Dismantling Mass Incarceration

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Michael Tonry, *Making American Sentencing Just, Humane, and Effective,* 46 **Crime & Justice: A Review of Research** (forthcoming 2017), available at SSRN.

The US incarcerates a greater percentage of its people than any other country in the world—by a wide margin. Even though we have heard the statistics enough to have become inured, they still manage to shock us: more than 2 million people are behind bars and more than 5 million more live under the daily supervision of the criminal justice (on parole, probation, etc.). There have been some promising events in recent years: bi-partisan Congressional support for sentencing reform, though still no enacted legislation; state voter referendums such as California's Proposition 47 that roll back sentences for low-level non-violent offenses; former Attorney General Holder's directives on federal charging; both the liberal Soros Foundation and the conservative Koch Industries are funding sentencing reform initiatives.

But still, as Michael Tonry argues in his detailed and sobering policy article, these reforms are mere "nibbles at the edges" of mass incarceration and will not make a significant difference in our outrageously high prison rates. While prison rates have dipped, much of that decline is not because of meaningful sentencing reform, but rather because of the U.S. Supreme Court decision in *Brown v. Plata* requiring California to release 35,000 prisoners to remedy overcrowding.

Tonry argues that meaningful change in incarceration numbers requires a rollback of the policies that got us there. Furthermore, to muster the political will to make this change, reformers should base their arguments in morality, rather than in efficiency and economics. It is unjust to incarcerate people for lengthy periods of time that are wildly disproportionate to any harm they caused or are likely to cause. Tonry notes

> No one should be surprised that normative arguments trump instrumental ones. The proposition that punishments should be harsher because that will better acknowledge victims' suffering is a normative claim about what is due victims. The proposition that violent or repeat offenders have forfeited any rights to have their interest considered is a normative claim about appropriate consequences of wrongful behavior. The proposition that laws that punish minor offenses disproportionately severely are unjustifiable is a normative claim about unjust punishment. The proposition that laws that punish minority offenders unduly severely are unjustifiable is a normative claim about social justice. The proposition that no punishment should be so severe that it ignores possibilities of redemption is a normative claim about human dignity. The proposition that just sentencing systems must be individualized to take account of the details of offenses and the characteristics and culpability of individual offenders is a normative claim about punitive justice. (P. 13.)

Instrumentalist arguments don't work. "Given a choice between doing what seems morally right and doing something else, most people prefer the morally satisfying choice, even if it cost more." (P. 13.) And normative claims can make a difference. Tonry cites examples where normative (moral) claims trumped, for example, the research of Lawrence Bobo and Victor Thompson that whites' support for federal law that punished crack cocaine offenses much more severely than for powder cocaine offenses "plummeted when they learned about its disproportionate effects on black offenders." (P. 13.) (But see my caveat below.)

Tonry reviews the well documented evidence that longer prison sentences do not create a significant deterrence effect. Indeed, there is evidence that imprisonment is criminogenic. Long prison sentences cannot be justified on

incapacitation grounds, either. For some kinds of offending, incarceration merely opens up an opportunity for someone else. This "replacement effect" is particularly true for drug crimes, where economic disadvantages and the risk-taking attitudes of youth result in a steady stream of would-be entrepreneurs. Furthermore, most crime is committed by young people and most people age-out of criminal offending. With draconian sentencing laws, people stay in prison long past the date at which they pose a risk of reoffending. Finally, long prison sentences cannot be justified because "rehabilitation doesn't work." Tonry notes that recent research demonstrates that "well-designed, well-targeted, well-resourced, and well-run treatment programs can modestly reduce later offending." (P. 22.)

Tonry provides a step-by-step guide for the changes in sentencing that are required to make a meaningful change in incarceration *going forward*. He then describes what is necessary to "unwind" current levels of incarceration. He sets as his prison population goal: "the total national rate for federal and state prisons and local jails should be reduced by 2020 to the mid-1980s level of approximately 350 per 100,000 and by 2030 to the 1973 rate of 160 per 100,000." (P. 24.)

To change incarceration rates going forward, Tonry argues for changes in policing and prosecutor charging decisions and for legislative changes in sentencing.

Prosecutors and police should create systems for informal disposition and/or treatment options for low-level offenses. Furthermore, they should create structured programs for many criminal cases that allow defendants to avoid incarceration by paying fines, participate in mediation, make restitution, or perform community service.

Legislatures should repeal "[a]ll three-strikes, mandatory minimum sentence, life without parole, truth-in-sentencing, and comparable laws." (P. 37.) If any of these laws are retained, they should be narrowed in scope and severity. Life without parole (LWOP), if retained, should only be applied in death penalty cases. Also on the chopping block should be repeat offender statutes that sweep in a broad range of priors, including non-violent ones, and result in extraordinary sentences of 10, 20, or more years of *additional* imprisonment. Truth in sentencing laws that require offenders to complete 85% of their sentence before they are eligible for parole should be repealed. Lengthy sentences are not justifiable both because they are inhumane and wildly disproportionate to the harms committed, but also because people change over time. Not only do they "age-out" of certain kinds of offending, notably violent offending, but "cognitive skills, self-control, drug dependence, and employment skills are `dynamic.' They can be changed…." (P. 34.) Young people mature. People reinvent themselves.

In addition to getting rid of these draconian sentencing laws, legislatures should : 1) create state sentencing commissions charged with creating presumptive sentencing guidelines; 2) create state parole boards and parole guidelines; 3) sub-categorize offenses according to their seriousness and create sanctions that reflect these gradations; 4) provide clear criteria for the imposition of sentences that are more severe than are authorized for ordinary cases and require, per the U.S. Supreme Court's holding in *Blakely v. Washington*, that the extraordinary conduct that justifies the sentence be proven beyond a reasonable doubt; 5) and defendants should be able to appeal a sentence on the basis that it is disproportionately severe or unreasonable.

Tonry additionally argues that statutory provisions should limit the weight given to prior criminal history in determining sentences. (Tonry notes that Scandinavian countries, for example, consider prior criminal history irrelevant to imposing a sentence for most crimes.) Contrary to popular understanding, most of those sent to prison for the first time do not reoffend. Furthermore, a significant portion of those who do reoffend are guilty of property and drug crimes. These offenders are often troubled, mentally ill or drug dependent. Prior criminal histories are one of the significant drivers of racial disparity, so removing these enhancers will likely to have a positive impact on racial fairness.

To make a meaningful dent in current incarceration rates will require large scale interventions. Tonry notes that other countries have employed amnesties or mass pardons, but he rejects this approach as unlikely to be politically viable in the US. Small scale versions, based on case-by-case reviews are unlikely to have a significant effect. He concludes that what is required is that parole boards or specially created administrative agencies should be given the authority to

consider the need for the continuing confinement after five years for all prisoners serving fixed terms longer than five years, or indeterminate terms, who are under the age of 35 years, and that the same review should take place after three years of imprisonment for all prisoners 35 years of age or older.

Unwinding mass incarceration will take a coordinated effort with simultaneous moves on several fronts. Tonry's article sets out a significant part of what is required and has the added virtue of presenting a concrete, well-supported legislative blue print. It is enormously clear and helpful.

In addition, Tonry's urging that supporters base their claims in moral values rather than in utility arguments strikes me as exactly right. Legislatures and the general public have been unmoved by the enormous cost of the prison buildup. Most of the support for the legislation that created mass incarceration has been what Tonry refers to as "pre-rational," that is, based on emotion and believes in narratives that had little basis in fact. Narratives that illustrate the unfairness and the harms of mass incarceration or that tell redemptive stories of changed lives are likely to be more effective. Tonry's message echoes that of the National Academy of Science 2014 report which concludes with a plea for a return to normative principles of proportionality, parsimony, social justice, and citizenship. (Tonry served on the Committee that authored the Report.)

And this is where I hit the one limitation of Tonry's otherwise wonderful article. A great deal of research demonstrates that the politics of race and implicit race bias, particularly against African Americans, played a significant role in the buildup of what Beth Richie (2012) refers to as "prison nation" (see also Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness). (There is a rich body of scholarship, both legal and scientific, on the importance of racial bias – both overt and implicit – to outcomes in policing, judging, conviction, sentencing, re-entry, and prisoner treatment.) A recent Marquette Law School poll underscores the continuing importance of racial bias as a major impediment to reform (O'Hear & Wheelock 2016). The poll found that racial attitudes were a significant predictor of respondents' belief in the value of rehabilitation. Those who believed that African-Americans are held back by the historical legacy of slavery and discrimination were much more likely to agree with statements endorsing rehabilitation for criminal offenders than were respondents who agreed with statements such as –

It's really a matter of some people not trying hard enough; if African-Americans would only try harder they could be just as well off as whites (O'Hear & Wheelock at 50).

In addition, while Republicans were more skeptical of rehabilitation when compared to Democrats, this difference fell away when racial attitudes were statistically controlled for. *In other words, what drove the political party affiliation difference were racial attitudes.* When racial attitudes were controlled for, Republican affiliation became a *positive* predictor for support for rehabilitation.

The cultural reality that links African Americans with criminality presents both an additional challenge as well as an additional urgency to Tonry's claims about the importance of reformers centering their arguments in morality.

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