

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

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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).<sup>1</sup>

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

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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 (Whelock, 2006, in Whelock and Uggan, 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,<sup>2</sup> 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 incarceration as a society-wide rather than a race-specific issue might gain more political traction,<sup>3</sup> 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.”

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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.<sup>4</sup> 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).

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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.<sup>5</sup> 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

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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 economic, 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.<sup>6</sup> 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

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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.<sup>7</sup> 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

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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).<sup>8</sup>

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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