

Letter from America by Chris Innes<sup>1</sup>

### **The Tippers versus the Wisers**

I am under the impression that, on the issue of prisons and incarceration, Americans have a reputation of being more than a bit dimwitted. One theme, both in the States and elsewhere, is that Americans are addicted to punishing people and insensitive to the damage our legal system inflicts on our society. Conversations I have with other Americans on this issue, however, reveal a richer mix of faith versus cynicism, optimism versus foreboding, and inspiration versus exasperation. There is, for example, one corner of the debate where optimism holds sway. Some commentators perennially become convinced that the U.S. has reached a “tipping point” in its collective attitude toward incarceration and that it is in the midst of a transformation. These policy Tippers repeatedly offer the argument that some recently observed change is clear evidence that, as Todd Clear, Dean of the School of Criminal Justice at Rutgers University, has recently written, show we have arrived at the “Beginning of the End of the Great Punishment Experiment”<sup>2</sup>. Others, however, are not so sure. They are the sadder-but-wisers who have seen before what they hoped was the dawn of a new era, only to find the new day proved to be pretty much like the old days. For myself, I am among the sadders, though I will not claim to be among the wisers. In any case, the national discussion here is at least a good deal more nuanced and thoughtful than one would have expected of a discourse among dimwits.

Dr. Clear has a distinguished record of scholarship and engagement in national policy discussions and enjoys a well-deserved reputation among criminologists and policy makers alike. In his article, he reviews the dramatic changes in incarceration since the 1970s and writes,

“...prison expansion happened as a consequence of intentional policy: over time, the cumulative effect of many sentencing reforms meant that the imprisonment rate of people convicted of felonies tripled and the time they served in prison doubled. By 2010, the number of prisoners in the United States had increased six-fold, and the incarceration rate had grown by 500%. No other democratic nation had anything approaching our numbers—it was a uniquely American social experiment in a penal policy centered on prisons.”

The use of the past tense I assume is intentional since Clear goes on to say, “But this is now changing...the last two years have seen a national *decline* in the number of prisoners—small, but after 38 years of unrelenting growth, remarkable. In fact, every sector of corrections is now losing numbers:

probation and parole; jails; and prisons”. (For the record, the total U.S. correctional population peaked at 7.3 million in 2007 and by the end of 2010 had dropped to 7.1 million<sup>3</sup>). Clear allows that one of the reasons for this population decline is the fiscal crisis in the U.S. over the last few years. He goes on, however, to cite a long list of events that are among, “...the many bellwethers that the great prison experiment of the 20<sup>th</sup> century may be slowly ending”. Clear is not alone. Other writers and organizations active in the public policy debates on incarceration in the U.S. routinely decry the past, but find recent proofs that the beginning of the end has arrived.

Although the declines in the incarceration rate in recent years have been, as Dr. Clear notes, “small”, especially given the worst economic conditions since the Great Depression, many observers have hailed them as a turning point in the way the criminal justice system works. A decade ago, when the previous recession depressed state prison population rates, they made the same claim<sup>4</sup>. More recently, the Vera Institute of Justice, a New York think tank, published a report in which they examined closely the apparent impact on correctional populations of the budget changes from 2006 to 2010<sup>5</sup>. The authors say that, “States have begun to reexamine their sentencing and correctional policies as a way to decrease prison costs immediately and over the long-term.” The Vera authors point to two broad strategies they say show promise, making more offenses eligible for “...non-prison sentences or sanctions,” and reducing the length of time people serve in prison. The goal of these approaches is to reduce costs by shifting more people to supervision in the community, which is much cheaper than to keep them in custody.

What Vera also found, however, were relatively modest changes in a few states. Expenditures clearly dropped during the period, but there was no discernible relation between the size of drop and the percent change in the sentenced prison population. Similarly, in two related reports Vera provided a long list of legislative changes which had occurred over the preceding decade which, the Vera authors believed, showed important changes were taking place in how states approached sentencing policies<sup>6</sup>. The Pew Charitable Trust, another longtime skeptic of the U.S. level of incarceration, also lauded the decline. Pew noted, however, that states varied widely in their trends, with 27 showing a drop, but 23 reporting an increase<sup>7</sup>. The Sentencing Project, a Washington D.C. advocacy group, issues a “Chopping Block” report that lists states that have or are contemplating the possibility of closing institutions; in 2012 they identified only 14,100 prison beds (out of a prison population of nearly 1.6 million) that could potentially be eliminated<sup>8</sup>.

Then there are other voices in these policy debates, the sadder-but-wisers. A recent example is a keynote speech given by Joan Petersilla at the June, 2012 annual conference on criminal justice research sponsored by the National Institute of Justice, one of the main research funders in the U.S. Department of

Justice<sup>9</sup>. Petersillia, a Professor of Law at Stanford University, prolific researcher and writer, and veteran of many efforts over the last 30 plus years to translate research into policy, has been deeply involved in the huge changes now occurring in the state of California. In her speech, "Looking Back to See the Future of Prison Downsizing in America," she noted that, "We have been here before". In the 1980s the intermediate sanctions movement tried to reduce incarceration and was also built, "...on the backs of community-based alternatives that turned out not to work in the long run". The result was that, "...prison downsizing then fueled a resurgence ...[of more imprisonment]...when the alternatives are found to be wanting".

Petersillia said, "After all, people said in those days, 'We have tried community sanctions and they haven't worked. We've given them their try and now our only choice is basically to build prisons'." Joan admitted that she was not happy being the bearer of this message, saying, "...it's funny for me to be now giving you a talk which is kind of a downer, which basically says, you know, we really need to rethink this. But it's the truth, and we've got to be honest about this." She went on to refer to the work of two other well-known researchers with policy credentials to match her own, Franklin Zimring and Michael Tonry, in giving several reasons that the task of reducing prison populations permanently might be even harder than in the past<sup>10</sup>.

The first reason she cites is that the sheer scale of imprisonment is so much larger. As Todd Clear pointed out, there are a lot more people in prisons today than there were 30 years ago. Petersillia said that the, "... power of the opposition at downsizing prisons will be incredibly huge...There are vested interests that, in fact, have now grown" and include unions and communities (with elected representatives) that want to keep prisons jobs. Secondly, the one big "easy fix" that existed before is gone; most states have eliminated parole board discretion, so they cannot simply lower the threshold for parole release. Another factor is the surveillance technology industry. All of the things, like GPS and electronic monitoring, are made and marketed by people who have an interest in making sure their products get bought and used. Petersillia noted that surveillance strategies often compete with treatment for resources and, when they do, "I think surveillance wins". "We need to be honest," she said, "We don't have a lot of good solutions". Finally, Petersillia gives one last reason and it's about money. She says, "It's going to all be about funding. It's going to all be about the money. This could not be happening at a worse time".

To be fair, I should note that Petersillia is not entirely pessimistic about current efforts and she sees several reasons that might contribute to success. First, she said, is that, "I think the science is much better than when we did this in the intermediate sanctions movement and certainly much better than in the 1970s. We have gotten better". She also believes that practitioners and researchers are in much closer alignment and are working together. In

addition, there are more stakeholders involved now than she saw in the past, including law enforcement, the judiciary, and prosecutors.

And while Petersillia sees promise in a greater focus on performance measures, she believes there is a danger in focusing too much on a simple-minded notion of recidivism as the penultimate measure of success. She reported that she is sometimes asked by policy makers, "Can you guarantee me if I go out on a limb and fund this program, recidivism rates will be reduced?" Petersillia said about this,

"I always look at them and say, 'Yes, I can guarantee it because by policy I can reduce your recidivism rates.' We just decided to revoke people under different things. We all know that game. That's just a shell game. Okay. Let's don't violate technical violations. I can get that down. Okay. Let's just decide we are going to let people fail three or four times and not violate them. I can get your arrest rates down. I can get a lot of things down. But have we really changed behavior? And so that's a much different thing."

She concludes that, when talking about performance indicators, we need to be, "...putting more on the table than just recidivism. Because recidivism, as we all know, is a combination of the offender's behavior and that agency discretion about what we're going to record".

Finally, Petersillia noted that some prisons at least are being closed and that once prison capacity has been reduced it will be difficult to increase it again. "We're not going to have prisons open at a level that is going to allow us to simply expand the prison population in the way that we did...to open up a prison, it takes 4 to 7 years, it's going to be just as hard once we close those prisons to open them up...". And, she said, public opinion has shifted. She said, "The scale of the problem has now influenced public opinion at so many different levels...you know, that commercial,...'what goes on in Vegas stays in Vegas'?. I think what we've showed in the American public is that what goes on in criminal justice does not stay in criminal justice. It bleeds to communities." Concerning attitudes when intermediate sanctions were tried, she said the public, "...were never with us. The public opinion was tough on crime when we tried to implement alternatives. And I think now for this period of time, we are going to see a much, much different end game..." And this, in the end, may be the key question that divides the tippers from the wisers; "*This time, will there be a much different end game?*". Todd Clear believes there will be and Joan Petersillia hopes he's right, but fears it will be otherwise.

Michael Toney begins his essay on punishment by noting that, "We are not very good at talking about punishing offenders."<sup>11</sup> This may not be entirely true, since we seem to be enthusiastic about the subject, especially during election campaigns and after a particularly shocking crime. But we are poor at talking together about exactly why we are punishing people in the first place. I suspect that this, more than any debate about the relative cost-effectiveness of

different sanctioning strategies, is why we are in danger of repeating the cycle of the past. The host of changes in sentencing laws, policies, and practices enacted decades ago remain in place and they continue to drive admissions to custody. These changes were *designed* to enhance the level of punishment and produced a huge expansion of the criminal justice system's capacities. Those greater capacities, from law enforcement, to prosecution, to the operation of our courts, to prison and jail beds, and probation or parole remain in place. Even as crime rates have fallen dramatically since the mid-1990s, the system's capacity continued to generate high levels of prison admissions.

This possibility, that the criminal justice system in the U.S. has become self-sustaining and divorced from external reality, is the subtext of debates about the strategies and tactics of reform. There is an overused quote, often attributed to Einstein, who is supposed to have said that the definition of insanity is doing the same things over and over again all the while expecting a different outcome. If this is true, than I think we can take comfort in the notion that we are not so dimwitted a crowd after all; we're just daft.

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<sup>2</sup> Todd Clear, *The Beginning of the End of the Great Punishment Experiment*, March 26, 2013, <http://www.nccdglobal.org/blog/the-beginning-of-the-end-of-the-great-punishment-experiment>

<sup>3</sup> Glaze, L. (2011), *Correctional Population in the United States, 2010*, Bureau of Justice Statistics, Washington, D.C.. The Bureau of Justice Statistics also reported that during 2011, the number of prisoners in state or federal prisons totaled 1,598,780. This was a 0.9% decline from the year before (when it was 1,613,803). By the end of 2011, there were 492 sentenced prisoners per 100,000 U.S. residents incarcerated, (it had peaked in 2007 with a rate 506 per 100,000). See Carson, E. and Sabol, W. (2012) *Prisoners in 2011*, Bureau of Justice Statistics, Washington, D.C.

<sup>4</sup> For reports from the early 2000s predicting a watershed from the earlier recession, see; Wool, J. and Stemen, D., (2004), "Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reform in 2003", Vera Institute of Justice, New York; Wilhelm, D, and Turner, N., (2002), "Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?", Vera Institute of Justice, New York; Greene, J., (2003), "Positive Trends in State-Level Sentencing and Corrections Policy" Families Against Mandatory Minimums, Washington, D.C.

<sup>5</sup> Subramanian, R. and Tublitz, R, (2012) *Realigning Justice Resources: A review of Population and Spending Shifts in Prison and Community Corrections*, Vera Institute of Justice, New York.

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<sup>6</sup> Lauren-Brooke, E. and James, J. (2012) *Reallocating Justice Resources: A Review of 2011 State Sentencing Trends*, Vera Institute of Justice, New York, and Austin, A. (2010), *Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001-2010* Vera Institute of Justice, New York.

<sup>7</sup> Pew Public Safety Performance Project, (2010), *Prison Count 2010: State Population Declines for First Time in 38 years*, The Pew Charitable Trusts, Washington, D.C. Pew has produced a steady stream of publications intended to raise the consciousness of the American public by pointing out how many people are imprisoned. See; Pew Center on the States, (2008), *One in 100: Behind Bars in America 2008*, Pew Center for the States, Washington, D.C.; Pew Center for the States, (2009), *One in 31: The Long Reach of American Corrections*, Pew Center for the States, Washington, D.C.

<sup>8</sup> Porter, N., (2012), *On the Chopping Block 2012: State Prison Closings*, The Sentencing Project, Washington, D.C.

<sup>9</sup> A video of the speech and full transcript are available at <http://nij.ncjrs.gov/multimedia/video-nijconf2012-laub-petersilia.htm>.

<sup>10</sup> Petersilia did not say during her speech which of Zimring's or Toney's writing she had in mind, but in a personal communication with me last month she identified them as, Gartner, R, and Zimring, F. (2011) "The past as prologue? Decarceration in California then and now," *Criminology & Public Policy*, 10:291-325, and Tonry, M. (2007), "Looking Back to See the Future of Punishment in America" *Social Research* 74:353-378.

<sup>11</sup> Tonry, M., (2001), "Punishment" in *The Oxford Handbook of Crime and Criminal Justice*, Oxford University Press, New York.