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Ending Mass Incarceration: Some Observations and Responses to Professor Tonry

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We should all be grateful for Michael Tonry's (2014, this issue) characteristically thoughtful article proposing 10 concrete steps to reduce the excessive reliance on incarceration in the United States. It would behoove legislatures and judges to think carefully about each of his proposals. The following remarks constitute an attempt to expand on some of his observations and offer a few cautionary notes about some of his proposals.

At the outset, however, it is important to note that I fully agree with the general premise of Tonry's (2014) article, which is by now conventional wisdom among criminal law scholars and practitioners and, increasingly, as Tonry is at pains to document, even among politicians on both the right and the left of the American spectrum: The United States has a vastly overinflated system of incarceration that is excessively punitive, disproportionate in its impact on the poor and minorities, exceedingly expensive, and largely irrelevant to reducing predatory crime. Tonry is also correct that the public mood seems to have shifted at least to the extent that fear of crime no longer drives the political debate as it has for so long in the United States. Reductions in imprisonment, in particular, and a movement away from harshly punitive attitudes in general, are no longer politically unthinkable for candidates for public office, as they have been since the late 1960s. As Tonry emphasizes, it might be an opportune time to consider specific proposals to implement this revived willingness to think about crime in a less fearful and vindictive manner.

Accordingly, Tonry (2014) focuses in large part on the practical mechanisms of reform. That is, he asks what concrete legislative steps are called for to accomplish the desired reduction in prison populations. That said, however, it is worth noting that Tonry recognizes that the optimism about political will that informs the beginning of the piece might be

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overstated. The section "Moving Forward" in particular recognizes that the political will to serious reform does not necessarily exist, as reflected by the fact that we are still doing little, in most states and in the federal system, to reduce the number of people in prison. I also note that the proposals in the section "Unwinding Mass Incarceration" are more ambitious, and are of a different nature, than those in the section "Sentencing Laws for the Future." Tonry's proposals in the first section could be considered, in one sense, to be mechanical—although they are still difficult to accomplish politically. That is, they are presented as a technical means of accomplishing progress toward an assumed goal of reducing incarceration. But the proposals in the "Unwinding Mass Incarceration" section are not so much means as ends: Tonry calls for the states to adopt specific goals for reducing incarceration over time. I think his choice to include these proposals demonstrates an implicit recognition that whatever consensus is beginning to develop around the abstract proposition that "we have too many people in prison," this still-nascent consensus has not evolved into a concrete acceptance of any specific goal or target for reducing prison populations. Moreover, the proposals in the "Unwinding Mass Incarceration" section are more radical insofar as they suggest not merely a revision of criminal sentencing law on a prospective basis (which would be welcome but would reduce the prison population only gradually) but also the release of people currently in prison, in substantial numbers. Such proposals test whether we are really serious: They translate "we have too many people in prison" into something much more concrete. Reaching an agreement on these proposals would be a major political advance; if we had a genuine political consensus that prison populations need to be reduced in significant numbers, including the release of many persons now in prison, many of the changes in the mechanics of sentencing set forth by Tonry would become no-brainers.

Moreover, some suggestions made by Tonry (2014) regarding sentencing law will not necessarily have any effect on reducing incarceration, absent a genuine determination, backed by enforceable legislative goals, to reduced prison populations. One of my few substantive concerns about one of Tonry's specific proposals illustrates this point. He proposes that all states create sentencing commissions and adopt sentencing guidelines. I agree with him—I played a role in persuading the American Law Institute (ALI) to start its sentencing project to replace the sentencing provisions of the Model Penal Code, and the impetus behind that change was in large part to promote guideline sentencing (and the model legislation that has slowly taken shape within the ALI reflects that policy preference). So I am on board with the general proposition. I understand that the experience in several states (North Carolina and Minnesota come to mind) is that guidelines can be a factor in reducing incarceration. I appreciate that the federal experience with guidelines is aberrational in many ways. However, the federal example is a significant cautionary tale. Commission and guidelines systems have many advantages, especially with respect to predictability and equity in sentencing. But guidelines and commissions do not inherently lead to reducing (or increasing) prison populations: That depends on the substance of the guidelines. In

the federal system, harsh mandatory guidelines were a significant factor in dramatically increasing sentence lengths.

There are many reasons for the increase in sentence lengths and many reasons to think that, in state systems (particularly ones with elected judges), standardizing sentences can be expected to decrease sentence lengths rather than increase them. But the federal experience suggests a few points about guideline systems. First, guidelines will reduce incarceration only when there is a political will to reduce sentences; otherwise, they probably will not. In North Carolina, the adoption of a commission and guidelines was specifically intended to reduce prison terms for nonviolent crimes without the legislature having to take the heat for any specific reductions in sentences that might be considered "soft on crime." But the legislature wanted to reduce prison budgets and recognized a commission-driven reduction in property-crime sentences as a desirable goal. The resulting reduction in overincarceration was not a product of guidelines in themselves but of the political will that lay behind the adoption of the guideline system. Some of what Tonry (2014) writes about guidelines reflects the kind of optimism that Marvin Frankel (1973) brought to his original proposal for sentencing guidelines—optimism that at least in the federal system proved misplaced. Judge Frankel believed that because creating guidelines was much too complicated a task for politicians to undertake for themselves and enact into legislation, having a commission would ensure that the guidelines process would be in the hands of politically insulated experts. He was right that creating guidelines was a daunting task. But if creating guidelines was too difficult for Congress, messing with them once a system had been created was not. Once a system is created, it is not complicated for a legislature to direct that the guideline sentence for a given crime be increased, and even if the general political climate is less driven by bitterness about rising crime rates, there will always be a temptation, driven by news reports of spectacular crimes, to react by tightening the screws. If the political actors want increased toughness, then I do not think that guidelines can exert any much counterpressure; they can even be a facilitating factor in increasing incarceration.

Second, Tonry (2014) repeats the view, which is common among guideline proponents, that voluntary guidelines do not work. But the term "voluntary" can be misleading. A wide spectrum of de jure and de facto systems of guidelines exists between the purely hortatory (I think that the view that "voluntary" guidelines are ineffective address such entirely advisory system) and the effectively mandatory and inflexible/like the federal guidelines, although even they were not, as a matter of law, mandatory, because they permitted (narrowly circumscribed) departures in the discretion of sentencing judges. Tonry supports "presumptive" guidelines. I think that is the right rubric, but in practice a great deal depends on the strength of the presumption. Both the current federal "advisory" guideline system and the former putatively "mandatory" guideline system could be described as involving presumptive guideline sentencing, although the systems are widely perceived as very different from each other.

Third, part of the problem with the federal guidelines is that they operated as a substitute for penal code reform. Unlike most (especially Model Penal Code–based) state codes, which already contain degrees of offenses and typically cover a relatively discrete type of conduct under each statutory heading, the federal guidelines had to create a sentencing scheme for offenses that had no coherent core. This technical fact about the federal guidelines raises the general point that substantive penal law is important. One reason we have too many people in jail is that we have too-long sentences for conduct that is appropriately made criminal, but another is that we overuse the criminal sanction for conduct that need not be dealt with by the criminal law at all. That might be a topic beyond Tonry's (2014) scope, but it is an important one for us to consider. The "war on drugs" is just one example of a policy whose reliance not just on long prison terms, but on the criminal law itself, warrants reconsideration. Such reconsideration need not involve a debate about legalizing conduct that is now illegal, but noncriminal sanctions and nonpunitive responses to a variety of social problems with targeted use of criminal punishment for only the most severe aspects of the conduct we aim to control might be both cost-effective and liberty enhancing.

Moreover, measures to reduce sentences, or even to cut back on the content of penal codes, ignore a large part of our custodial population. A significant portion of our carceral population is not in prisons (institutions for punishing offenders convicted of serious offenses and sentenced to long terms in custody) but in jails (local institutions for detaining those accused of crime or sentenced to short terms). Tonry (2014) does little to address this facet of the problem. Repetitive short terms in jail for petty offenses or the jailing of persons to await trial on charges that are eventually dropped deprive many people of liberty, often for a surprisingly long time. Many of these people do not need to be imprisoned and (like many of our prison inmates) are in custody as a practical matter because they are mentally ill, or otherwise disruptive of their communities. Finding alternative ways to deal with these individuals, and reduce our jail population, is an important project.

The reminder that many of the inhabitants of our prisons and jails are mentally ill leads me to another point, which I am afraid is a pessimistic one. Reformers are prone to overpromise about the benefits to be expected from the reforms they propose. I fully agree that we spend too much on prisons and that the belief that mass incarceration is necessary to control crime is exaggerated. It should follow that we can reduce the size and cost of our prisons without unacceptable increases in crime. But caution is in order, on both the cost and crime fronts.

Tonry (2014) points to the dollar costs of our overuse of imprisonment and argues, like many reformers, that providing other social services would be cheaper. That might be true. But I think it is a mistake to sell reduced incarceration primarily as an economy measure—especially if we are arguing that our streets can be safe without incarceration. A substantial part of our prison and jail population exists as a result of the deinstitutionalization of the mentally ill. That process was also sold on the ground that it would be both economical and liberty enhancing to treat the mentally ill in the community. Well, it turned out to

be cheaper mostly because the social services that were supposed to be provided in the community were not in fact provided. But that led to the reinstitutionalization of many troubled and troubling people via the criminal justice system. Turning a lot of people out of jail without services (which is the predictable result of a policy of "reduce prison populations and save a lot of bucks") risks bad consequences on the street. I think we need to be clear that our problem is using prisons to deal with social problems and that reducing our use of prisons will not do much to solve those social problems. No doubt a reduction in incarceration could do some good in that regard: Avoiding family disruption and reducing structural unemployment of ex-prisoners would be useful, and prisons are criminogenic in some ways. But we are fooling ourselves, possibly in dangerous ways or in ways that risk a return to public fear and restoration of the prison regime, if we do nothing with the money saved but reduce taxes or deficits. Many of those who do not belong in prisons do need treatment through mental health services, probationary oversight, and the like. Freeing prisoners without any social oversight is costly, but the necessary treatment and supervision is costly. Efforts to save money by farming probationary and treatment services out to the private sector is not likely to work, either—we are already beginning to observe evidence of the abuses that result when alternatives to incarceration are managed for private profit. Ignoring the social pathologies that lead young men to think that violence, theft, or the drug trade are the only available routes to income, social status, and self-respect will leave us with the same depressing crime problem we turned to prisons, ineffectively, to solve. Attempting to treat those pathologies will easily eat up whatever we save in prison budgets.

Finally, I would say one other word of caution. I am a little more hesitant than Tonry (2014) about the idea that our experiment in mass incarceration had nothing to do with recent reductions in crime. That seems to be the conventional wisdom among criminologists, but there is a tendency to oversimplify the point. I understand and applaud the fact that New York, for example, has managed to reduce prison populations while reducing serious crime. That is the key takeaway on which I fully agree with Tonry: We can be smarter about our use of incarceration without sacrificing public safety. But it remains true that if you lock up everybody who has committed a crime, you will (at great and excessive cost to liberty and the public fisc) be locking up a lot of people who are indeed dangerous and who might not be accurately identified by more selective means of incapacitation. I do not argue that the possibility that overinclusive imprisonment might reduce crime rates at the margins is worth the cost of imprisoning huge numbers of people who pose little or no threat and whose incarceration brings misery to themselves, their families, and their communities. But I am wary of implicitly overpromising. There is some controversy in the literature about the effectiveness of longer periods of incarceration in reducing crime. I am not sufficiently knowledgeable to argue the point; I do not have an opinion about the relative role of various factors in reducing crime rates generally in the United States and especially steeply in a few cities (most notably New York). Perhaps it is just my tragic worldview that leads me to assume generally that we cannot always have it all and to be

skeptical of the argument that having a humane carceral policy will have no cost at all in terms of crime rates. Perhaps Tonry completely disagrees, and he knows much more than I do about the relevant criminological studies. But to the extent that there is any nuance in his views or any controversy in the literature, I would like it to be acknowledged more explicitly. There is a difference between arguing that we are insanely overdoing imprisonment to no good effect and failing to recognize the risks in indiscriminate reductions in incarceration that mirror the harm caused by the indiscriminate increases of the last generation.

References

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