales or possession. Burglaries and robberies, for example, are frequently drug-motivated. And possessing a firearm in connection with drugs is sometimes considered a crime of violence.

Further, although public officials commonly speak of “violent criminals,” the data indicates that many people who fall into this category could be released without creating an unreasonable risk to the public. This includes, among others, prisoners who are elderly and have likely aged out of criminal conduct, prisoners who have little or no criminal history apart from the case for which they are currently serving time, prisoners who have not been convicted of homicide or sexual assault or if they have, have not been convicted of one of the more serious or aggravated forms of the offense, prisoners who have already served a decade or more in prison, often in excess of the average punishment for the offense they committed, and prisoners who were relatively young when they were imprisoned. It is also fairly common for cases involving a violent offense to involve some mitigating circumstances. Thus, there are good reasons for transcending the negative stereotype of the violent criminal. Nevertheless, the fact that substantially reducing mass incarceration must include offenders who have committed violent offenses presents an obstacle to reform.

Another dimension of the political barrier in the path of reducing mass incarceration is institutionalized resistance to reform. There is a relatively formidable corrections network that employs over a half-million workers. This network is threatened by policies that would substantially reduce the number of inmates, and it has particular power in state legislatures. Prisons have been increasingly located in rural communities where they are often regarded as an

important economic asset and even a means of economic development. And, in some states, unions representing correctional officers have become a strong political force consistently opposing any measures that would reduce the prison population. A recent example of the intense resistance that reforms in the criminal justice system can generate is the backlash led by district attorneys, police and some legislators against New York State's partial elimination of money bail.

Thus, the size of the required reductions and the political difficulties in achieving them present serious obstacles to making a major dent in mass incarceration. This is not to say that such obstacles are insurmountable. It, of course, would be extremely helpful if legislatures provided disadvantaged communities with increased access to the rewards enjoyed by many Americans. But, as Professor Tonry points out, from a purely criminal justice standpoint, to achieve a substantial reduction in mass incarceration, it will be necessary to arrive at somewhat different normative beliefs about imprisonment. Prison needs to come to be seen as a "bad thing," a necessary evil whose use should be minimized and whose effectiveness in reducing crime is regarded with deep skepticism. If there is a will to decarcerate, numerous policy options are available. But it is essential that there be a fairly widespread interest in imprisoning fewer Americans. As Professor O'Hear eloquently puts it, "The hard part is the ethical challenge: that of convincing large numbers of citizens to see in criminal offenders a shared humanity and a real potential for good, to recognize them as part of us not simply a frightening them."