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## POLICY ESSAY

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# Money and mass incarceration: The bad, the mad, and penal reform\*

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Spelman's (2009, this issue) analysis calls into question the popular contention among many antiprison activists and other penal reformers that the U.S. prison boom is bound to end soon because states just cannot afford it anymore. States have had extremely deep pockets to build more prisons even in hard times, and the availability of state revenues to pay for more prison beds has been a leading engine for prison growth. States spent more money on prisons between 1977 and 2005, but they also spent more on lots of other items, such as education and health care. Leaving aside the current financial crisis, the United States has had three major economic downturns since the early 1980s. These downturns made no dent whatsoever in the nation's incarceration rate, which continued to increase steeply through good times and bad. Spelman's analysis implies that it would take a truly enormous economic contraction that drastically hit state spending across the board to cause the nation's extraordinarily high incarceration rate to plateau or turn downward. For anyone troubled by mass incarceration in the United States, this analysis looks like a dismal picture of what, if anything, can be done to reverse the prison boom, except perhaps to pray for a wrenching and protracted economic contraction.

But an alternative policy prescription embedded in Spelman's (2009) analysis is far less fatalistic. In addition to ample funds to pay for more cells, Spelman identifies two other factors as key in explaining why the U.S. prison population has been escalating for more than 35 years with no end in sight: an increasing crime rate and tougher sentencing policies. He casts doubt on alternative explanations that attribute the U.S. prison boom primarily to underlying social and economic conditions, like poverty, unemployment, failing schools and failing families (as measured by high-school dropout rates and out-of-wedlock births), income inequality, and

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the size of the black and Hispanic populations. He also suggests that political factors, specifically Republican control of state governments, the timing of the electoral cycle, and the conservatism of public opinion, are not major engines of prison growth. The overall policy message could be read as a hopeful one for those who want to slow or reverse prison growth: The prison boom is not rooted in deep-seated social, economic, and political patterns that might take generations to change. Rather, it is the consequence of a succession of small policy steps that are reversible.

Spelman (2009) does an excellent and convincing job of identifying what those small steps should be. But what are the necessary political preconditions for enacting the policy agenda he outlines? His narrow construction of the role of partisan politics (are Republicans in control of the state government?) and public opinion (how conservative is the state, and how many people identify themselves as evangelicals?) leads him to claim optimistically that partisan politics and public opinion play little part in decisions to fill prisons or build new ones. To his credit, Spelman does not mince words when he affirms that “nothing was inevitable” about America’s prison buildup. Where he falls short is his expansive claim that the future of prison growth “is fully under control of public policy makers.”

This essay will first evaluate the rationale for the policy agenda he proposes. It then discusses some political obstacles to pursuing that agenda. In doing so, it elaborates on the case of the deinstitutionalization of the mentally ill from state mental hospitals beginning in the 1960s, which Spelman (2009) suggests may have important political and policy parallels with efforts to end mass incarceration in the United States.

### **The Crime Rate and Changes in Penal Policy**

As Spelman (2009) shows, one of the central factors that has contributed to the prison boom of the last three decades is, not surprisingly, the crime rate. But why, then, has the prison population nearly doubled since the early 1990s despite generally falling rates for violent and property offenses? One reason is the time lag between legislative authorization of capital to build more prison beds in response to increasing crime rates and when those beds are ready for business. Spelman also affirms that if you build it, they will come. The “demand” for prison beds is sufficiently elastic to ensure that they will be quickly filled once they come on line—regardless of the ebb and flow of the crime rate.

Changes in penal policy, especially the war on drugs, are another reason why the prison system continued to grow despite the falling crime rate. Spelman (2009) does not come right out and say it, but his analysis could be read as a call to end the war on drugs, especially the war on marijuana use. Spelman uses a comprehensive measurement for the crime rate that includes the standard yardsticks of property and violent crime as well as the number of drug arrests. As documented here and elsewhere, the prison boom persisted in the 1990s despite decreases in property and violent offenses in part because of increases in drug arrests. States that decriminalized marijuana possession increased their prison populations significantly less each year than states that did not, according to Spelman's calculations. The proliferation of state-level truth-in-sentencing laws as a consequence of the federal 1994 crime bill also fueled the prison boom, Spelman found, while presumptive sentencing policies seemed to slow prison growth.

Spelman (2009) persuasively argues that states need to redirect their scarce resources away from incarcerating petty property offenders, drug users, and many first-time violent offenders and concentrate instead on the most violent and dangerous offenders. He contends that enormous cutbacks in the U.S. prison system of 50% or more are not difficult to justify in economic, social, and crime-fighting terms and would likely save the country billions of dollars annually. States need to change their sentencing policies and develop alternatives to incarceration so that policy makers and politicians do not reflexively build more prisons each time the crime rate turns upward. To accomplish this, the financial incentives for state officials and policy makers have to change, he argues. Spelman identifies the federal government as an important candidate to shift these incentives. In making his case, he highlights two examples of federal action that in his view dramatically shifted the financial incentives at the state level, which caused a monumental shift in public policy: the 1994 crime bill, which offered states billions of dollars for new prison construction in exchange for adopting get-tough measures like truth-in-sentencing laws, and the deinstitutionalization of the mentally ill beginning in the 1960s.

### **Federal Initiatives**

The significance of the 1994 bill for state prison populations is perhaps overstated. Although the legislation certainly contributed to an increase in the state prison population, it was not the primary engine, at least not directly. The state prison population had already been climbing steeply for more than a decade before the federal legislation was enacted. The number of states with truth-in-sentencing laws, which eliminated most "good

time” provisions and required convicted offenders to serve 85% of their prison sentence, proliferated in the wake of the federal crime bill, increasing from 4 states in 1992 to 27 by 1998. But even by Spelman’s (2009) own calculations, the truth-in-sentencing provision in the 1994 measure accounted for only about 18% of the state prison population increase between 1995 and 2005. The more interesting point he makes is his counterfactual: If the federal government had made presumptive sentencing and the decriminalization of marijuana—rather than truth-in-sentencing—conditions for federal funding in the 1994 Crime Bill, then the incarceration rate would have peaked in 1999. It is not obvious, however, that these changes alone would have significantly reversed the prison growth of the last few years. As Figure 5 in Spelman’s article indicates, the steep increase in the incarceration rate in the 1980s and early 1990s would have been followed by only a slight dip and not by a major downward slide.

The more telling example of the significance of federal incentives to shift public policy at the state level may be the case of the deinstitutionalization of the mentally ill, but not necessarily for all the reasons Spelman (2009) gives. Deinstitutionalization of the mentally ill is a tantalizing case to consider in the context of mass incarceration because it is a rare instance of the government eventually shutting down a vast archipelago of institutions that states had invested heavily in for decades. In 1955, the state mental health population was 559,000, which is nearly as large on a per capita basis as the prison population today. By 2000, it had fallen to below 100,000, a drop of more than 90%. The development of new drugs like Thorazine to combat mental illness helps to explain some of this decrease. But the real change came about because of federal actions.

The deinstitutionalization example is an important reminder that the politics of constructing certain state institutions may be different from the politics of mothballing them. A complex set of economic, political, sociological, cultural, and medical factors explains why state mental institutions proliferated in the late nineteenth and early twentieth centuries (Grob, 1994; Rothman, 1990). The federal government was largely inconsequential in the growth of state mental hospitals, but federal policy was the decisive factor in their demise. With passage of the Community Mental Health Act in 1963, local governments (but not states) became eligible for grants to create alternatives to state mental hospitals. This act spurred the establishment of hundreds of new community mental health centers in a few short years. Another major development was the creation of Medicare and Medicaid in 1965. Medicaid regulations stipulated that the federal

government would pay for inpatient care of the mentally ill in local hospitals and nursing homes but not in state mental institutions. As a result, some residents of state mental hospitals were transferred to other facilities, but most were released to the community.

Spelman (2009) convincingly argues that policy changes at the federal level could have potentially far-reaching effects on state prison populations, much as they did on state mental institutions. Left largely undiscussed, however, is what prompted the federal government to act in the first place. An intricate set of political forces came together to propel the federal government to pursue policies that ultimately brought about the demise of the state mental hospitals.

The psychiatric profession was a key player in this development. In the mid-nineteenth century, the embryonic community mental health movement was stillborn because the powerful psychiatric profession effectively thwarted the development of noninstitutional alternatives that would have threatened its power base in state mental institutions. It took nearly a century for the psychiatric profession to become disenchanted with state mental hospitals. As the aged population began to grow and families were less able to provide care at home because of the strains of industrialization and urbanization, mental hospitals became de facto almshouses for the elderly. These facilities became increasingly identified as providers of custodial care at a time when a new generation of psychiatrists coming of age in the early-to-mid twentieth century was attempting to identify more closely with the rest of the medical profession and with cutting-edge advances in acute care. The experience of treating soldiers traumatized by combat in World War II bolstered the idea that providing short-term psychological care early on in a noninstitutional setting could obviate the need for long-term institutionalization later on (Gillon, 2000; Grob, 1994).

These developments fueled the psychiatric profession's growing disenchantment with state mental hospitals and undermined the symbiotic relationship that psychiatrists and state mental asylums had enjoyed for more than a century whereby each reinforced and conferred legitimacy on the other (Grob, 1994). As the once inseparable bonds between psychiatrists and state mental hospitals began to dissolve, so did a key pillar of political support for state mental hospitals. Increased popular and journalistic attention to warehousing the elderly and mentally ill in dirty, overcrowded, unhealthy facilities undercut the legitimacy of the state hospitals. Conscientious objectors assigned to state mental institutions during World War II were critical muckrakers in exposing these conditions and leaders in the community mental health movement (Gillon, 2000; Torrey, 1997), which attracted vital public support from luminaries like Pearl S. Buck, Eleanor Roosevelt, and J. Robert Oppenheimer (Torrey, 1997).

These political developments provided an opening for federal intervention but did not make federal action inevitable. Political leadership was crucial. Robert Felix, director of the Division of Mental Health of the U.S. Public Health Service, seized on the political opening and shrewdly maneuvered to end federal passivity on mental health. He was an indispensable catalyst for the development of a succession of pieces of federal legislation that helped empty the state mental hospitals. The 1946 National Mental Health Act created the National Institute of Mental Health, which provided critical research and analysis for the establishment of community mental health centers, and the National Mental Health Advisory Council, which became a nerve center to promote community alternatives among politicians, policy makers, and the wider public (Grob, 1994). The 1946 act spurred the creation of the mental health lobby, which was so critical years later in pushing for the Community Mental Health Act of 1963 and other landmark federal legislation. Felix and other public health professionals also gave mental illness an image makeover. Mental disorders were no longer recognized primarily as individual diseases to be treated by individual practitioners but rather as public health problems that affected the entire health of the community, which warranted a community-wide response.

The community mental health movement did not act in isolation. It was buoyed by important connections with and advances in other burgeoning social movements, which included the civil rights movement and the senior citizens movement. Philanthropic support was also vital to passage of the Community Mental Health Act (Gillon, 2000). Community mental health advocates also forged vital alliances with fiscal conservatives by promising to improve the condition of the mentally ill while saving vast sums of government money (Gillon, 2000).

The deinstitutionalization example demonstrates the enormous importance of the political context for the development and implementation of successful federal and state policies to shrink state institutions dramatically. Elite leadership at the federal level was an important but not sufficient precondition for a change in policy direction that entailed dismantling institutions of long standing. Shifts in the training, world view, and identity of a key profession—in this case, psychiatrists—were essential in dislodging the state mental hospitals as the American Psychiatric Association split over the question of institutional care versus community mental health. The emergence of major new and interconnected social movements was pivotal in pushing policy makers to embrace change, as was journalistic and popular attention to the dire conditions in state mental hospitals. Moreover, the issue had to be reconceived. No longer was it about individuals and their individual diseases. Rather, mental health became a barometer for the health of the whole community.

Politicians and policy makers still faced enormous bureaucratic resistance to closing state mental hospitals. Mental institutions were a huge and growing drain on state budgets for years, and yet deinstitutionalization progressed very slowly (Koyanagi, 2007). Even though many psychiatrists moved on and many residents of state mental hospitals were transferred to other facilities or released, these largely empty hulks remained open for decades. It was not until the 1990s—three decades after deinstitutionalization began—that whole institutions began to close in significant numbers. And it took that long to secure wide recognition that adequate medical treatment was insufficient to ensure successful community integration, and that the mentally ill needed access to other things as well, like housing and jobs (Koyanagi, 2007). Unions and communities in which mental hospitals were the primary employer bitterly opposed closing the facilities. Only after many contentious years did unions win recognition that workers in psychiatric hospitals needed retraining to move into community programs. Remarkably, it was not until 1993 that more state-centered mental health money was allocated to community care than to state institutions (Koyanagi, 2007).

### **Partisan Politics and Public Opinion**

Although the parallels between the deinstitutionalization case and efforts to end mass incarceration are considerable, there are also significant differences. Debates about crime, punishment, and law and order have been deeply entangled in wider political battles and electoral strategies in ways that mental health never was. Mental health certainly was a controversial issue. For example, an enormous fuss erupted in Congress in 1955 when legislation was introduced to permit Alaska, which was still a territory not a state, to build a psychiatric hospital for residents. Conservative groups circulated thousands of letters and petitions claiming that psychiatrists would use the new facility to hospitalize conservatives and other political dissidents involuntarily and even charged that the mental health movement was a communist plot (Torrey, 1997). The conservative movement denounced mental health practitioners for purportedly encouraging immorality and for de-emphasizing personal responsibility. They also attacked state mental institutions as symbols of out-of-control government spending. Despite these controversies, mental health policy has never been a lightning rod in American politics the way penal policy and law and order have been since the 1960s.

Republicans staked the rebirth of the modern Republican Party on the “southern strategy,” which used talk of law and order as code words for race so as to undermine the new Democratic majority resting on the Civil Rights Movement and to build a new coalition of white voters anchored in the South and West. Bill Clinton staked his campaign for the White House on a kinder, gentler version of the southern strategy to woo the infamous Reagan Democrats back to the party. Given the higher profile of crime and punishment at the federal level and how this issue has been a pillar to reposition the major political parties, political openings to shift penal policy are fraught with risk and are harder to sustain. The opportunity for a penal Robert Felix to emerge and put into motion from a federal perch a major decarceration of state prisons is less likely.

Partisan politics is relevant in another respect. Because of a variety of exceptional institutional and political factors, which include the absence of an insulated, highly skilled, widely respected professional civil service, U.S. public policy is more vulnerable to the vagaries of partisan politics at the federal level (Brodeur, 2007; Gottschalk, 2006). Richard Nixon waged a high-profile battle with Congress to impound money authorized for mental health. Jimmy Carter attempted to address the problem of inadequate funding for mental health with passage of the 1980 Mental Services Act, which the Reagan administration repealed the following year. Ronald Reagan slashed federal money for mental health and made wide use of block grants to the states, which quickly reversed three decades of federal involvement and leadership on mental health (Grob, 1994). These cut-backs in mental health funds together with cuts in federal money for public housing and other services led to streams of apparently deranged people living on the streets. This outcome fueled a backlash against deinstitutionalization and community mental health and overshadowed the large proportion of mentally ill people who made successful transitions to community life (Grob, 1994). With the closing of state mental hospitals and the contraction of federal money for treatment, services, and housing, jails and prisons unfortunately became the mental institutions of last resort for many seriously ill people (Gillon, 2000; Harcourt, 2006; Torrey, 1997).

Public opinion poses an additional hurdle to penal reform. Spelman (2009) concludes that public opinion is largely inconsequential in explaining the prison boom because differences in the proportion of people who call themselves conservatives and evangelicals explain little of the variance in state prison populations. But it is important to consider not only public opinion en masse but also how public opinion gets channeled through effectively mobilized interest groups and social movements. Furthermore, policy makers seriously misperceive public opinion on penal matters, mistakenly seeing the public as more punitive than it actually is (Gottfredson and Taylor, 1987). This observation may explain their persistent reticence

to make bold moves that would significantly cut the incarceration rate, and why politicians across the political spectrum respond to increases in the crime rate by reflexively calling for more prisons and for keeping more people in prison for longer periods.

It may also explain why, time and again, a single dramatic crime has upended sensible penal reforms long in the making. Faced with a particularly gruesome high-profile crime, political leaders perceive that they need to respond with bold law-and-order gestures. Two horrific crimes in Connecticut in 2007 jeopardized a promising set of penal reforms to lower the state's incarceration rate. In their wake, the state tightened up parole eligibility and considered new get-tough measures, which included three-strikes legislation (*New York Times*, 2008). In the fall of 2008, Governor Ed Rendell of Pennsylvania temporarily suspended all parole in the state after a parolee killed a policeman during a traffic stop and subsequently called for a ban on parole for repeat violent offenders (Associated Press, 2009). Ironically, Rendell's response came just as the Pennsylvania legislature finally enacted a wide range of bills designed to take the edge off of some of the state's get-tough policies and to reduce the state prison population. As those bills were winding their way through the state legislature, the state Department of Corrections was finalizing the sites for three new prisons to deal with a serious prison overcrowding issue that predated the freeze on parole (Barnes, 2008).

Public opinion is relevant in another respect. The mentally ill and their legal advocates had considerable access to the courts to press their civil rights claims and to expose the dire conditions in state mental hospitals. The 1996 Prison Litigation Reform Act, the Antiterrorism and Effective Death Penalty Act, and a string of unfavorable court decisions have made it increasingly difficult for prisoners and their legal advocates to use the courts to pursue civil rights claims and to document and expose the conditions in U.S. prisons. Likewise, the media no longer serve as vehicles to prod reform. Because of cutbacks and restructuring in the news business, investigative pieces that document abuses in all kinds of institutions—prisons, nursing homes, hospitals—are increasingly rare. Furthermore, prison and state officials have been erecting ever-higher barriers for journalists attempting to cover what happens behind prison walls, which include complete bans on face-to-face interviews with prisoners in some states (Bergman, 2006; Prendergast, 2007). Moreover, the once vibrant in-house penal press is nearly extinct. Award-winning prison newspapers and underground prison publications that once reached thousands inside and out no longer exist (Caldwell, 2006).

Spelman (2009) stresses the importance of federal incentives to force policy makers at the state level to shift course on penal policy. This could lead to the mistaken assumption that the federal government is the most likely catalyst to engineer a contraction of the penal system. Certainly, federal initiatives and leadership have been pivotal in a long line of major social policy developments in the United States, which include everything from the establishment of national unemployment benefits and old age security in the New Deal to community mental health centers in the 1970s and 1980s. But vital state-level experimentation for years—even decades—often preceded federal action. Pioneering states like Wisconsin had been exploring for years the various unemployment insurance and old age security schemes that later became models for federal intervention in the 1930s. Likewise, in the 1950s, New York State and California were pioneers in state legislation to develop community mental health centers and provided templates for subsequent federal action (Grob, 1994).

In assessing the possibilities to reverse the prison boom, we need to examine political and institutional differences at the state level that extend beyond blunt political and partisan measures like the percentage of conservatives and Christian evangelicals in the population and whether the Republican Party controls the state government. What explains, for example, why the deep blue state of California seems trapped in a perpetual Groundhog Day,<sup>1</sup> investing billions more in new prison beds even as it is forced to make truly draconian cuts in education, health, and other vital state services? Meanwhile, New York State, which had been a pioneer in using creative financial schemes to fund a vast prison empire upstate, is one of only four states that actually has had a sustained decrease in its average annual incarceration rate between 2000 and 2005 (Sabol, Couture, and Harrison, 2007). As Barker (2006) convincingly demonstrates in her comparative study of state-level penal politics, the differences in the structure of state governance and in the practice of civic engagement help to explain why California has pursued far more punitive policies than New York or Washington State.

## Conclusion

Spelman's (2009) greatest contribution may be the compelling challenge he lays down to the "root causes" approach to ending the prison boom, which seeks to solve the crime and punishment dilemma by ameliorating structural problems like rampant poverty, high unemployment, dysfunctional schools, an abysmal health-care system, and outcomes dramatically

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1. Dir. Harold Ramis. Perfs. Bill Murray, Andie McDowell. Universal Studios, 1993.

stratified by race. Fifteen or so years ago, the focus on the structural roots of crime and punishment was critical to help neutralize culture of poverty and moral poverty arguments that supported the development of the carceral state. Attention to structural causes—and how they create cultural pathologies—at a time of increasing (and then decreasing) crime rates and media hysteria over crime also helped mitigate somewhat the demonization of people living in high-crime, inner-city communities. But if the aim today is to shrink the country's extraordinary incarceration rate over the next few years—not the next few decades—perhaps the focus on structural causes and solutions is misplaced.

By giving structural problems primacy in efforts to end mass incarceration, we are essentially accepting that the extensive U.S. penal system is here to stay for a very long time to come, because structural problems call for comprehensive, often expensive, long-term solutions and commitments. Long-term fixes are problematic not just because they take a long time. They are nettlesome because they are harder to sustain from one change of administration to the next. In the U.S. case, the absence of a respected, expert, nonpartisan civil service that maintains policy continuity despite political shifts compounds the problem. The focus on structural problems overshadows the fact that more than half of the people held in state prisons are serving time for nonviolent offenses, many of them property or petty drug offenses that would not warrant a sentence in many other countries (Irwin, Schiraldi, and Ziedenberg, 1999). It also deflects attention away from the fact that prisons exacerbate many social ills that contribute to crime and poverty and are unlikely to rehabilitate anyone significantly. Spelman's (2009) work bolsters the contention that if the United States is serious about ending the prison boom, it should follow the lead of countries like Finland that successfully brought down their exceptionally high incarceration rates by focusing on changing penal policy in the short term rather than by mounting a sustained attack on structural problems and the root causes of crime (Brodeur, 2007; Lappi-Seppälä, 2007).

Four decades ago, the United States had many of the same structural problems it has today, but it did not have such an expansive penal system. Since then, the United States has embarked on a war on drugs and on a broader war on crime characterized by penal policies and penal conditions unprecedented in modern U.S. history and unheard of or disdained in other industrialized countries. A deeper commitment to addressing structural problems like widespread poverty and unemployment is an admirable goal. But by making that the centerpiece of any penal reform agenda, opponents of the carceral state risk losing a sense of urgency. Criminal justice reform is fundamentally a political problem—not a crime and punishment problem. The real challenge is how to create the political

will and political pressure at all levels of government—local, state, and federal—to pursue new sentencing policies and to create alternatives to incarceration that will end mass imprisonment in the United States sooner rather than later.

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