
Foreword

Mass Incarceration as a Chronic Condition: Diagnosis, Prognosis, and Treatment

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The American phenomenon that is mass incarceration exploded in the last quarter of the twentieth century, giving rise to an imprisonment rate greater than any other nation's today.¹ Mass incarceration exacts an undeniable human toll on those locked up, and on their families, communities, and society.² As a result, mass incarceration is a keystone of the criminal justice movement, and legal and policy strategies to reduce mass incarceration have culminated in a charged debate about the value of human liberty, public safety, and equity, one which encompasses moral, economic, political, and legal spheres.³

The 2019 *Minnesota Law Review* Symposium brought leading legal minds together to address the future of mass incarceration in conversation with the three main themes animating Professor Franklin Zimring's forthcoming book, *The Insidious*

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1. FRANKLIN ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (forthcoming 2020) (manuscript ch. 1, at 3).

2. *Id.* (manuscript preface, at 2). Social and scholarly interest in mass incarceration has increased as well: while there were five prison policy books published throughout the 1990s, thirty-two have been published since 2010. *See Id.* Additionally, some prison policy books have reached bestseller lists and captured a national stage. *See Hardcover Nonfiction*, New York Times (Apr. 27, 2019), <https://www.nytimes.com/books/best-sellers/2019/04/27/hardcover-nonfiction> [<https://perma.cc/BQ8G-V4LH>].

3. ZIMRING, *supra* note 1 (manuscript preface, at 2).

Momentum of Mass Incarceration.⁴ First, Zimring, William G. Simon Professor of Law at UC Berkeley, considers how and why mass incarceration will persist as a “new normal” in the absence of major institutional changes. Second, he proposes legal changes to redefine crime and punishment to disrupt the momentum of mass incarceration. Finally, he addresses policies related to the construction of prisons and jails, and the collateral consequences of this, both of which exacerbate the persistence of mass incarceration and its impact on American society.

Kevin Reitz, James Annenberg La Ve a Land Grant Professor of Criminal Procedure at the University of Minnesota Law School, helped assemble an array of legal scholars to discuss, expand on, and critique *Insidious Momentum*, still in manuscript form, from the vantage point of specialized areas in criminal law. After each presentation, speakers took questions from the audience. Professor Franklin Zimring responded to the speakers’ feedback at the end of the day. A lunch panel organized by *Law & Inequality: A Journal of Theory and Practice* hosted additional speakers to frame the issues with a local focus in mind. The day succeeded in bringing together experts with the shared hope of finding solutions to the pervasive American problem of mass incarceration.

The keynote speaker was Rachel E. Barkow, Vice Dean and Segal Family Professor of Regulatory Law and Policy and Faculty Director for the Center on the Administration of Criminal Law at New York University School of Law. She brought a wealth of expertise as a recent member of the United States Sentencing Commission, as a former member of the Manhattan District Attorney’s Office Conviction Integrity Policy Advisory Panel, and from her experience co-founding a clemency resource center. Her talk highlighted lessons from her book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, and *Insidious Momentum of Mass Incarceration*.⁵ After comparing various institutional forces that create the large sweep of criminalization, incarceration, and supervision guiding American penal policy, Barkow questioned how best to reverse course.

4. ZIMRING, *supra* note 1. Professor Zimring’s earlier work, *The Scale of Imprisonment*, precipitated and defined academic study of mass incarceration in the 1990s. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991).

5. RACHEL R. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019); ZIMRING, *supra* note 1.

The second speaker was Alfred Blumstein, J. Eric Jonsson University Professor of Urban Systems and Operations Research Emeritus, and former Dean of the H. John Heinz III College of Information Systems and Public Policy, at Carnegie Mellon University. Professor Blumstein presented a striking statistic: the United States increased its incarceration rate by almost five hundred percent, and has, since its peak, reduced it slowly by only about ten percent over the last ten years. He then responded to Professor Zimring's recommended solutions, especially whether they were feasible given the scale of American imprisonment. He also addressed Professor Zimring's concerns about the collateral consequences of increased criminalization.

Professor Blumstein's talk was followed by a two-person panel discussion between John Pfaff, Professor of Law at Fordham University, and Robert Weisberg, Edwin H. Huddleson, Jr. Professor of Law at Stanford University and Co-Faculty Director of the Stanford Criminal Justice Center. Professor Pfaff introduced recommendations from his recent book, *Locked In*,⁶ which offer a nuanced consideration of the cultural and political roots of mass incarceration. While he agreed with Professor Zimring's focus on addressing poor institutional design to promote criminal justice, he also emphasized the politicized role of prosecutors.

Professor Weisberg brought his experience as a consulting attorney for the NAACP Legal Defense Fund and the California Appellate Project to the panel. He addressed Professor Zimring's discussion of prosecutorial and judicial dynamics, which Professor Weisberg thought did not sufficiently address the individual and cultural behaviors motivating such actors. He also considered how fundamental attitudes about faith in empirical science, political design, and the adaptability of human behavior frame responses to mass incarceration.

The second panel featured Professor Jessica Eaglin, Associate Professor of Law at the Indiana University Maurer School of Law, and Professor Reitz. Professor Eaglin specializes in how sentencing reforms, adopted in response to the economic pressures of mass incarceration, will impact underlying sociopolitical transformations. In particular, she examined the ongoing debates about using actuarial risk assessment tools for addressing the pressures of mass incarceration, and how these tools could inform Professor Zimring's proposed solutions.

6. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

Next, Professor Reitz discussed risk assessment in light of the reforms suggested by Professor Zimring. Professor Reitz brought his experience as Reporter for the American Law Institute's project to rewrite the sentencing and corrections provisions of the Model Penal Code, as Co-Director of the Robina Institute of Criminal Law and Justice, and as editor and an author for Oxford Press's *American Exceptionalism in Crime and Punishment*. His talk considered the exploding use of actuarial risk-assessment tools in criminal sentencing, the old and new controversies surrounding them, and how reformed approaches to risk-informed sentencing might be a necessary component for decarceration policy in the coming decades, including those introduced by Professor Zimring.

The third panel brought together Professors Richard Frase, Benjamin N. Berger Professor of Criminal Law at the University of Minnesota Law School, and Mark Bergstrom, Associate Teaching Professor of Sociology and Criminology at The Pennsylvania State University, Executive Director of the Pennsylvania Commission on Sentencing, Adjunct Professor at the Duquesne University School of Law, and Adjunct Faculty at the Villanova University School of Law. Professor Frase brought to the panel his significant experience researching sentencing guidelines, punishment and proportionality theories, and criminal procedure and sentencing practices in the United States and abroad. He addressed Professor Zimring's premise that sentencing guidelines commissions could, if given additional powers, help states substantially reduce their bloated prison populations. He critiqued the strengths and weaknesses of Professor Zimring's sentencing guidelines proposal, while also highlighting the ways in which such commissions are already helping some states limit the rate of imprisonment.

Professor Bergstrom discussed the work of the Pennsylvania Commission on Sentencing to create risk assessment tools to reconsider sentencing guidelines, parole guidelines, and commitment ranges. He also assessed Professor Zimring's similar incorporation of such strategies, but he also posited that while these and other activities hold the promise of improved coordination across decision points and better "governance of imprisonment," their calibration and administration require significant effort and expertise.

At the end of the day, Professor Zimring responded to the presenters' feedback. He expressed his gratitude for the Sympo-

sium's focus on his forthcoming book and for the respectful critiques and suggestions his work received.

Each presenter at the 2019 *Minnesota Law Review* Symposium emphasized the gravity of mass incarceration, its intractability, and the importance of committing to deep and sophisticated structural change to reverse course. The articles that follow expound on the ideas put forth at the Symposium, having Professor Zimring's instructive suggestions as a common thread. Professor Barkow's keynote speech is published in its entirety. *Minnesota Law Review's* hope, and my own, is that this issue helps illuminate, enrich, and inspire further commitments to stronger communities and a more just society.