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Reducing Incarceration Rates When Science Meets Political Realities

As the United States considers ways to improve how it incarcerates people in prisons and jails—and particularly how to reduce the number of people incarcerated—it is first necessary to recognize that there is no single national incarceration policy, but instead 50 distinct state policies and one federal policy. Accordingly, pursuing improvements will require the development and adoption of reforms in 51 separate jurisdictions. An undertaking of this scale may seem overwhelming. But over roughly the past decade, researchers have conducted comprehensive analyses in approximately half of the states to identify and promote significant changes to corrections and public safety policy.

Work in the states documents the difficulty of this challenge, but also reveals some lessons that may help policymakers and other stakeholders reach this aim.

As part of this story, the Pew Charitable Trusts (Pew) in 2006 launched the Public Safety Performance Project. Continuing today, the project aimed to “help states advance fiscally sound, data-driven policies and practices in the criminal and juvenile justice systems that protect public safety, hold offenders accountable, and control corrections costs.” The project drew on the experiences of some states, including lessons learned from a comprehensive analysis that the Council of State Governments Justice Center (CSGJC) conducted for Connecticut state leaders in 2003 and 2004.

Around the same time, sensing a growing demand among states for the types of analyses that the CSGJC provided, the Bureau of Justice Assistance (BJA) of the U.S. Department of Justice made funding available to complement Pew’s investment to support the delivery of intensive technical assistance to a limited number of states. Then in 2010, the BJA established the

Justice Reinvestment Initiative, a public-private partnership between BJA and Pew, with \$10 million in funding from Congress for that fiscal year. The Obama administration subsequently recommended a major increase in funding for the initiative, and by fiscal year 2014, with congressional bipartisan support, the annual appropriation had grown to \$25 million.

Pew and BJA have described their goal for justice reinvestment as being to support state leaders who demonstrate working across party lines to slow, or even reduce, corrections spending and to reinvest some of those savings into strategies that will increase public safety. The CSGJC has played a central role in assessing conditions in the states and delivering technical assistance to them, starting before and continuing after the launch of the Justice Reinvestment Initiative. As of 2015, with support from Pew and BJA, the CSGJC has delivered intensive technical assistance to more than 20 states. In addition, Pew has funded, and in some cases provided, technical assistance to an additional 12 states as part of its Public Safety Performance Project.

In the normal course of CSGJC's studies, a team of experts, working over the course of nine to 18 months, conducts exhaustive analyses, in conjunction with local elected officials and stakeholders, to identify areas for policy changes and develop a political consensus to achieve these changes through the legislative process. In almost every case, the level of analysis of the state's data is more extensive and thorough than anything the state has previously used to inform criminal justice policy. The timeliness of the analyses is essential to coincide with legislative sessions. Findings and recommendations must be distilled into concise actionable reports for policymakers' consideration.

Here, we summarize CSGJC's work in four states—Texas, Pennsylvania, North Carolina, and Michigan—and then explore what we have learned from these efforts, including the potential and limits of science in this area.

State portraits

Based on our experiences in these states and others, we believe that scientific findings supporting the case for “less incarceration” will be insufficient to achieve dramatic shifts

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in the use of prison and jail. Such an outcome depends on overhauling 50 sets of state laws (to say nothing of the federal system); fundamentally changing the perspective and approach of thousands of locally elected judges, prosecutors, and sheriffs who operate in independent counties and cities; dismantling an industry that supports hundreds of thousands of state and

local personnel; and effectively transforming how the public thinks about punishment, particularly for people convicted of violent crimes. It takes, and will continue to take, a lot of hard work by many people at the state level to accomplish these changes.

Understanding our efforts in the four states we have singled out first requires a basic grasp of what factors drive increases and decreases in state prison populations, and what type of data policymakers need to inform decisions designed to decrease the number people who are in prison.

An increase or a reduction in the number of people in prison results from a change in one of two factors: how many people are admitted to prison, or how long people stay in prison once admitted. Over the past several years, the average length of stay for people incarcerated in prison has increased considerably; according to a 2012 study conducted by Pew, people released from prison in 2009 had served 36% more time than those released in 1990. This increase is the result of a combination of factors, including sentencing laws that allow or require longer prison terms for certain types of offenses, longer percentages of sentences that must be served behind bars, prosecutorial and judicial discretion related to how defendants are charged and how their sentences are disposed, and a decline in the rate that parole is granted by many state parole boards. For these reasons, the number of people leaving prison may decline, and states that have

sentenced fewer people to prison have not necessarily seen a reduction in the overall prison population. Consider the simple analogy of water in a bathtub. Even if the water coming out of the bathtub faucet slows, the water level will still rise if the bathtub is not draining at an equal or faster rate. So as sentence lengths have increased and release rates have decreased, even a significant decline in prison admissions due to lower crime is unlikely to cause a state to experience the drop in its prison population it might otherwise expect.

State-level data are available that can help policymakers understand changes in each of these areas (sentencing, probation, parole); however, the data comes from different agencies that are not necessarily coordinated or working with each other with the common purpose of providing a cohesive “diagram.” State agencies may have researchers, but they usually are stretched too thin, and more importantly, have no incentives or authority to analyze and review aspects of the system not under their agency’s umbrellas. Finally, given the usual political alliances in a state, researchers and their sponsors may be seen as having an agenda that does not give them broad credibility.

The technical assistance provided on a justice reinvestment project is purposely designed to compile a multiagency system analysis, developed through a transparent process working with all key stakeholders, and to create a diagram of the “bathtub and its plumbing.” A rigorous evaluation of corrections trends in a state typically requires the analysis of hundreds of thousands, and often millions, of individual case records, including those related to sentencing, corrections, parole, probation, and criminal history. Data matches involving stand-alone databases that maintain information about arrest histories, prison admissions, participation in treatment programs, and community supervision files are conducted, translating into thousands of hours of research labor. Even with such efforts, an analytical investment does not by itself translate into findings and recommendations that key decision makers in a state will find credible.

While the data gathering and analysis is taking place, a bipartisan group of policymakers and stakeholders representing all three branches of government is convened to discuss the information, identify areas for policy reforms,

and develop proposals for the governor and legislature to consider. Hundreds of meetings with combinations of prosecutors, judges, law enforcement officials, defense counsel, community corrections administrators, treatment providers, and victim advocates are necessary to present interpretations of the data that incorporate the perspectives of these important stakeholders. Similarly, elected officials will not seriously consider policy recommendations unless they believe that they reflect the input of these key constituencies. This process often has to be repeated, as the flux of state players due to election turnover and changes in constituencies require active engagement.

Depending on the state, its complexity and expected timelines for collecting data, conducting the research, engaging stakeholders and legislators, and developing the communications strategy and proposal, the cost of providing technical assistance can range from \$500,000 to \$950,000 per site. This is funded from different sources as described above. If the policy changes are adopted, a “Phase II” commences to provide technical assistance to the state to help effectively implement the adopted policies.

Highlights from the experiences in the four target states include:

Texas. At the request of the chairman of the Texas House Corrections Committee (a Republican) and the chairman of the Texas Senate Criminal Justice Committee (a Democrat), the CSGJC in 2007 conducted an extensive analysis of the state’s criminal justice data and identified three important trends driving the growth in the state’s prison population. First, the number of people whose probation had been revoked and who had been sent to state prison increased 18% between 1997 and 2006, while the number of people on probation supervision had declined by 3% over the same period. Second, reductions in funding and the resulting closure of various community-based programs and facilities caused the number of people awaiting release from prison to the community to balloon (by 2007, more than 2,000 people remained incarcerated while awaiting placement to substance use and mental health treatment programs). Third, parole grant rates were much lower than the parole board’s own guideline requirements (among low-risk individuals,

the board fell short of its minimum approval rate by 2,252 releases).

Drawing on these findings, the state legislature approved policies effective in the 2008-09 biennial budget that increased treatment capacity in the prison system by 3,700 program slots for substance use treatment (outpatient, in-prison, and post-release) and mental health treatment, and expanded diversion options in the probation and parole system by 3,000 slots for technical violations of the conditions of their supervision or transitional treatment and substance use treatment. The funding for these policies was \$241 million for the 2008-09 budget, and was based on the assumption that these policy changes would make building new prisons unnecessary, avoiding \$443 million in new construction and operating costs.

Indeed, thanks to these policies, the state did not need the approximately 9,000 more prison beds that were forecast in the budget plan first presented to the legislature in 2007. In fact, since then, there has been an unprecedented development in Texas: three prisons have been closed, one in 2011 and two in 2013, for a total reduction of about 5,000 beds. The prison population has declined 4%, even though the state resident population has increased by 20% in the previous decade alone. The state's incarceration rate has dropped by 10% since 2007, as measured by the U.S. Bureau of Justice Statistics (part of the Department of Justice). Finally, between 2006 and 2013, the crime rate decreased by 20%.

North Carolina. In 2009, the governor and leaders of the North Carolina House and Senate (all Democrats) were faced with projections showing that the state's prison population would grow 10percent in the next decade. Probation revocations accounted for more than half of prison admissions, and only about 15% of people released from prison received supervision. Over a two-year period, during which a Republican was elected governor and Republicans won majorities of both chambers in the state legislature, the CSGJC analyzed hundreds of thousands of files, conducted extensive policy reviews, and met with hundreds of state and local government officials.

In 2011, the state adopted policies addressing these problems, including mandatory post-release supervision; increased funding for community-based treatment and change

to the way this treatment is delivered; and a comprehensive set of progressive sanctions for probationers to help them avoid revocation to prison. These policies are projected to save the state up to an estimated \$560 million over six years in reduced spending and averted costs. The legislature allocated more than \$8 million in treatment funding to its budget for fiscal year 2012 for improving existing community-based treatment resources. When the policies were adopted in June 2011, the state prison population was 41,032. By June 2014, the prison population had dropped to 37,665. Between fiscal years 2011 and 2014, there was a 41% decline in releases without supervision and a 50% decline in probation revocations. By 2013, the crime rate had decreased by 8%, and 10 prisons have been closed to date.

Pennsylvania. Between 2000 and 2011, state spending on corrections increased 76%, from \$1.1 billion to \$1.9 billion, while the prison population increased 40%, from 36,602 to 51,312. The CSGJC worked with state leaders in 2011 and 2012 to produce a set of policies that redesigned the state's residential community corrections programs to serve as parole transition and violation centers, and provided for a more comprehensive set of sanctioning responses to reduce the number of people revoked to prison for technical violations of the conditions of their parole supervision. The policies also addressed various inefficiencies in the release process, by seeking to reduce the number of days from parole approval to actual release and increase the number of parole-eligible cases heard per month. Finally, the state pursued a performance-based contract system with many of its service providers, requiring that the recidivism outcomes for participants in those programs meet or exceed the baseline set by the state's department of corrections.

These policies are projected to save the state up to an estimated \$253 million over five years. According to a statutory formula, the state will reinvest a portion of realized savings into local law enforcement, county probation and parole, and victim services. The prison population began to fall in 2014, marking the first time in over 20 years that a decline had occurred in that state. The population as of June 2015 was 50,366. There has been a sharp decline in the number of people who return to prison due to technical violations of

the conditions of their parole, and an aggressive use of local alternative sanctioning to address technical violations of supervision. Between 2011 and 2013, the crime rate in the state decreased by 7%. Based on the success of its first justice reinvestment effort, the state is preparing for another round of analysis to explore whether additional policy or sentencing changes can further reduce the criminal justice population.

Michigan. Statewide, one out of every three state employees works for the department of corrections, and one out of every five general fund dollars goes toward the operation of the state prison system. Michigan has analyzed this situation in recent years and implemented a range of diverse strategies, including statewide reentry programs to reduce recidivism and law enforcement efforts to deter crime in cities plagued by violence. Arrests for violent crime, parolee re-arrest rates, and the number of people in prison declined since 2008.

In 2013, legislative leaders and the governor expressed concern that corrections spending continued to make up a large portion of the state budget, the public remained concerned about high levels of crime in parts of the state, and the prison population showed signs of increasing again. At the state's request, the CSGJC conducted an unprecedented study of the state's felony sentencing system for its impacts on public safety, recidivism trends, and state and local spending.

After analyzing 7.5 million individual data records and conducting over 100 in-person meetings and 200 conference calls with stakeholders, our findings showed that the state could improve its sentencing system to achieve more consistency and predictability in sentencing outcomes. The recommended sentencing changes would stabilize and lower costs for the state and counties, and allow some resources to be re-directed to reduce recidivism and improve public safety. In a report to the Michigan Law Revision Commission, a bipartisan group of legislators and members of the general public, the CSGJC presented our analyses and recommendations. With the support of local prosecutors and other law enforcement groups, state legislators introduced four bills in November 2014 to implement the recommended changes to sentencing laws and enact policies designed to increase the effectiveness of community supervision and improve

the collection of victim restitution. The bills made their way through the Republican-controlled legislature, received laudatory coverage in newspapers across the state, and neared passage, until the state attorney general launched an aggressive attempt to thwart their passage. The attorney general argued that the state had already shrunk the prison population effectively; these bills put public safety at risk in the name of cost savings; and the sponsor of the legislation intended to rush the bills through during a lame duck session without sufficient consideration for the life-and-death issues at stake.

Legislative support for the bills subsequently dissipated and the governor, in the midst of a reelection campaign, stayed silent. In the lame duck session that followed, where the bills' legislative champion neared the end of his term, two bills passed, one to create a Criminal Justice Policy Commission for four years and another to update the objective and funding goals for the state-operated community corrections program. The more comprehensive sentencing policies died, although they may be reintroduced at a later time.

Lessons learned

Based on more than 10 years of experience conducting analyses of state criminal justice systems and the results of the CSGJC's work in the states, we offer here nine lessons for consideration by the growing number of policymakers and others demanding the review of incarceration policies.

Lesson One. Conducting the type of "systematic reviews of penal policies" that we have described is a time-consuming, resource-intensive, state-by-state undertaking. Academic institutions typically are not positioned to conduct these types of time-sensitive quantitative analyses, coupled with hundreds of meetings over the course of just a few months. Nor are academic institutions usually accustomed to the quick distillation of extensive research into practical terms that elected officials can easily convert into policy. Few state agencies anywhere have the capacity (or independence or standing among all three branches of state government) to lead this type of process. Therefore, absent an effort similar to the justice reinvestment process, it is unlikely that the states themselves will undertake a systematic review of penal policies.

Lesson Two. Research-based recommendations that appear to have the singular goal of significantly reducing the prison population, regardless of the financial savings that would be generated, rarely attract broad, bipartisan support in the states. Similarly, a policy reform package presented to reduce the prison population purely for social justice reasons is typically insufficient to motivate elected officials across the political spectrum. Broad bipartisan support for policy changes that will reduce the prison population is generally contingent on the endorsement of (or at least the absence of concerted opposition from) a cross-section of stakeholders in the criminal justice system, including law enforcement, victim advocates, and other local officials. These constituencies are most inclined to lend such support when they are assured that the policy reforms recommended will strengthen the criminal justice system.

In the states where the CSGJC has worked, we have found that policy strategies that reduce a state's use of prison are most likely to rally this level of support when they effectively demonstrate that they meet one or more of three criteria. The strategies must focus either on opportunities to target limited resources on people most likely to reoffend, reinvest in programs that are effective in changing the behaviors of people involved in the justice system, or strengthen systems of supervision and treatment. In each of these cases, there is extensive research that shows that policies that apply these principles can be successful in reducing recidivism, which may lower prison admissions. But such success is contingent on an adequately resourced system. It is well established, for example, that caseloads for many community corrections officers are in the hundreds and waiting lists for substance use treatment slots are hopelessly long. This picture is consistent in most states. If mental health issues are added to the mix, the picture is even more challenging, with most states not able to meet basic demand for public mental health services for the general population. Again, for example, in Texas, only one-third of adults with the most severe mental illnesses are served by the state-funded community mental health services.

Lesson Three. In general, states have been reluctant to reduce minimum sentences terms or to walk back efforts to achieve truth-in-sentencing, particularly for violent offenders.

Without a major reduction in sentences and time served in prison for violent offenders, it is virtually impossible to achieve the 50% reduction in incarceration that some observers have advocated. Violent offenders disproportionately consume the most prison space due to their length of stay in prison. A recent examination by the Marshall Project showed that if "100% of all people convicted of drug, public order, and property crimes were released early or sentenced to punishments other than prison time, you would still need to free, say, 30% of robbery offenders to achieve a 50% reduction in the prison population."

Lesson Four. Efforts to reduce the prison population by focusing on people who have committed nonviolent offenses will confront the reality that legislative discussions evolve quickly into a lack of agreement on how to operationalize "non-violent" and how this definition will be applied in reality to particular persons. In state legislatures, advocates for reducing high incarceration rates have to face law enforcement groups, prosecutors, and victim advocates who may agree that certain offenses can be considered non-violent but do not necessarily agree on which persons will qualify as non-violent under sentencing or parole release policies.

Lesson Five. States have shown little appetite for directly addressing the issue of racial disproportionality in prison. There have been individual policymakers and stakeholders in the state task forces that the CSGJC has worked with who have raised the issue of racial disproportionality and have asked for analyses regarding this issue. But in most states where the CSGJC has worked, the governor, leaders in the legislature, and the judiciary have not worked together to make reducing racial disproportionality in the corrections system an explicit goal of their efforts. However, during the justice reinvestment process, some states have created incentives for people in prison or community supervision to earn time off their sentences or be subjected to a sanction for parole or probation violation short of returning to prison. These changes have reduced the number of people on probation or parole supervision returned to prison for minor violations of the conditions of their release. This appears to have had, either directly or indirectly, a positive impact on reducing the racial disproportionality in prison populations.

States must have the capacity to collect, analyze, and report data on a routine basis, so that policymakers can monitor trends and hold administrators accountable for outcomes, and adjust policies and funding as necessary.

Lesson Six. Experts and advocates pushing for reductions in the numbers of people in prison have not paid enough attention to the importance of indigent defense systems. In a 2009 report, the National Right to Counsel Committee of The Constitution Project extensively documented the neglect of the constitutional right to counsel. Most defendants that end up incarcerated are poor and, in general, receive indigent defense services from systems that are overloaded, short of investigators, and part of a low-paying defense plea machine. Significant improvements and increases in funding are needed in

indigent defense systems in the states. In most of the states where the CSGJC has worked, this has not been addressed as part of the reform agenda in any salient manner. Compared with a person without effective counsel, a defendant represented effectively is more likely, following his or her arrest, to have the charges dismissed, to be released on pre-trial supervision, or to receive a sentence to probation instead of to prison. Similarly, a person who is effectively represented and convicted of a crime that carries a prison sentence is more likely to receive a shorter sentence than someone with a similar conviction who does not receive effective representation.

Lesson Seven. States must have the capacity to collect, analyze, and report data on a routine basis, so that policymakers can monitor trends and hold administrators accountable for outcomes, and adjust policies and funding as necessary. Some states have these capabilities (such as Texas and Pennsylvania); most do not. Without a consistent and

credible way to measure the factors that impact the prison population, the impact of alternatives to incarceration after recidivism, and the cost-effectiveness of policies, it is difficult to sustain policy reform over time.

Lesson Eight. The implementation of adopted policies needs to be effective. As complicated as it is to make changes to state statutes or budgets, modifications to policy will not, in and of themselves, have a sustained impact on a state's incarceration rate. Prosecutors, judges, and the defense bar must embrace the new policies and apply them to everyday decisions regarding arraignment, sentencing, responses to violations of conditions of supervision, and release from prison. Transforming the culture of a community corrections agency, for example, requires, among other things, extensive training and redefined personnel policies that use new metrics to evaluate someone's performance. Requests for proposals and subsequent contracts to treatment providers must recognize the skills, workforce, and general capacity to deliver the types of services that are being promoted. This is why our justice reinvestment efforts are followed, if possible, by Phase II technical assistance to the states, to provide some momentum for effective implementation. Ultimately, though, no technical assistance can make up for lack of local interest, intense ground-level opposition, or deficient operational leadership. Addressing and overcoming such challenges are the responsibility of state and local policymakers.

Lesson Nine. When legislation contemplates significant systems change and carries with it political risk, it must enjoy the unqualified, focused, determined commitment of at least the governor, an especially powerful legislative leader, or an extraordinary judicial leader willing to insert him or herself into legislative affairs, to overcome the inevitable objection of a particular constituency. The example of Michigan illustrates how, even following exhaustive analysis, debate, media coverage, and painstaking negotiation of bipartisan agreements, legislation will die when concerted opposition materializes at the 11th hour and key elected officials determine that they must dedicate limited political capital to other legislative priorities.

As part of these lessons, it is worth noting that three large states that have achieved significant declines in incarceration

rates did so not because of a data-driven, consensus-based approach to lawmaking (and have done so without the benefit of the justice reinvestment process). In California, the historic declines in its prison population have been achieved only after decades of neglect of the state prison system and severe overcrowding, which the state confronted fully only once the U.S. Supreme Court exhausted the state's appeals. In 2011, in *Brown v. Plata*, the court declared: "This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected." In New York, dramatic reductions in its state prison population have not been achieved as a result of particular legislative changes, but because so many fewer people in New York City were arrested for felony offenses. And in New Jersey, the decline in its prison population is attributed to a combination of crime decreases lowering prison admissions, a change in parole policies due to a court order, and new guidelines issued by the attorney general regarding exempting the lowest drug offenders from minimum sentences due to the "drug free zone laws".

Progress, but challenges remain

Advocates seeking to reduce incarceration rates and eliminate mass incarceration view the developments we have described as progress, but hardly success. The incarceration rate of sentenced prisoners under state jurisdiction decreased by 6% between 2006 and 2013, but during the same period, the national violent crime rate decreased by 30% and the property crime rate decreased by 18%. And as documented here, a lot of hard work by many people has been behind the progress that has been made. Therefore, elected officials, especially at the state and federal level, must now revisit how incarceration fits into their vision—which has become quite entrenched over the past 30 years—of how to provide public safety.

The majority of people who are in prison are there because they committed a violent crime. Reducing incarceration rates to levels that preceded the historic investment made in prison construction and operations over the past three decades means that policymakers must reject their long-held notion that lengthy prison sentences are a deterrent to violent crime. They must similarly recognize publicly that incapacitating

people who commit such crimes for long periods does little to protect the public. Achieving that sort of shift in mindset requires nothing less than a fundamental cultural change. President Barack Obama's speech to the NAACP in July 2015 in Philadelphia, where he talked about sentencing changes for non-violent offenders, and his subsequent visit to a federal prison represent unprecedented steps toward such a change. However, for some observers this is not enough, as they argue that to significantly reduce incarceration rates, it will be necessary to address the sentence lengths of those with violent offenses.

On a broader level, the public must change how it thinks about punishment—and in particular its desire to see people convicted of violent crimes and sex offenses, as well as people who repeatedly commit property crime, locked up for lengthy periods. Such a conversion in thinking requires a state-by-state (and in many cases county-by-county) conversation, because each state (and communities within that state) has different cultures predisposing residents to different punishment thresholds. For example, for complex historical, geographical, and cultural reasons, states in the South have shared more punitive attitudes than other areas in the country. Therefore, what will be perceived in some quarters as minor changes in how people are punished will require wholesale changes of thinking in other portions of the nation.

There is no question that the research community is more unified than ever regarding the negative consequences of high incarceration rates in the United States. The political conversation on incarceration has changed in recent years, with the "right" and the "left" finding more common ground on the need to reduce incarceration rates. Whether this consensus is sufficiently profound to translate into a historic reduction of incarceration rates—of a magnitude on the same order of the massive build up experienced over the past 30 years—remains to be seen. Much will depend on the values that candidates in upcoming elections at the state and national level articulate, along with their willingness to propose specific policy changes for reducing punishments for violent offenders.

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