Mass incarceration can be approached from (at least) four perspectives: those of social science, cultural criticism, advocacy, and policy analysis.

The social scientist wants to know about causes and consequences, to employ theories to explain events such as the explosion of incarceration in America over the past generation, and to use events to develop new theories. The cultural critic strives to elucidate meanings, asking about the intentions behind the actions of participants in the social, administrative, and political processes that produce a given set of results; about how they justify those actions to themselves and others; and about the character of the social order that produced those processes and their results. The advocate searches for persuasive means to the end of ameliorating an already identified evil. The policy analyst tries to figure out what course of action would best serve the public interest, all things considered, trying to take into account unintended as well as intended consequences.

Viewed through a policy-analytic lens, “mass incarceration” looks like only a partial problem definition; the other part of the problem is crime. If the crime problem were trivial, or if incarceration had only a trivial effect on crime, the solution to the problem of mass incarceration would be trivially obvious: release those currently locked up and end the practice of sending offenders to jail or prison. The policy analyst’s work would then be complete, and the task of persuasion could then be turned over to the advocate, guided by the social scientist and the cultural critic.

But if crime is a real problem and if incarceration can be one means (among many) to control crime, then the situation looks more complicated. One would need to measure the harms done by crime as well as the harms done by incarceration, ask about the effects of alternative incarceration policies on the rates of different sorts of crime, and consider the likely results of making more use of other crime-control measures, including alternative forms of punishment, while reducing incarceration.

For example, it seems clear that increasing police activity can reduce victimization rates. Thus it ought to be possible in principle, given some target level of victimization, to “trade off” policing against incarceration: adding police while reducing imprisonment. Whether that tradeoff would be desir-
able is a different question. The extremely aggressive style of the New York Police Department, even if we credit it with reducing crime (and, consequently, reducing incarceration as well), seriously complicates the lives of poor, young African American, Dominican, Puerto Rican, and Haitian New Yorkers.

Is it better to live in a city with fewer prisoners but more police surveillance? The answer is not obvious on its face: resolving the question would require both the collection of facts and the assignment of values to different outcomes. But it is the sort of question that a policy analysis starting from the problem of mass incarceration must try to answer, if crime matters and if incarceration is one means of reducing it. That analysis must also ask which offenders to release early or not to incarcerate at all.

Thinking about mass incarceration and crime control as twin problems can create two tactical advantages for those committed to reducing mass incarceration. First, since many political actors are concerned about crime and do think that incarceration helps control it, advocates of incarceration reduction will find a better hearing if they propose alternative means of crime control instead of simply ignoring the crime problem. Second, there is evidence that support for highly punitive approaches to crime varies – albeit with a substantial lag – with the crime rate, so that success in reducing crime will tend to facilitate the project of incarceration reduction. As the crime explosion of 1962 to 1994 helped produce the problem of mass incarceration, the crime collapse since 1994 might help ameliorate it, especially if victimization rates continue to fall.

Even at current levels, crime – especially in poor African American communities – remains a first-order social problem, comparable in magnitude to the problem of mass incarceration. Merely reducing the prison head count without also making the lives of residents of dangerous neighborhoods safer would solve only half the problem.

The measurable losses from crime do not seem to be especially large compared to the measurable losses from other sources of risk: surely not large enough to account for the level of public concern over crime. Across households, the average property lost to burglary comes out to about $4 per month, a small fraction of a typical utility bill. Homicide is a horrible event, but also a rare one; twice as many people die on the highways each year as are deliberately killed by others.

Victimization risk imposes costs on those who are never actually victimized, because of the costly efforts they make to avoid victimization and because of the “external costs” of victimization-avoidance measures taken by others. Crime, like incarceration, deprives people of liberty; it does so by making them afraid. The deprivation of liberty is, in general, less profound – though there are certainly people who feel trapped in their homes because they are afraid to go outdoors – but it extends to a much larger group of people. The costs of crime avoidance easily swamp the immediate costs of victimization.

If the bulk of crime-related loss is not victimization loss, then the rate of completed victimization – the crime rate – is not a good proxy for the seriousness of the crime problem. A neighborhood abandoned due in part to crime, or where residents stay inside behind locked doors for fear of muggers, or a park that many people are afraid to enter after dark, may have a lower rate of completed crime than a safer neighborhood or park simply because so many...
fewer people are at risk. Even before the spectacular post-1994 crime decrease, New York City had a relatively low burglary rate compared to other big cities. But the public impression that burglary risk was higher in New York was nonetheless probably correct: as a visitor could easily notice, New Yorkers were habituated to being much more careful about burglary-proofing their homes than was common in cities where burglary was less on residents’ minds.

The extent to which the fear of crime reflects mass-media choices about what sort of “news” to emphasize remains an open question. Certainly, there is no strong tendency for measures of fear to shift quickly with, or even in the same direction as, measured crime. But this need not indicate that the fear itself is irrational or insensitive to the actual crime risks prevalent in various social milieux, since victimization might fall precisely as a result of increased precaution.

If the level of precaution tends to rise with the criminal riskiness of the social environment, and if precaution tends to reduce the rate of being victimized, then the measured changes in the rate of completed crime will tend to understate the changes in the underlying risk, especially when crime is increasing. For example, if the number of robberies doubles even as potential victims are taking greater precautions against being robbed, then the rate of robbery per exposed person-hour – imagining that such a quantity could be measured – must have gone up even more. The flow of population away from high-crime urban neighborhoods and into lower-crime suburbs and exurbs means that the measured crime rate could fall even as the level of risk in every area continued to rise.

The observation that the Great Crime Decline has left the country with “only” 250 percent of the crime rates prevalent in the early 1960s is less reassuring than it would seem. I am not very old, but I am old enough to recall when American storefronts, unlike European storefronts, did not have metal shutters, and when middle-class parents did not regard it as imprudent to allow their teenage children to ride late-night buses through tough neighborhoods. If Americans continued to be as careless about the risks of crime as they were forty-five years ago, the rate of completed crime would no doubt be substantially higher. The loss of that carelessness – or rather, of a social environment that made that carelessness rational – is not a small loss, and it becomes no smaller if we blame it on television news shows rather than on muggers.

The fear of crime deprives the residents of high-crime neighborhoods of economic opportunity by driving jobs away from the places where they live. Whether the “spatial mismatch” between the location of the unemployed and the location of unfilled jobs is an important cause of high minority unemployment remains a contested question, but there can be no doubt that having to commute farther to work is, at best, an inconvenience, especially for teenagers who would be working only part-time and whose attachment to the labor market may be weak. Those disadvantages tend to accumulate, since teenagers with less work experience become less attractive employees as young adults. Worse still, anything that makes licit employment less attractive will tend to make its illicit alternatives more attractive; a criminal record can be a very substantial barrier to subsequent employment in the licit economy.

Poverty to crime to job loss to poverty to crime is a positive-feedback loop: poor neighborhoods are often high-
crime neighborhoods, high-crime neighborhoods tend to be low-opportunity neighborhoods, low-opportunity neighborhoods encourage criminal activity by their residents, and criminal activity, in turn, makes the neighborhoods even less attractive places in which to live and do business and makes some of the residents less attractive as potential employees. Loss of residents, especially the relatively prosperous residents most likely to be able to afford to move out, makes a neighborhood less attractive to retail businesses, and the loss of retail services in turn makes the neighborhood a less attractive place to live for those who have other options.

The economic geography of every metropolitan area provides testimony to the importance of crime as a factor shaping residential and business location decisions. How else could one account for the coexistence of housing abandonment and new housing construction only a few miles apart? There are many reasons for moving to the suburbs, but crime ranks high on the list. The same applies to business-location decisions. It would be unconventional to insert a discussion of crime control in a treatise on reducing suburban sprawl, but it would not be irrelevant.

That poverty is a cause of crime is a commonplace, though the mechanisms involved are complex and poorly understood. That crime is a sustaining cause of poverty is no less true, though in the past it has been remarked on much less. The poor are victimized directly; the probability of criminal victimization falls with income. They are victimized again as a result of crime-avoidance behavior that limits their opportunities and blights their neighborhoods.

The picture is worst for African Americans; even adjusting for overall lower incomes, African Americans suffer much more crime than do members of other ethnic categories. Homicide provides the most dramatic example: representing less than 15 percent of the population, African Americans suffer more than 50 percent of the murders.

The problem tends to be self-sustaining. Given a constrained criminal justice system, punishment per crime tends to be lower where crime is more common. Assuming that the threat of punishment has some deterrent effect, growing up where that threat is smaller—and licit economic opportunity less available—should be expected, other things equal, to lead to a higher rate of criminal activity. Indeed, that is what we find. African Americans are far more heavily victimized than others, but not as a result of cross-ethnic aggression; crime is overwhelmingly intraracial.

Paradoxically, then, efforts to reduce the racial disproportion in the prison population are likely to intensify the implicit racial discrimination among victims that results from lower per-crime rates of punishment, leaving African Americans even more exposed to victimization. The critique of the current system in terms of imposing prison sentences and the consequent social stigma on a much higher proportion of African Americans than of whites is fully justified by the facts, but the mechanisms involved are far more subtle than conscious, or even systemic, racial discrimination by officials against African American perpetrators.

In some ways it would be better if, as is often asserted, systemic racial bias, in the form of more severe punishment for African American offenders, lay at the root of the problem; then eliminating racial bias could eliminate disproportionate incarceration. But if the actual problem is the positive-feedback loop from high criminal activity to low pun-
lishment-per-crime back to high criminal activity, no such fix is available. The standard critique portrays a melodrama; the reality is a tragedy.

If crime and mass incarceration are both great evils, then we should look for ways to have less of both, for example by substituting some other form of punishment for incarceration to serve the twin functions of incapacitation and deterrence. If, as sociologist and anthropologist Bert Useem and economist Anne Piehl argue, the rising scale of incarceration has brought its marginal crime-control benefits down close to—or in some instances below—zero, then to some extent we could reduce mass incarceration without increasing crime. But the data do not suggest that 50 percent of current incarceration is useless, and cutting our incarceration rate in half would still leave it more than twice its historical norm and more than twice the level in any other advanced polity.

Probation and parole are the two systems that manage convicted offenders outside the walls of prisons and jails. Fines, community service, diversion to drug treatment or mental health treatment, and “restorative justice” programs all rely on probation and parole supervision as their enforcement mechanism, without which they are no more than helpful hints from a judge. Alas, that enforcement is generally very weak, and compliance with “alternative sanctions” spotty at best. In California’s famous Proposition 36 drug-diversion program, only about one entrant in four completed the prescribed course of treatment, and virtually none of the rest faced any consequence for reneging on the bargain they had made with the court, other than the lost opportunity to have their convictions expunged and the risk that an outstanding bench warrant might complicate the aftermath of some future arrest. Those are precisely the sort of important but delayed consequences that impose suffering without changing behavior to any great extent.

That failure does not stem from the laxity or laziness of probation officers—though no doubt some probation officers, like some workers in any job category, are lax and lazy—but from the conditions under which they work. Typically, a big-city probation officer supervises more than one hundred clients and is expected to meet with each of them once a month. That schedule alone largely fills a working week, and the time required to prepare a violation report to send to the supervising judge is measured in hours. So the number of referrals is constrained by the officer’s time. The judge and the judge’s staff are also busy, and will not thank the probation officer for subjecting them to a flurry of revocation motions.

Short of the threat of revocation, a probation officer’s leverage over a client is limited. Only the judge can order a term of confinement; the probation officer (generally with the concurrence of a supervisor) can only use moral suasion and impose additional requirements, such as more frequent meetings. But what if the client defies those requirements as well?

If a revocation motion is made, the judge, too, has a limited repertoire of sanctions. She can send the offender to prison or jail, usually for a period of months but sometimes for years. She can impose more onerous conditions of supervision (which, again, the probationer may well ignore). She can lengthen the period of supervision, which is a noticeable inconvenience but one that doesn’t hit until sometime in the future.

None of these options is attractive. Jails and prisons are crowded, and what-
ever the probationer did to earn the conviction that underlies his probation term, the violation of probation conditions is likely to be relatively trivial: a missed meeting or a “dirty” drug test. To a judge who has just put someone on probation for a burglary, sending someone else away for a mere “technical” violation seems disproportionate, unless that violation comes at the end of a very long string. (Sometimes a new substantive offense is handled as a violation of probation rather than prosecuted afresh; in those cases, a term behind bars is a more likely outcome.)

As a result, the most likely consequence for a probationer caught breaking a probation rule is a warning, either from the probation office or (less often) from the judge. If the probationer keeps it up, at some point it will prove to be the case that his previous “last warning” really was the last, and he will be on his way to, or back to, a cell. But such deferred and low-probability risks, though they may cumulate to a great deal of punishment, do little to reduce the violation rate. The lack of an immediate and high-probability aversive consequence for a violation helps sustain the high violation rate, and the high violation rate in turn guarantees that most violations will not be sanctioned. This is simply the social trap of the neighborhood with a high crime rate and a low punishment risk per offense, writ small; the community corrections system reproduces the cruel and futile randomized draconianism of the larger criminal-justice system. (Parole supervision is tighter, though it, too, over-relies on severe sanctions, but there are about five times as many probationers as parolees.)

Just as the threat of severe sanctions is largely impotent at controlling behavior if the sanctions are uncertain and deferred, the threat of even a mild sanction can be potent if the consequence follows the act swiftly and certainly. In Hawaii, a judicial warning that the next positive drug test would draw an immediate jail term measured in days succeeded in virtually ending drug use for more than three-quarters of a group of chronically defiant felony probationers, most of them methamphetamine users. The hard part was organizing the judge’s staff, the probation department, the sheriff’s office, the police, the jail, prosecutors, and defense counsel to deliver on that warning when the rules were broken. (That meant, for example, developing a two-page, check-the-box or fill-in-the-blank reporting form to replace the elaborate motion-for-revocation paperwork; since only a single violation is in question, very little information is needed.)

Half of the probationers in the program – dubbed HOPE (Hawaii’s Opportunity Probation with Enforcement) – never faced an actual sanction; the warning alone did the job. On average, the group subjected to tight supervision spent about as many days in jail for probation violations as a comparison group, with more but shorter spells. But they spent only about a third as many days in prison after revocations or new convictions, and had only half as many arrests for new crimes.

The project now covers about 1,500 offenders, about one in five felony probationers on the island of Oahu; the judge plans to expand it to 3,000, and intends to manage all of them himself, by contrast with a drug-court judge who typically manages a caseload of 50 to 75. Most of the participants, but by no means all, are drug abusers; the process works just as well enforcing different sets of rules on domestic violence offenders and on sex offenders. The underlying process isn’t specific to drug
abuse; it applies basic principles of behavioral change relevant to a wide range of behaviors, as long as the behaviors can be easily monitored. South Dakota’s 24/7 program, which requires repeat drunken drivers to submit to twice-a-day breathalyzer tests, has dramatically reduced their risk of winding up in prison for a third offense.

Commercial vendors now sell, for $15 per month, a service that tracks the whereabouts of a GPS monitor; parents place them in their young children’s backpacks to be able to find them when they stray. One version of that service provides “exception reporting”: after the parent enters a weekly schedule of where the child is supposed to be at given hours of given days, the system sends a text message to the parent’s cell phone or email inbox if the child isn’t where he is supposed to be.

Now imagine mounting such a unit on an anklet that can’t be removed without setting off an alarm. That would make the whereabouts of an offender wearing that anklet subject to continuous monitoring. Comparing offenders’ position records with the locations of crimes reported to the 911 system would make it difficult for anyone wearing an anklet to get away with a new predatory offense. Street gangs would not welcome the presence of members whose location is transparent to the police. Such a system would make it feasible to enforce curfews, stay-away orders, “community service” obligations, and requirements to appear as scheduled for employment or therapy, and to enforce home confinement as a sanction for violations of probation or parole conditions.

Unlike the expensive process of monitoring sex offenders, in which any straying constitutes a potential emergency and the system must therefore be staffed around the clock, for routine probationers and parolees there would be no urgency about responding to a mere schedule violation; it would suffice for the probation or parole officer to be notified the next morning. As long as the offender is still wearing the device, finding him would pose no challenge, and the next day is soon enough for a sanction to be effective.

An emergency would arise only when an offender removed the device; usually that would mean he was planning either to commit a new crime or to abscond from supervision. But the police department, already staffed 24/7, could respond to those (presumably rare) events.

The operational challenges would be legion: developing rules about imposing and relaxing restrictions; figuring out what to do if the GPS unit loses contact with the satellite; dealing with false alarms; ensuring that the police respond quickly and vigorously to absconding; and managing the sanctions hearings. But given the results from HOPE, it’s a reasonable guess that 80 percent, perhaps even 90 percent of probationers and parolees would comply with the system in the sense of not shedding the GPS device, and that they would be highly compliant with rules and commit very few new crimes. They would probably also find it much easier to secure employment – despite their criminal records – once employers found that they were not only certified drug-free but also showed up for work every day under pressure from their probation or parole officers. As a result, many fewer of them would wind up returning to prison.

Once probation and parole involved that sort of monitoring, only a limited number of cases would justify using incarceration: people who commit such heinous crimes that justice demands it (the Bernie Madoffs of the world), peo-
ple whose demonstrated tendency for assault or sexual predation requires their incarceration to protect potential victims, and those who, in effect, choose incarceration by absconding. Everyone else could be adequately punished and largely incapacitated from reoffending with position restrictions alone, backed by monitoring and brief jail stays for violations. That could reduce the inflow to prison (both by reducing the number of revocations and persuading judges to sentence more felons to probation instead) and increase the outflow from prison by encouraging parole boards to make more early-release decisions. Moreover, converting probation into a real punishment, rather than the placeholder for an absent punishment that it now largely is, would be expected to deter crime, reducing the inflows to both prison and probation.

How far this process might go is anyone’s guess. But it would not be utterly fantastic to hope that the United States might find itself a decade or two from now with a European incarceration rate and crime rates resembling those of the 1950s.

The change could not be made overnight; each jurisdiction that adopts such a system will need an operational “shake-down” period. Furthermore, it is essential that the program not outgrow its capacity to monitor and sanction; once offenders come to believe that the threat of quick incarceration is a bluff, their offending will swamp the system that it will become a bluff.

But other than the need for shaking down and then phasing in, this approach has no natural upper limit. HOPE costs about $1,400 per year on top of routine probation supervision, which is to say that it costs about twice what routine supervision alone costs. Most of that excess goes to drug treatment for the minority that cannot comply without professional help. It pays for itself several times over in reduced incarceration costs alone, which means that cost need not be a barrier to expansion if some way can be devised to recycle the savings to the state budget from reduced incarceration into the county budgets that bear most probation costs.

The implementation of this idea will vary from jurisdiction to jurisdiction and from population to population. In various ways, it could be applied to juvenile offenders, probationers, parolees, and those released while awaiting trial either on bail or on their own recognizance. For juvenile probationers in particular, “outpatient” supervision under tight monitoring backed with the threat of forty-eight hours’ solitary confinement for each violation might succeed in squaring the circle of finding a punishment aversive enough to deter but not so damaging as to risk pushing a juvenile toward persistent criminality by reducing his commitment to, and opportunities within, the world of school and licit work.

The project of what might be called “virtual” or “outpatient” incarceration cannot expect a universally warm welcome. In a criminal-justice-policy debate that sometimes seems to take place between the disciples of Michel Foucault and those of the Marquis de Sade, it will be too intrusive for the foucauldians and not retributive enough for the sadists. But for those not overly reluctant to punish lawbreakers with some months or years of a boring, go-to-bed-early-and-show-up-for-work middle-class lifestyle, and unwilling to accept current levels of incarceration or of crime, the virtual prison cell offers the prospect of having less of both.

With respect to the population not currently in prison, including pretrial
releasees and those newly placed on probation who would not have gone to prison otherwise, there is no doubt that the proposed system represents a further extension of state control over individuals. Whether that is desirable could be debated, with the answer depending in part on the empirical results in terms of crime, days behind bars, and employment, family, and housing status, and in part on the value one assigns to the liberty and privacy of the recently arrested (including their liberty to commit fresh offenses with impunity). In the somewhat longer run—over a period of a few years—the result might be to reduce the scope of direct state control by discouraging offenses and thus reducing the total size of the prison-jail-probation-parole-pretrial release population.

Such a happy ending cannot be guaranteed. The program has yet to be tried out on parolees; it is possible (though I would rate the probability as small) that massive absconding and consequent return to prison would make it operationally infeasible. It is more plausible that, in some jurisdictions, a combination of haste, under-resourcing, and administrative noncompliance would lead to program breakdown, with the supervised population discovering that, despite the threat, violation did not in fact lead swiftly and predictably to confinement. If that happened, violation rates would surely soar, thus putting the program into a “death spiral” of increasing violation rates and decreasing swiftness and certainty of sanctions. Preventing such a breakdown is no easy task; managing the behavior of offenders is straightforward compared to managing the behavior of officials, and most of all the behavior of independent officials such as judges.

The other risk is that some offenders who, under the current system of loose supervision, get away with minor violations, finish their assigned terms, and then go straight would find the new system of tighter supervision intolerable, commit repeated technical infractions leading to short confinement terms, abscond, and wind up in prison. That risk would be especially grave if the system were applied to misdemeanants in addition to felons, since the misdemeanants start out with a much lower level of prison risk.

But if the application of “outpatient incarceration” can be restricted to those who would otherwise face, with high probability, repeated spells of actual incarceration, then on balance it promotes not only public safety but the liberty and life prospects of the offender population. There are worse fates than being forced to live a law-abiding life.