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Civics Lessons: How Certain Schemes to End Mass Incarceration Can Fail

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Over the last decade the United States has witnessed an unprecedented wave of criminal justice reforms aimed at reducing or reversing the mass incarceration juggernaut and its consequences, which swept over the country from 1973 through the early years of the new millennium. Beginning with the Omnibus Crime Control and Safe Streets Act of 1968, the Comprehensive Drug Abuse and Control Act of 1970, the Anti-Drug Abuse Act of 1986, through to the Violent Crime Control and Law Enforcement Act of 1994, and the flurry of state lawmaking these acts triggered, the crime control ethos of criminal justice has inundated American law, multisectoral government policy and practice, and, perhaps most importantly, American culture. It used to be said that school is where society gets into your bones. Today, jail, not school, might better express that maxim's deep truth.

However, there are nascent indications that what some have called the nation's long experiment with mass incarceration has reached a plateau and is leveling out. For the first time in decades, the country has witnessed three consecutive years (2010, 2011, and 2012) of very slight decreases in the national prison popula-

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tion (Carson and Golinelli 2013). Socioeconomic megatrends of the last 15 years have helped to shape the political and economic context of this slowdown. Plummeting crime rates, beginning during the economic boom years of the 1990s, have led to the decline of crime as a public concern far below other national priorities. Yet the unrelenting increase in the proportion of state budgets being encumbered by rising prison costs continued unabated and left many in state government wondering why the historic drop in crime did not pay dividends in reduced state prison populations and correctional budgets—a concern that was particularly aggravated in the face of state budgetary pressures resulting from two major economic crises beginning in 2001 and then again in 2007.

Over those 15 years, there has been a marked increase in the scope and diversity of criminal justice reform efforts operating across the country and on Capitol Hill. Fifteen years ago, nobody was talking about "prisoner reentry." By the 2004 State of the Union Address, President Bush was calling America "the land of second chances"; every state in the country had formed or would soon form some sort of commission or task force on reentry, and in 2008 the Second Chance Act was signed into federal law. After years of advocacy and public education about racial disparities in sentencing, the Fair Sentencing Act reduced the differences between crack and powder cocaine terms. The Criminal Justice Reinvestment Act, most recently enacted in 2010, consolidated inspiration behind long-standing prison population reduction advocacy efforts, ranging across more than a dozen states under an expanding federal grant program. Add to these federal legislative benchmarks the many instances of state and local statutory reforms surrounding what were once dubbed the "invisible punishments" of imprisonment and a criminal record—felony disenfranchisement; restrictions on government-issued medical, housing, and sustenance benefits; discrimination in hiring and vocational licensing; and loss of parental rights. Even more recently, what was once considered to be politically toxic legislation in any statehouse, the decriminalization of medical marijuana, has swept into law in a handful of states and continues to gain momentum in others.

The eruption of reform was not simply an organic development of the socioeconomic megatrends of that time. It is in good part the fruit of the indefatigable labor of research and advocacy organizations around the country, including The Sentencing Project, Families against Mandatory Minimums, the Drug Policy Alliance, the American Civil Liberties Union, the Justice Policy Institute, the Center for Effective Public Policy, the Crime and Justice Institute, Justice Strategies, the Safer Foundation, and the Brennan Center for Justice, to name just a few. It is due as well to the adoption of the same goals by a range of independent institutes and national associations, including The JFA Institute, The Urban Institute, the Vera Institute of Justice, the Council of State Governments, and the Pew Center on the States. Apart from the many innovators and policy leaders working from within these organizations, one must also count the plethora of academic researchers whose reams of new inquiries have begun to shift the center of research away from a near-exclusive focus on crime analysis and recidivism evaluation, toward the multidimensional impact of incarceration and reentry, a prominent review of which will be issued by the National

Academies of Science in its forthcoming report from the project, "The Causes and Consequences of High Rates of Incarceration."[1]

All along the way, underwriting these efforts are the philanthropic foundations committed to a vision of human and civil rights that demand an end to mass incarceration. Rightly circumspect, they constantly assess and reassess the strategies, goals, and effectiveness of the public education campaigns, research, litigation, and technical assistance that make up the many moving parts of mass incarceration reform. So what are they and we to make of these recent successes? What promise do they hold for the future? And what strategies do they suggest will be effective going forward? Despite the legislative achievements of the last decade and the leveling off of the aggregate national prison population, the movement to end mass incarceration is in danger of falling into two sorts of traps. The first is the institutionalization of the historically high national rates of incarceration that exist today—a sort of "Keynesian Peter Principle" of imprisonment, where we reach a level of carceral punishment that is no longer financially sustainable at the state budgetary level, nor democratically governable at those community sites of locally concentrated incarceration, and that remains there, just short of bankruptcy and social upheaval. The second represents a potentially difficult trade-off between concrete statutory gains and underlying changes to the mythology of punishment that conditions an array of discretionary practices at the local level. This amounts to assessing the way forward within a framework of a kind of "civic ecology" of public safety.

Many of the terms of such a framework are enunciated here in this volume. Questions about how decades of locally concentrated carceral punishment and criminalization have conditioned "social inequality and the capacity of citizens," "learning and perceptions," and "political outcomes and behaviors" are all elements of civil systems thrown out of balance. They characterize the deep fissures in community life that result from the hyperactivity of a criminal justice system used to compensate for developmentally disadvantaged civil society institutions. But once we view mass incarceration from the lens of a civic ecology of public safety, the contention that the reversal of statutory missives will be sufficient to extract our communities from perpetual criminal justice governance strains the credulity of even the most hopeful among us.

The Inherent Limitations of Exclusively State-Based Reform

The Justice Reinvestment Initiative (JRI) is perhaps most illustrative of the tensions, trade-offs, and conundrums that advocates working to end mass incarceration and its collateral consequences face going forward. From its inception in 2002 at the Open Society Institute foundation, the JRI was devised as a politically viable strategy for pursuing state prison population reduction within the broader terms of a community ecology of public safety (Tucker and Cadora 2003). In its broadest strokes, the purpose of the JRI, as it was originally conceived, was to hold state

governments accountable to the places where the country's mass incarceration juggernaut had landed—namely, in impoverished communities, which were mostly, but not exclusively, black and Latino. As a result of the "coercive, downward mobility" of locally concentrated mass incarceration, historically disadvantaged neighborhoods are driven deeper into perpetual economic divestment, social isolation, civic disenfranchisement, and physical distress. Consistent with the foundation's overarching framework for criminal justice reform, the principle underlying the JRI was that public safety in an open society depends on maintaining a delicate balance between well-functioning civil society institutions and the prudent and reserved use of criminal justice interventions. But radical and unprecedented increases in both the scope and length of imprisonment have thrown the civil/criminal economy of already disadvantaged communities woefully out of balance.

To restore that balance, that is, to reduce the scope and extent of criminal justice governance and strengthen the institutions and networks of civil society, the JRI's political strategy took its cue in part from "charge-back" reform initiatives implemented in Oregon and Ohio between local jurisdictions and state juvenile justice authorities. The strategy was formulated as a problem of supply and demand and of misaligned incentives. On the "supply side" was a budgetary policy problem—states (and to a less explored degree, counties and cities) were spending increasing proportions of their budgets on discretionary public safety costs (namely, expensive prisons), which were becoming long-term obligations as fixed operating costs; this, despite historic drops in crime. On the "demand side" was a human services problem—cities and counties were witnessing deepening pockets of concentrated impoverishment in neighborhoods where unprecedented concentrations of criminal justice governance had become the norm. Mapping the wildly disproportionate residential concentration of incarceration among neighborhoods and the associated costs via "million dollar blocks," for example, was employed to document and dramatize direct, cost-for-cost tradeoffs. State criminal justice spending policies amounted to a prison subsidy (Ball 2013) in which states footed the bill for the rental of prison cells for high proportions of working-age male residents of particular neighborhoods for an average of three years. These policies are in contrast to investment policies that could yield returns in strengthened local social services and community-based institutions and networks. The mythology of public safety that has animated the era of mass incarceration, which the JRI was intended in part to reframe, holds, instead, that the civil/criminal "balance" is really a zero-sum economy, where weak civil institutions (such as failing schools) can be compensated for by strengthening and expanding the institutions and activities of criminal justice (such as juvenile detention facilities). Translated into the terms of our contemporary public imagination, the more we incarcerate, the safer we will be.

With Foundation support in hand, a small group of grantees took on the job of transforming the JRI, with its broad, sweeping purpose and its strategy for aligning supply and demand incentives into an actual, ongoing concern in statehouses across the country. During the initial years of implementation between 2002 and 2007, the JRI swept through a number of states—Connecticut, Rhode

Island, Kansas, Arizona, and Texas. These successes galvanized latent interests for reform in state government, particularly for stemming the growth of, and sometimes even reducing, prison populations and costs. Propelled by a fast-growing tally of legislative success, JRI has evolved from the specific initiative of a national foundation (Justice Reinvestment, proper) to a nationwide and international reconsideration of correctional policies in general (justice reinvestment, common). The justice reinvestment discourse is now written in state legislation across Arizona, Connecticut, Kansas, Michigan, New Hampshire, Nevada, Rhode Island, Texas, Vermont, Ohio, North Carolina, Pennsylvania, and Indiana; it has also been written into federal legislation (the Criminal Justice Reinvestment Act of 2010) and into the priority programs, technical assistance, and grant-offering units of the Department of Justice, Bureau of Justice Assistance. Overseas, in the UK, justice reinvestment is the subject of the most extensive written consideration yet available, a remarkably incisive, 250-page House of Commons, Justice Committee report; the discourse appears in the founding planning documents of experimental reform initiatives in Newcastle/Gateshead, Leicester, Leicestershire, Rutland, the Tower Hamlets Borough of London, and even the "Diamond Districts" initiative in East London; in Australia, justice reinvestment has been championed by the Australia Commission on Human Rights, incorporated into the analysis and recommendations of a Senate, Legal and Constitutional Affairs References Committee report, and a subsequent justice reinvestment pilot in Adelaide, in Western Australia. As much as they differ in scope and detail, these and surely many other instances of the justice reinvestment discourse, now inscribed in the documents of public affairs (federal and state government reports and legislation), all serve as a growing placeholder in the public imagination for "correctional" policies and practices that are less ambitious in their reach and scope while becoming more accountable, including financially, to the communities they most impact.

So why, after more than a decade of operation and in the face of its remarkable popularity and expanding adoption, has JRI been unable to achieve more substantial reductions in the nation's prison population, and unable to steer reinvestment into the hardest-hit communities?

One answer is found, ironically, in the roots of its own success. The sophistication that the national JRI leaders have brought has been effective at building state legislative coalitions in favor of justice reinvestment legislation in statehouse after statehouse. In fact, these initiatives have been so politically effective—and the justice reinvestment moniker has come to represent criminal justice reform writ large—that official entry of JRI in a state can marginalize other reform advocates and even sideline other sometimes politically viable, coalition-building reform campaigns already under way. The "collateral consequences" of JRI's success—its tendency to overshadow other reform efforts that could potentially add value through additional pressure on lawmakers to make more meaningful statutory reforms—may in fact be reaching the inherently conservative limitations of state legislative bodies to pursue the more far-reaching reforms in admissions to prison and lengths of stay that are needed to reduce prison populations in a substantial way. For example, there may be broad agreement (among both reformers

and policy-makers) that deep reductions in incarceration will not be achieved—at least statutorily—without reforming how we respond to felony offenses, including those classified as violent. There may be similar consensus that without substantial additional pressure—especially of the type that could assume some of the political risks—state legislative bodies are not prepared to pursue that policy.

Moreover, once adopted and enacted by state legislatures, JRI reforms are often seen as the terminus of reform aspirations on the part of state lawmakers. As a result, when JRI is successful at stopping the growth of a state's prison population or even achieving slight reductions—and there is good reason to believe that it has done so—ironically, these gains can threaten to institutionalize incarceration rates at their historic highs, held steady by lawmakers under the banner of successful legislative reforms already achieved.

But even if other long-standing, state-anchored advocacy couples with JRI efforts, serious questions remain about the sufficiency of exclusively state-based statutory reforms to extract high-incarceration neighborhoods from the shackles of criminal justice governance. This doubt stems from two concerns. The first is that although the reversal of punitive legislative statutes at the state level is necessary if we are to achieve serious reductions in imprisonment, it may not be sufficient. Statutory reforms do not in themselves establish the incentives that drive discretionary decisions all along the spectrum of local criminal justice activity. Discretion at arrest, charging, prosecution, and, to the degree that it still exists, at sentencing stages, has the ability to fulfill or frustrate the goals of prison reduction reform. In an extreme sense, discretionary decisions at these points could achieve very meaningful reductions in incarceration, even without a full reversal of punitive legislation. New York is a case in point. Over the last decade and a half, New York State has witnessed nearly a 30 percent drop in state prison populations, and New York City has seen its jail population cut in half. Although aggressive, long-standing advocacy to repeal or reduce the infamous Rockefeller Drug Laws has recently witnessed partial victories, the lion's share of the unprecedented reduction in incarceration to date preceded those reforms. Instead, the vast majority of those drops are due to a radical reduction in felony arrests, prosecutions, convictions, and sentences. And all these reductions took place in New York City, accounting for all the state's prison population drop (Austin and Jacobson 2013). In contrast, California exemplifies prison reduction by statutory fiat, enforced as it is by federal edict. What remains to be seen is how statutory reforms are implemented at home, where formerly incarcerated people are returning. To what extent is state prison being exchanged for county jail? What discretionary postures are local authorities taking to accommodate new statutory policy? What reinvestments are being made on the ground to address the collateral consequences and criminogenic conditions that persist in historically disadvantaged, high-incarceration communities?

The second, related concern stems from the absence of viable political coalitions that represent stakeholders at the local county, municipal, or community district level, which could share and absorb from the state some of the considerable political risks inherent in pursuing and implementing an ambitious, systemic reduction in the use of incarceration. Initial efforts on the part of the JRI

grantees and their philanthropic sponsors to define, identify, and recruit expert partners to help steer anticipated reinvestments on the demand side toward "criminogenic" conditions in high-incarceration communities were never fully successful. These included attempts to recruit institutions, such as ShoreBank, which could access or mobilize a network of local community development financing institutions (CDFIs) affiliates; or organizations with community development expertise, such as Urban Strategies; or even individual community organizers, who could work with local officials and advocates to organize local demand around JRI projects. But no consistent solution to organizing a systematic approach to cultivating local demand was reached.

The Civic Ecology of Systemic Reform

It is unlikely that states will take on the considerable political risks required to enact systemic reforms of the type and scope required, even under pressure from state advocates, without the political commitment and participation of authorities in key local jurisdictions from which high proportions of state prisoners come. Local jurisdictions are in a unique position to share the risk for such substantial reform efforts because they are more directly accountable for both the potential costs and benefits associated with the impact of such reforms on their constituents. And it is only at the local level where the civic ecology of public safety is registered and can be addressed in its many-faceted dimensions.

Municipal and county authorities are also more likely to adopt ambitious, tangible goals such as reducing by half the locally concentrated, disproportionate use of incarceration that mires certain parts of their communities in an inexorable cycle of community-wide disadvantage and downward mobility. Adopting and implementing neighborhood-specific goals that address the problems and interests of community constituents is their stock-in-trade. It is much more conceivable, for example, that the mayor of San Antonio would adopt systemic reforms to cut by half the number of residents from the Prospect Hill neighborhood who are sent to prison each year—a neighborhood that is 96 percent non-white or Hispanic, where 54 percent of households have incomes of less than $25,000, and which, despite accounting for only about 3.5 percent of the city's adults, is home to 12 percent of city residents sent to prison each year[2]—than is it conceivable that the state legislature would adopt the goal of reducing the state's prison population by half. A locally based JRI coalition would also have a strong interest in recouping financial resources from the state in proportion to reductions in their use of state prison resources, which they would be in a unique position to leverage, pool, and reinvest locally within the context of other local development initiatives already under way. And to protect their interests—that is, to reduce the risks and maximize the benefits—in pursuing a community incarceration reduction program, local authorities are much more likely to steer investment into those communities targeted for large scale reductions in incarceration.

However, an important caveat remains. Even locally initiated mass incarceration reform is subject to the entrenched civic ecology of public safety. A comparison of the neighborhood-level incarceration rates in New York City and Houston offers an instructive lesson in the micropolitics of reform. Citywide in 2009, New York City sent a comparatively low 1.8 people to prison for every 1,000 adult residents. Houston, on the other hand, sent approximately 6.3 people for every 1,000 adult residents. Although New York City achieved a prison admissions rate nearly 3.5 times lower than Houston's, the relative residential distribution among each city's neighborhoods of those sent to prison is nearly identical. In both cities, 52 percent of people sent to prison come from neighborhoods that are home to only 19 percent of the cities' residents.[3] This remarkable equivalence is no coincidence. It represents an entrenched civic ecology of public safety that, despite even sizable reductions in incarceration rates, remains unaddressed. And it goes some distance in understanding the conundrum in New York City. Proactive, discretionary policing and prosecutorial practices resulted in very meaningful reductions in overall incarceration rates in the City. Nevertheless, they were undertaken in isolation from the many other dimensions that constitute the civic ecology of those neighborhoods most affected by decades of hyper–criminal justice activity, not the least of which is represented in the current political imbroglio regarding police-citizen contact in the form of intensive stop-and-frisk operations in those neighborhoods. These contradictions suggest that incarceration reform efforts that do not address the criminogenic dimensions of longstanding community criminalization will leave the most affected neighborhoods as permanent subjects of criminal justice governance.

It is no doubt tempting to reach for solutions that relieve the egregious symptoms of the mythology of punishment that infect the most vulnerable of our communities, while subordinating community reinvestment to a secondary, next-steps standing. The major problem with that approach is that it runs the risk of repeating the mistakes of another prominent deinstitutionalization policy endeavor—the decommissioning of state mental health institutions in the 1980s. Without concomitant investment in community care networks, many mentally ill went untreated (Koyanagi and Bazelon 2007) and eventually ended up incarcerated (Kofman 2012). Today, upwards of half the people in state prisons and local jails suffer from a mental illness (James and Glaze 2006). Moreover, if reforms aimed at ending mass incarceration are not formally linked to community reinvestment that addresses the deep collateral consequences of decades of criminalization, we will have missed an opportunity that today's emerging openness to reform presents. Today, the same communities that are subject to the martial governance of carceral punishment also suffer from related misplaced, urgent-response-oriented government in other sectors. Whether prison, emergency room, homeless shelter, or zero-tolerance school, the resort to urgent response systems to govern historically disadvantaged communities is not only a financially costly spending policy, it is likely to tie those communities—which could most benefit from the strategic deployment of preventive and chronic care networks—to a permanent dependency on the last resort of acute-care government.

Notes

1. See http://www8.nationalacademies.org/cp/projectview.aspx?key=49441.
2. See www.justiceatlas.org.
3. Data come from maps produced by the Justice Mapping Center for a forthcoming report from the National Academies of Science's Committee on the Causes and Consequences of High Rates of Incarceration.

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