

BY MARC MAUER

SENTENCING REFORM

Amid Mass Incarcerations—Guarded Optimism

In a recent university lecture on the causes and consequences of mass incarceration, I analyzed the profound significance of these developments over the past decades yet I closed my address with my reasons for optimism due to a series of recent reforms. During the discussion period, the first speaker agreed with everything in my talk with one major exception: “You painted such a bleak picture of mass incarceration, how could you possibly be optimistic about the prospects for reform?”

A good question. As we analyze the admittedly modest openings for reform regarding mass incarceration, we are presented with a classic case of whether the glass is half empty or half full. I will leave it to the reader to draw his or her conclusion as I present what I believe is the relevant evidence to consider.

The Changing Climate for Criminal Justice Reform

The worldwide recession has clearly had major repercussions for all nations, but not without a few silver linings.

At least in the United States, the high cost of imprisonment, particularly at the state level, has caused policy makers to consider a host of reform strategies designed to stabilize or reduce the number of people in prison.

While the fiscal crisis is clearly driving much of this rethinking, it would be shortsighted to attribute this momentum entirely to one factor. The fiscal crisis came about at a time when other dynamics were also opening up the possibility of an altered political climate, one in which we can identify changes that in some respects had already been significant.

First, a significant decline in crime has prevailed across the country since the early 1990s. Although there is continued debate as to the causes of this decline, it is quite clear that the decline is real. This means both that the average person is less likely to be victimized today than 20 years ago, and that he or she also *feels* safer. The latter point is important in that much of what has been driving the politics of crime has been a “culture of fear,” one in which policy makers have exploited such

emotion for political gain. The declining saliency of crime as a political issue can be seen, for example, in the presidential campaigns of 2000 through 2008—three national elections in which issues of public safety received remarkably little attention. Thus, as crime becomes less of a political and emotional issue, there is less perceived advantage for political leaders to promote new iterations of “get tough” policies.

A second key factor is that we now have a generation of reforms and alternatives to incarceration that have been implemented in jurisdictions nationwide. These include community service programs, victim restitution, restorative justice, and a host of treatment and community supervision programs. Leaving aside for the moment the question of how effective one believes these initiatives have been, their broad presence is a clear statement that they have become virtually institutionalized in many court systems and communities. By doing so, they have contributed to changing the public climate in which “get tough” rhetoric is now less prevalent and where advocates for alternatives have modest room for dialogue.

As a result of these shifts in the public dialogue, and certainly preceding the fiscal crisis, we can identify a number of measures that indicate developing trends in policy and practice.

Reentry initiatives. First introduced in the late 1990s, the reentry concept has gained remarkable traction nationally. Virtually every major corrections system now has a commitment to reentry programming—some clearly more sophisticated than others—and the concept has bridged political divides as well. For example, the Second Chance Act reentry legislation passed by Congress in 2008 was championed by long-time US House liberals John Conyers and Danny Davis, along with one of the leading conservative voices in the US Senate, Sam Brownback. This diversity of support was mirrored in the public, with support ranging from civil rights organizations to evangelical Christian groups such as Prison Fellowship.

Evidence-based policy. Along with the growing commitment to effective programming in the reentry field is a renewed interest in examining “what works” in corrections. Thus, we see initiatives such as the Washington State Institute for Public Policy, an arm of the state legislature charged with evaluating program interventions in a range of areas, including public safety, and presenting information on cost-effectiveness to be used in policy deliberations. In addition, analyses by the Campbell Collaboration and publications supported by the US

Department of Justice have provided practitioners with much insight into effective crime reduction strategies.

Sentencing policy changes. Although there has yet to be a wholesale redirection of American sentencing policies, there have, in fact, been a series of reforms enacted to some of the more egregious “get tough” policies of recent decades. A number of states have scaled back mandatory sentencing policies, “school zone” drug laws, and sentencing enhancements such as “truth in sentencing.” Perhaps most notable among these was the reduction in the notorious differential in sentencing between crack and powder cocaine offenses in the federal court system enacted in 2010. While still falling short of the equalization policy advocated by a broad range of academic and practitioner experts, the change nevertheless marked a bipartisan acknowledgment of racial unfairness and excess in mandatory sentencing policy.

Current Reform: At the State Level

After nearly four decades of unprecedented expansion, including double-digit percentage increases in the 1980s, the population in state prisons appears to be stabilizing overall and even declining in a number of states. Over the past decade, notable changes include population declines in the range of 20 percent in New Jersey and New York, and lesser but notable declines in states such as Kansas and Michigan.

In each of these states the population reductions were achieved by a mix of front-end (sentencing reform) and back-end (parole release and revocation changes) reforms. And no adverse impacts on public safety were observed in any of these states. (Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States*, The Sentencing Project (2010).)

Sentencing reforms in a number of states have been significant, largely focused on mandatory sentencing policies for drug offenses. Among the high-profile changes has been New York’s scaling back of the Rockefeller Drug Laws, the policies adopted in 1973 that had served as the symbolic underpinnings of the punitive orientation of the drug war. Other notable changes have included reforms to Michigan’s “650 Lifer” law, under which sale of 650 grams of cocaine or heroin, even for a first offense, resulted in an automatic sentence of life without parole. And in California, the voter-endorsed Proposition 36 of 2000 ushered in a significant focus on treatment as an alternative to incarceration in cases of lower-level drug crimes.

More prominent in policy and practice changes in recent years have been efforts to enhance parole consideration for persons in prison and to alter the revocation process for those under community supervision. For example, during the budget crisis of 2009, governors and

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legislative bodies in a number of states enacted measures to advance parole consideration, generally for persons serving prison terms for nonviolent offenses. In Colorado and Kentucky, parole eligibility was moved up by 60 days, and even “tough on crime” states such as Louisiana, Mississippi, and Texas increased the amount of good-time credits that prisoners could earn toward release. (Nicole D. Porter, *The State of Sentencing 2009: Developments in Policy and Practice*, The Sentencing Project (2010).) Many of these changes were spurred on by the fiscal crisis, and were designed to produce a short-term impact on the prison population and related costs.

In the community setting, there is now increasing recognition of the significance of parole revocations as a source of growth in the prison system. Whereas revocations constituted about one-sixth of prison admissions in 1980, this share had doubled by 1998 to one-third. In fact, the 206,000 admissions for revocations by 1998 exceeded all admissions—182,000—of any kind in 1980, and have remained at high levels.

While many of these revocations result from new arrests or convictions, about half come about through technical violations of the conditions of parole. In this regard, the discretion invested in individual parole agents holds the potential for significant, and perhaps unwarranted, variation in how cases are handled. When a routine drug test picks up evidence of recent drug use, for example, one parole agent might order more frequent drug testing, a second might require that the parolee spend a weekend in jail, and a third might revoke parole, sending the individual back to prison for the remainder of the sentence.

In order to establish more guided use of discretion, as well as reducing unnecessary revocations to prison, more parole agencies are developing graduated sanctions for such cases, as well as providing greater oversight in decision making. In Kansas, for example, the department of corrections adopted evidence-based community supervision practices, new case management tools, and training in workforce development strategies for parole officers. As a result, the number of technical parole revocations declined by nearly half from 2005 to 2009.

Campaigns to address the collateral consequences of mass incarceration have had success as well. Reform of felony disenfranchisement policies—statutes that restrict voting rights for various categories of persons with felony convictions—has been accomplished in 21 states since 1997 (Nicole D. Porter, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997–2010*, The Sentencing Project (2010).) These changes have included repealing the ban on voting after completion of sentence in Maryland and New Mexico, extending voting rights to people on probation and/or parole in Connecticut and Rhode

Island, and eliminating the requirement of paying all financial obligations before voting rights can be restored in Washington State. In addition, advocates in a number of states have successfully challenged various collateral consequences of drug and sentencing policy, including the ban on receipt of welfare and food stamp benefits and unwarranted employment restrictions for persons with felony convictions, while others have led campaigns to enact state and local policies to ease employment restrictions on persons with criminal convictions.

While these various reforms don’t necessarily provide a sustained attack on the underpinnings of mass incarceration, they nonetheless represent a changed political environment on crime policy from the one that prevailed in the 1980s and early 1990s. Two decades ago, scholars and reformers devoted much of their energy to opposing the latest variation of proposed “get tough” policies. Such challenges remain, but now there is an opportunity to advance constructive initiatives in the public debate.

Current Reform: At the Federal Level

Assessing the state of reform at the federal level calls for a different lens. On the one hand, federal initiatives are less significant than those at the state level because only about 13 percent of prisoners are held in federal facilities. But developments at the federal level gain importance for other reasons. First, activity in Congress is by definition “national” in scope, and therefore often achieves high visibility. Federal decision making can also influence state policy development, particularly through financial incentives. For example, the \$30 billion 1994 federal crime bill included \$8 billion for state prison construction. Half of those funds were made conditional on a state’s adopting “truth in sentencing” legislation requiring that persons convicted of violent offenses (and sometimes additional categories) serve at least 85 percent of their sentences. Subsequently, about half the states adopted such policies; an analysis conducted by the General Accounting Office concluded that in 15 of 27 states the availability of federal funds was either a partial or key factor in adopting the policy. (U.S. Government Accountability Office, *Truth in Sentencing: Availability of Federal Grants Influenced Laws in Some States*, Report No. GGD-98-42 (1998).)

One barrier to reform on Capitol Hill is that the fiscal impact of corrections in the federal budget is quite modest in comparison to its significance at the state level. Nevertheless, the punitive climate at the federal level has moderated in recent years. As noted, support for reentry programming has gained bipartisan interest and funding. In contrast to the 1980s and 1990s, there have been few serious attempts to promote mandatory sentencing penalties; in fact, the sentencing disparity between crack

and powder cocaine has been substantially reduced. Growing bipartisan support as well has been evidenced for Senator Jim Webb's proposal to establish a commission to examine the criminal justice system and for the Youth PROMISE Act, a prevention initiative sponsored by long-time reformer, Rep. Bobby Scott.

Shortly after taking office in the Obama administration, Attorney General Eric Holder delivered a series of high-profile speeches highlighting his commitment to "smart on crime" policies emphasizing a more effective use of criminal justice resources.

Holder also hosted a major summit on indigent defense issues, the first of its kind in more than a decade, and appointed distinguished Harvard Law scholar Lawrence Tribe to oversee federal initiatives to advance indigent defense reform. Within the Department of Justice, Holder established a working group to review federal policy in the areas of sentencing and incarceration, which involved soliciting input from a broad range of stakeholders, although the findings were never publicly released.

end of the "tough on crime" era, it does appear that we have reached a point where the policies and political rhetoric emanating from that time now have considerably less salience. But stability of the prison population hardly represents a reversal of mass incarceration, and, in this regard, the current situation is rather sobering.

In order to fully appreciate the progress to date—a stabilizing of the prison population, along with impressive reductions in a handful of states—we need a sense of perspective on the scale of incarceration today. Imagine, for example, that somehow we were able to cut the prison population by half over the next decade, a political development that no rational analysis would view as feasible at the moment. Even if attainable, the United States would still have a rate of incarceration three to four times that of other industrialized nations.

In this regard, the unique position of the United States can be viewed as one in which the scale of punishment itself is completely out of proportion to that of other industrialized nations. While leading theorists

Offenders in this country are far more likely to go to prison—and for a longer time—than in other industrialized nations.

Despite these promising initiatives, reform in the federal court system is only as effective as the actions of federal prosecutors and prison officials. In this regard, there do not yet appear to be any significant changes in the scale of drug offense prosecutions, the key factor in the overextension of the federal system in recent decades. Also, criminal justice policy making has to compete for attention with the economy, foreign policy, and other major issues that inherently limit the range of initiatives that may be considered in any given legislative session.

Assessing the Current State of Reform: How Far Have We Come?

The momentum for criminal justice reform over the past decade has been substantial and its accomplishments have been demonstrated in a variety of ways. The "tough on crime" rhetoric has moderated substantially since its heyday in the 1980s and 1990s. It's been replaced by a climate of greater receptivity to policies that are "smart on crime" or "evidence-based," along with bipartisan political interest in concepts such as reentry and justice reinvestment.

Reform efforts have moved beyond the discussion stage as well. Prison growth throughout the first decade of the twenty-first century moderated substantially, and by 2008 the population in state prisons had essentially stabilized. While it would be premature to declare the

(DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY*, Univ. of Chicago Press (2001); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE*, (Oxford Univ. Press, 2005); LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (Duke Univ. Press, 2009)) in recent years have attempted to provide explanations for this outlier status, fundamentally we can see that the scale of punishment itself is unique. As virtually the only industrialized nation that maintains the death penalty (Japan employs it as well, but in modest numbers), the top point of the punishment scale is thus set at a far higher level than in comparable nations. Since most punishment policies and practices are proportional—that is, murderers are punished more severely than robbers, who are punished more harshly than burglars, etc.—then employing death as the ultimate sanction inevitably raises the scale of punishment across the board.

Comparative data on sentence lengths across nations is relatively limited, but a study of US sentencing practices and those of seven other industrialized nations documents that offenders in the United States are both more likely to be sentenced to prison and for longer periods of time than their counterparts in other nations. In a review conducted for the Bureau of Justice Statistics, leading

criminologists concluded that for the crimes of burglary and robbery, defendants in the United States are far more likely to receive prison sentences and serve much more time in prison upon conviction than are like defendants in the other nations (with the exception of Sweden in some periods). For burglary, persons sentenced to prison served on average two to four times as long as persons sentenced in Scotland, Sweden, or England and Wales (David P. Farrington, Patrick A. Langan, & Michael Tonry, *Cross-National Studies in Crime and Justice*, Bureau of Just. Stat., Office of Just. Programs, U.S. Dep't of Just. ix-xii (2004).) Thus, the scale of punishment is a function not only of how many people are sent to prison, but how long they remain there.

An examination of the reforms implemented to date is sobering as well, and indicates that despite the best efforts of practitioners and advocacy organizations, there are inherent limitations to what has been accomplished.

The fiscal crisis as a driving force is problematic. As we have seen, a major driving force of the reform movement of recent years has been the fiscal constraints imposed on state budgets, and the consequent need to reduce corrections costs. That factor, though, represents a double-edged sword. Just as money for prisons has become tight, so too has it for services such as substance abuse and mental health treatment that might otherwise be employed to divert people from incarceration. In Kansas, for example, where a model parole and reentry program had been established, the fiscal crisis resulted in a cut of more than half the \$12.6 million budget for treatment and support services between 2008 and 2010 (Rick Montgomery, *Kansas' model parole program collapses with state budget cuts*, KANSAS CITY STAR (April 3, 2010), available at <http://www.kansascity.com/2010/04/03/1855064/kansas-model-parole-program-collapses.html>.) Further, while it is always risky to predict economic trends, it is unlikely that the fiscal crisis will continue unabated; therefore, the pressure to reduce prison costs may wane over time.

“Back end” release valve practices are inherently limited. A number of states have addressed their prison problems by moving up parole consideration for certain categories of prisoners by 60 or 90 days. Such policies may relieve population pressures in the short run, but unless permanently enacted will only result in a return to “normal” once the crisis period is over. These policies also come with a built-in political liability. To the extent that such policies are perceived as permitting “early” release from prison, any subsequent offense committed by a released prisoner within the 60- or 90-day window in which he or she would have otherwise been incarcerated can be seen as a crime that could have been prevented. In this regard, it makes little difference that there is no criminological literature that supports any additional deterrent

or rehabilitative benefit of an extra two or three months in prison. Rather, the “common sense” observation that such a crime could have been prevented is the one that is likely to prevail in the media and political climate.

The reentry concept has not translated to sentencing policy to date. In the initial development of the reentry framework, many proponents articulated the potential of a successful reentry movement to ultimately influence sentencing policy as well. Essentially, the set of issues posed by reentry programming—focusing on offender needs and services—were equally relevant as sentencing considerations. But while the reentry concept has made great strides in a relatively short time, it would be difficult to make the case that its basic premises have been incorporated into a changed environment regarding sentencing policy and practice. Without such a transition, prison remains the default sentencing option in far too many cases.

Prison population impact of reforms is limited due to a focus on lower-level cases. As noted above, many of the recent initiatives for diversion or sentence reduction have focused on less serious offenses. This is understandable for political reasons, as well as representing a better use of criminal justice resources. But while such changes can produce reduced need for prison space, an exclusive focus on just these categories risks overlooking a major source of prison growth, that of longer-term prisoners. The substantial increase in numbers of prisoners serving life terms—one of every 11 nationally—along with declining prospects for release of these persons means that any diversionary impact at the lower scale of offense severity risks being eroded by “three strikes” and similar sentencing policies at the higher end of the scale.

Reforms have generally not led to improved conditions in prison. As a result of litigation efforts beginning in the 1960s, conditions in the nation’s prisons improved considerably for a period of several decades. This included reductions in violence in many institutions, along with improvements in access to health care, education, and other rehabilitative services. This movement, though, was dealt a major blow by congressional passage of the Prison Litigation Reform Act in 1996, which placed restrictions on the types of cases that could be brought before the courts and on attorney fees. As a result, the scale of litigation has been curtailed since that time, and efforts to revisit the legislation in Congress have not advanced. In addition, as prison populations continued to rise while state budgets declined, it became very difficult to maintain even the relatively modest level of programming and services that was the norm in most prison systems.

Obstacles to Reform

In addition to the limitations of current reform efforts, a variety of structural hurdles serve to perpetuate the state

of mass incarceration. These include both issues of the political and cultural climate on issues of crime and punishment, as well as a host of harsh sentencing policies that are very difficult to roll back.

Despite the reform momentum documented here, the “tough on crime” political environment still remains all too prevalent. Somewhat bizarrely, political leaders are still afraid of being labeled as “soft on crime,” as if nearly four decades of record prison expansion were not a sufficient statement of commitment to punishment.

Resistance to change becomes more understandable if we examine traditional political considerations. While a strategy to end mass incarceration holds the promise of producing better public safety outcomes, in the minds of many it is perceived as merely a “prisoner rights” program. With framing like that, it becomes quite difficult to gain broad support for reform, outside a handful of liberal enclaves.

This is perhaps most prominently observed among political leaders. One of the reasons why Sen. Webb’s criminal justice commission proposal has gained such widespread support in the advocacy community is its sheer uniqueness. While there have been some outspoken advocates for reform on Capitol Hill, these have been almost exclusively black Democrats in the House. Until Sen. Webb began to speak on prison issues, the last time a white senator had been as outspoken on these issues was in the 1990s, when Sen. Paul Simon of Illinois frequently highlighted the outlier position of the United States in its incarceration policies.

Institutionalized resistance to reform poses significant challenges as well. A corrections network that now employs some half-million workers is directly threatened by any policies that might hold the potential of significant reductions in prison populations and potential institutional closings. Particularly in the rural towns in which prisons are increasingly constructed, prisons have come to be seen as a key source of economic development (although research findings generally do not support this contention). In one particularly bizarre consequence of these developments, an April 13, 2010, editorial in West Virginia’s *Charleston Daily Mail*, titled “Prisons do provide recession-proof jobs,” praised the practice of mountain-top mining because it flattened the land to make possible a construction site for a new federal prison. Posing a challenge to environmentalists, the editorial concluded, “Those who oppose all mountaintop mining might want to explain how they would reduce unemployment and poverty in Southern West Virginia.”

Because of local resistance to these purported economic benefits, even in cases such as the 20 percent prison population reduction in New York State since 1999, there has not been a commensurate reduction in the number

of penal institutions. As a result, the cost savings produced through population reductions are considerably less than might otherwise be the case. And in some cases, with California being the most prominent example, the correctional officers’ union has become a major political powerhouse in the state, often being influential in deciding statewide elections, as well as providing support for punitive measures such as “three strikes and you’re out” that produce higher prison populations.

Institutionalization of mass incarceration is aided not solely by economic interests, but through inertia as well. As mass incarceration has become the norm in American society, it becomes increasingly difficult to remember or conceive of a time when the scale of imprisonment was dramatically lower. One way in which we can see how this comes about is in the area of federal sentencing. Since the implementation of the federal sentencing guidelines in 1987, and increasingly overlaid with mandatory sentencing penalties required by Congress, federal sentencing practices have become extremely harsh and rigid in their application. In comparison with the sentencing guidelines systems used in about 20 of the states, the federal system was by far the most restrictive in the limitations it placed on judges’ ability to consider personal characteristics of the defendant—such as substance abuse or single parenthood—at the time of sentencing. Many federal judges expressed dismay at the range of restrictions and the manifest injustice these produced in many cases.

Yet once the US Supreme Court granted judges a considerably broader range of discretion through a series of decisions culminating with *U.S. v. Booker*, 543 U.S. 220 (2005), judicial sentencing behavior has not changed markedly. As measured by departures from the sentencing guidelines grid, one might have expected that there would be a substantial increase in downward departures from the grid if judges perceived that the presumptive sentences for a given set of offense seriousness and offender criminal history were frequently too high. In fact, such departures have increased, but only modestly. In FY 2003, prior to the *Blakely* decision that preceded *Booker*, nongovernment sponsored departures occurred in 7.5 percent of all cases. (*Blakely v. Washington*, 542 U.S. 296 (2004).) In FY 2006, the first full year after *Booker*, such departures rose to 12.1 percent, and by FY 2009 had increased modestly to 15.9 percent (Douglas A. Berman & Paul J. Hofer, *A Look at Booker at Five*, FED. SENTENCING REPORTER, 77-80 (2009).)

Several factors are likely to explain this relatively modest change. Foremost among these is the fact that most sitting federal judges today have only been on the bench since the adoption of the sentencing guidelines. Therefore, they have not necessarily had any direct ex-

perience with a more discretionary federal sentencing system and are likely to have become comfortable with the relative certainty that comes with a highly structured grid system. This is not to suggest that all federal judges impose sentencing this way (and indeed, quite a few have used their enhanced discretion to fashion thoughtful, individualized sentences), or that they do not take sentencing seriously, but normal human behavioral patterns would suggest that such responses are not unusual.

Finally, in many respects the driving force of mass incarceration is the racial dynamic of criminal justice policy. This was highlighted in 1995 when Bill Clinton (hardly an advocate of criminal justice reform while in office) famously asked “every white person here and in America to take a moment to think how he or she would feel if one in three white men were in similar circumstances,” (President William J. Clinton, Address to the Liz Sutherland Carpenter Distinguished Lectureship in the Humanities and Sciences, Erwin Center, University of Texas at Austin, (1995) *available at* <http://www.afn.org/~dks/race/clinton-e6.html>), in response to a report documenting that one in three young black men was under criminal justice supervision. Regardless of whether one sees the extreme incarceration rate of African Americans as a result of conscious racism or individual pathology or a byproduct of socioeconomic policies, it is surely inescapable that both the image and reality of the criminal justice system is one that is largely viewed as a “black [and increasingly brown] problem.”

In this regard, navigating the political waters for reform involves strategic decision making regarding how to frame the racial argument. Law professor Michelle Alexander, for example, describes the current regime as “the new Jim Crow” in her recent book by the same name—*The New Jim Crow, Mass Incarceration in the Age of Colorblindness* (The New Press, 2010)—and sees a clear continuum from the days of slavery to today. Others, most notably President Obama, attempt to steer clear of making an outright racial argument in reform strategies. They view such tactics as being unlikely to gain majority support for change and instead argue that a strategy of “a rising tide lifts all boats” will be more likely to succeed politically and will largely benefit communities of color.

Strategies for Reform

Perhaps nowhere in the realm of social policy is there such a broad consensus among scholars and practitioners than in the area of public safety as to what should be done to promote better outcomes yet where there has been less implementation. Despite a widespread critique of mass incarceration and virtually no credible defense of its policies, reforms have been exceedingly modest and

slow in coming, given the scale of the problem. Thus, while we still have much to learn about prevention, treatment, and reentry, the key dilemma we face is not so much one of figuring out “what works,” but rather how to transform the political environment to one that is more receptive to reform.

The challenge for reformers is how to provide policy makers with a comfort level at which they can enact the reforms that our policy prescriptions tell them will produce better outcomes than does current policy. Building on the analysis described in this article, we can assess the elements of political strategies and the messages and messengers that will be necessary to achieve a rollback of mass incarceration. Further, we need to assess how to reframe the debate on public safety so that it becomes one that is not focused on incarceration, but rather a more holistic view of how to promote safe communities.

As with any other assessment of social policy reform, there is the question of whether significant change will come from grassroots movements or actions taken by decision makers. Social history generally shows us that political leaders do not lead with social reform; instead they respond to pressure from below. In recent US history, this is clear from assessing the impact of the antiwar and civil rights movements of the 1960s and how they shaped the national political discussion.

In recent years, we can see evidence of both elite and grassroots initiatives in criminal justice reform. The state prison population reductions of the past decade have in large part come about through conscious actions by policy makers and practitioners. In Kansas and Michigan, for example, corrections leaders developed policy initiatives to implement a justice reinvestment strategy that produced significant reductions in the prison population in a relatively short period of time. These included enhancing parole and community supervision services to make reentry a more constructive period, as well as providing options and oversight of the parole revocation process in order to reduce the number of technical violators returned to prison.

Elite initiatives, of course, are often products of social movements, and many of the recent reforms have been a reflection of the changing climate for corrections reform. We can see this particularly in New York State, which led the nation with a 20 percent reduction in its prison population from 1999 to 2009. Virtually this entire decline involved reducing the number of drug offenders in prison, which was a function of the scaling back of the Rockefeller Drug Laws as well as a variety of merit time programs designed to shorten prison stays. These changes were clearly made possible by the decades-long grassroots advocacy around the drug laws, with campaigns such as “Drop the Rock” building on grassroots activism while

also obtaining high-level editorial and political support.

Although encouraging, grassroots movements for criminal justice reform in much of the country are relatively modest. Although notable campaigns have developed in New York, California, and elsewhere, these have often been more the exception to the rule. In most areas of the country, where a grassroots reform movement exists, it consists of a relative handful of organizations with limited resources.

To the extent that reforms have been achieved, we can learn something about how the issues have been addressed. In particular, there is the need to consider the role of the racial dynamics of mass incarceration. Recent public opinion research demonstrates the continuing significance of racial animus as a driving force. In an examination of three competing models to test public support for punitiveness, two criminologists concluded that “a prominent reason for the American public’s punitiveness—including the embrace of mass imprisonment and the death penalty—is the belief that those disproportionately subject to these harsh sanctions are people they do not like: African-American offenders.” (James D. Unnever & Francis T. Cullen, *The Social Sources of Americans’ Punitiveness: A Test of Three Competing Models*, 48 (No. 1) *CRIMINOLOGY*, 99-129, 119 (2010).)

Yet some observers argue that while the racial effects of imprisonment are dramatic, a reform strategy should avoid talking about race since it often proves divisive and incapable of gaining majority support for reform. Various polling and focus group projects have concluded that this is the case as well, particularly for white audiences.

While we should not discount the challenges framed by these findings, it appears self-defeating to avoid discussion of race in advocating for reform. Should the developing civil rights movement of the 1950s have avoided discussing racism out of concern that southern whites would be unreceptive to that message? The answer is obvious, and merely tells us that yes, these issues are challenging, but also that they can be addressed in a sustained and effective manner when discussed transparently.

Indeed, we have seen encouraging progress championed by criminal justice reform movements that have prioritized racial dynamics, particularly in the realm of drug policy. At the state level, the New York Rockefeller Drug Laws reform movement successfully highlighted the fact that 90 percent of drug offenders in prison were black or Latino, while at the national level, the crack cocaine reform movement argued that the law’s discriminatory impact was evidenced by the fact that 80 percent of the people affected were African American. But critically, in both these and other campaigns, the message of racial bias was also accompanied by a strong argument that the prevailing drug policies were counterproductive,

in addition to any concerns about racial disparity. That is, incarcerating someone for five years for possessing as little as five grams of crack cocaine was financially exorbitant and had virtually no effect on drug markets. The success of these campaigns can be seen in how conservative political support was won over, even along lines of racial justice. In Congress, for example, key Republicans such as Sen. Jeff Sessions of Alabama noted that the vote to reduce penalties for crack cocaine brought greater “fairness” to the sentencing process.

Similar strategies, and successes, can be seen in movements to address the collateral consequences of mass imprisonment, particularly in regard to felony disenfranchisement. Often these campaigns have been spearheaded by black and Latino legislators, with broad community support. But here, too, the arguments advanced for reform combined racial justice with issues of public safety and democracy. Essentially, disenfranchisement policies are discriminatory in effect and exacerbate unwarranted disparities in the court system, but they also are counterproductive for public safety. That is, persons who maintain positive connections with their communities, such as electoral participation, will be less likely to engage in antisocial behavior.

While addressing the racial underpinnings of criminal justice policy is critical, equally important is the means by which reform messages are conveyed to the public. One aspect of this regards the public perception of the spokespersons for reform. In order to counter the irrational, but still prevalent, mythology of liberals being “soft on crime,” it has been critical to have a range of diverse voices presenting reform messages. So, for example, leaders of the evangelical Justice Fellowship organization have been influential in opening doors on Capitol Hill for discussions with conservative Republicans. And at least part of the success of Senator Jim Webb in promoting a national criminal justice commission has been due to his background as a Republican-turned-Democrat and former military leader.

Other key messengers have included persons directly impacted by policies of mass incarceration. Just as the Willie Horton story framed a message for many about an out-of-control prison system, so too do stories like those of Kemba Smith convey an understanding about the extremes of American sentencing policy. Smith, raised in a middle-class African-American home, became the college girlfriend of a major drug dealer. Following his death she was charged as if she had been head of his entire drug conspiracy. Despite not having any prior convictions, Kemba Smith received a 24-year prison sentence, a result of federal mandatory sentencing penalties. After a national campaign highlighted her circumstances, she ultimately received a presidential commutation of

her sentence after serving more than six years in prison.

Finally, in order to affect the public climate on consideration of public safety issues, it's also necessary to establish a "facts on the ground" environment of reform. Just as massive prison construction became the prevailing criminal justice image from the 1970s through the 1990s, so too can sentencing reforms and prison population reductions become the counter-message now. Following the heating up of the fiscal crisis in 2008, scores of stories in major media reported on efforts by state governments to close budget gaps by enacting sentencing and parole reforms. Along with this a variety of reputable national organizations have disseminated policy overviews of state sentencing and corrections reform initiatives, sending a message to both policy makers and the public that reforms are both practical and politically feasible. While not without controversy, these efforts have nonetheless brought home the message that prisons are indeed expensive and also compete with funding for higher education and other vital services.

Broader Framework for Public Safety Required

While broad sentencing, parole, and drug policy reform is clearly critical to addressing mass incarceration, even those far-reaching goals are in many ways too modest, and fail to address the driving forces that have produced the current situation. The fundamental problem we face is not solely that we have become more punitive in our justice system, though that is clearly the case, but that we have come to rely on the criminal justice system as our primary means of addressing public safety concerns in low-income communities.

To realize why this is such a flawed strategy, consider the elements that produce neighborhoods that we think of as "safe." Are these the communities with the greatest police presence, the harshest jail conditions, or where mandatory sentences are employed most often? Of course not. Instead, these "good" neighborhoods are the ones with above-average family incomes, high-quality schools, good medical care, and many other features of middle-class America. Therefore, it is not the deterrent effect of the criminal justice system that causes young people to refrain from involvement in crime, but rather the positive rewards that derive from taking advantage of opportunity.

Thus, if we want to come to rely less on the criminal justice system as a means of producing public safety, we need to level the playing field so that disadvantaged communities will have increased access to the rewards already enjoyed by many Americans. This is not the place to lay out the particulars of what that might look like, and each of us may have our own vision of the components of such a social policy, but clearly key elements

of such a transformation include a focus on education, employment, housing, and health care. And before dismissing any such focus as overly utopian, consider the dramatic inequalities of wealth and income produced since the 1980s and how far a more equitable distribution of resources might have gone toward producing a more level playing field.

While a strategy for moving in such a direction is clearly one that is not the sole province of the criminal justice reform community, leaders in the field can play a key role. Within the criminal justice system, a leveling of the playing field needs to incorporate a shift in resources, particularly in the areas of indigent defense and alternatives to incarceration. In far too many parts of the country, the day-to-day reality of indigent defense still means that court hearings and sentencings resemble assembly-line justice rather than an individualized assessment of case characteristics and possible responses. In creating sentencing options, particularly for low-income defendants, the experience of drug courts and other initiatives demonstrates that such mechanisms are capable of gaining considerable institutional and public support.

On a larger scale, the developing concept of justice reinvestment holds the potential for informing a more rational approach to public safety. To date, most of the justice reinvestment movement has focused on shifting resources within the criminal justice system, particularly reducing prison funding while increasing resources for community-based supervision and services. This has been an encouraging development, but the long-term potential of this approach is to stimulate broader public safety strategies, with reduced reliance on the formal criminal justice system.

One way to conceptualize such a process is through the imagery of the "million dollar block." (Eric Cadora et al., *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, in *PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES* (Urban Institute Press, Jeremy Travis and Michelle Waul, eds., 2003).) These are urban neighborhoods, first identified in Brooklyn, New York, where taxpayers annually spend \$1 million to incarcerate people just from that single block. Therefore, these are not cases where funds for public safety do not exist. Clearly, they do, and in great abundance, but they are heavily weighted toward incarceration. The challenge is to begin to reallocate these resources into more proactive strategies for promoting public safety. Imagine, for example, if we were to reduce sentence lengths by just 20 percent, so that a five-year sentence for someone from those neighborhoods became a four-year prison term. This would have a negligible im-

pact on recidivism rates and public safety, but would theoretically free up 20 percent of the neighborhood funds, or \$200,000 a year for public safety. Those are funds that could be used for community policing, preschool education, substance abuse treatment, or a range of other services that might very well do more to promote public safety than excessive incarceration.

The challenge here is how to effect such a transfer of resources. Within most legislative bodies, this is not a simple process, since resources tend to be allocated by

area of social policy (education, health care, corrections, etc.) rather than by structures such as “neighborhood public safety.” So we need to either develop an alternative framework for making such decisions or create a ground-up movement to call for more proactive investments and thereby shift the political calculation of resource allocation. Neither of these are simple undertakings, but if we hope to challenge mass incarceration we need to become creative in our thinking about how to make those changes possible. ■