Can Fiscal Crises Change Our Incarceration Problem? Maybe.

Author : Elizabeth Joh

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Mary D. Fan, *Beyond Budget-Cut Criminal Justice*, 90 **N.C. L. Rev.** __ (2011-2012, forthcoming), available at SSRN.

The effect of budget cuts on criminal justice systems seems obvious enough. Shrunken police departments result in low enforcement priorities (or non-enforcement) for non-violent offenses. Fiscally constrained prosecutorial resources mean that some offenses will be ignored rather than prosecuted. But what of prisons? Certainly many prison systems around the country have suffered similar fates as police departments and prosecutor's offices: attempting to do the same (or more) with less. In many states, prisoners have faced even harsher conditions of confinement, including overcrowding, reduced medical attention, and fewer resources for substance abuse treatment and job training.

Yet as Mary D. Fan observes in her timely and thought-provoking *Beyond Budget-Cut Criminal Justice*, the economic downturn of the past few years has yielded an unexpected result: the emergence of certain penal reforms that were once thought to be politically impossible. Many criminal justice scholars have lamented the steady rise of incarceration rates in the United States; we imprison people at a higher rate than any other country in the world. This "incarceration stagnation," as Fan puts it, continues despite a well-documented crime drop in the 1990s, evidence of diminishing gains as incarceration rates continue upward, and public opinion polls suggesting that a primary focus on incapacitation (rather than rehabilitation and alternatives to imprisonment) may be misguided. Public officials have typically avoided serious solutions to the incarceration crisis, for fear of appearing "soft on crime," and suffering the electoral consequences. The recent recession, however, has created opportunities for legislators facing budget emergencies to explore and propose a variety of reforms.

Some of these measures are decidedly modest; about half of the states have introduced "back-end" sentence reductions in their early release and parole programs so that individual prisoners receive small adjustments in their sentences in the interest of collective fiscal savings. Wisconsin has introduced "Taco Tuesdays" to save $2 million dollars a year by shaving off ten cents per inmate meal. Other measures, though, are decidedly more ambitious. Fan draws upon many examples. In 2008, Mississippi amended a law requiring prisoners to serve 85 percent of their sentences, so that parole boards could decide to release prisoners after serving 25 percent of their sentences. In 2009, New York amended its law to give counties the discretion to establish "local conditional release committees" to review applicants for early release. In 2010, the Colorado House of Representatives passed a bill with bipartisan support that lowers the penalties for several drug possession and use crimes.

So what accounts for these newer, post-recession experiments? According to Fan, these efforts have become politically palatable because of a shift in the social meaning of penal reforms that embrace rehabilitation, community supervision, and reduced sentencing severity over ever increasing incarceration. Penal reforms have become possible because legislators and politicians in many states have been able to convince their constituencies that these measures are cost-effective without any increased risk to the public. This approach avoids traditional attacks on these reforms as coddling criminals or risking public safety. Of course these reforms pose risks to their supporters as well. Reforms face considerable public backlash when a parolee benefitting from a new early release program commits a particularly horrific and widely publicized crime. Likewise, the political climate of some states continues to elicit strident criticism against penal reforms even in the face of budgetary emergencies.

Another, though less important, part of this emerging legal and political climate is the Supreme Court's new willingness to apply the Eighth Amendment's proportionality review in noncapital cases such as *Graham v. Florida*, 130 S. Ct. (2011), and *Brown v. Plata,* 131 S. Ct. 1910 (2011). In both instances, Fan sees a renewed role for courts to intervene

in penal policies at a time when penal severity is being questioned on a variety of fronts. While Fan does not see judicial intervention as taking on a primary role in transforming criminal justice policies, she argues that this judicial interest is part of a "perfect storm" of circumstances that are making real and significant penal change possible.

So how can we ensure that a pattern of what Fan calls "rehabilitation pragmatism" gains a permanent foothold in our national conversation about criminal justice policy? Fan suggests public officials consciously embrace a fiscally responsible, evidence-based approach to penal policies that focuses on alternatives to automatically increasing sentences and warehousing prisoners. Unlike the rehabilitative ideal of the first half of the twentieth century, this rehabilitation pragmatism is less interested in the moral transformation of the prisoner and more concerned with cost-effective measures that nevertheless assure the public of its safety. Fan draws our attention to a moment in our history that may well be a turning point for prison policies that desperately need political will and legislative attention.

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