Sentencing Reform in an Era of Racialized Mass Incarceration

Statement to the Massachusetts Sentencing Commission
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This statement responds to the Massachusetts Sentencing Commission’s invitation to comment on issues relating to sentencing policies and practices for the Commonwealth of Massachusetts. We provide the commission with a brief overview of sociological research on mass incarceration, sentencing practices, and racial/ethnic minorities’ disproportionate contact with criminal justice institutions. We focus on empirical research pertaining to potential sentencing practices, policies, and principles that may assist the commonwealth in reducing racial/ethnic sentencing disparities (G.L. c. 211 E, § 2 (4)), and in so doing, promote greater respect for the law (G.L. c. 211 E, § 2 (3) (B)), provide just punishment (G.L. c. 211 E, § 2 (1); G.L. c. 211 E, § 2 (3) (C)), and secure public safety (G.L. c. 211 E, § 2 (2); G.L. c. 211 E, § 2 (3) (E)). We then draw on this research to comment on the specific topics outlined by the commission at its October 19, 2016 public hearing.

An Era of Racialized Mass Incarceration

Racial disparities in the criminal justice system are defined as the disproportionate contact of racial/ethnic groups with criminal justice institutions relative to their presence in the general population. Racial disparities are often calculated at the state or federal levels with respect to arrest, jail, and prison contact. In Massachusetts in 2010-2014, racial/ethnic minorities constituted 22% of the state population (2010) but 33% of convicted defendants (2013), 38% of defendants sentenced to incarceration (2013), and 57% of the current Department of Corrections population (2014) (Massachusetts Sentencing Commission, 2016).

A large proportion of these racial disparities can be explained by differences in criminal offending rates by racial/ethnic groups (Sampson and Lauritsen, 1997). The smaller proportion of these racial disparities that cannot be explained by such differences has been characterized as unwarranted disparity. Unwarranted racial disparities, as defined by the commonwealth of Massachusetts, are disparities that exist “among defendants with similar criminal records who have been found guilty of similar criminal conduct” (G.L. c. 211 E, § 2 (4)). In other words, unwarranted disparities are racial/ethnic disparities that cannot be explained by legal factors such as charge type, nature of the case, or criminal history. Decades of criminological research in the United States has documented the continued existence of unwarranted racial disparities in the courts (for reviews, see Mitchell, 2005; Spohn, 2000, 2013), especially in relation to drug crimes (Blumstein, 1982; Tonry and

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Melewski, 2008). These disparities are often attributed to implicit and explicit discriminatory treatment of racial/ethnic minorities by police officers and court officials from arrest to sentencing (Bridges, Crutchfield, and Simpson, 1987; Steffensmeier et al., 1998).

Recent decades have witnessed a substantial increase in the number (and proportion) of Americans incarcerated in federal and state prisons (Gottschalk, 2015; Travis, Western, and Redburn, 2014). Scholars have termed this increase in the penal population mass incarceration. Given that a disproportionate number of those imprisoned over these past few decades have been members of racial/ethnic minority groups and that some of the crime policies that resulted in mass incarceration relied on racist stereotypes, some scholars have described this period as an era of racialized mass incarceration (Bobo and Thompson, 2010). While Massachusetts has the third lowest state prison incarceration rate in the United States (188 per 100,000 people in 2014), it has the 13th highest black/white disparity in incarceration rates and the highest Hispanic/white disparity (Sentencing Project 2014a). These large racial/ethnic disparities may be driven by Massachusetts’ relatively low incarceration rate of whites in comparison to other states. However, if Massachusetts is conceived of as a country, its state prison incarceration rate (which does not include incarceration in jails) is higher than, for example, the incarceration rates of Australia (151 per 100,000), Germany (78 per 100,000), and Canada (106 per 100,000) (Sentencing Project 2014b). Recent scholarship has also underscored increases in probation and parole supervision, referring to a period of mass probation (Phelps, 2016).

The Importance of Reducing Racialized Mass Incarceration

Punitive Crime Policy and Public Safety

Although violent and property crime rates have generally declined since the 1990s, it is unclear whether—and to what extent—this crime drop is attributable to increased incarceration rates over the same period, as opposed to competing explanations, such as an improved economy (Roeder, Eisen, and Bowling, 2015), improved security of property (Farrell, 2013), and decreased lead exposure (Reyes, 2007; Feigenbaum and Muller, 2016). While scholars continue to debate the precise reasons for the crime drop (Baumer and Wolff, 2014), the most careful analyses to date conclude that, when it comes to incarceration, “the incremental deterrent effect of increases in lengthy prison sentences is modest at best” (Travis, Western, Redburn, 2014: 131). Additionally, incarceration has been found to have a modest criminogenic effect, such that experience of incarceration, on average, slightly increases an individual’s likelihood to commit crime (for a review, see Nagin, Cullen, and Jonson, 2009). Punitive crime policies that promote lengthier sentences and periods of incarceration, therefore, are unlikely to have strong positive impacts on public safety.3

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2 For more on United States crime trends, see the National Academy of Sciences roundtable on this issue: http://sites.nationalacademies.org/DBASSE/CLAJ/CurrentProjects/DBASSE_081065

3 In New York City, between 1996 and 2014, the incarceration rate declined by 55% (while it rose by 12% in the remainder of the United States), and the crime rate declined by 58% (while it declined by 42% nationally). See “Better by Half: The New York City Story of Winning Large-Scale Decarceration while Increasing Public Safety” by Judith Greene and Vincent Schiraldi (2016) for a detailed account of how New York City lowered its incarceration rate. Stable URL: https://www.hks.harvard.edu/ocpa/cms/files/criminal-justice/research-publications/fsr2901_04_greeneschiraldi.pdf
Research has consistently found that, relative to whites, racial/ethnic minorities have increased perceptions of criminal injustice and of perceived discrimination within the criminal justice system (Bobo and Johnson, 2004; Hagan, Shedd, Payne, 2005) as well as decreased confidence in the legal system for protection and safety (Bobo and Thompson, 2006; Brunson, 2007). These negative perceptions of the legal system relate to the sociological concept of legal cynicism, defined as “a cultural orientation in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety” (Kirk and Papachristos, 2011: 1191). Legal cynicism can have negative implications not only for minorities’ subjective well-being and feelings of inclusion as equal and valued members of American society but also for public safety. Perceptions of unjust policing have been found to cause decreases in 911 calls (Desmond, Papachristos, Kirk, 2016), and higher rates of legal cynicism within neighborhoods have been found to relate to higher homicide rates (Kirk and Papachristos, 2011).

Racialized mass incarceration and the practices that sustain it—from police Terry stops to sentencing practices—are a major cause of legal cynicism among minorities (Brunson, 2007; Muller and Schrage, 2014). Reducing mass incarceration could increase trust in the legal system, thereby better ensuring public safety for all citizens (Tyler and Huo, 2002).

Civil Consequences of Harsh Punishment

Detainment in jail or prison—either while awaiting trial or as part of a sentence—is associated with a host of negative consequences for criminal defendants, their families, and their communities (for a review, see Wakefield and Uggen, 2010). For example, incarceration has been shown to have negative effects on mental and physical health outcomes (for a review, see Wildeman and Muller, 2012). In addition, those who have been incarcerated face discrimination in the labor market, housing, and education (Pager, 2007; Uggen, Manza, Thompson, 2006). Even among formerly incarcerated persons who wish to change their lives for the better, the stigma of a criminal record inhibits their ability to build stable lives and to participate in American society (Uggen, Manza, Behrens, 2004; Uggen, Manza, Thompson, 2006). Beyond formerly incarcerated individuals, incarceration has negative implications for the health, well-being, and social inclusion of their spouses and children (Comfort, 2007). These collateral consequences not only harm individuals and communities but also likely contribute to increased crime (Nagin, Cullen, Jonson, 2009) due to a lack of job opportunities and delimited social and civic opportunities for formerly incarcerated individuals (Uggen, Manza, and Behrens, 2004).

Rethinking Just Punishment

Below, we respond to the commission’s points for discussion. Our responses are guided by the following principles that are grounded in sociological research:

a. Given the racialized nature of mass incarceration, defendants’ criminal records cannot be considered strictly objective or free of racial bias. For example, relative to whites, minorities are arrested for drug crimes at disproportionately higher rates, after accounting
for reported rates of drug use and, to a lesser extent, distribution (Tonry, 1995; Beckett, Nyrop, and Pfingst, 2006).

b. Many incarcerated individuals in Massachusetts have themselves been victims of or witnesses to violence and/or have histories of childhood trauma (Western, 2015), rendering the line between offenders and individuals in need of care blurry (Smith, 2016).

c. Given the potential criminogenic effects of incarceration and legal cynicism noted above, the criminal justice system in its current form is failing to promote public safety. Our responses below aim to address this failing and to promote the well-being of criminal defendants, their families, their neighborhoods, and broader society.

1) a series of “gap” and “decay” provisions

In order to improve individuals’ chances of reintegration, the conviction-free period required by a gap or decay provision should be reduced to five years. The majority of individuals who recidivate do so within the first few years after discharge and clearing that initial hurdle is often indicative of great effort. Such individuals should be able to continue to move forward, and their sentences for any new convictions should not be exacerbated by their pasts.

2) changes to how adjudications of delinquency (juvenile convictions) are counted for criminal history purposes

We agree that no prior adjudication of delinquency for a misdemeanor should be counted for criminal history placement on the sentencing grid. We further suggest that no prior adjudication of delinquency for a felony prior to age 18 should be counted for criminal history placement on the sentencing grid.

3) the addition of an Offense Seriousness Level 0

We agree with the addition of a new offense level of 0 that would carry no incarceration, probation, fines, or fees for minor offenses. Minor offenses, such as disorderly conduct or drinking in public, disproportionately impact individuals living in poverty who need stable housing and job security rather than supervision. The disparate impact of facially neutral laws—which, in effect, criminalize poverty—is one cause of racial/ethnic disparities (Tonry, 1995).

4) guidelines as to the length of probation supervision

While we do not object to the proposed presumptive maximum probation ranges, a comment on probation conditions is in order. When applicable, defendants’ mental health, of which substance use disorder is a part, must be taken seriously and addressed in consultation with trained mental health professionals. For example, as substance use disorder, by definition, often involves continued use of a substance despite negative consequences (Substance Abuse and Mental Health Services Administration, 2015), a probation condition of no drugs or no alcohol would simply set up a defendant with a substance use disorder to fail. Even in combination with treatment, relapses are often part of the road to recovery (McLellan, et al., 2000) and should not be categorized as probation violations or punished as such.
5) probation violations

Following from the above, violations of no drugs or alcohol conditions of probation should not be punished with incarceration among individuals with a diagnosis of substance use disorder.

6) changes to the current sentencing guideline ranges

Given the racialized nature of criminal records noted above, the commission should rethink the criminal history scale to incorporate a history of poverty, disparate policing, and court officials’ potential differential treatment of criminal defendants in prior cases (see Clair and Winter, 2016: 353-5).

Given evidence on prison as a potentially criminogenic environment as well as the harmful effects of even one day spent incarcerated, offense level 1 should not include the possibility of incarceration. In addition, offense level 2 should not include the possibility of incarceration for current criminal history scales A through C.

While unwarranted bias against racial/ethnic minorities remains a problem in the sentencing of criminal defendants, there is, unfortunately, no easy solution. For example, mandatory minimum sentences were created partially to remove judges’ (presumably biased) discretion and address existing sentencing disparities. However, these policies failed to address other causes of disparities, such as differential policing and prosecutors’ charging decisions. Today, risk assessment tools are being hailed by many as an improved method for removing potentially biased discretion from the sentencing process. However, Attorney General Eric Holder, among others, has critiqued these tools, arguing that they are unconstitutional and, in fact, racially biased, as many of the factors that such tools often rely on to generate a defendant’s predicted risk level, such as criminal history and employment status, are correlated with race (Starr, 2014). Indeed, a ProPublica report found that a widely used assessment tool “made mistakes with black and white defendants at roughly the same rate but in very different ways. The formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants,” while “white defendants were mislabeled as low risk more often than black defendants” (Angwin et al., 2016). We, therefore, caution the commission against recommending such tools for reducing racial/ethnic disparities.

7) a safety valve provision

Instead of a safety valve provision, the commission should recommend the abolition of mandatory minimum sentences. Such sentences have been a driver of mass incarceration (Travis, Western, Redburn, 2014) and do not allow prosecutors or judges to consider mitigating circumstances in their recommendations or decisions.

8) a presumptive supervised release provision

We caution against this proposal. Although its intent is to reduce recidivism, probation has been shown, in some states and time periods, to lead to higher incarceration rates (Phelps, 2013). In Massachusetts, evidence from The Council of State Governments suggests slightly lower
recidivism rates but higher reincarceration rates among those released to supervision, relative to those released to no supervision (Mosehauer, et al., 2016). Additionally, those currently released to supervision are a selected population; therefore, it is unclear how presumptive supervised release would affect the trajectories of most formerly incarcerated persons.

In considering this idea, we suggest that the commission consider the successes and failures of other states in expanding probation and supervised release. Michigan has found some success in using probation as a tool to reduce incarceration (Phelps, 2013: 70-71). Certain steps such as gradated sanctions and reducing the conditions under which probation would be revoked should be considered. Without such tools, presumptive supervised release will set individuals up for failure and incur excessive fiscal costs. Research on criminal desistance shows that, to reduce recidivism, individuals leaving prison and jail need a support system that will ensure they have stable housing and, ideally, employment (Sampson and Laub, 1995). Probation, alone, will not provide these supports. In addition, probation fees often weaken conditions necessary for reintegration (Harris, 2016).

9) **repeal of archaic and/or unconstitutional statutes**

We agree with this proposal.

10) **amending Section 3 of Chapter 279, to allow judges more flexibility in sentencing a probationer when surrendered**

We agree with this proposal.

**Coda**

If followed, our suggestions would save the component agencies of the Massachusetts criminal justice system a substantial amount of money by reducing caseloads as well as the incarcerated population. This money should be reinvested into disadvantaged neighborhoods (i.e. neighborhoods with high poverty rates) through, for example, affordable housing and job creation. Such investments would reduce the burden currently placed on the criminal justice system by addressing the underlying structural conditions that allow for the concentration of poverty and, in turn, crime. Since racial/ethnic minorities are disproportionately exposed to concentrated neighborhood poverty (Sharkey, 2013), such broad-based programs hold the largest potential for reducing racial/ethnic disparities in the criminal justice system. Furthermore, such broad investments are likely needed to address recidivism and support the reintegration of formerly incarcerated individuals at a large scale. Increased access to stable housing and jobs would have spillover effects across individuals’ social networks, rendering the family and friends of justice-involved individuals more equipped to assist those exiting prison or jail.
References


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