

Mass incarceration, legal change, and locale Understanding and remediating American penal overindulgence

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Since the turn of the 21st century, a proliferation of empirical and theoretical scholarship has developed regarding mass incarceration in the United States. This work has grappled with its causes, contours, and consequences and has led to numerous important insights about how we arrived at our current state of overincarceration and about its human and economic impact. Yet, as I hope to tease out in this article, several aspects of the processes that gave rise to mass incarceration are theoretically and empirically underdeveloped in the existing literature. The American case, I will suggest, is neither as homogeneous nor as straightforward as might be implied by much criminological research.¹ This observation is of central importance to strategizing about policy reform because it means that remediation efforts will need to be multiple, varied, and smaller in scope than what might be assumed from the existing body of work.

I have three major (and interconnected) goals here in examining the American mass incarceration story. First, I explicitly make the case that, to understand American *penal* change, we must make analyses of *legal* change central to the endeavor. In doing this, I map the four different forms of legal change that have been catalysts to the rise of mass incarceration.² The first of these forms is the most obvious and the one best attended to in the criminological literature—legislative and other statutory changes to penal codes that

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1. For the purposes of this article, I will focus primarily on empirical examinations of the mass incarceration problem so I will not consider or critique in any detail the primarily theoretical works on this subject, including Garland (2001a), Simon (2007), and Wacquant (2009).
2. The concept of “mass incarceration,” or “mass imprisonment,” is not fully defined in the literature, although in general, the following elements are commonly assumed: vast numbers of imprisoned citizens and skyrocketing rates of imprisonment, overcrowded facilities, and the concentrated impact on minorities and the poor (Garland, 2001b).

have increased the likelihood and lengths of prison terms in jurisdictions across the country. The second form is found in federal case law, particularly 8th Amendment jurisprudence on conditions of confinement and related issues. The third aspect of legal change is in the area of postsentencing law and policy (especially related to parole release, supervision, and revocation). Finally, the fourth form of legal change has to do with the myriad changes to on-the-ground legal practices related to sentencing and punishment in local courtrooms around the country. I argue that the law (and its transformation) in these varied forms is the engine that has propelled mass incarceration and, therefore, must be foregrounded in explanations of this phenomenon.

This discussion leads to my second goal, which is to move beyond national-level explanations of American mass incarceration to begin to sketch out an empirically based, more unified understanding that highlights the localized social, cultural, and political factors that have contributed to the imprisonment explosion. To do so, I illustrate how much of the criminal law and policy that resulted in mass incarceration is local at its core, emanating in large part from specific regions of the nation and then diffusing from there. I suggest that punitive policy development and its pattern of movement across jurisdictional boundaries help to explain the regional and national effects we have witnessed. I also illustrate how criminal and penal law *as practiced* is significantly shaped by the local (and locale) such that, although law on the books might lead us to expect some homogenization of outcomes within state and federal jurisdictions, law in action indicates much more microlevel variation shaped by local norms and culture related to how the business of criminal justice happens in any given place. In essence, I will make the case that, to understand the proliferation of penal populations, we also must look at where the power to imprison resides, which is typically at the county level in the United States. In making these claims, I do not intend to deny the impact of national and even global factors that have brought about and helped sustain mass incarceration; rather, I hope to add a multilevel dimension to the analysis of its causes.

My final goal is to explore potential avenues that would work to scale back or at least stem the tide of mass incarceration. In this exploration, I highlight how the law, and its grounding in local sociopolitical cultures, can be strategically deployed in this effort. In so doing, I make a claim that the mitigation of mass incarceration must emerge from an understanding of, and intervention into, the specific and intertwined catalysts that brought it on in the first place.

The Criminology of Mass Incarceration

As many observers have noted, the explosion in American imprisonment that followed the infamous “decline of the rehabilitation ideal” (Allen, 1981) was stunning in several regards, including the following: its breadth and size, in that all U.S. jurisdictions began to incarcerate at rapidly growing rates within several years of each other; the ironic nature of its timing, in that the critique of the prison as a rehabilitative institution would seem to have logically led to the development of alternative interventions to reduce the reliance

on the prison as a sanction; and its dramatic fiscal impacts that nonetheless seemed to raise little concern for elected legislators and executive officers. Given that, beginning in the mid-1970s, increases in the use of incarceration seemed to be occurring everywhere in the United States, the major empirical investigations of its causes have tended to treat the problem as a national one, and state-level variations in social and political conditions have been treated as factors that could predict incarceration growth at this more macrolevel. This approach has been especially prevalent for quantitative criminological analyses, which have looked at such influences as population demographics, economic conditions, political factors, various forms of state spending and revenue capacities, crime rates, as well as sentencing policy on incarceration rates and growth.

One problem with this approach is that it assumes these factors mean the same thing over time and in different jurisdictions. It also has meant that some potential causes of mass incarceration are not included because they are not easily reducible to quantitative measures. As a result, to the extent that researchers have tried to develop empirically testable hypotheses about the American incarceration explosion, they have had to make some questionable assumptions about how law, policy making, politics, and social relations happen, including assuming that these processes work the same way across and within different states and regions of the country. In particular, some important variations across time and place get homogenized in problematic ways in quantitative research that relies on aggregated national-level trend data or even state-level imprisonment data (see Kovandzic and Vieraitus, 2006 for a thoughtful discussion of this issue).

For example, researchers can and do account for whether states have enacted determinate sentencing or other nondiscretionary sentencing schemes (Greenberg and West, 2001; Marvell and Moody, 1996) to test whether such laws predict incarceration rates. But such sentencing policies qualitatively differ so substantially from state to state that their presence or absence hardly can be expected to be predictive of sentence outcome lengths. As a point of specific illustration, Minnesota was at the forefront of the determinate sentencing revolution, developing an often-emulated guidelines system to constrain sentencing discretion. Since those guidelines were put into practice in 1980, this state has been among the most resistant to mass incarceration in the nation. At the end of 2009, the state's imprisonment rate was 189 per 100,000 population, trailing Maine, which had a rate of 150 per 100,000 population (West, Sabol, and Greenman, 2010). On the other end of the spectrum, Louisiana also adopted a guidelines system for sentencing; yet it has been consistently either the top state incarcerator or in second place since the guidelines' adoption, and it maintains an imprisonment rate that is nearly five times that of Minnesota. At the end of 2009, its rate stood at 881 per 100,000 population (West et al., 2010).³ Thus, the fundamental differences in these sentencing structures' content—the actual presumptive sentences delineated for

3. As such, both Maine and Minnesota more closely resembled Canada (116/100,000) and England (153/100,000) in terms of rates of imprisonment than their Southern and Western peer states (Walmsley, 2008).

specified offenses—render them proverbial “apples and oranges,” which should not, in any conceptualization, be treated as equivalent on anything but rudimentary form (see Knapp and Hauptly, 1992 for more on this issue).

Many prevailing understandings of mass incarceration also assume that specified causes move in only one direction in triggering the effect of prison growth even in cases where the process might be more bidirectional. For instance, several major state-level studies have found that levels of state-level revenue predict incarceration rates and growth (Greenberg and West, 2001; Spelman, 2009). These research designs appropriately build in a time lag to ensure that the proposed cause (revenue) clearly precedes the effect (incarceration). Nonetheless, such an approach still might elide the much messier underlying process of revenue generation for prison costs. My own historical research on Arizona’s move to mass incarceration highlights how incarceration pressures predict revenue as much as the other way around (Lynch, 2009). In the Arizona case, legislators and governors were forced to figure out revenue-generating schemes when faced with inadequate resources to manage the projected prison population growth brought on by a variety of law changes (affecting both the influx and the release rates of inmates) during several key periods since the 1970s. Such schemes take a variety of forms in different jurisdictions, but in Arizona, they included reallocation of existing funding streams, the institution of new fines and fees imposed on certain convicted offenders (particularly drunk drivers), “sin” taxes added to liquor and cigarette sales that were designated specifically for prison construction, and increased vehicle licensing fees. Thus, a bidirectional and spiraling pattern of the generation of funds to meet present and projected incarceration demands might have looked, from the outside, like a simple case of expanded revenue capacity of the state.

Finally, and most problematically, as I will delve into in much more detail in a subsequent section, absent from many quantitative examinations that aim to explain the increase of mass incarceration is detailed attention to key local- and county-level variables, despite their centrality to the sentencing process that leads to imprisonment. Most of the power to incarcerate rests at the substate level, in county courts where prosecutors pursue prison sentences, defendants plead guilty to prison-eligible felonies, and judges formally impose sanctions; yet the impression one gets from many studies is that such decisions occur at the state or federal level. Although sentencing statutes have been toughened at the state and federal levels, thereby creating the capacity for mass incarceration, mass incarceration has not been realized without local-level criminal justice actors transforming their daily practices to send more and more offenders away to state penal institutions.

Penal Change as Legal Change

As alluded to previously, penal change—specifically the explosion in the American prison population—at its heart is a case of legal change. It is indeed influenced by politics, public sentiment, economics, and other similar factors, but it would not have happened without

specific legal transformations both to the formal law in jurisdictions around the nation and to the legal practice in courtrooms throughout the United States. Furthermore, those legal changes are much more complex and variegated than how they typically are characterized, and they have impacted almost all aspects of imprisonment. Thus, to understand the causes of mass incarceration, it is not enough to specify a version of legal change (such as the adoption of determinate sentencing or truth-in-sentencing statutes) as a potential causal factor; rather, we need to uncover and interrogate those processes that brought about changes to criminal/penal law, including how they were decided and how they are implemented in different locales.

Statutory Changes

Again, the effect of formal changes to sentencing statutes on emergence of mass incarceration has generated the most significant attention by criminological scholars. These changes are typically—although not always—conceived of, drafted, and enacted by legislative bodies and, therefore, are fairly heavily grounded in the political process.⁴ Yet, despite its centrality to many analyses, much criminological research—particularly quantitative empirical examinations—has treated this form of legal change as it exists after the fact, with little attention given to the conditions and contexts in which sentencing laws were devised or transformed. Nonetheless, the important clues to mass incarceration lie in the legal reform processes themselves in that they reveal, in some instances, a window into how irrational and short-sighted such lawmaking was from the start.

A growing body of empirical research that primarily uses historical analytic methods to examine these processes at the individual state level (Barker, 2006, 2009; Campbell, 2010; Lynch, 2009; Miller, 2008; Schoenfeld, 2009) and at the federal level (Gottschalk, 2006; Provine, 2007) provides some insight in this regard. Taken together, this work suggests that, as the symbolic politics of crime and punishment grew, particularly by the late 1970s and early 1980s, pragmatic and realistic criminal justice policy making nearly disappeared.

My study of Arizona's prison buildup, for instance, demonstrated how, from approximately 1975 on, legislators and governors were more than willing to make sentencing changes that they knew were fiscally unsustainable and for which they had no workable plans for financing (Lynch, 2009). This kind of policy making represented a dramatic shift from how state policy making had been done in Arizona since territorial days (Arizona previously had subscribed to a relatively rigid commitment to only implementing policies for which known and available funds existed). My research also indicated that, during the incarceration buildup, lawmakers became increasingly hostile to evidence-based analyses of

4. Two most typical kinds of sentencing policy changes to emerge from sources other than the legislature are those promulgated by sentencing commissions that are then approved legislatively and those passed into law through the initiative/referendum process.

criminal justice policy or other forms of expertise that could inform their decision making, thus calling into question how much rationality can be assumed about how policy was made during the last 25 years of the 20th century. As such, this research lends support to those theories that suggest mass incarceration has less to do with sound crime-control policy than with other social, cultural, and political forces (e.g., De Giorgi, 2006; Garland, 2001a; Gilmore, 2007; Simon, 2007; Wacquant, 2000) and casts some doubt on the work that presumes it was driven primarily by a rational quest of crime control (e.g., Useem and Piehl, 2008).

Changes to 8th Amendment Case Law

The second key legal change that must be attended to in explanations of American mass incarceration is federal case law. Again, a growing body of empirical scholarship, primarily in the law and society tradition, illustrates how federal courts' management of prisons (brought about through prison conditions litigation) from the 1970s onward has contributed to mass incarceration in somewhat unexpected ways. The lesson from this work converges with that on "tough-on-crime" sentencing reforms in that it indicates that state political leaders in some jurisdictions openly eschewed pragmatic solutions to pressing and severe criminal justice problems and rejected criminal justice expertise in responding to court orders.

For example, Schoenfeld (2010) examined the paradoxical role that prison conditions litigation challenging overcrowded conditions played in creating mass incarceration in Florida. Her research highlights the importance of timing; in particular, how litigation in that state began in a different political climate than when the case was resolved, which shaped the state response to the case. Rather than complying, state actors dug in against court orders to reduce prison population and rhetorically transformed the battle as one of state's rights versus federal intervention. Consequently, the state embarked on "an aggressive prison construction program" rather than making efforts to reduce prisoner population in response to court orders, thereby providing increased capacity for mass incarceration (Schoenfeld, 2010: 751).

A similar pattern of response to court orders mandating that the state reduce overcrowding was evident in Arizona in the late 1970s and early 1980s (Lynch, 2009). Again, particularly telling was the interpretation of the court orders by elected officials as a more symbolic issue of state's rights, which was expressed as resentment toward the *federal* judges who were telling the state how to run its institutions. In both the Florida and Arizona cases, no surplus revenue was readily available to respond through increasing institutional capacity (quite the opposite, in fact), which created a crisis in itself. Yet rather than complying immediately with orders to reduce the prison population by implementing viable but low-cost release strategies, both states engaged in stalling tactics until, eventually, they came to sink unprecedented amounts of money into large-scale prison building programs. In Arizona, at least, such action was done despite evidence provided by the Department of

Corrections that options were available to comply with the orders using early releases and alternative sanctions without undue risk to public safety and with significantly less capital outlay (Lynch, 2009).

These single-state historical analyses are supported by recent research by sociologists Josh Guetzkow and Eric Schoon that looked at the relationship between prison overcrowding litigation and prison building across the United States. In a time-series analysis using data from 49 states, Guetzkow and Schoon (2010) demonstrated that major resource allocations to prison and actual prison capacity building followed prison overcrowding litigation, and they concluded that such litigation is an indirect contributor to American mass incarceration. Taken together, this set of findings prompts the question as to why states did not respond to court orders to reduce overcrowding in a way that would have been simplest and cheapest for lawmakers and the executive branch (i.e., by releasing low-risk offenders and developing lower cost alternatives to prison). No shortage of support was found for this route among legal scholars and criminal justice experts, and this option would mean that lawmakers and governors would not have to do the hard work of figuring out how to fund the construction and operation of new penal facilities. In addition, if public backlash or other negative consequences were to occur, then state actors could have fully deflected responsibility onto the federal courts. Yet this response was not the predominant course of action in most states, again suggesting that something powerful, other than pragmatic policy concerns, was driving the response to such court orders in jurisdictions across the country. This is not to suggest that prison conditions cases should not have been mounted. The right (albeit increasingly limited) to seek relief from damaging and even deadly conditions of confinement is fundamental and necessary to ensuring at least some limits to penal cruelty. Rather, the point I aim to make here is that understanding the specific irrationalities in states' responses to such lawsuits provides a more complete explanation of the mass incarceration problem and sheds light on the limits of prison litigation as a policy solution to mass incarceration.

Changes to Postincarceration Law and Policy

The third form of legal change has to do with the regulation of prison releases and returns to custody. Major legal and policy transformations in jurisdictions across the country have limited the availability of back-end parole release mechanisms, on the one hand, and have increased the likelihood of returns to prison among releasees, on the other hand, thereby contributing to mass incarceration. Under many determinate sentencing statutes, prisoner release decisions are no longer left up to parole boards and are functionally mandated at the time of sentencing. By 2000, only one of every four releasees was let out of prison based on a parole board decision, whereas 25 years earlier, most prisoners were so released (Travis and Lawrence, 2002). As such, an important form of institutional release valve, which could be (and was) used to regulate prison population size, has been curtailed dramatically. In addition, during the same period, both the nature and the terms of parole supervision

have been transformed in many jurisdictions to emphasize enforcement and control over rehabilitation and reintegration (Lynch, 1998, 2000; Petersilia, 2003; Simon, 1993). This policy shift has been shaped partly by technology, as drug testing rose to become the predominant mode of monitoring parolees in some jurisdictions (Lynch, 1998; Simon, 1993). As a result of these changes, parolees are less likely to receive assistance that will facilitate successful reentry and agents are more likely to revoke parole and return parolees to prison in response to violations, even ones that might call for more reasonable alternative interventions. Thus, Jacobson (2005) has demonstrated how probation and parole violators have played a huge role in burgeoning penal populations and has suggested that reforms to violation policies will be the key to downsizing them.

California stands as a hallmark case of how policy change in parole has played a central role in mass incarceration. The state enacted a determinate sentencing law in 1977 that dramatically changed how prison sentencing and release was done, by specifying presumptive sentences for felonies and by eliminating discretionary parole release that had been the venue of a parole board, the Adult Authority, for all but the few offenses subject to a life sentence. Consequently, this change had the potential to do away with parole supervision, which had been used for those released from institutions by the board. Yet, as Mayeux (2010) detailed in a recent manuscript, the parole officers' lobby responded to the possible elimination of parole supervision by pressuring the legislature for an expanded term of supervision for most felons to 4 years (including revocation time). According to Mayeux, there were no apparent policy-relevant reasons related to crime control or rehabilitation for this proposal, lobbyists and supporters did not cite any research that suggested such a long period of supervision would be optimal (in fact, most research available at that time suggested its costs would outweigh its benefits). Nonetheless, the legislature complied by passing SB 1057 in 1978, which mandated a standard 3-year term of supervision (extending to a 4-year time period for those who were sent back to prison on violations; see also Simon, 1993 on the politics of California parole).

Looking back to that policy implementation, its impacts on California's prison population are crystal clear. The extended period of supervision, coupled with a distinct shift to parole-as-surveillance that accompanied the policy change, has resulted in staggering numbers of parolees returning to prison on violations. By 2000, more than 40% of the California prison population was comprised of parole violators (the majority of whom were technical violators), and six out of ten new admissions were returns to custody from parole (California Department of Corrections and Rehabilitation, 2008; Mayeux, 2010). Parole had become a revolving door back to prison in the state.

Changes to Local Legal Practices

The final form of legal change—transformations in local court adjudication of felony cases—is probably the least explored in the criminological literature in terms of its contributory role to mass incarceration. In many ways, however, it is the most intriguing and provides the

most interesting avenues for examining how local practices interact with state and federal factors in producing mass incarceration. As a wide range of law and society scholarship has demonstrated, a significant gap often exists between law on the books and law in action. Such work has highlighted how changes to statutes and legal policies that occur in a given jurisdiction might be put into practice in ways that are contrary to the stated goals of the formal laws or that subvert the aims of the legal change in question. Indeed, this line of scholarship suggests that looking only at how formal law has changed to understand the increase of mass incarceration would lead to an incomplete and even misleading picture of the process.

Perhaps one of the best illustrations of this “gap” in a criminal law context comes from Candace McCoy’s (1993) now-classic study of the reshaping of plea-bargaining practices in California after the passage of Proposition 8 in 1982. This initiative was billed as a victim’s bill of rights, and it included a provision that “banned” plea bargaining in felony cases. McCoy’s research indicated that the law change merely moved the stage at which bargaining took place to earlier stages of felony processing—prior to the felony indictment or information being filed. The new law thus directly increased prosecutorial power in negotiations by creating pressure on defendants to plea bargain earlier in the process, and the change affected many more cases because the opportunity for a plea negotiation disappeared at later stages. The law also added a provision for a sentence enhancement in serious felony convictions, which became an additional weapon wielded by prosecutors as a threat against those who did not want to plead guilty immediately. As such, this law, as practiced, diverged from its stated intent and likely contributed to the state’s incarceration growth by driving up the “cost” of offenses in plea negotiations, especially in serious felony cases that were subject to the enhancement.

More fundamentally, as noted in the beginning of this article, it is local courts that produce prison-sentenced felons, so explanations of the rapid increase in incarceration numbers should attend to how those court practices were transformed from the late 1970s on. How much of mass incarceration is a function of the increased prosecutorial power that has co-occurred with formal legal changes (Gershman, 1991; Simon, 2007; Stith, 2008)? To what extent do “law-and-order” politics and the fear of being labeled soft on crime, especially in places with judicial elections, shape actual sentencing by state-level judges (Swisher, 2010; Weiss, 2006)? How much can be explained by increasing criminal court caseloads brought on by higher crime rates and expanded law enforcement resources (Weidner and Frase, 2001)? Does a large part of the *capacity* for mass incarceration lie in the unique American structure that provides local criminal justice actors with the power to incarcerate but no responsibility to pay for it (Lynch, 2009; Zimring and Hawkins, 1991)? Some strands of research are suggestive about each of these transformations, but additional examinations of how local factors have contributed to the national phenomenon are still needed.

Law as Local(e)

Indeed, because of the fragmented American criminal justice system(s), the mass incarceration puzzle is much more complex and layered than it is in national jurisdictions with a more centralized and singularly hierarchical legal system. Thus, a key task in explaining American mass incarceration lies in teasing out the degree to which the “51 different countries” that make up the American criminal justice system are “a single organism having diverse organs. . . or a group of autonomous units functioning independently but marching together” (Zimring and Hawkins, 1991: 137).⁵ Beyond that, within those 51 autonomous systems are 3,141 county (or county equivalent) jurisdictions that do the actual prosecution and sentencing of felony defendants that themselves receive cases from even more local and regional law enforcement jurisdictions. In other words, criminal justice policy is made and put into action at the municipal, county, state, and national levels, and the thousands of organizations that comprise this criminal justice network are, for the most part, relatively autonomous both horizontally and vertically.

Because of this structural anomaly in the United States, it seems that the problem of American mass incarceration might be explored more fruitfully as a ground-up process, rather than as a top-down process. It is risky to assume that similar processes and outcomes underlie the production of prison sentences across these microjurisdictions, even at the state level of analysis. Again, this is not to say that no macrolevel processes have contributed to the increase of mass incarceration, particularly global economic transformations that have constrained opportunity for huge subpopulations. In terms of theory, however, shifting the starting point from the macro to the micro offers a more contextualized, interactive, and grounded understanding of how massive penal change occurred in the United States over such a relatively brief period. Moreover, as Gottschalk has suggested, from a policy standpoint, the best avenue for reform is through altering the laws and policies that allowed for mass incarceration, which means intervention at the specific points of legal decision making. Opportunities for reform efforts also might emerge through an analysis of, and intervention into, the on-the-ground local legal practices that overproduce prison sentences.

Region—irrespective of literal jurisdictional lines—also provides locale-based clues into American mass incarceration. Laws, policies, practices, and norms get shared, adopted, and remade as local across jurisdictional lines, and these boundary crossings often follow regionally based movement in adoption patterns. Indeed, as I will explore in more detail in the subsequent discussion, the regional picture adds a level of complexity to the picture of American mass incarceration and it serves as an intriguing point of linkage between microlevel and macrolevel impacts across periods of time.

5. By this, the authors are referring to the autonomous state political and legal systems, which make and enforce laws relatively independent from each other, as well as the federal system, which is actually just a small player in American criminal justice.

The Localized Practices of Criminal Law

Criminal law is almost always local in its application. Any given known criminal offense has the potential for vastly different outcomes as a function of where it happens. The chances of it being prosecuted at all, the actual charges filed and pursued, the type and content of any plea bargain negotiations, and the final disposition are all subject to variations by locale.⁶ Of course, such differences across state lines (or between state and federal jurisdictions) are, in part, a product of different statutes that define and punish similar acts in varying ways. But even within a single legal jurisdiction, microlocale matters.

The “gap” between law on the books and law in action, described in the preceding section, produces vast local intrajurisdictional variations despite the fact that the formal law is the same for any given state or federal jurisdiction. In California, for instance, one can find significant differences between counties in the rates of application of the “three strikes” law, even though that law, as drafted, specifically aimed to take away legal actors’ discretion in dealing with defendants with prior serious or violent felony records (Clark, Austin, and Henry, 1997; Males and Macallair, 1999). Specifically, as of the end of 2004, county-level courts in Kern County, which is a large agricultural and oil-producing locale in the Central Valley, were more than 13 times likely to sentence under a provision of the three strikes law than were San Francisco County courts (Legislative Analyst’s Office, 2005).⁷

Perhaps the best example of how the local level shapes state-level punishment is the contemporary administration of the death penalty.⁸ As Baumgartner (2010) has illustrated, American capital punishment is neither a national- nor a state-level story; rather, its persistence is largely the product of a few counties in the nation. Only 14% of the nation’s counties have been responsible for those executed since the death penalty was reinstated in the 1970s, and only 14 counties (of 3,146), concentrated in four states, have produced 30% of all executed offenders. Indeed, one county in the nation—Harris County, Texas—has been responsible for nearly 10% of all executions in the modern era. Additionally, numerous state-level studies have illustrated how local (county) jurisdiction, above and beyond homicide rates, matters in who ends up going to death row, particularly in terms of prosecutorial policy in seeking death sentences (e.g., Baldus, Woodworth, Grosso, and Christ, 2002; Ganschow, n.d.; Paternoster, Brame, Bacon, and Ditchfield, 2004).

6. Before even getting to this stage, of course, major disparities by locale exist in the likelihood of even coming to the attention of the criminal justice system, especially for offenses that are detected primarily through proactive law enforcement, such as drug offenses. See King (2008), for example, for a study on “disparity by geography” in urban drug arrests.

7. Kern County sentenced at a rate of 1,518 per 100,000 population adult felony arrests; San Francisco sentenced at a rate of 113 per 100,000 population adult felony arrests (Legislative Analyst’s Office, 2005).

8. Although contemporary American capital punishment is distinct from mass incarceration, more than one commentator has argued that the two are part of the same sociopolitical process (Gottschalk, 2006; Hallsworth, 2002; Simon, 2007).

The persistence of wide variations in sentence outcomes by district and region in the federal criminal justice system—despite major efforts by the U.S. Sentencing Commission to eliminate such variations—is a testament to the important role of local legal norms and practices (Johnson, Ulmer, and Kramer, 2008). Johnson et al.'s (2008) work indicates that, in the federal system, which has had a rigid guidelines system in place since 1987 that aims to reduce sentence disparities for similarly situated defendants, the likelihood of getting a prison sentence and the length of prison sentence significantly varies as a function of local courts and local court actors (see also, Kautt, 2002).

The purported reasons for such intra-jurisdictional differences within state jurisdictions and the federal system are varied, ranging from levels of crime, arrest rates, and conviction ratios (McCarthy, 1990; Weidner and Frase, 2001, 2003); degree of urbanization (Bridges, Crutchfield, and Simpson, 1987); region of the nation (Weidner and Frase, 2001, 2003); economic conditions (McCarthy, 1990); and population demographics of locale (Bridges, Crutchfield, and Simpson, 1987; Weidner and Frase, 2001). In any case, there is little question that the application of criminal law varies significantly as a function of local court jurisdiction (Johnson, 2006).

Local application of criminal law also helps to explain the temporal dimensions of mass incarceration. As Weiman and Weiss (2009) recently demonstrated, localized “grassroots” enforcement policies within New York City, rather than federal- or state-level factors, explain the long lag time between the passage of the harsh Rockefeller drug laws in 1973 and the surge in drug offense imprisonment rates in the state. They found that law enforcement agencies and prosecutors developed pragmatically selective policies toward the drug law enforcement and applied the new laws only in more serious cases rather than in all eligible cases. In the 1980s, local law enforcement policy change, at the direction of the New York City mayor's office, which began to focus on lower level offenses, ended up significantly increasing arrest rates, prosecutions, and tougher sentences in local courts, which then drove up the state's incarceration rate. The researchers concluded that the majority of the state's move to mass incarceration was a result of these local factors within the city of New York.

Law is local in postsentencing legal practices as well. For probationers and parolees, the risk of being incarcerated or returned to prison for violating conditions is influenced by microlocale. In a national study, Kerbs, Jones, and Jolley (2009) found that probation officers and parole agents responded to rule violations differently as a function of geographical characteristics, in that suburban officers were more punitive than urban or rural officers. Grattet, Petersilia, and Lin's (2008) analysis of parole revocations in California also indicated that the parole region within the state influenced the likelihood of revocation and returns to prison above and beyond case factors.⁹

9. Even the way doing time is experienced by felons sent to prison varies in significant ways depending on the institution one is sent to within a given penal system—even for those at equivalent custody levels (Kruttschnitt and Gartner, 2005)—so in this sense, the prison sentence itself has local characteristics.

Federal prison case law always emerges from the local as cases begin with individual litigants (or groups of litigants) that file complaints about conditions specific to individual institutions. These cases might be joined to implicate a larger system, but the nature of such litigation limits access to the courts to individual parties with standing—those who can reasonably claim that they are harmed by specific actions (or omissions) by the party being sued. District court judges, and even circuit courts, diverge from each other in how they interpret case facts and the applicable law in such cases, leading to a wide array of outcomes across the country. Therefore, understanding the broader impacts of prisoner litigation is best grounded in examinations of the specific local and temporal conditions in which the suits first emerged and in which they proceed over time (Schoenfeld, 2010). This includes understanding the local dynamics of the federal courts that review such petitions initially as well as upon appeal. Similar claims in front of different judges in different regions and circuits are and will continue to be treated in disparate ways, and some that might be denied after the initial review in one place may prevail in another.

Furthermore, even major national legal policy reform affecting prisoner litigation has its roots in local action. This was the case with the passage of the Prisoner Litigation Reform Act of 1995 (PLRA), which severely constrained prison inmates' access to federal courts and imposed substantial limits on the ability of federal courts to intervene in prison conditions cases. The idea for this legislation actually came from Samuel Lewis, the corrections director in Arizona at the time of its passage. Lewis was in a series of contentious battles over prison conditions with a federal district judge in Arizona, Carl Muecke, which prompted him to write to Arizona's Senator Kyl (one of the PLRA's cosponsors) with his wish list of reforms. Kyl then worked with Arizona Attorney General Grant Woods to craft the language of the federal law, which was modeled after Arizona's own prisoner litigation reforms (see Lynch, 2009, and Winslow, 2001 for more on this issue). Thus, in this case, the federal law, which has curtailed legal interventions into prison overcrowding problems and has created a more hands-off standard of review in regard to punitive living conditions around the nation (Hanson, 2010; Specter, 2010), initially was catalyzed by a localized conflict in Phoenix.

Finally, legislative changes (and other statutory innovations) that have contributed to mass incarceration often have emerged from local- and state-specific conditions and have taken on characteristics that are entrenched in local social and political culture (Barker, 2009; Lynch, 2009). Thus, laws are made in different jurisdictions in ways that are both highly idiosyncratic in regard to politics, styles and structures of governance, and even individual personalities of political actors (Barker, 2009; Gottschalk, 2006; Lynch, 2009). But at the same time, most criminal law innovations are not completely original and innovative; a significant amount of formal and informal interjurisdictional transfer of trends and ideas, knowledge about how to do things, and symbolic political messages occurs in the criminal justice realm (Nicholson-Crotty, 2009).

Even if we look to the federal system and criminal justice lawmaking in the era of mass incarceration, the localized roots of federal criminal law quickly become evident.

The ferocity of the federal “War on Drugs,” particularly against crack cocaine, was in part the product of Boston Celtics’ draft pick Len Bias’s death in 1986. His death, which may have been related to cocaine ingestion, prompted Massachusetts congressman and House Speaker Tip O’Neill to push through hastily drafted quantity-based mandatory minimum legislation (Sterling, 1995). Also at the federal level, the flurry of federal sex-offender laws passed by Congress in the 1990s and 2000s—the *Jacob Wetterling Acts* (1994 and 1997), the *Pam Lychner Act* (1996), and the *Adam Walsh Act* (2006)—testify to the case-specific, local roots in their names (Lynch, 2002). One can look in the legislative records regarding criminal law reform from the 1980s onward in most U.S. jurisdictions to find how broad-based statutory change often is premised on and promulgated by a single, local, sensationalized criminal case.

The Movement of Law and Policy: Regional Effects

It also is through changes in subnational lawmaking that we can best trace movement across jurisdictional lines. As I have argued previously (Lynch, 2009), there is a distinct geographic pattern to the transformation of those conditions inherent to mass incarceration, just as there was in the adoption and diffusion of rehabilitative correctional policies and practices in the early to mid-20th century. Indeed, in some sense, these sets of transformations are in geographic opposition to each other in that the “penal welfare” (Garland, 2001a) innovations emerged first and strongest in the Northeast and industrial Midwest, whereas the mass incarcerative innovations were born primarily in the Sunbelt South and West (Lynch, 2009).

For instance, the “three strikes” sentencing policies that proliferated in the 1990s began in the West, and state adoption moved south and east from there. The best marker of geographic correlates of these laws, however, has been in their implementation. Most three strikes states have used the law sparingly, and only three states—Florida, Georgia, and California—had incarcerated more than 400 felons under such statutes by 2002.¹⁰ Thus, it is how the contemporary sentencing reforms—determinate sentencing, mandatory minimums, “truth-in-sentencing,” and three strikes laws—have been implemented rather than just the nature of the reforms themselves that have followed a regional pattern of dispersal. States in the South and Southwest have been much more likely to use such reforms to increase sentence lengths dramatically since the late 1970s than have states in the Northeast. Ultimately, as annual reports from the Bureau of Justice Statistics have indicated for decades, this trend has resulted in the clustering of incarceration rates by region. The South consistently maintains the highest rates, the West has the second highest rates, the Midwest comes in third, and the Northeast maintains the lowest rates. These patterns existed before the incarceration explosion and have persisted throughout the expansion

10. California’s use has exceeded all others in that more than 42,000 offenders were incarcerated as under the three strikes law in the first 8 years (Schiraldi, Colburn, and Lotke, 2004).

(Lynch, 2009). Levels of racial disproportionality in prison admissions also vary by state and region; only in this case, the Midwest has the highest discrepancy between Blacks and Whites in incarceration rates compared with the other regions of the nation (Sorenson, Hope, and Stemen, 2003).

Again, the death penalty provides a stark, albeit corollary, illustration of regional effects and, in particular, indicates a strong role of path dependency in penal practices. Capital punishment as a legal sanction was disrupted when the U.S Supreme Court, in *Furman v. Georgia* (1972), declared it unconstitutional as implemented. Those states that enacted new death penalty legislation and those that have gone on to be the most active users of capital punishment are generally the same ones (concentrated in the South) that authorized and actively used capital punishment before *Furman* (Zimring, 2003).

Even the actual mechanisms of lawmaking that have been used to transform sentencing and punishment policy have regional roots and patterns. The “direct democracy” mechanisms of the state-level initiative and referendum are a Western phenomenon (Baude, 1998); many states in the West have included such measures in their constitutions since the turn of the 20th century. The initiative process began to be used regularly to pass “tough-on-crime” laws by the late 1970s, particularly in California, Oregon, Washington, and Arizona, and in some cases, those laws have dramatically reshaped criminal justice in those jurisdictions. California, in particular, has approved significant sentencing and criminal justice procedural reforms through such measures, including the three strikes law, the victims’ “bill of rights,” laws expanding the category of death-eligible offenses, and several laws that have shifted the balance of power to prosecutors in the state.

Within penal institutions, the 1990s “no frills” prison movement (Johnson, Bennett, and Flanagan, 1997), which stripped prisons of basic amenities and often imposed intricate rules on inmates, had its roots in southwestern states such as Texas and Arizona and spread first to other states in the region before moving north to states such as Wisconsin and Ohio. The trend of charging inmates for things like medical treatment and electricity is also an innovation born in the Sunbelt West. Nevada was the first state to implement a copayment for medical services within its prison system, beginning in 1981, followed by Colorado and then Arizona and California. By the beginning of 1996, 8 more states had joined the trend and 26 states either had approved legislation or had legislation in the works to charge inmates for medical care (Gipson and Pierce, 1996).¹¹ Likewise, one hallmark of the contemporary mass incarceration penal system—the “supermax”—was first put into use by a sunbelt state (Arizona), and its most concentrated use has been observed in the West (King, 1999).

11. County jails around the country have implemented similar policies and now typically charge for services that are directly related to local jail operations, such as transportation as well as room and board for work-release inmates.

Thus, mass incarceration is shaped by regionally significant historical, political, and cultural factors, which leads to distinct regional patterns of imprisonment rates and punishment practices. Beyond region, a particularly prolific kind of diffusion of criminal justice policy seems to persist in the “tough-on-crime” era, thereby making mass incarceration a national phenomenon as well as a local and regional one (Nicholson-Crotty, 2009). Indeed as Nicholson-Crotty (2009) recently argued, criminal justice policy making has the characteristics that make it the most likely to diffuse quickly and with the least amount of informed deliberation because of the high salience of crime issues and the low technical complexity of the policies themselves.

Of course, the widespread and rapid diffusion of tough-on-crime policies has also been helped along by several federal incentive programs that have proliferated during the past few decades beginning with the *Law Enforcement Assistance Program* in 1968 (Blumstein, 2008; Nicholson-Crotty, 2004). States have been enticed with major grants and funding streams if they mandate sex-offender registries and notification programs (Lynch, 2002); ensure “truth-in-sentencing” for violent offenders (Sabol, Rosich, Kane, Kirk, and Dubin, 2002); and target, prosecute, and punish drug law offenders (Nicholson-Crotty, 2004). In such cases, however, the federal government generally joined the bandwagon after state-level innovation on such policies and then encouraged their broad adoption through the use of financial “carrots” and “sticks” (Welch and Thompson, 1980).

Furthermore, the federal incentives generally only account for a modest share of the incarceration explosion (Gottschalk, 2009; Spelman, 2009). For instance, in the case of the short-lived federal truth-in-sentencing grant program, the federal funding opportunity was not a key driver in the state-level adoption in most states that have implemented such laws, nor did it dramatically increase either prison capacity or population in those states that adopted truth-in-sentencing laws (Turner, Greenwood, Fain, and Chiesa, 2006). Rather, the direct catalysts for mass incarceration generally are located in regional, state, and local conditions—historical and contemporary—whereas their proliferation appears to be enhanced by more macro-level factors.

Remediation: The Pathways Out of Mass Incarceration

This article has attempted to lay out an integrated approach to understanding the causes of mass incarceration by linking the intellectual traditions of law and society (or sociolegal studies) scholarship with criminological scholarship, advocating for the use of both quantitative and qualitative empirical research methods, looking at multiple levels of explanation, and moving away from simple causal models. As such, I am (admittedly) proposing a relatively messy approach to questions about the increase of mass incarceration. Nonetheless, some clarity can, and does, emerge from this quagmire, which has both theoretical and policy reform implications.

Although more empirical work that focuses on the processes and mechanisms of change rather than on just the outcomes (particularly state- and local-level inquiries) is

clearly necessary, the existing body of work—both in the more traditional quantitative criminological tradition and the more qualitative historical work—points to several factors that help explain the increase of American mass incarceration as well as the significant sub-national variation in criminal justice within the United States. These insights are not only important for theory building but also are the key to strategizing about how to scale back our reliance on imprisonment. I conclude in this section by outlining the lessons relevant to policy reform as I see them.

First, the historical rootedness of rehabilitation within the locale seems to be a strong indicator of its current commitment to mass incarceration both qualitatively and as quantified by incarceration rates. Thus, in places with at least a historical commitment to rehabilitation, part of a reform strategy could include an invocation of that past, as some evidence indicates that solutions are sought not only from outside but also through looking inwardly to historical processes (Lynch, 2009). Although rehabilitation has new meanings in the era of mass incarceration (Robinson, 2008; Travis, 2004), its contemporary viability as a renewed focus likely will be tied to its historical role in any given jurisdiction.

There are prevailing and enduring narratives and conceptions about the role of state governance in every given locale that shape the universe of possibilities for reform. To borrow from Swidler's (1986) conceptualization, cultural "toolkits," which include ideologies, belief systems, and worldviews about the way things are and should be, shape official responses to problems and crises such that solutions are not necessarily equally viable across disparate locales. In the case of prison reform, what might sell to both the populace and the political elites in Maryland or Massachusetts—places with at least a historical investment in the notion of rehabilitation—would have little resonance in Arizona or Nevada, where an overt or even crass appeal based on fiscal frugality would strike a chord (Lynch, 2009).

Relatedly, efforts to remediate the racially disparate impacts of mass incarceration are strengthened by attending to the particular structural and cultural trajectories of race relations in a given locale. While a substantial record has been amassed about the racial disproportionality of who bears the brunt of punitive criminal justice intervention (Mauer, 2006; Roberts, 2006; Tonry, 1996; Western, 2006), the particular mechanisms that underlie the disproportionality will vary significantly as a function of local history, sociopolitical culture, and legal norms and structures. Interventions that might work to remediate Black-White inequalities in Rustbelt states, for instance, may have less applicability or resonance in Southwest border states where historical and contemporary White-Latino relations will matter, or Southern states where the legacy of slavery and Jim Crow might well be considered in reform efforts.

The degree to which post-World War II population growth and its attendant destabilization of communities has occurred in a given place also appears to be correlated with the relative intensity of mass incarceration in a given locale. This connection is likely in part a result of the social anxiety and turmoil that accompanies rapid change, as well as the weaker social ties, fewer interdependencies, and decreased sense of community that comes

with population instability. In any case, in jurisdictions with trajectories of major population growth and turnover, one can expect that the governance styles will have adapted to this feature. As Vanessa Barker has argued (2006), states characterized by low (and cynical) levels of civic engagement with the political arena, which is typical of locales with unstable populations that experience significant influx and outflow of residents, are expected to be more punitive than those with activist and engaged citizenry. Thus, successful policy reform needs to be tailored to those specific styles and structures of the targeted locale. In such locales, it might be that the actual elements of policy change and the political rhetoric about the change can be and may need to be more incongruous with each other (and disingenuous in rhetorical content) than in places with more engaged and stable citizenship.

Along similar lines, the structure of lawmaking in a given jurisdiction matters to reform efforts. States that allow for referenda and initiatives offer an open avenue to reform that will not be available in jurisdictions without such direct democracy measures. Indeed, although it seems that in the states that have used the initiative process to alter criminal justice policy, the results for the most part have contributed to the mass incarceration problem; a recent trend indicates a turning tide on this issue. During the past 15 or so years, numerous states have functionally decriminalized marijuana, and some of those states have done so for other drug types through the initiative process (O'Hear, 2003). Although California's November 2010 ballot initiative that would have authorized full state legalization of marijuana did not pass, it opened up a serious policy conversation in the state about the future possibility of legalization and its revenue-generating potential.

Attention to appropriate referent jurisdictions also matters in promoting policy change at the state level. To the extent that polities view themselves as distinct and different from certain others, especially when that view is a point of pride and distinction, citing those "other" jurisdictions as examples of how to do criminal justice might backfire. Such was the case in Arizona in which several political figures suggested in interviews with me that their criminal justice system was the polar opposite of Minnesota's and asserted Arizona's clear superiority on fiscal and punitive grounds. However, the state had no issue with looking to Texas for guidance and advice (Lynch, 2009). This was true during the prison buildup and seems to remain so today as the state tries to scale back its reliance on prison through sentence reform. The first person to testify at the most recent hearing of the House Committee on Sentencing, held in May 2010, was a state representative from Texas to share how his state had decreased its prison population through a variety of small policy changes. He has been the only outside state political figure invited to testify in either hearing that has been held by this committee. So, although Texas might not objectively be the best state to look to for a model of scaling back (New York or New Jersey would have been [Greene and Mauer, 2010]), it has been and continues to be an acceptable referent state for political actors in Arizona.

Furthermore, as the recent report by Judith Greene and Marc Mauer (2010) aptly illustrated, successfully "downscaling" prisons is a piecemeal project that necessarily differs

by locale given different statutory constraints, institutional policies, and practices. Thus, they described in detail how four states have had success in scaling back their prison populations, with each using a combination of all or some of the following: sentencing statute reforms, investment in and implementation of alternative programs for prison-eligible felons, sentence reductions for those in custody, expanded parole-release policies, and reformed parole revocation policies. It is clear from this work that reform efforts must be attuned to the specific legal structures, political norms, and governance traditions of the state jurisdictions in which they are being attempted.

Another key, microlevel intervention that must be developed and implemented more fully deals with the fundamental structural problem that allows counties to send offenders to prison without any fiscal responsibility for those outcomes. As a result, prosecutors can voraciously pursue prison sentences (and judges can sentence offenders to prison) with no fiscal risk but high-reward potential. Politically, little can be lost in the “tough-on-crime” era by sending eligible offenders to prison, and with shrinking local resources, few alternative programs, overcrowded local jails, and overburdened probation departments, it makes financial sense for the county as well.

Thus, reforms that incentivize counties to treat and manage their felony offender populations at the local level have the potential to dramatically reduce the inflow of people into prisons. Such an incentive-based diversion strategy has been implemented successfully in a pilot program for nonpayment of child-support felony offenders in selected counties in Ohio, whereby the state corrections department provides funding to allow those offenders to stay in local facilities and even continue to work. In Arizona, a law enacted in 2008 authorized the state to reward county probation offices for the cost savings generated by avoiding revocations (where a violator would have been sent to prison) or new prison-eligible offenses through local efforts. Counties are required to calculate those savings estimates and a portion of that is supposed to go back to the local jurisdiction for the savings on prison costs. Probationers, under the law, are rewarded for good behavior with shortened probation terms, so the incentives flow from the state to the counties and the offenders. According to a Pew Center on Courts report (2011), this measure saved the state \$36 million dollars and reduced revocations and commitments to prison by about 30%. Just as the federal government’s financial “carrots and sticks” have reshaped state-level criminal law and policy, so can states innovate to come up with options to partner with counties to divert defined prison-bound offenders to more appropriate local alternatives from the start. This kind of scheme, however, presumably would require that local jurisdictions are provided with resources to manage and treat those offenders effectively and are otherwise de-incentivized from overusing prison as a sentencing option.

Finally, from a grassroots social-change perspective, significant room might be available to reshape micro-level practices to slow the flow of prison-bound felons. As detailed previously, county-level courts not only played a huge role in the incarceration buildup, but also they vary considerably from each other, even within states, in terms of how they mete

out felony sentences. Thus, strategies that challenge locally elected criminal justice actors—particularly prosecutors—to pursue more balanced and policy-effective approaches in their responses to crime have a great deal of potential to make many small dents in the huge mass incarceration machine. As I have argued elsewhere (Lynch, 2011), local community-based strategies offer several advantages. Community-based reform efforts invite a cooperative and collaborative, rather than an adversarial, mode of resolution that can be defined rhetorically as inclusive of the interests of all in the community. Local politics are generally more pragmatic in style and process than state and federal politics, and therefore, calls for alternative or innovative approaches to the problem of crime are often more resonant for local leaders. Because crime, in particular, is prone to symbolic state and national politics, serving as a simplistic “valence issue” for grandstanding elected officials and candidates (Scheingold, 1995a: 166), efforts at reform are much more challenging as the reform target moves away from the local. As Miller (2008) has illustrated, this helps explain why minorities and the poor—who are both disproportionately victimized by crime and targeted by punitive policies—are relatively uninfluential at those higher levels of the political process. Indeed, her work suggests that local-level criminal justice policy reform efforts have the best chance of success if the larger goal is to achieve fair and effective crime-control policy.

Political scientist Stuart Scheingold (1995b) has also suggested that fewer incentives, and more risks, are present when politicizing crime at the local level, opening up space for pragmatic and cooperative reform efforts. Local politicians who go the “tough-on-crime” route run a high risk of it backfiring by making promises they may not be able to keep, hurting the local economy by inciting fear of crime, and inflaming racial tensions as the politicization of crime is typically very racialized (Scheingold, 1995b: 280).

Finally, a local action strategy can highlight the “we” of community in its articulation of the need for reform by highlighting how the failures of the status quo policy harm community members. This strategy allows advocates for change to frame group identity as inclusive and diverse as well as made up of the entire community, and can facilitate empathy for those harmed by punitive policies and practices (Lynch, 2011). Consequently, empathy also can lead to increased strength and cohesion in social-change efforts through the reconfiguring of group boundaries. This kind of locally based strategy has been used by prison reform activists in Los Angeles (Gilmore, 2007), where mothers of incarcerated people highlight the harms done by mass imprisonment to their families and their neighborhoods to put a face on the human costs of our current policies. Such a strategy becomes more difficult to employ as the social, demographic, and geographic distance between those who have the power to change policy and those negatively impacted by its increases.

It actually might be good news that the project of moving away from mass incarceration must happen with localized, multiple, and smaller scale interventions. Moving political and institutional actors to make specific fixes with projectable payoffs (in population reductions and cost savings) is much more feasible in the short term than is focusing exclusively on

tackling the huge and nearly intractable social and economic conditions that also underlie the mass incarceration problem. As Gottschalk (2009: 107–108) suggested:

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.

I fully concur with Gottschalk (2009) that this approach does not mean that those large problems should be ignored; rather, much can be gained for the larger projects of social, racial, and economic justice if we can make notable inroads into the mass incarceration problem through more immediate and feasible policy reforms. Indeed, a retreat from our overreliance on the prison as a social-policy solution ideally will open the door to more rational, thoughtful, and just policy making on several challenging social issues that underlie the problem of crime.

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