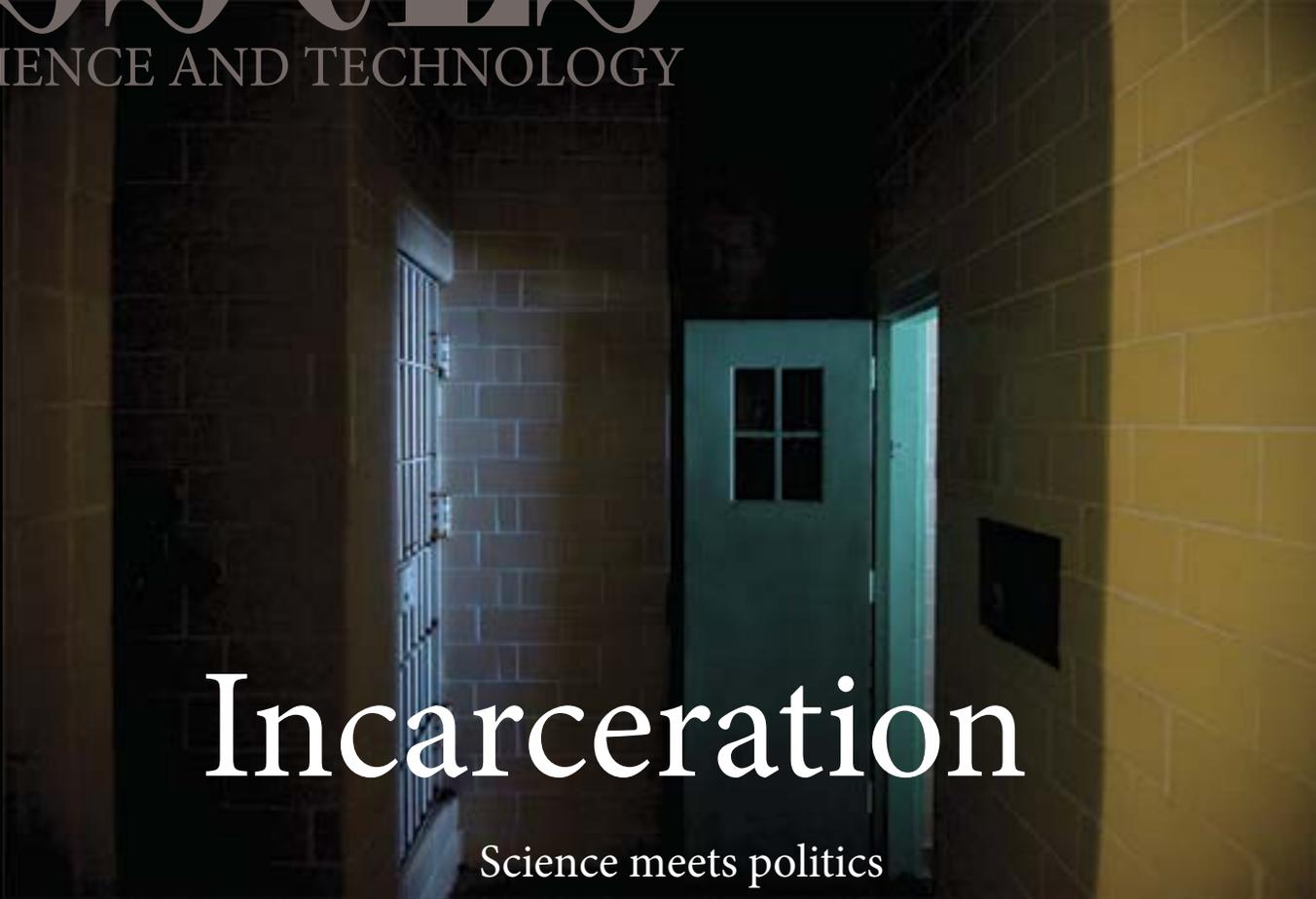


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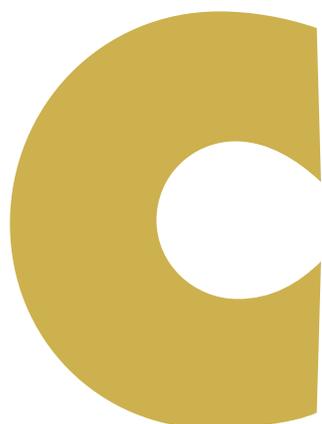
Practical bipartisanship



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Unwinding Mass Incarceration

More must be done to help the large number of people already in the criminal justice system successfully reenter society—or risk undermining support for reform.



Consensus is now emerging that the United States should move away from its heavy reliance on mass incarceration, which has ramped up over the past 40 years, ending in more people being locked in jails and prisons than ever before. A variety of policies have been offered that may well begin to reduce the nation's excessive incarceration. But even as these steps reverse some of the most egregious causes of the prison buildup, there is no insurance that this will unwind the overburden of incarceration for the generation of those already extensively involved with the criminal justice system.

This is the focus of our concern. In particular, we have been interested in identifying the challenges facing local jurisdictions (states and counties) that take up the charge to reduce their reliance on incarceration. Our views are informed by research and by experience in corrections in multiple jurisdictions. From this, we argue that unwinding mass incarceration will neither

be cheap nor easy, and to be done responsibly will require a new infrastructure of coordinated community-based facilities and services that can meet evidence-based incarceration needs while also ensuring public safety.

Much recent reform-oriented rhetoric portrays most prisoners as nonviolent drug offenders who pose little danger to their communities. The reality is that the majority of those in state prison are serving sentences for violent crimes. And offenders do not neatly sort themselves as “nonviolent” or “violent,” but have marbled offense histories that include some of both types of crimes. Drug dealing is often accompanied by firearm possession, and labeling individuals as nonviolent drug offenders may understate the seriousness of the crime. Further, three national decennial studies that examined the success rates of released prisoners from the 1980s, 1990s, and 2000s show a stubborn consistency in the high rates of re-arrest and re-incarceration after release. In each study, nearly two-thirds or higher were re-arrested within three years of release, and this figure has remained invariant to significant temporal changes in the economy, social mores, and the political landscape. In the current conversation, the widespread availability of criminal records is often pointed to as the scarlet letter that serves as a barrier to released prisoners, yet even in pre-Internet times when criminal history information was not so widely available, recidivism rates were as high as they are today.

The United States Sentencing Commission and a growing number of states have taken steps to reduce the disproportionate and ineffective sentences adopted during the excesses of the “war on drugs” at the end of the past century. The commission has applied some of these reforms retroactively, and in July 2015 President Barack Obama extended commutations to 46 federal prisoners whose prison terms would have been completed had they been arrested under the new regime. We applaud these steps. But there are many more incarcerated—2.2 million federal, state, and local prisoners. What would it take to unwind mass incarceration on a broader scale?

Any reform effort must sort out the dangerous from those who do not pose much risk to the community. As noted, this is easier said than done. One challenge is distinguishing between the addict who may have a high risk of recidivating for

low-level offenses (for example, probation violations for positive drug tests) and a released prisoner with a lower risk to recidivate but whose offenses have a greater potential for lethality. The dramatic reductions in criminal victimization over the past 20 years have led to substantial improvements in quality of life across the nation. These gains must be maintained and improved on, as some neighborhoods continue to suffer from high rates of homicide and chaos due to the threat of violence. This requires that policymakers carefully target how prison populations are reduced. We worry that if there is substantial failure in the form of a spike in crime, homelessness, or other social ill, there could be political blowback—familiar to all involved in criminal justice for more than a decade or two. An increase in crime could put the whole reform agenda at risk.

Criminal history trap

It is a general truism that policy problems cannot be solved simply by stopping the action that yielded the problem. This is the case for the environmental degradation caused by toxic waste—and it is the case in mass incarceration. Due to changes in public policies and practices in recent decades, millions of people in the United States have criminal convictions, arrests, citations, and detentions in their histories, and this is not easily undone, stopped, or reversed. (It is a particular frustration that existing data systems do not allow the calculation of reliable estimates of just how many are in each of these categories.) And, as it currently operates, the criminal justice system frequently bases decisions not only on current conduct, but on one's past criminal history. As a result, the likelihood of detention while a case is resolved and the degree of punishment depend upon the official record of past encounters with the criminal justice system. This system has logic, as there is a significant body of evidence that demonstrates that the greatest predictor of future crimes is one's past criminal history. At the same time, without additional policy action, any events that resulted from the overly punitive enforcement environment of the past will long influence future levels of incarceration, stymying efforts to achieve proportionality or parsimony, much less the broader goals of social justice and citizenship that are being increasingly expressed in various quarters.

Employers, too, have begun to depend on criminal records as

cheap and easy personnel screens. Often the decision is binary: application processes stop if there is the presence of a criminal history regardless on the nature of the specific offenses, the overall extent of criminal involvement, and how long ago it took place. Given the difficulty in interpreting criminal histories, the questionable accuracy of records in the county's disaggregated criminal justice records database systems, and the inconsistent and unreliable practices of the third-party companies that provide employers with criminal record information, employers can almost be forgiven for skirting Equal Employment Opportunity regulations and "ban the box" legislation that requires fair review of criminal offenses as they apply to the duties of a vacant position. The widespread use of criminal background checks has reduced the employment opportunities, particularly with larger companies with more robust human resource and legal departments. It is no surprise, then, that small employers are generally the ones who hire released prisoners, but at lower salaries, with fewer benefits, and in positions with less growth opportunity.

Even if the country begins to punish with more parsimony going forward, there will still be several generations of people with criminal records accumulated during the era of mass incarceration. Massachusetts has adopted a "sunset clause" to criminal histories revealed to potential employers at 10 years for felony convictions and five years for misdemeanors. (Convictions for homicide and some sex-related crimes are not subject to the provision.) Again, this is an important policy innovation, based on research that shows that the risk of committing another crime strongly decreases with age and with longer-term abstinence of criminal activity. But it leaves much more work to be done to regulate how information in private hands is used, and how the system itself bases decisions on prior criminal justice outcomes.

And we are concerned that regardless of whether someone's past punishment history was just or not, many of the individuals in the generations already deeply connected with the criminal justice system will fail without a substantial support system. Their health, educational, and employment-related deficits have been well documented in a number of reports, perhaps most notably by the Urban Institute. But there are also a number of lesser-known conditions that affect someone's prospects following release from prison.

Complications of everyday life

Our experience has taught us that it is not easy for former inmates to disentangle themselves from the system or to extricate themselves from the relationships that the system will be monitoring. Many of them resume relationships with individuals in communities with high crime rates whose actions attract police attention. Even for those with the resolve to change behavior, past relationships can haunt them well into the future. This might work through the predictable mechanism of being drawn to old friends and old behaviors. But sometimes it works in surprising ways. Offenders of domestic violence typically do not merit sympathy, but those in law enforcement and corrections bear witness to situations in which a woman's jealousy of her former abuser's new relationship, for example, will lead her to report a violation of a protective order that she may have initiated. And, like it or not, criminal justice agencies are then involved. Once this happens, participants with criminal records frequently end up incarcerated, incurring probation or parole violations, or detained awaiting resolution of new charges.

The level of chaos and social disorganization of the extended families of released prisoners can also pull them off a seemingly successful path. The following is just one case with which we are familiar. This released prisoner, after a successful internship with a construction company and placement in a heavy-equipment training class arranged by a mentor, disappeared for several weeks and did not respond to emails or messages. After a search by correctional staff and program administrators, he finally surfaced and indicated that a cousin had been killed in Florida and that he felt the need to leave immediately to attend to the needs of his family. His urgent response to his family situation, jeopardizing valuable opportunities that he had spent months developing, is one that is repeated by many released prisoners. The frequency of violent and premature deaths, family medical problems, home foreclosures, job losses, criminal involvement of other family members, and other financial and social setbacks are orders of magnitude greater than in middle-class communities. These demands entangle many released prisoners, retarding their own prospects for success.

These external family and relationship factors are not the primary barriers for so many released prisoners, however. Many of those deeply connected to the criminal justice system exhibit behaviors and personalities that both explain their criminal history and prove so hard to accommodate in the workplace and civil society. An individual's lack of impulse control that leads to an assault charge also raises legitimate questions to an employer about that person's ability to take orders from a supervisor and to provide good customer service on the job. Of all the factors

that drive recidivism, criminologists have identified poor "attitudes" and "orientation" as more predictive of failure than the availability of family support, employment, and housing, and as the factors in a person's life hardest to change. Poor decision-making skills can and do cascade from the trivial to tragic. In another case known to us, someone on work release stole candy from his employer, and then assaulted a fellow employee who he erroneously thought had "snitched" on him. The decision to steal candy and then to assault the coworker now has him sitting in jail, revoked from the program, having lost his job and income, facing new criminal charges, and awaiting a possible return to a federal penitentiary.

Some correctional systems have responded to this research by offering cognitive behavioral programming. Through a dissection of past decisions and role-playing scenarios involving criminal activity, participants learn how to slow down impulsive tendencies and to develop more reflective thinking processes. Evidence shows that cognitive behavioral programs are generally effective at reducing recidivism. That said, thinking processes are not easily changed, and program effects are usually adjustments rather than transformations, particularly for those with mental health conditions.

Indeed, inmates with mental health problems pose some especially thorny challenges for correctional systems. The nation has long incarcerated a disproportionate number of individuals with serious and persistent mental health issues, including personality disorders (such as narcissism and lack of empathy), depression, bipolar disorder, and schizophrenia. Post-traumatic stress disorder (PTSD) is also commonly noted. Practitioners often comment about how matter-of-factly prisoners may describe some aspects of their background: placement in dozens of foster homes, victimized by emotional and physical abuse; witnessing the stabbing and death of a family member or the abuse of a mother, the absence of a father in their lives due to incarceration. Many have no recognition that such an upbringing is abnormal compared with others in civil society. Of those with mental illness or PTSD, a large fraction have co-occurring substance abuse issues that bring them to the attention of law enforcement through criminal behaviors that range from public nuisance crimes to the most serious violent offenses.

It is generally recognized that the deinstitutionalization of state mental health hospitals in the 1970s without the concomitant development of community housing options, coupled with the simultaneous disappearance of sheltered workshops and day programs, has driven the mentally ill onto the streets, into poverty, and then—following a journey through a justice system that often treats them unfavorably—into jails. But the

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extent to which this social condition affects the prospects for reducing jail and prison populations receives little attention. Now that prison populations have stabilized, perhaps attention that previously concerned overcrowding can be shifted to this issue.

But from a larger social perspective, this issue should not be the responsibility of corrections administrators. No one believes that jails are the best place for providing mental health services. Several recent efforts are demonstrating alternatives. For example, the Stepping Up Initiative—run by a nationwide coalition of organizations from the mental

health, substance abuse prevention, legal, and law enforcement communities—uses a variety of tools to divert people with mental illness from jails and into treatment. Among its efforts, the initiative connects communities that are successfully reducing the number of people with mental illness in their jails with other communities seeking such change. In addition, a number of states and communities are developing mental health courts, often with support from the federal Bureau of Justice Assistance. More than 150 of these courts are now in operation, and more are being planned. Their goal is to divert appropriate individuals from incarceration and instead link them to employment, housing, treatment, and support services. Such efforts offer some hope that correctional leaders, policymakers, and public health advocates can join forces to develop better alternatives for mentally ill individuals when and if they can be managed safely and legally in the community.

Need for local infrastructure

No one enters prison directly from the community, yet upon release most return straight from the prison gates to their neighborhoods with little more than a token amount of money, a bus ticket, and a meshed bag with their few possessions. As courts and jails serve as the gateway to the correctional system, their role in preparing individuals for release has emerged as a promising model of reentry. After all, states fund prisons, but services are provided at the county level, and jails should

be in a much better position to be at the center of reentry for all released prisoners returning to communities. However, few jails have the infrastructure and “correctional” culture to perform this mission. Rather, the energy, talents, and resources of most local corrections systems are consumed by meeting the constitutional requirements of due process and humane care for a predominantly pre-trial population characterized by short stays and frequent movements. Some jail systems do not incarcerate sentenced individuals at all, or do so for a very short time. Layering on the additional responsibility of preparing and assisting individuals as they return to their communities will require different staff, programs, facilities, and, often underappreciated, the assumption of increased risk and liability for the actions of released offenders in settings beyond the full span of control of the agencies. This explains why relatively few local correctional systems have adopted pre-trial community-based supervision programs, despite clear evidence that this is a safe and cost-effective way to reduce jail populations.

Studies have found that among inmates in federal, state, and local correctional systems, many of them are over-classified—that is, they are occupying prison and jail beds at security levels higher than warranted—often due to the lack of available beds in community correctional facilities or community supervision programs. This is a costly policy problem. If one considers medium- and maximum-security prison cells (with their accompanying high staffing ratios) as scarce resources, good correctional practice would reserve these beds for the truly dangerous. Increasing the number of community correctional pre-release beds and programs would make all prisons safer for staff and inmates by providing incentives for inmates to comply with rules while in custody to have a greater chance of being “stepped down” to a community program. The operational benefits of these programs and beds for correctional institutions are as important as the reductions in recidivism rates found by some studies.

Even as the number of prisons vastly expanded in recent decades, however, there has been no proportional increase in community correction facilities. Many nonprofit and religious organizations that had operated such centers have lacked the financial capital required to bring them up to higher building codes and correctional accreditation standards, and some beds and facilities have been taken offline. Community correctional beds are not necessarily cheaper than institutional beds, and in tight budget times, state and local correctional agencies often cut these programs first. As a sign of other hurdles, in Rhode Island and California, unions have opposed community corrections for fear of reduced correctional officer jobs.

There is a paradox that the infrastructure of community correction beds is inadequate while many beds go unused on a daily basis due to poor coordination among the different correctional agencies that contract for them. Probably the primary reason for the low usage rates concerns the lack of incentives that state and local correctional agencies have to fully engage in a reentry mission rather than retreat to the traditional goals of running clean, safe, and orderly institutions that meet correctional and constitutional standards. Simply put, correctional agencies bear the costs and risks of reentry while the benefits accrue to individuals and the general community in ways that are hard to measure. Officials running correctional agencies understand that they will be held fully accountable for the misdeeds of inmates in their custody—especially those in highly publicized cases—and will bear no responsibility for those released and no longer on their watch. By definition, reentry extends the reach of corrections into the community and beyond the safe confines of the prison and jail walls. This is what makes it feel risky to many correctional practitioners. The hardening of the function of probation and parole to one of supervision and away from services speaks to this incentive problem, as well as to the high caseloads and chronic underinvestment in these community correctional agencies. As one possible step to make parole and probation both more effective and less burdensome for administrators of prisons and jails, policymakers can eliminate supervision requirements that interfere with released inmates' employment and other desired pro-social activities.

To their credit, some jurisdictions have invested in pre-release community correctional beds. The Federal Bureau of Prisons contracts with more than 200 facilities, and previous agency directors have made it a goal to release all federal prisoners through these programs. Similarly, the state correctional agencies in Ohio and Pennsylvania use an extensive network of halfway houses to transition soon-to-be released prisoners back into the community. One of us (LoBuglio) has spent 10 years managing a community-based pre-release center run by a local county correctional system. The Montgomery County Pre-Release Center (PRC) in Maryland has served over 18,000 individuals during its 43-year history, and uniquely this program has received and transitioned soon-to-be released inmates from all three levels of corrections: the local jail and the state and

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federal prisons.

In general, these community correctional residential facilities aim to help soon-to-be released inmates find and secure private-sector employment, reengage with their families, and develop individualized reentry plans that address treatment, housing, finances, and other areas of need. They also require the inmates to pay program fees, taxes, restitution, and child support orders. As most of these facilities are small and privately run by nonprofit or for-profit agencies, the scope

and quality of the services vary widely. Often, the contracting correctional agency and the facility itself will have restrictions on the type of offenders that can be served in these settings, and the offenders most commonly excluded include those convicted of violent, sex, firearm/ammunition, and gang-affiliated crimes. The contracting relationship also serves to de-couple the full responsibility for the success of the clients from the agency and residential facility.

Although there are a number of high-quality models, the Montgomery County Pre-Release Center enjoys several large advantages over most community-based residential correctional facilities. As part of the county's Department of Correction and Rehabilitation, the PRC is better resourced and has a smaller staff-to-client ratio, and employees are better trained, credentialed, and paid than their counterparts in private halfway houses. As a consequence, the PRC receives offenders of all types—from murderers who have served 25 years in the federal system to those serving months for petty theft—excluding only those who have had past escape convictions. Also, the integration with the county jail allows the PRC to sanction noncompliance with the rules more swiftly and proportionally than other programs, and to privilege those who fulfill the

program's requirements. Participants who test positive for drugs can immediately be suspended to the jail for a period of days, following which they return to the program. Conversely, those who find jobs are eligible for home visits. Using these tools, the program helps those in custody change their thinking and behavior to conform to behaviors that will help them succeed post-release. Finally, the advantages of this government-run model are that the goals and responsibilities of the larger correctional department and the pre-release center are fully aligned. The PRC improves the overall safe and orderly flow of inmates through the jail into the center, and its excellent performance metrics of high employment rates and low recidivism rates reflect well on the entire agency.

One truth is that providing high-quality correctional services is expensive. And we have documented several reasons that most agencies have underinvested in this program model. But history teaches that state and local governments respond to federal incentives. In 1994, the Truth-in-Sentencing legislation tied federal subsidies for corrections to sentencing reforms and helped spur a boom in the construction of prisons. Our experience convinces us that it makes sense to use the same strategy to incentivize states and localities interested in building PRC-type facilities.

The bottom line

As we have learned from our experiences—and as others have observed as well—unwinding mass incarceration requires much more than stopping current practices or reversing course by mass commutations and early release programs. Those most heavily involved in the criminal justice system will not succeed without the assistance of programs that provide services, discipline, and structure to guide their reintegration into society prior to and after their release. This will require a large, expensive, and politically challenging investment in an infrastructure of community-based correctional facilities throughout the country and especially near communities that receive a disproportionate share of returning prisoners. Ideally, the centers will be located near job and transportation centers, and be run by local correctional and public safety agencies.

No matter the policies introduced, the key to success will be strong leadership and public commitment. And we are partic-

ularly concerned that new policies be pragmatic, established in ways that account for the way their populations interact with other sectors of the criminal justice system as well as the larger social environment. Moving individuals from incarceration to community liberty without proper support and accountability can jeopardize not only the entire reform agenda, but also individuals and communities that are already fragile.

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