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The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration

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Abstract

Mass incarceration is an unprecedented development, one with myriad adverse consequences. Although the expansion of US penal institutions is largely a function of changes in practice and policy rather than rising crime rates, reversing this trend will nonetheless be challenging. The need for comprehensive sentencing reform is clear, but political limits on legislative remedies and the failure of the courts to notably reduce the scale, or improve conditions, of confinement render these approaches highly uncertain. In the short term, unconventional methods that do not require legislative authorization, such as electing, pressuring, and incentivizing prosecutors to reduce penal severity, may be a promising way of addressing mass incarceration. The return and revitalization of parole or other systems of post-sentence review are also crucial and may be legitimated in terms of the need to incentivize rehabilitation and prevent the unnecessary and costly incarceration of the elderly. The recent mobilization of grass-roots movements for penal change that include those directly affected by both violence and mass incarceration is also auspicious, as their work may help to humanize the justice-involved and undermine the erroneous assumption that crime survivors are well-served by mass incarceration.

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INTRODUCTION

The contours of mass incarceration are, by now, broadly familiar. The US incarceration rate, which includes people in state and federal prisons as well as local jails, began an unprecedented ascent in the 1970s. This trend continued through 2007, when 760 of every 100,000 US residents, nearly 1 in 100 adults, lived behind bars, five million others were on probation or parole, more than ten million were booked into jail, and nearly one in three, between 70 and 100 million people, had a criminal record (Kaeble & Glaze 2016, table 4; PEW Cent. States 2008; Sabol 2014; Subramanian et al. 2016). The scale of confinement now sharply differentiates the United States from comparable countries, where incarceration rates range from 48 per 100,000 residents in Japan to 148 per 100,000 in England and Wales (Walmsley 2015). By 2015, the US incarceration rate had fallen to 670 per 100,000 residents, a drop of nearly 12%. Despite this modest decline, the United States remains the world's leading jailer (Wagner & Walsh 2016).[1]

The emergence of mass incarceration in the United States has spawned a tremendous amount of social-scientific research. Many studies analyze mass incarceration's racial origins and/or disparate impact on communities of color (Alexander 2010, Beckett 1997, Lee et al. 2015, Pettit & Western 2004, Provine 2007, Tonry 2011, Weaver 2007). Others assess how penal expansion affects not only the incarcerated but also those who are stopped, frisked, arrested, fined, and surveilled, even in the absence of incarceration or conviction (Beckett & Murakawa 2012; Brayne 2014; Goffman 2014; Greenberg et al. 2016; Harris 2016; Kohler-Hausmann 2013, 2014; Napatoff 2015; Rios 2011; Sewell et al. 2016; Stuart et al. 2015). Still others analyze how mass incarceration affects family and community members of the justice-involved (Comfort 2007; Clear 2007; Lee et al. 2014, 2015; Sykes & Pettit 2014; Wakefield & Wildeman 2013; Wakefield et al. 2016; Wildeman & Western 2010). And a substantial body of research shows that penal expansion has had far-reaching demographic, political, health, and sociological effects that tend to enhance, and mask, racial and socioeconomic inequalities (Beckett & Western 1999; DeFina & Hannon 2013; Harris et al. 2010; Lee et al. 2014; Massoglia & Pridemore 2015; Pettit 2012; Pettit & Western 2004; Travis et al. 2014; Uggen et al. 2016; Wakefield et al. 2016; Western 2006, 2012).

Although the recent drop in the incarceration rate is modest, it has nonetheless triggered much discussion regarding the fate of mass incarceration. More-optimistic accounts emphasize the significance of the recent mobilization of conservative reform advocates (Dagan & Teles 2014, 2016; Green 2015; Travis 2014) and the political opportunities afforded by heightened fiscal concerns in the post-Recession period (Aviram 2015; see also Phelps 2016, Phelps & Pager 2016). By contrast, more-pessimistic accounts foreground the problem of path dependence, especially the power of institutions with a vested interest in mass incarceration (Gottschalk 2015; Page 2011a,b; Thorpe 2015), the ongoing invocation of the need to get even tougher on people convicted of comparatively serious crimes (Beckett et al. 2016, Gottschalk 2015, Seeds 2016) and the challenge of harnessing the discretion of the criminal justice actors whose everyday practices notably impact penal outcomes (Cadora 2014).

Yet researchers are debating more than the prospects for penal change; they also offer competing understandings of the problem, what should be done about it, and how to achieve relevant goals. In what follows, I describe varying perspectives on these issues and the research that underlies them. In the section titled Conceptualizing the Problem: From Mass Incarceration to the Carceral State, I explore alternative conceptualizations of the problem posed by penal expansion, and suggest that identifying the problem as the carceral state as opposed to mass incarceration

[1]As of 2016, the four countries (with populations of a half a million or more) with the next highest incarceration rates were Turkmenistan (583), El Salvador (517), Cuba (510), and Thailand (472) (Wagner & Walsh 2016).

has important substantive implications that are worthy of consideration. The section titled The Prospects of Penal Change: Path Dependence and Its Critics describes various perspectives on path dependence as well as debates over forces and dynamics that arguably undermine or reinforce penal expansion. In this section, I suggest that while many groups and organizations now benefit economically, politically, and/or institutionally from penal expansion, these interests do not always prevail in battles over criminal justice reform. In the future, comparative studies might deepen our understanding of how and why criminal justice reformers are sometimes able to achieve at least some of their goals despite the vocal and well-financed opposition of these vested interests.

The sections titled What Should Be Done? and Dismantling Mass Incarceration assess alternative perspectives on the ultimate questions: What should be done, and how might these changes come about? In these sections, I contend that the need for practices and policies that send fewer people to prison and for shorter times is clear. However, because research does not provide much reason to think that either the courts or legislatures will end mass incarceration in the short or medium term, ongoing efforts to alter prosecutorial practices are promising, at least in the near future. Systems of post-sentence review are also needed to avoid the unnecessary, costly, and inhumane incarceration of the growing population of elderly prisoners. Moreover, although the penal system could theoretically be downsized without meaningful reductions in crime and violence, as some scholars emphasize, movements that involve both crime survivors and the justice-involved may help challenge the idea that victims are well-served by mass incarceration and identify ways that both problems can be simultaneously addressed. The conclusion provides a summary of the main findings and points of contention, and identifies practices and policies that are feasible in the short term and may help lay the groundwork for a comprehensive effort to dismantle mass incarceration and the carceral state.

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CONCEPTUALIZING THE PROBLEM: FROM MASS INCARCERATION TO THE CARCERAL STATE

The terms mass incarceration and carceral state are relatively new and are often used interchangeably to highlight the extraordinary expansion of the US penal system. However, these terms have unique implications that render each term more appropriate in certain contexts. Below, I trace the history and use of these terms and discuss why their use matters.

David Garland coined the term mass imprisonment in 2001 to call attention to the "unprecedented expansion of prison populations" in the United States and to the "systematic imprisonment of whole groups of the population" (Garland 2001, p. 2). Since that time, the use of mass incarceration, a quite similar term that also includes the jail population, has exploded (Roeder 2014). The literature that explores the causes and consequences of this development pays particular attention to the tail end of the criminal process (i.e., incarceration) and to the policy developments that have fueled rising incarceration rates. For example, the recent report by the National Research Council entitled *The Growth of Incarceration in the United States* provides a comprehensive overview of the causes and consequences of the expansion of US prisons and jails (Travis et al. 2014).

As Garland (1990) notes, this focus on incarceration and its drivers can be contrasted with efforts to "trace all of the forms in which state power is exercised through the criminal justice apparatus" (Garland 1990, p. 18). However, many recent analyses seek to do precisely this, namely, to map the development, operation, and effects of criminal justice institutions (including the police) in the context of US penal expansion and welfare retrenchment (Beckett & Murakawa 2012). Studies aimed at this broader objective often use the term "carceral state" to call attention to the expanding role of penal institutions, broadly defined, in the lives of the poor and in communities of color (e.g., Hernandez et al. 2015). Scholarship showing that penal intervention matters even absent

incarceration provides support for this conceptual framework. For example, Devah Pager's seminal work documents the impact of low-level felony convictions (absent evidence of incarceration) on applicants' job prospects and analyzes how the mark of a criminal record interacts with race to enhance inequality over time (Pager 2007, Pager et al. 2009). More generally, a growing body of research shows that criminal conviction enhances poverty and inequality by limiting access to occupational licenses, jobs, credit, housing, social benefits and services, and other opportunities even if incarceration does not occur (Vallas & Dietrich 2014).

Moreover, recent studies suggest that criminal justice contact and surveillance can have deleterious consequences even in the absence of either conviction or incarceration. For example, a growing body of scholarship shows that aggressive policing adversely affects the health and well-being of targeted individuals and communities (Beckett & Herbert 2010, Geller et al. 2014, Lerman & Weaver 2014, Rios 2011, Sewell et al. 2016, Sewell & Jefferson 2016). Research further shows that criminal justice contact and surveillance shape residents' everyday lives, including the routes by which they travel, the institutions they access (or avoid), and the balance of power in their personal relationships (Brayne 2014, Flores 2016, Goffman 2014, Lara-Millan 2014, Lerman & Weaver 2014, Stuart 2016). For example, Lara-Millan (2014) shows that the presence of police officers in hospital emergency rooms induces many of those seeking medical care to leave the hospital without receiving treatment, a pattern that may reproduce health inequalities over time. Similarly, Brayne (2014) finds that people who have had any form of criminal justice contact, including having only been stopped or arrested by the police, are significantly less likely to interact with organizations that engage in formal record-keeping (including medical, financial, labor market, and educational institutions) than people who have had no criminal justice contact. Insofar as access to these institutions is an important means by which people improve their quality of life and achieve upward mobility, system avoidance may be an important mechanism by which the carceral state reproduces social inequality over time.

Similarly, in the tradition of Feeley's (1979) classic account of the misdemeanor court experience, recent studies highlight the powerful effects of contact with the expanding misdemeanor court system, even when it does not result in either conviction or incarceration (Kohler-Hausmann 2013, 2014; Napatoff 2015). As Kohler-Hausmann (2013) shows, involvement with the lower court system can be enormously time-consuming and create a variety of burdens, including reporting and other requirements, fines, and more. Even where courts depend on high dismissal rates to manage caseloads, and conviction is relatively uncommon, the process can be quite exacting. As Kohler-Hausmann (2013, 2014) argues, this "managerial" mode of justice involves the regulation and surveillance of millions of people for extended periods of time, even when cases are ultimately dismissed.

The dramatic uptick in the assessment of legal financial obligations by criminal justice institutions similarly illustrates how criminal justice contact can affect everyday life and exacerbate inequality even absent conviction and incarceration (Beckett & Harris 2011, Eisen 2015, Greenberg et al. 2016, Harris 2016, Harris et al. 2010, Martin et al. 2017). The imposition of fees, fines, and other legal costs has increased notably as courts and other penal institutions struggle to fund their expanding operations (Harris et al. 2010). This trend, combined with the rise in the number of people who are convicted each year, means that millions of mainly poor people now carry criminal justice–related debt (Harris et al. 2010). Yet many people who are never convicted are also assessed legal fees and fines. For example, a recent study found that fines imposed on people arrested but not convicted of a misdemeanor offense or traffic violation far outstrip those imposed on people convicted of a felony offense in Alabama (Greenberg et al. 2016). Similarly, parents are charged for the cost of their children's detention in at least nineteen states and numerous other counties (Hager 2017).

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In summary, some of the deleterious effects of criminal justice contact do not involve conviction and incarceration. Moreover, the growth of the penal system has meant that a variety of control-oriented institutions play a significant and often adverse role in the everyday lives of the poor. This body of scholarship thus suggests that it is not just the growth of incarcerative institutions but rather the expansion of penal institutions more generally that adversely impacts poor people and enhances inequality over time. For this reason, some scholars use the term carceral state to highlight the adverse and stratifying role of criminal justice institutions in the lives of the disadvantaged (e.g., Hernandez et al. 2015).

Some scholars go further still, arguing for recognition of the "shadow carceral state" and the legally hybrid control tools that sustain it (Beckett & Murakawa 2012, Stuart et al. 2015). Highlighting the growing fusion of immigration and criminal law, new versions of trespass law that combine civil and criminal legal authority, the civil commitment of convicted sex offenders who have completed their criminal sentence, the incarceration of immigrants and asylum seekers in prison-like detention facilities, and the use of civil contempt charges to jail legal debtors, Beckett & Murakawa (2012, p. 237–38) suggest that

> Within the shadow carceral state, a variety of institutional actors have manipulated the ostensibly discrete boundaries of civil, administrative, and criminal law, thereby creating and/or enlarging non-criminal pathways to punishment. Studies of penality that focus only on the tail end of the criminal legal process overlook both the expansion of noncriminal routes to punishment and the legal fungibility that has made them possible.

In short, studies suggest that incarcerative institutions represent only the most-visible tentacles of penal power and that the harm caused by the excessive use of prisons and jails has been dramatically compounded by the growth of the many institutions that make up the carceral state. From this perspective, solutions that tackle overincarceration without also addressing carceral state power are partial at best and may actually worsen the problem by simply shifting power from one part of the carceral state to another under the guise of reform.

But whether one's focus is limited to incarceration or includes the operations and effects of the carceral state, researchers studying penal developments in the contemporary United States uniformly highlight the need for change. It is in this context that scholars assess the problem of path dependence and the challenge it poses for advocates of criminal justice reform.

THE PROSPECTS OF PENAL CHANGE: PATH DEPENDENCE AND ITS CRITICS

An emerging body of scholarship explores whether meaningful penal change is possible given the growth of the carceral state, and, if so, how it might come about. Alternative perspectives on path dependence lie at the heart of these discussions. The term path dependence refers to "the tendency for courses of political or social development to 'generate self-reinforcing processes'" (Pierson 2000, p. 810) that frustrate efforts to change direction. These reinforcing processes are sometimes referred to as positive policy feedback. By contrast, negative feedback undermines existing policy arrangements and the institutional arrangements that support them (Dagan & Teles 2014; see also Dagan & Teles 2015, Murakawa 2014). More-pessimistic assessments of the prospects for penal change tend to emphasize positive policy feedback mechanisms such as the political power of the institutions that benefit from penal expansion, whereas penal optimists highlight a variety of potential negative policy feedback mechanisms, including the recent emergence of conservatives seeking to get "Right on Crime" and the intensification of budget pressures in the post-Recession context.

Positive Policy Feedback Mechanisms

Researchers emphasizing the challenge of path dependence often identify a range of interest groups that benefit from penal expansion and now endeavor to block penal reform. For example, private corporations that own and operate prisons (or profit from contracts with them), prison officers' unions, the bail industry, and even county clerks who depend on the collection of fees and fines benefit from the penal status quo and often seek to undermine progressive criminal justice reforms (Gottschalk 2015; Justice Policy Inst. 2012; Page 2011a,b; Petersilia & Cullen 2015). Similarly, legislators from rural communities that house prisons constitute an important voting block that seeks to obstruct the adoption of legislative reform measures (Thorpe 2015). In addition, a variety of state agencies and organizations, including state departments of correction, prosecutorial associations, and law enforcement groups have expanded in recent decades, and these organizations sometimes pose a powerful obstacle to reform (Campbell 2012, Gottschalk 2015).

Yet it is also true that these groups do not always achieve their anti-reform goals. Certainly, some reform initiatives falter in the face of opposition from organized groups that benefit from mass incarceration. For example, as Page (2011a,b) shows, the uniquely powerful California prison guards' union [California Corrections Peace Officers Association (CCPOA)] served for many years as an effective obstacle to legislative reform. More generally, prison officers' unions represent a powerful vested interest group that actively works to resist what Page (2011b) calls prison downsizing: the closure of prisons and the laying off of correctional staff. And yet some prison downsizing has occurred, even in California.[2] In New York State, for example, the recent closure of nine prisons was staunchly opposed by the prison officers' union (Porter 2016). Nationally, ". . . at least 22 states have closed or announced closures for 94 state prisons and juvenile facilities, resulting in the elimination of over 48,000 state prison beds and an estimated cost savings of over $345 million" since 2011 (Porter 2016, p. 1). Although some of these facilities have been reopened or repurposed to serve alternative carceral purposes, many have not.

Vested opponents of penal reform have lost other battles as well. Recently, for example, California voters adopted Propositions 47, which reduced many felony offenses to misdemeanors, and 57, which renders people serving time for nonviolent offenses eligible for parole, despite the opposition of most law enforcement groups, district attorneys, and the CCPOA. In Maryland and New Jersey, bail reform advocates have made significant progress toward eliminating cash bail for most defendants, the opposition of the bail bond industry and other law enforcement groups notwithstanding (Hernandez 2017, Wiggins 2016). And although legislators from rural communities that house prisons often seek to obstruct proposed criminal justice reforms (Thorpe 2015), many such reforms have been enacted. In fact, since 2008, at least 48 states and the District of Columbia have undertaken some type of progressive criminal justice reform aimed at reducing reliance on incarceration; more than half the 50 US states adopted significant drug law reforms (Beckett et al. 2016, Subramanian & Moreno 2014). Until about 2011, such measures were also opposed by ALEC (the American Legislative Exchange Council), which represents about one-third of all state legislators (Green 2015).

In short, although vested penal interests clearly exist and often attempt to block reform, they sometimes lose. Evidence that powerful private interests with a stake in mass incarceration exist and attempt to influence policy debates is not, therefore, evidence that change is impossible or even unlikely. Penal pessimists might counter that recently enacted reforms tend to be limited to

[2]This occurred in the wake of the Supreme Court's 2011 *Brown v. Plata* ruling, which mandated that California significantly reduce its prison population. In this context, voters approved several decarcerative ballot initiatives despite the opposition of the California Correctional Peace Officers Association (CCPOA) and many law enforcement groups (Krisberg 2016).

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nonserious and nonviolent offenses, and that their potential impact on the scale of incarceration is therefore limited (Beckett et al. 2016, Gottschalk 2015, Tonry 2016). Although accurate, this observation does not negate the fact that many recent reforms were enacted over and against the opposition of vested and powerful interest groups. In the future, comparative case studies would help researchers develop and evaluate hypotheses regarding the circumstances and tactics that favor or disfavor reform under such circumstances. In the meantime, evidence of the existence of vested interests should not be construed as evidence that change is impossible.

Negative Policy Feedback Mechanisms

In addition to debating the extent to which vested interests can block progressive criminal justice reform measures, scholars disagree about the significance of two recent developments that arguably have the potential to bolster reform efforts and undermine mass incarceration. These include the intensification of budget pressures stemming from the Great Recession and the mobilization of conservative critics of mass incarceration.

Budget pressures as reform opportunity? The Great Recession was triggered by the bursting of a roughly eight-trillion-dollar housing bubble in December 2007. In 2008 and 2009, the US labor market lost 8.4 million jobs (Aviram 2015), and for several years after 2009, the economy remained insufficiently strong to create the jobs needed even to keep pace with population growth. The Great Recession had a significant impact on the economic health of state and local governments, many of which lost substantial amounts of revenue (Thompson 2013). In some states, the effects of the Recession continue to reverberate, placing significant limits on state and local expenditures.

A number of researchers have suggested that these fiscal pressures may enhance legislators' receptivity to decarcerative measures (Dagan & Teles 2014, 2016; Green 2015). Research showing that state fiscal capacity is a significant predictor of the size of its prison population (independent of crime rates and other relevant factors) provides support for this claim. For example, Spellman (2009) found that state-level variation in public resources explained 30 percent of the observed variation in the size of state prison populations, with better-endowed states having larger prison populations. More recently, researchers have examined the impact of fiscal pressures stemming from the Great Recession on the enactment of criminal justice reform measures and/or incarceration rates. These studies suggest that the intensification of budget pressures associated with the Great Recession is correlated with efforts to reduce prison populations. For example, Brown (2013) found that states with less revenue introduced more measures to reduce reliance on incarceration immediately following the Great Recession. Similarly, Phelps & Pager (2016) report that states with low fiscal capacity in 2010 were significantly more likely to reduce their incarceration rates between 2010 and 2013. Although such correlations do not mean that decarceration is inevitable during economic downturns, they do suggest that enhanced budget pressures create opportunities for new political alliances and opportunities that are generally conducive to efforts to reduce prison populations, at least in the short term (see also Aviram 2015).[3]

This line of reasoning is most-strongly challenged by Gottschalk (2015, p. 26), who argues that "the Great Recession has spurred excessive hopes that the United States is at the beginning of the end of mass incarceration because the fiscal costs are too high to sustain it." Gottschalk

[3]This does not imply that decarceration can happen only when fiscal constraints intensify. In Finland and other Nordic countries, for example, incarceration rates were notably reduced in the context of political rather than economic challenges to the repressive ideal (Lappi-Seppälä 2012).

makes several points in support of her argument. First, she suggests that such hopes are rooted in a misunderstanding of the amount of money that could be saved by reducing prison populations, as incremental declines in those populations do not yield significant savings absent prison closure. This is true, and yet, as discussed earlier, a nontrivial number of prisons have indeed been closed. Gottschalk also notes that releasing prisoners, especially older people, does not necessarily result in public savings, as many of those individuals would be covered by federal programs such as Medicaid, Medicare, and/or Social Security upon release. Although this is also true, most prisoners are housed in state prisons, and states clearly have an incentive to shift these costs to the federal government.

Gottschalk's second claim is that the tendency to scapegoat and ostracize marginalized groups is often exacerbated by economic distress, which means that economic downturns could heighten support for punitive measures. Although plausible, this conjecture is not borne out by recent studies that find a significant correlation between Recession-induced state budget pressures, criminal justice reforms, and reduced incarceration, as noted above (Brown 2013, Phelps & Pager 2016). Thus, although punitiveness and scapegoating certainly can increase during economic downturns, it is not clear that this occurred in the post-Recession period.[4]

Finally, Gottschalk (2015) suggests that the idea that budget pressures tend to have decarcerative effects overlooks the ways in which particular groups benefit fiscally from mass incarceration. For example, the use of civil asset forfeiture laws, tied to the war on drugs, now serves as a significant source of revenue for law enforcement organizations. Yet the entities that benefit financially from mass incarceration and related policies tend not to be state governments. For example, the vast majority of revenues generated through civil asset forfeiture laws go to local law enforcement agencies (Alexander 2010). Similarly, private corporations benefit from private prisons; state governments do not. Thus, it may remain the case that state budget pressures render state governments comparatively receptive to cost-savings measures.

Even if this is true, however, there are several reasons to be concerned about reforms motivated primarily by cost considerations, as Gottschalk (2015) emphasizes. First, some such measures do not reduce incarceration but rather simply worsen prison (and jail) conditions (Gottschalk 2015). Indeed, Gottschalk's warnings about this possibility may well be prescient if states primarily turn to private prisons, where conditions are generally even worse, to reduce costs. Second, to the extent that reforms are intended only to provide short-term financial relief, they will not lead to long-term declines in incarceration or reduced carceral state power. For example, some states created temporary relief valves that enabled correctional authorities to authorize the early release of prisoners in the wake of the Recession but then rescinded those measures as the state economy recovered (Beckett et al. 2016). In the absence of a broader critique of mass incarceration, measures oriented toward cost-savings alone are unlikely to yield long-term change (Alexander 2010, 2014; Gottschalk 2015).

In sum, state-level budget constraints since the Great Recession have been correlated with reform and decarceration, most likely because they enhance legislative receptivity and create opportunities for new political alliances. At the same time, reforms that are motivated solely by cost concerns are unlikely to notably undermine mass incarceration and carceral state power. In a

[4]Although punitiveness and scapegoating have become increasingly pronounced since the 2016 presidential campaign began, it is not clear that this is due to economic forces, as the economy is on much stronger footing in 2016–17 than it was during and immediately after the Recession (Weller 2017). However, recovery from the Recession has been quite uneven, with many rural areas lagging behind (Edsall 2017), and this may help explain the particular receptivity to anti-immigrant, anti-Muslim, and law-and-order rhetoric in rural America.

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similar vein, some analysts also question the capacity of conservative critics of mass incarceration to forge alliances and initiatives that lead to meaningful and long-lasting change.

The mobilization of conservative critics of mass incarceration. After years of advocating tough crime and drug policies, many conservatives have come to believe that prisons and jails have grown too large. Some researchers argue that this development has the potential to notably undermine mass incarceration. For example, Dagan & Teles (2014, p. 270) attribute the recent uptick in reform measures to the mobilization of conservative critics of mass incarceration who "tied what had been a handful of scattered state-level reforms into a broader narrative that cast decarceration as a matter of conservative principle, then marshaled their political networks to spread the message, and plotted strategic initiatives at the state and federal levels to bring around potential allies." For these scholars, the significance of these developments lies not only in the novelty of conservatives' revised position but also in the role that they play in presenting evidence of mass incarcerations' costs to other conservatives, thereby spreading the new gospel. As they put it, "policy *effects* become policy *feedback* only through a process of construction.... it requires resourceful entrepreneurs and favorable conditions for deleterious policy effects to be identified, for changes to such policies to be framed so as to be politically acceptable, and for the reform agenda to be diffused through policy-making channels" (Dagan & Teles 2015, p. 128).

Dagan & Teles (2015) suggest that this process was so effective that reform has become the new "conservative orthodoxy." Although the embrace of criminal justice reform by some conservatives is indeed novel, the election of Donald Trump to the Presidency casts significant doubt on this claim. Indeed, President Trump and his allies draw heavily on 1980s-style racialized law-and-order rhetoric that highlights the danger of (allegedly) rising crime rates and the need for intensified policing and harsher punishments for all crimes, including drug offenses (Grawart 2017, Hulse 2016). Although the Republican Party is clearly split over these issues, the existence of powerful Republican leaders, including Attorney General Sessions, who vehemently resist calls for criminal justice reform casts doubt on the idea that reform is now uniformly embraced by conservatives.

Even setting the election of Donald Trump to the Presidency aside, however, many scholars dispute Dagan & Teles' (2016) contention regarding the potential impact of the mobilization of conservative critics of mass incarceration. That is, even prior to the 2016 election, some analysts challenged the idea that the emergence of a bipartisan reform movement was a necessary and potentially sufficient condition to ensure meaningful reform. This is mainly because bipartisan elites have limited their attention to the least-serious crimes (Gottschalk 2015). These debates over whether this focus on nonserious crimes is sufficient and what else should be done are described below.

WHAT SHOULD BE DONE?

There is significant disagreement about what is needed to bring about meaningful penal reform and how these changes might be achieved. For critics of expanded carceral state power, measures that modestly reduce incarcerated populations by, for example, expanding probation and parole are inadequate as well as risky (see Cullen et al. 2016). For example, Kleiman's (2013) call for enhanced criminal justice supervision supplemented by swift and certain sanctions for technical violations as a means of reducing incarceration would likely strike most critics of the carceral state as a Pyrrhic victory, one with the potential to lead to net-widening[5] and the enhancement rather than diminution of carceral state power (e.g., Clear & Frost 2013).

[5] Phelps (2013) empirically examined the relationship between probation and imprisonment, and found that probation sometimes serves as an alternative and sometimes as a supplement to incarceration.

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Yet even among those whose goals are limited to reducing incarceration rates (as opposed to carceral state power), there is considerable debate about what should be done. One issue, noted above, is whether bipartisan alliances initiated by conservatives can and will produce legislative reforms that make a significant difference or whether their tendency to focus on the low-hanging fruit (mainly theft and drug use) will produce measures that merely "nibble around the edges" (Tonry 2016) of mass incarceration. A second debate concerns whether efforts to dismantle mass incarceration need also to address the problems of crime and violence. A third debate concerns the importance of sentencing policy. Below, I briefly describe the debates over these issues.

Bifurcation: Is the Low-Hanging Fruit Enough?

Many scholars contend that the war on drugs is not the primary cause of mass incarceration (Forman 2012, Gottschalk 2015, Pfaff 2017). This argument is supported by evidence that a relatively small and declining proportion of all incarcerated people in the United States [fewer than one in five in 2016 (Wagner & Rabuy 2017)] are serving time for a drug crime. Michelle Alexander (quoted in Hagar & Keller 2017) argues that this measure of the import of the drug war ignores its broader significance:

> Some people get caught up in the prison data...they lose sight of the fact that the drug war was a game-changer culturally and politically.... The declaration and escalation of the war on drugs marked a moment in our history when a group of people defined by race and class was defined as the 'enemy.' A literal war was declared on them, leading to a wave of punitiveness that affected every aspect of our criminal justice system... Counting heads in prison and jails often obscures that social and political history.

Although plausible, Alexander's claim is in tension with evidence that the war on crime preceded the war on drugs rather than vice versa (Beckett 1997, Murakawa 2014, Weaver 2007). And although the rhetoric of the drug war may amplify punitive tendencies, it remains the case that a relatively small proportion of people living behind bars are there as a result of a drug conviction. This is important because recent studies suggest that mainstream advocates of reform tend to limit their attention to people convicted of nonviolent crimes (Beckett et al. 2016, Seeds 2016) or to "non, non, nons," nonserious, nonrepeat, and nonviolent offenders (Gottschalk 2015). Moreover, although pragmatic considerations undoubtedly underlie this strategy, this approach appears to be producing a new way of thinking and talking about crime, one that is premised on the idea that only relatively sympathetic defendants facing less-serious charges are deserving of reform (Beckett et al. 2016). Indeed, according to Seeds (2016), the logic of bifurcation, which holds that the response to nonviolent crime should be fundamentally different from the response to violent crime, has become the guiding principle of the mainstream reform movement led by bipartisan elites and technocratic reformers. This hypothesis is consistent with the argument that penal change rarely represents a sudden rejection and replacement of past practices and policies (Goodman et al. 2014, Campbell & Schoenfeld 2013). It is also bolstered by evidence that states have continued to expand life-without-parole (LWOP) statutes even as they enacted decarcerative reforms pertaining to drug and other nonviolent offenses (Seeds 2016).

Analysts disagree about whether reforming practices and policies pertaining only to nonviolent and nonserious crimes will make a significant dent in mass incarceration. Dagan & Teles (2014, p. 272) believe that it would: "While major decarceration will ultimately require reformers to face tough questions about shortening the sentences of serious offenders, there is much that can be achieved through less-controversial changes—what critics might call 'tinkering' with the carceral

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state." Dagan & Teles (2014) buttress this claim by pointing out that roughly 60% of people in jail or prison were convicted of a nonviolent offense. Although this is correct,[6] it is also true that people convicted of violent crimes spend far longer than others behind bars. For example, PEW estimated that state prisoners convicted of drug and property crimes in 2009 spend an average of 2–3 years behind bars, whereas those convicted of violent crimes spend an average of 7.1 years in prison (PEW Cent. States 2012, appendix A).

Moreover, recent reforms have most frequently authorized diversion and/or shorter sentences for people convicted of only the least-serious drug and property crimes. For example, reform measures have mainly targeted drug possession rather than trafficking and theft rather than burglary (Beckett et al. 2016, Gottschalk 2015). Indeed, in the context of the opiate epidemic, the argument that drug dealing is an inherently violent crime (Bennett & Walters 2016) poses a major barrier to reform, and many states have heightened sanctions for drug sales (Natl. Counc. State Legis. 2016). In other words, at this point, reform remains elusive even for people convicted of many drug and property crimes as well as for people convicted of violent, sex, and public-order offenses. Yet people convicted of drug possession and theft make up only 3.5% and 3.6%, respectively, of the state prison population (Carson & Anderson 2016, table 9).

In sum, measures that provide alternatives to incarceration for only the least-serious nonviolent crimes have the potential to affect only a small proportion of people in prison, although they may have a slightly larger impact on jail populations. But the impact of reforms that are limited to nonserious and nonviolent crimes may be restricted for another reason as well. In their analysis of media rhetoric and legislative reforms enacted from 2000 through 2012, Beckett et al. (2016) found that reforms pertaining to nonviolent offenses were often legitimated in terms of the need to ensure that sufficient resources are available to incarcerate people convicted of violent crimes for even longer periods of time. It thus appears quite possible that late mass incarceration (Seeds 2016) will be characterized by shorter sentences or diversion for a handful of less-serious crimes such as drug possession and theft but even longer sentences for violent and sex offenses (and possibly drug dealing). Given that sentences imposed in the United States for all types of crime are already substantially longer than those imposed in comparable countries (Tonry 2016) and that one in seven prisoners is currently serving a life sentence (Nellis 2017), this possibility is quite sobering. Such a shift would have only a marginal impact on incarceration rates.

Should Criminal Justice Reformers Also Target Crime and Violence?

Researchers also disagree about whether efforts to reduce mass incarceration and dismantle the carceral state ought to also prioritize efforts to reduce crime and violence. Gottschalk (2015) argues against this proposition. Although she acknowledges that both violence and mass incarceration disproportionately and adversely impact communities of color characterized by high levels of segregation and poverty, she argues that closely connecting efforts to dismantle mass incarceration with efforts to reduce violence would be a mistake for at least two reasons. First, the concentration of violence in certain neighborhoods is mainly a function of high levels of economic and racial inequality, which are more deeply embedded in US history and society than mass incarceration and will, therefore, be even more difficult to tackle. Second, closely connecting these issues runs the risk of conveying the (mistaken) idea that high incarceration rates in the United States are a function of crime patterns. As Gottschalk (2015) and Tonry (2016) note, many countries with

[6]Data provided by the Prison Policy Institute indicate that 41.5% of all incarcerated people were behind bars due to a violent crime, and 19% for a drug crime, in 2016 (Wagner & Rabuy 2017).

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much lower incarceration rates are characterized by overall crime rates that are similar to or higher than those found in the United States. She concludes, "The United States needs a visionary agenda aimed at ameliorating the root causes of crime and other persistent and gaping inequalities in high-crime communities. But in the meantime, there is no excuse for keeping so many of the people from these communities locked up or otherwise ensnared in the carceral state" (Gottschalk 2015, p. 279).

By contrast, a number of analysts suggest that criminal justice reformers should also advocate for measures aimed at reducing violence. One rationale for this is that although many countries with comparatively low incarceration rates have overall crime rates that are similar to those found in the United States, it is also true that the United States appears to have comparatively high levels of serious violence, including homicide and rape (Lynch & Pridemore 2011). Another argument for connecting efforts to reduce violence to criminal justice reform is political/pragmatic: Although the connection between crime and incarceration rates is somewhat tenuous, any association between decarceration and threats to public safety or rising crime rates could easily doom the criminal justice reform movement (Clear & Frost 2013). Happily, recent studies show that the states that have reduced their prison populations the most have also experienced larger than average reductions in crime (Mauer & Ghandnoosh 2014).[7] A third argument for tethering anti-violence objectives to criminal reform initiatives concerns the criminogenic nature of the experience of interpersonal violence: Violence survivors are notably over-represented among arrestees, prisoners, and ex-prisoners, even after controlling for poverty and other risk factors (Jaggi et al. 2016, Neller et al. 2006, Western 2015, Wolff et al. 2009). Indeed, the popular juxtaposition of (innocent) crime victims and the (guilty) justice-involved is entirely mythical: The people, families, and neighborhoods who suffer the burden of violence are also most harmed by mass incarceration.

For these and other reasons, some criminal justice reform initiatives do truss decarceration to antipoverty and antiviolence efforts. For example, the original case for the Justice Reinvestment Initiative (JRI) called for the reallocation of funds spent on mass incarceration to communities devastated by violence, poverty, and high incarceration rates (Austin et al. 2013). Cutting edge restorative justice diversion programs provide resources and services to violence survivors while also addressing the needs of people who cause harm and holding them accountable but keeping them out of prison (Stillman 2015). Similarly, new survivor organizations seek both enhanced victim services and progressive criminal justice reform (Jackman 2017). The work of these organizations provides ample support for the idea that victim services, violence prevention, and decarcerative criminal justice reform can be mutually supportive.

Debating the Importance of Sentencing Policy and the Need for Sentencing Reform

Researchers agree that shifts in policy and practice rather than rising crime rates were the primary driver of penal expansion (Blumstein & Beck 1999, 2005; Raphael & Stoll 2009, 2013; Travis et al. 2014). This conclusion is based mainly on studies that decompose the criminal justice process into its constituent parts to trace shifts in the criminal justice system response to reported crimes and show that the system response to crime rather than crime trends was the main engine of prison growth (see, e.g., Blumstein & Beck 1999, Raphael & Stoll 2013). Although regression-based

[7] Findings from Lofstrom & Raphael's (2016) analysis of county-level variation in California's prison downsizing were slightly less auspicious: prison population reductions had no impact on violent crime rates but did have a modest impact on rates of auto theft.

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studies fairly consistently show that violent crime rates (and the size of the black population) are significant predictors of higher incarceration rates across US states (Campbell et al. 2015, Greenberg & West 2001, Jacobs & Carmichael 2001, Spellman 2009), studies that use a decomposition methodology to analyze the drivers of prison growth over time suggest that the impact of crime trends has been quite modest relative to the impact of changes in policy and practice. For example, on the basis of their decomposition and simulations, Raphael & Stoll (2013, p. 70) conclude "nearly all (if not all) of the growth of the state and federal prison populations can be attributed to tougher sentencing policy."

Decomposition-based studies identify two main shifts that fueled mass incarceration. First, the odds that a felony arrest would result in prison admission increased notably after the early 1980s (Blumstein & Beck 1999; Pfaff 2011a, 2017; Raphael & Stoll 2009, 2013; Travis et al. 2014; Western 2006). Insofar as this shift likely stemmed at least in part from prosecutors' increased proclivity to file felony charges,[8] these findings are consistent with research that highlights prosecutors' vast and unregulated discretionary power, which includes the authority to decide whether to file charges, which charges to file, and which plea bargains to accept (Davis 2008, Stuntz 2011). Changes to sentencing policy that enhance prosecutorial power and/or encourage the use of prison rather than probation or jail might also have increased the likelihood that a felony arrest would trigger prison admission by, for example, raising the minimum sentence to 12 or more months.[9]

Second, all but one of the researchers examining this topic have concluded that time served in prison increased notably in recent decades, particularly in the 1990s (see Blumstein & Beck 1999, 2005; PEW Cent. States 2012; Raphael & Stoll 2009, 2013; Travis et al. 2014; but see Pfaff 2011a,b; 2017). Disagreement on this question likely reflects the use of different methodologies to calculate time served. Time served is most-directly captured by observing the amount of time between the admission and release of actual cohorts of prisoners, but inmates with very long or life sentences are rarely released and are therefore undercounted in such observational measures (Travis et al. 2014). The recent increase in the number of people serving long and life sentences, as well as the increase in de facto lifers (Gottschalk 2012, Nellis 2017), means that a growing number and proportion of inmates will only be "released" from prison upon their death. As a result, direct observation yields underestimates of time served. Patterson & Preston (2008) show that the observational measure of time served employed by Pfaff (2011a,b; 2017) is the least accurate of the available options for assessing trends in time served. Indeed, the PEW Center on the States (2012) concluded that, in 2009, the observed measure underestimated time served for people convicted of violent offenses by an average of approximately two years.

In this context, researchers have used a variety of methods to estimate time served in ways that capture information about the growing number of people who are serving long or life sentences (and adjust for shifts in the number of prison admissions and releases) (see Patterson & Preston 2008). Given that changes in the composition of the prison population, such as the infusion of

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[8]Pfaff (2011a) analyzed the filing-to-arrest and admission-to-filing ratios separately and found that only the former increased, which he interprets as evidence of the role of prosecutorial discretion (as opposed to sentencing policy) in the prison buildup. However, the filing data on which this analysis relies have a number of important limitations (Kathryn Holt, pers. commun.). Moreover, Bureau of Justice Statistics data show that the share of defendants who were charged with, and subsequently convicted of, a felony offense increased from 50 to 59 percent between 1990 and 2004. Similarly, the share of defendants who were convicted of the original felony charge rose from 43 to 51 percent (Reaves 2013, figure 18). The available evidence thus suggests that although important, prosecutors' filing decisions were not the sole cause of the increase in the arrest-to-admission ratio.

[9]In general, defendants convicted of felony offenses who are sentenced to more than 12 months of confinement serve their sentences in prison rather than jail (Pew Cent. States 2012).

low-level drug offenders, affect estimates of time served, it is also important to analyze time served by offense type (for example, see Raphael & Stoll 2013, Travis et al. 2014, Western 2006).

Studies that take these and other methodological precautions find that time served has increased notably in recent decades for most violent and property crimes, and especially for the former. For example, Raphael & Stoll (2013) find that between 1984 and 2004, time served for murder and negligent manslaughter increased by 55%, for robbery by 44%, and for burglary by 21%. Travis et al. (2014) report similar findings for the period from 1980–2010 (see also PEW Cent. States 2012, appendix A). The PEW Center on the States (2012) found that time served increased for people convicted of all offense types, including drug violations.[10]

In sum, studies using the most careful and appropriate methods find that time served in prison has increased for many offense categories, and especially for violent crimes. These findings have important policy implications. Time served is influenced by sentencing policy as well as by correctional policies regarding the accumulation of good-time credits and parole-release decisions in states with parole boards (Tonry 2016). Studies indicating that time served has increased for many offense categories therefore imply the need to overhaul sentencing policy and to reduce sentences (and/or time served requirements) for violent crimes in particular (Tonry 2014, 2016). They also underscore the need to reintroduce parole where it has been abolished, and to ensure that meaningful post-sentence review occurs regularly in states that have parole boards (Tonry 2016). Indeed, a recent Sentencing Project report shows that parole boards have become increasingly reluctant to release lifers on parole, despite low recidivism rates among this population (Ghandnoosh 2017). This trend, along with the abolition of parole in fourteen states, has notably contributed to the growth of the lifer population as well as to the dramatic rise in the number of elderly prisoners (Am. Civ. Lib. Union 2012).

An international perspective helps illuminate how and why sentencing law matters. Tonry (2016) argues that changes in US sentencing policy have largely created mass incarceration, and supports this argument by providing evidence that people convicted of felonies in the United States are far more likely to be sent to confinement than is the case in other countries. Indeed, the share of convicted felons sentenced to confinement in select European counties ranges from a low of 3.1 percent in Finland to a high of 23 percent in the Netherlands. By contrast, in the United States, 73 percent of people convicted of felonies in 2009 were sent to prison or jail (Tonry 2016). US prison sentences are also extraordinarily long compared to those imposed in other Western democracies. Fewer than ten percent of all felony cases adjudicated in other Western democracies result in a confinement sentence longer than one year, and only 1–3 percent are sent to prison for more than five years. Although the data Tonry provides do not allow for direct comparison, the average prison sentence imposed by US state courts is undoubtedly far longer. In 2009, for example, the average prison sentence was 4.3 years; for violent crimes, it was 7.5 years. Moreover, life sentences are extremely rare in other democracies, but one in seven US prisoners is now serving a life sentence (Nellis 2017).

In his recent book, Pfaff (2017) argues that tough sentencing laws have not notably impacted time served, and therefore that it is not necessary to repeal or modify them to reduce mass incarceration. This argument stems from his apparently erroneous conclusion that time served did not increase in recent decades (see above). It also derives from the problematic assertion that

[10]Of these studies, it appears that only the PEW Center on the States (2012) included time spent in jail on the current charge in its calculation of time served. This may help explain the discrepancy between its findings regarding time served by people convicted of drug offenses and those reported by Raphael & Stoll (2013) and Travis et al. (2014). All studies discussed here focus on mean (average) time served other than Pfaff, who presents the median (see, for example, Pfaff 2017).

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prosecutors do not actually invoke tough sentencing statutes even when they are available because they understand that to do so would increase state correctional costs to unacceptable levels.

This argument is unconvincing for several reasons. First, insofar as the vast majority of district attorneys are elected and funded by counties, they often have a clear political incentive to promote their tough-on-crime credentials but few or no incentives to reduce state costs (Zimring & Hawkins 1991). Indeed, the fact that local actors decide who to send to prison but do not incur the costs associated with that decision has been recognized as a "correctional free lunch" problem that has fueled the growth of prison populations (Zimring & Hawkins 1991; see also Ball 2014). Oddly, Pfaff acknowledges that this incentive problem may have contributed to the increased propensity of prosecutors to file charges, which he contends is the main cause of prison growth. But if prosecutors are willing to crowd prisons by filing many more felony charges, it seems quite unlikely that they would consistently refrain from seeking long sentences out of concern for state budgets.

Second, it is clear that many prosecutors do invoke tough sentencing laws when they are available to them, although there is significant geographic variation in this practice (Chen 2014). In California, for example, courts sent more than 80,000 second strikers and 7,500 third strikers to prison between 1994 and 2004 alone (Brown & Jolivette 2005). By the end of 2004, third strikers composed more than one-quarter (26%) of the California prison population (Brown & Jolivette 2005). In the federal system, an estimated 46,000 of the roughly 100,000 federal prisoners (46%) serving time for a drug offense were sentenced under mandatory minimum sentencing laws (Horwitz 2015). By 1998, more than two-thirds of people admitted to US state prisons for a violent offense had been sentenced under a truth-in-sentencing (TIS) law that required that they serve at least 85 percent of their sentence (Ditton & Wilson 1999), and these statutes notably increased both time served and prison populations (see Tonry 2016). Similarly, the number of prisoners serving LWOP sentences has skyrocketed as states have expanded their LWOP statutes (Nellis 2017). Thus, although some prosecutors do seek to avoid triggering tough sentences, many others eagerly utilize the laws that authorize tough sentences where they are available.

Moreover, as Lynch (2016) shows in her analysis of the impact of tough federal drug sentencing laws on courtroom dynamics and outcomes, harsh sentencing laws have important qualitative and quantitative effects even when the majority of defendants do not receive the maximum allowable sentence. Research on TIS laws illustrates this point well: The mere existence of these laws increased sentences even when defendants plead guilty to lesser crimes that are not subject to TIS laws (Owens 2011). Lynch's analysis of courtroom dynamics explains why this is the case: Even if defendants are not charged under harsh sentencing statutes, the existence of those statutes enhances prosecutorial power in plea negotiations, which yields longer average sentences. For all these reasons, it is clear that the adoption of punitive sentencing laws has indeed worked to bolster mass incarceration.

In summary, scholars agree that mass incarceration was caused mainly by changes in practice and policy rather than by crime trends, although levels of lethal violence are comparatively high in the US and states with higher violent crime rates tend to also have comparatively high incarceration rates. The increased proclivity of prosecutors to file felony charges and changes in sentencing law and policy (which increased convictions, prison admissions, and time served, particularly for violent crimes) were the fundamental causes of prison expansion.[11] In light of these findings, many scholars emphasize the need for changes to prosecutorial practice and policy and for comprehensive

[11]A secular increase in the average number of prior convictions may also be fueling longer sentences (King 2016; see also Tonry 2016). Changes to bail practices that require more defendants to stay in jail while they await adjudication have also contributed to the expansion of the jail population (Rabuy & Kopf 2016).

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sentencing reform. Below, I describe competing perspectives on how these objectives might be achieved.

DISMANTLING MASS INCARCERATION

Although most researchers agree that shifts in both the exercise of prosecutorial discretion and the enactment of tough sentencing laws fueled mass incarceration, it is not at all clear how these forces may be reversed. Below, I briefly summarize key debates regarding the capacity of legislative reform, litigation, grass-roots movements, and other change modalities to affect the key drivers of mass incarceration.

Legislative Reform

In his recent book, *Sentencing Fragments*, Tonry (2016, p. vii) makes a clear, bold, and comprehensive case for sentencing policy reform: "No one admires American sentencing systems. They are arbitrary and unjust, they are much too severe, they ruin countless lives, and they have produced a shameful system of mass incarceration." Tonry's argument is based on evidence that US sentences are far longer than those imposed in comparable countries, and that both sentences and time served (as well as the likelihood of prison admission given arrest) have increased dramatically in the United States. He also notes that although violent crime rates tripled and property crime rates doubled in developed countries from the 1960s to the 1990s, only the United States responded with a war on crime and drugs. On the basis of these and other observations, Tonry (2016, p. 2) makes a compelling case that "No meaningful change will occur in reducing mass incarceration, rampant racial and ethnic disparities, or injustice in individual cases until sentencing laws and practices are overhauled."

Tonry further argues that the kinds of reforms states have enacted in recent years are wildly insufficient (see also Gottschalk 2015). For example, after critiquing the modest steps taken by the Obama Administration and the US Sentencing Commission, Tonry (2016, p. 9–10) writes,

> Legislatures have done little better, merely nibbling at the edges of the problem. Reports issued by the National Conference of State Legislatures list many hundreds of changes to sentencing laws since 2000, but almost all are minor. . . No state legislature has repealed a three-strikes, truth-in-sentencing, or life-without-the-possibility-of-parole law. Except in Michigan, in 2002, no state has repealed broad-based mandatory minimum sentencing laws for drug and violent crime.

Although his case for comprehensive sentencing reform is exhaustive, Tonry does not offer a plan for motivating legislators to do better. As noted previously, Dagan & Teles (2014, 2015, 2016) are optimistic about the legislative and leadership capacity of conservative opponents of mass incarceration. The fact that the statutory reforms supported by "Right on Crime" groups do not entail a wholesale rejection of the "get tough" approach to sentencing does not trouble Dagan & Teles (2014), who contend that reforms aimed at low-level crimes can yield substantial dividends, as noted previously. For the moment, they are also the most that can be hoped for, as there is little evidence that elected officials in the United States are willing to make the case for reform of sentencing laws pertaining to violent or serious crimes.

Dagan & Teles (2014, 2016) are also pessimistic about the prospects of the alternative advocated by Gottschalk (2015), Alexander (2014), and others: a grass roots social movement for progressive penal change. Specifically, Dagan & Teles (2014, p. 267) argue that a broader movement that frames the carceral state as a civil and human rights issue would "almost certainly require an

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exceptionally unlikely direct mobilization of mass incarceration's victims." Although currently and formerly incarcerated people likely cannot generate and sustain such a movement alone, it remains to be seen whether grass-roots movements led by the people and communities that are disproportionately affected by both violence and mass incarceration could change the narrative (and policy) on these issues in deeper and more lasting ways than bipartisan elites are willing to do.

Indeed, a growing number of visible and effective reform organizations are run by formerly incarcerated people and/or their family members. And as Forman (2017) notes,

> ...the public role of these activists may have a ripple effect. Each time a formerly incarcerated person appears before a legislature, speaks at a news conference or writes about life in prison, walls of shame and stigma begin to totter, and others find it easier to speak up. In a nation in which nearly a third of people have been arrested by age 23, these voices could have a profound collective impact.

Moreover, the recent mobilization of progressive crime survivors who favor progressive penal reform (Stillman 2015) and their role in securing a variety of recent reforms[12] suggest that the grass-roots mobilization of those most affected by violence and mass incarceration could be a powerful force for change. Voter's recent support for some progressive ballot initiatives suggests that this mechanism may be a promising tool for any such movements that do materialize in states in which the ballot initiative process is available and the legislature remains mired in gridlock.[13]

The Courts

Historically, prisoners and advocates of criminal justice reform have often turned to the courts for relief. Although the courts provided little recourse to prisoners seeking protection in the early and mid-twentieth century, they did play an important role in protecting prisoners' rights in the 1960s and 1970s. However, the enactment of the Prison Litigation Reform Act in 1986 has severely limited the ability of prisoners and their advocates to use the courts to address conditions of confinement or other relevant issues (Schlanger 2016).

It is in this context that recent events in California loom large. In 2011, the Supreme Court ruled in *Brown v. Plata* that overcrowded conditions in California state prisons violated the Eighth Amendment and ordered the removal of roughly 40,000 inmates from its prisons (Simon 2014). The number of people admitted to California state prisons dropped markedly in the wake of this ruling. And as Simon (2014) argues, the Court's abundant references to prisoners' right to dignity, its recognition of the affront that California prison conditions represented to this right, and imposition of a population cap as a means of addressing overcrowding in *Brown v. Plata* may mean that this ruling will serve as the legal basis of the nationwide dismantling of mass incarceration.

Yet there are also several reasons to be skeptical that this will occur. First, as Simon (2013) acknowledges, the State of California was technically compliant with previous court orders to address overcrowding and unconstitutionally cruel conditions but also continued to reveal "deliberate indifference" to the humanitarian needs of prisoners. Second, in the wake of *Brown v. Plata*, the state prison population did shrink, but the state notably increased allocations for jail

[12] Consider, for example, the work of the Alliance for Safety and Justice (**https://www.allianceforsafetyandjustice.org/**).

[13] For example, voters in California adopted Proposition 47 in 2014, which downgraded several major felonies to misdemeanors, as well as Proposition 57 in 2016, which renders prisoners serving time for nonviolent crimes eligible for parole and enables them to earn early release credits for educational and rehabilitative programming. Progressive crime survivors were key forces behind these initiatives. Also in 2016, Oklahoma voters passed SQ 780, which reclassifies many felonies as misdemeanors.

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construction, and the jail population has grown markedly (Rubin 2015). Indeed, California's incarcerated population in 2015 was only 9% smaller than in 2011; ongoing jail construction in many California counties and cities may mean that the net decline is even smaller in the near future.[14] Third, studies suggest that prison overcrowding litigation does not reduce prison overcrowding but does increase corrections spending and incarceration rates, presumably by serving as a catalyst for prison (or jail) construction (Guetzkow & Schoon 2015; see also Schoenfeld 2010). Nor have the courts served as an effective vehicle for improving prison conditions in recent decades, consistently ruling, for example, that the widespread use of solitary confinement does not violate the Eighth Amendment's prohibition of cruel and unusual punishment (Reiter 2015).[15]

In short, although the need for comprehensive sentencing reform is clear, legislative reforms enacted to date have been modest because of politicians' reluctance to reach for anything other than the lowest hanging fruit. Even these quite modest reforms have been legitimated in terms of the need to preserve resources to crack down on other types of crime (Beckett et al. 2016). There is little reason to suspect that this political dynamic will change in the short term, although the ballot initiative process may offer some relief, particularly with the support of progressive crime survivors. At the same time, research casts doubt on the idea that prison litigation will yield meaningful reductions in incarceration or improvements in prison (or jail) conditions. In this context, ideas about potential changes to prosecutorial practice and policy seem like a comparatively promising path.

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The Role of Prosecutors

Given legislative gridlock and the apparent inefficacy of litigation-based efforts, some reform advocates have turned their attention to prosecutors. For example, Gottschalk (2015, p. 266) argues that "prosecutors will have to be cajoled or pressured into embracing a commitment to send fewer people to prison and to reduce sentence lengths." Even absent authorizing legislation, she notes, prosecutors could change their charging standard from "probable cause" to "likelihood of conviction" and/or make a policy decision not to prosecute certain low-level offenses, as a number of district attorneys have done. Tonry (2016) suggests even more radical shifts in prosecutorial policy and practice, arguing, for example, that prosecutors in the United States could make greater use of conditional dismissals, which require that defendants make restitution, perform community service, and/or pay a fine in exchange for a dismissal of the case. Pfaff (2017) similarly proposes a range of reforms aimed at curtailing prosecutorial discretion and reducing felony filings, including improving data collection regarding prosecutorial decision-making and re-zoning to reduce the power of suburban voters in prosecutorial (and judicial) elections. He also recommends a series of reforms aimed at addressing the "political defects" that, he argues, lie at the root of prosecutorial excess. Perhaps the most important of these recommendations is that prosecutors be appointed rather than elected.

The adoption of decarcerative practices could be incentivized by providing state funds to counties that divert people to community-based programs rather than sending them to state prison,

[14] A total of 220,802 people were in jail or prison in California at the end of 2011 (calculations based on data provided by Carson & Sabol 2012, table 2; Public Policy Inst. Calif. 2017). By 2015, that number was 201,000 (Kaeble & Glaze 2016, appendix table 4). Counties that previously sent a disproportionate share of people to state prison prior to 2011 are now making greater use of local jails (Verma 2015).

[15] In light of this history, Schlanger (2016, p. 5) calls for a "new generation of anti-incarcerative remedies in conditions lawsuits, unconnected to a population order, whose purpose is to keep vulnerable would-be prisoners out of harm's way by promoting workable alternatives to incarceration."

as the Adult Redeploy Illinois Program does. More generally, governments could use incentives to address the "correctional free lunch" problem identified by Zimring & Hawkins (1991) years ago (see also Ball 2014, Eisen & Chettiar 2015, Pfaff 2017). The adoption of decarcerative prosecutorial practices might also be encouraged by the election of progressive district attorneys, which is why philanthropists spent more than $3 million on seven local district attorney races in six states in 2016 (Bland 2016). Such prosecutors could address the problem of overincarceration not only by more selectively filing charges and sending fewer people to prison but also by modifying their charging practices to reduce the number of people sent to prison with very long sentences. They could also advocate for, and help implement, alternatives such as harm reduction, diversion programs for low-level offenses.[16] and restorative justice–oriented diversion programs for more serious crimes that simultaneously offer services and support to survivors and keep people out of prison and jail by addressing the root causes of criminal behavior.[17] Such programs have the potential to not only reduce incarceration and improve victim services but also challenge the myth that survivors of crime and violence are well-served by mass incarceration and to humanize people who have caused harm by facilitating rehabilitation and redemption.

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CONCLUSION

Mass incarceration is an unprecedented political and institutional development, one with a broad range of adverse social consequences, including reduced quality of life for the justice-involved (as well as their families and communities) and enhanced social inequality. Moreover, research shows that the expansion of US penal institutions is overwhelmingly a function of changes in practice and policy rather than crime trends. In particular, shifts in the exercise of prosecutorial discretion and changes to sentencing policy have meant that more people who are arrested are ending up in prison or jail, and the people who are sent to prison have been staying there for longer periods of time.

The path forward is less clear and is complicated by the fact that reform efforts can have unintended consequences and are therefore both promising and risky. This is especially true when reform advocates legitimate the reduction of penalties for selected nonserious crimes by stressing that any resources saved could be directed to enhancing sentences for other (more-monstrous) defendants (Beckett et al. 2016). Efforts that rely on enhanced state surveillance and control to reduce carceral state power and prison and jail populations are also unlikely to reduce the harm associated with either violence or mass incarceration.

In this context, researchers disagree about the most-effective means of reducing incarceration given political limits on legislative remedies and the failure of the courts to notably improve conditions of confinement in recent decades. Unconventional methods that do not require legislative authorization, such as electing, pressuring, and incentivizing prosecutors to adopt practices that reduce penal severity, appear to be a useful way of addressing mass incarceration in the short term. Although the prospects of comprehensive sentencing reform are not strong in the short term, the creation and revitalization of parole and other post-sentence review systems may be possible given evidence of the inefficacy and high cost of incarcerating a quarter-million elderly prisoners (Am. Civ. Lib. Union 2012). The mobilization of grass-roots movements for penal change that make evident that violence and mass incarceration adversely affect the same people and communities,

[16]For an example, consider the Law Enforcement Assisted Diversion (LEAD) program, which is now in effect or development in approximately 25 U.S. jurisdictions (**http://www.defender.org/projects/lead**).

[17]The Common Justice program in Brooklyn, NY, is an excellent example. See **https://www.vera.org/centers/common-justice**.

and that neither are well-served by current crime policies, are also auspicious. Similarly, the creation and expansion of diversionary restorative justice programs would show that it is possible to meet the needs of both crime survivors and the justice-involved without reliance on prisons and jail, and may help relegitimize the idea of rehabilitation and the possibility of redemption. Finally, shifting the narrative that equates incarceration with public safety and depicts the justice-involved as monstrous outsiders may be the most-effective way to lay the foundation for the comprehensive sentencing reform that is so clearly needed.

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