POLICY ESSAY

AMERICAN PENAL OVERINDULGENCE

Leaving mass incarceration

The ways and means of penal change

Karol Lucken
University of Central Florida

For nearly 30 years, a vast body of literature has examined the "get-tough" era, or what some have referred to as mass incarceration (Jacobson, 2005) or a punitive policy experiment (Raphael and Stoll, 2009). In examining the policies that have defined this era (e.g., War on Drugs, minimum mandatory sentencing, habitual offender statutes, three strikes, and truth-in-sentencing), the literature has been both incisive and comprehensive in its coverage. Various trends have been documented, effectiveness has been analyzed and disputed, explanations have been proposed and debated, and social implications have been identified and interpreted.

As the ability to sustain "get-tough" measures has now been constrained [by fiscal crisis], a different political tone and policy focus is emerging. Much of the penal research has shifted as well, turning to issues of offender reentry or to new insights about the trajectory of mass incarceration. Lynch's (2011, this issue) work clearly falls into the latter category by challenging the prior literature and its conventional argument about the locus and direction of penal change. Her work has relevance then for understanding not only mass incarceration in particular but also reform policy in general, including offender reentry.

Lynch (2011) identifies four legal factors as the "engine that propelled mass incarceration." These factors include legislative and other statutory changes to penal codes, federal case law related to litigation on overcrowding, postsentencing law and policy related to parole, and the day-to-day sentencing and punishment practices of local courtrooms. However, rather than adopting an aggregated or nationalized view of the scope and impact of these factors, Lynch offers a more nuanced take based on local social and political contexts. She maintains that, although the capacity or opportunity for mass incarceration might have been established at the macrolevel, the realization of mass incarceration was contingent on local or regional responses to state or federal initiatives.

Direct correspondence to Karol Lucken, Department of Criminal Justice, University of Central Florida, 4000 Central Florida Boulevard, Orlando, FL 32816–8005 (e-mail: lucken@mail.ucf.edu).

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Given the autonomy afforded by a decentralized criminal justice system, Lynch (2011) suggests that a "ground-up" or "on-the-ground" approach to studying mass incarceration would be equally, if not more, illuminating than one that ignores this structural reality. Although the claims of the more prolific "top-down" research are not wholly rejected, Lynch does assert that the emphasis on national-level data and explanations has produced an overly "homogenized" account of mass incarceration. Consequently, remedial policies based on this account alone might miss the intended mark. Policies that reduce reliance on incarceration need to be, in Lynch's words, "multiple, varied, and smaller in scope."

My given task for this essay is to expound on these policies, which Lynch (2011) alternately terms "pathways out of mass incarceration" or "lessons relevant to policy reform." The pathways she identifies operate at the local and state level and constitute a two-pronged approach to facilitating change—a change that incidentally is already underway. One approach can be categorized as rhetorical/sentimental in its makeup, whereas the second approach is more legal/justice system based.

The former approach is most evident in the suggestion that crime-control narratives comport with the history and sentiments of the local population. For example, jurisdictions with a history of rehabilitative commitment are instructed to invoke their past as a way to shape their future (away from mass incarceration). For jurisdictions that lack this historical commitment, stories of fiscal crisis can be told to appease a conservative base.

This rhetorical approach is observed again in the suggestion that political narratives heed the level of social stability and civic engagement in a particular jurisdiction. Citing Barker's (2006) finding that areas characterized by low levels of social stability and civic activism tend to be more punitive, Lynch (2011) advises that, in such areas, a tougher crime-control message could be communicated, although a softer crime-control policy actually would be implemented. The inference, I presume, is that if a local population is sufficiently transient and disengaged, then the message–policy disparity will go unnoticed.

Assuming the inclination is to engage, Lynch (2011) highlights the value of "we"-based activism. In this scenario, advocacy groups are recognized as a local resource that can reshape the politics of social identity. Through such activism, officials would be awakened to the shared ground between "them" (i.e., offenders) and "us" and therefore the shared harms of mass incarceration. In this rhetorical/sentimental pathway, appeals to empathy and reminders of the universal costs of incarceration are the key.

The state-level recommendation for careful use of "referent jurisdictions" also relies on the power of rhetoric to reverse mass incarceration. Lynch (2011) contends that a reversal can occur as long as the appropriate form of group think or peer pressure is applied. That is, one can implore conservative, get-tough states to get softer [smarter] by pointing out what all of the other conservative former get-tough states are doing. This tactic is at work in the "Right on Crime" movement launched by the Texas Policy Foundation. The movement, which has also taken in root in Florida, upholds conservative principles on punishment, but supports less incarceration as a matter of fiscal prudence. The signatories to this "smart

justice" movement include former Speaker of the House Newt Gingrich, former Drug Czar Bill Bennett, and former Attorney General Edwin Meese.

These various rhetorical pathways are accompanied by proposals that also involve legal/justice system processes. Particular attention is given to direct democracy measures, such as state referenda and citizen initiatives. According to Lynch (2011), the promise of these law-making mechanisms is based on their potential, but only of late, to affect change in a less punitive direction (i.e., decriminalization of marijuana and other drugs). A second legal/justice system pathway pertains to the often ignored divide between the sentencing practices of the local courts and the state's financial responsibility for those practices. Lynch recommends a system of state-based incentives to control costly reliance on prison institutions.

Considering the theoretical paradigm that informs Lynch's (2011) analysis, I find these proposals to be practical and thoughtfully constructed. In fact, after additional scrutiny, the concept of "pathways" itself is somewhat revealing. First, it implies that multiple, distinct, and/or converging routes can be taken. This is not a reference to the simple and typical notion of state legislators alone exercising more than one policy option (i.e., directly implementing or modifying a set of laws) but a reference to the idea of placing reform into various and intersecting hands. Individual citizens, advocacy organizations, local elected officials, and state-elected officials all would have a role to play in staging the way out (of mass incarceration).

The construct of "pathways" also implies that the way out and the way in might be the same. Indeed, the examples provided by Lynch (2011) indicate that the pathways out of mass incarceration are the same pathways that led to mass incarceration. Words, messages, narratives, and outcry thus are established as the essential tools of policy, whether they are used by elected officials to influence, pacify, or deceive the citizenry; by the citizenry to inform, pressure, or bypass elected officials; or by elected officials of one state or county to convince the elected officials of another. In effect, the pathways to change are politically and rhetorically paved no matter what direction policy is heading.

In this regard, the bottom-up strategies envisioned by Lynch (2011) bear a close correspondence to the top-down or macrolevel theories that have dominated the literature. For example, Beckett (1997) asserted that the get-tough zeitgeist was politically engineered through fear-based narratives. Fear of crime and the "dangerous classes" was successfully spread by "New Right" Republicans to divide the electorate and grow their base of support (see also Dyer, 2000). Now, a "smart justice" narrative is being successfully spread by "Right on Crime" Republicans largely to maintain their base of support (see Tonry, 2004, for a review of all top-down theories). Likewise, just as advocacy groups and citizens were advancing the get-tough agenda (Victims of Crime and Leniency, Stop Turning Out Prisoners, and California Citizens for Law and Order), advocacy groups and citizens now can be deployed against it (Mothers Against Mandatory Minimums and Families with Loved Ones in Prison).

The point of all of this musing about pathways is as follows. Lynch (2011) appropriately recognizes the politicized environment that surrounds penal policy and therefore identifies pathways that are viable and pragmatic for those who must navigate this environment at all levels of government. Yet the pathways also reflect a kind of political coaching that encourages short-term exit strategies rather than long-term strategies for developing rational policies. In other words, the pathways are suited to take advantage of the current climate, as opposed to transcending the climate, despite the political season.

Lynch (2011) is not alone in this message-crafting approach. The Pew Center on States, in conjunction with Public Opinion Strategies and the Benenson Strategy Group, has been explicit in its political coaching. Based on what The Pew Center also calls "lessons learned" or "key takeaways" from its public safety survey, it offers specific advice on framing the crime-control message. Aside from documenting public support for community-based alternatives for first-time and/or nonviolent offenders, the authors of The Pew Center report explicitly state the following in their presentation: "Voters are moved by language that suggests they could be getting more bang for their investment in corrections" (The Pew Center on the States, 2010:20).

Although this message might be the right one, it might only be the right one for right now; it is doubtful that rhetorical, in-the-moment strategizing of this or any kind will eradicate the rash and short-sighted culture of penal policy making. For this reason, the criminological literature generally has sought to depoliticize policy making by exposing officials to the more neutral and constant message of "evidence-based research." This campaign by the academic community has enjoyed some success of late, as demonstrated in the various practitioner training sessions on evidence-based practice, and any number of practitioner-targeted reports on evidence based practice (National Institute of Corrections, 2004), U.S. Congressional testimony on best practices in youth correctional education, and the development of scientific advisory boards for the U.S. Department of Justice and the National Institute of Justice and Bureau of Justice Statistics more specifically (Lucken and Blomberg, in press). Undoubtedly, this apparent interest in research on the part of various public and elected officials reflects the fact that, when financial resources diminish, the demand for proven practice increases (Lucken and Blomberg, in press). Nonetheless, the aim of the academic community is that impulsive and reactionary style policy making would no longer be the rule.

A less politicized option might exist in the form of state-based incentives. However, it is less politicized only in the sense that it removes the citizenry and the centrality of rhetoric from the process and enables a more technical and bureaucratic means of addressing prison populations. Lynch (2011) recommends incentives specifically to divert prison-bound felons and to halt the flow of prison-bound felons. These incentives would target the prosecutorial and judicial phases of the process, but beyond this suggestion, it not indicated how they should operate.

The idea of incentives in general warrants continued discussion as it seems to be gaining traction across states and policy circles without much question or deliberation. For example, probation- and parole-based incentives have been recommended by the Council of State Governments, Bureau of Justice Association, The Pew Center, and the Public Welfare Foundation in a collectively authored report titled *The National Summit on Justice Reinvestment and Public Safety* (see Clement, Schwarzfeld, and Thompson, 2011). Whether an incentives-based strategy can make a difference or is even appropriate, however, is contingent on who receives the incentives and on what types of incentives are dispensed.

Building on the issue of who receives incentives, it seems important that they not be limited to one sector of criminal justice; yet this seems to be the tendency thus far in states using incentives (i.e., Kansas and Texas). If incentives do not work in tandem by addressing the policies, practices, and capacities of community corrections, prosecutors, and judges simultaneously, then imbalances created by unilateral incentives might lead to various forms of accommodation. For example, if judges are incentivized to divert prison-bound offenders into community alternatives, but community corrections agencies are not funded accordingly, then higher caseloads will diminish the quality of supervision and/or create a greater willingness or need to violate offenders. It can be problematic as well if prosecutors are given incentives to halt the flow of prison-bound offenders, but judges are not incentivized to divert prison-bound offenders. This issue could create conflict within the courtroom workgroup if judges and prosecutors are working toward opposite ends. Also, if fewer prison-bound offenders are coming into the courtroom, judges might feel less encumbered by the prospect of overcrowded prisons and remand those who are eligible for prison to prison more often and for longer periods of time than they would have been previously. Finally, if incentives only target community-based program revocation policies, then the pattern of net widening or business as usual with regard to judicial and prosecutorial use of prison will remain, thus nullifying or reducing the intended effects of the incentive.

The type of incentive given is also an important consideration in the diversion of prison-bound offenders and in the reduction of the flow of prison-bound offenders. Common sense suggests that the type of incentive offered must hold value to those in related leadership positions as well as to those who must execute the decisions that affect the receipt of the incentive. Yet this necessary linkage is inherently problematic. Financial incentives can be dubious given their capacity to create the wrong impression (i.e., payoffs) or to compromise appropriate discretion and accountability in dealing with offenders.

For example, in Arizona, a bill was passed in 2008 that imposed a performance-based funding mechanism for probation departments. The state gives counties that successfully reduce crime and probation revocations 40% of the cost savings produced by these reductions; the savings are to be reinvested in victim services, substance abuse treatment, and strategies to improve community supervision and reduce recidivism (Clement et al., 2011).

In the 2 years after the law's enactment, statewide probation-to-prison revocations had declined by 28% and revocations to jail had declined by 39%. The number of probationers convicted of a new felony also declined statewide by 31% (2011). Similarly, the Kansas Department of Corrections awards funds to community corrections agencies that can reduce their revocation rates by 20%. Since the enactment of the provision in 2007, revocations declined by 25% in just 2 years. In that same time, the number of offenders that successfully completed probation increased by 29% (2011).

In reflecting on the rapid results of these incentives, one cannot help but wonder how reductions (or increases) are achieved and distributed, whether in these states or elsewhere. With regard to how [revocation] reductions are achieved, it is assumed that risk classification instruments are employed to guide discretionary decisions or to set standardized policy. Yet, to what extent can risk classification fairly or accurately determine which rule violations by which offenders should be overlooked or not acted upon through traditional custodial means?

With regard to the question of distribution, which jurisdictions can use these incentives to their advantage without much risk to public safety? For counties that are in desperate need of funds, which is probably most of them, a definite motivation or a pressure is present to produce the desired results of lower crime or revocations. If a county, [on average], has a low crime rate and a less serious offender population, then a no-revocation decision carries fewer risks and greater benefits. Is a cap in place on how low a jurisdiction can go in generating fewer revocations or how high it can go in terms of receiving compensation? However, in highly urbanized counties, where crime [on average] is likely to be more prevalent and severe, a policy inclined toward not revoking probation carries much higher risks, particularly once (not if) word spreads among offenders that revocation policies resulting in jail or prison have been tempered. Yet it is in these areas where added funding for various services and programs might be most needed.

It is certainly possible that a financial incentive system can be sufficiently structured so that mishandlings are minimized or nonexistent. However, an alternative strategy that is less affected by these complications might be found in exercising the occasional stick rather than the continuous carrot. To illustrate, one of the more compelling and widely used statistical comparisons in the penal literature involves general population, crime, and correctional population rates over time (see Blomberg, Bales, and Reed, 1993; Blumstein, 1995; Irwin and Austin, 1997). In the 1980s and 1990s, the disproportionate gaps between these rates prompted considerable discussion about the relationship between crime and punishment or, rather, the lack thereof. Most notably, Irwin and Austin (1997) reported that, nationally, between 1980 and 1994, probation populations increased by 165%, jail populations increased by 199%, prison populations increased by 219%, and parole populations increased by 213%. Meanwhile, the adult population only increased by 18%, adult arrests increased by only 46%, and reported index crimes increased by a mere 4%. More recently, Austin (2008) provided similar figures in a report titled *Reducing America's*

Correctional Populations: A Strategic Plan. He documented that, between 1980 and 2007, prison populations increased by 373%, probation populations increased by 284%, and parole populations increased by 274%. However, the U.S. population increased by a mere 35%, and reported index crimes and index arrest rate per 100,000 declined by 16% and 30% respectively.

These calculations provide the basis for a law that requires states and jurisdictions to maintain proportionality between their crime and punishment rates. Such a mandate would be akin to a balanced budget amendment in that punishment rates would not be permitted to outpace or vastly exceed crime rates. The figures necessary to make these calculations are available at state and local levels and can be compiled and assessed on a regular basis or every few years. This system enables states to identify and penalize, perhaps through graduated sanctions (e.g., admonishment and corresponding budget reductions), jurisdictions that deviate from their expected norm. This norm would be determined by local conditions, such as reported felony index crimes, felony arrests, felony convictions, and demographic information. This process allows prosecutors, judges, and community corrections agencies to base decisions on salient and fluctuating local realities rather than on monetary compensation tied to revocation and crime reduction—the latter of which is often beyond a probation officer's or the criminal justice system's immediate control. In combination with evidence-based practice, a requirement for a balanced punishment system could help to insulate policy from the politics and crises of the day and the swings and extremes in policy that these factors engender.

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Karol Lucken is an associate professor with the Department of Criminal Justice at the University of Central Florida. She coauthored the book *American Penology: A History of Control* with Thomas Blomberg and is the author of several published articles in the areas of penal reform trends, offender reentry, intermediate punishment, and sex offender civil commitment.