

## **Remarks for Sentencing Symposium in Reaction to a Paper by William Sabol**

By Glenn C. Loury, Brown University, September 24, 2010

Brace yourselves: You are about to hear from someone who is not a card-carrying criminologist – indeed, I do very little empirical research of any kind. As it happens, I’m an economic theorist by training and inclination, and a public intellectual by recent practice. I therefore have no choice here but to deal in what Shaun Bushway has called “the big ideas”: those are the ones I know something about! When it comes to criminology I suffer from an intellectual far-sightedness that forces me to view the research terrain from 30,000 feet. So, I’ll have to try to make a virtue out of this necessity.

So, I apologize to Dr. Sabol in advance for failing to give his very fine effort at empirical excavation of recent trends in the extent of imprisonment the detailed attention that it deserves.

Fortunately for me, while technique is vitally important, the most challenging policy problems are not merely technical – which leaves room for a public intellectual like myself to make a contribution to a deliberation among criminologists such as the one in which we are participating right now.

Neither is public policy discourse only instrumental. The means-ends calculus of technical policy analysis is indispensable, of course. But, let’s face it: public policy debates are also expressive and constitutive, in that (1) they set an agenda for action; (2) they frame key moral judgments of a citizenry; (3) they mark the boundary between civic and communal responsibility; (4) they convey a narrative of justification, and establishes the significance of a nation’s history for its present-day course of public action. Thus, whether intended or not, public debate over the most basic issues implicitly answers the question, what manner of people are we Americans?

This outcome is surely true for public debate about what may be the preeminent domestic policy issue of our time: that mass incarceration is now, de facto, a central element of American social policy. It is not enough, I would maintain, to plow through the numbers. We must also raise our sights -- if only occasionally -- in order to ask ourselves the larger normative questions about criminal sentencing and mass incarceration. And so, must I ask you to view my forthcoming remarks in this light.

Here’s a big idea: Both crime and punishment are rooted in violence. Prisons, which dehumanize corrections officers and inmates alike, represent an institutionalization of this violence – perhaps necessary, though no less problematic for that – undertaken by the state on behalf of the citizenry in the service of order maintenance and the doing of justice. And, while social control and the management of the unruly are primary among the functions served by such institutions, social affirmation – the construction of a virtuous “we” – is another, less celebrated though no less elemental, function.

The violence I speak of is not only physical; there is also violence of thought and conception – a “violence of ideas,” if you will. Key to this “violence of ideas” is the process of mystification, wherein the exercise of might is made to seem right, natural, inevitable and necessary. One role of the public intellectual, as I see it, is de-mystification – exposing and laying bare the underlying

ideological terrain. Is this posture of mine a pretense? Perhaps. But, what else is a mere intellectual to do in the midst of so much violence?

Here's another big idea: "Crime," is not a natural category. The war on drugs shows this graphically. Much of what we call crime is socially constructed. Thus, the line between "illness" and "criminality" is not given in nature. We have to draw it. Moreover, as the discussion of "prediction" at this conference has already made clear, the idea of the "criminal" is a further, potentially ominous social construction. The lifetime stigmatization accompanying imprisonment in the U.S. – creating the categorical distinction that marks ex-offenders, and enacting a host of collateral sanctions and deleterious stereotypes – these are key features of punishment, American style.

As we all know, over the past four decades, the United States has, by any measure, become a vastly more punitive society. How and why this transformation has come to pass is up for debate – it is an argument I do not expect to see resolved in my lifetime. What is indisputable, though, is that this expansion and transformation of U.S. penal institutions—which has taken place at every level of government, and in all regions of the country—is without historical precedent or parallel elsewhere in the industrialized world. Surely, it tells us something important about the nature of American society that, with roughly five percent of the world's population, the U.S. confines about one-quarter of the world's prison inmates. The prison system in this country has grown into a leviathan that is unmatched in human history. Just what manner of people does our prison policy reveal us Americans to be? There is no small irony in the fact that America, with great armies deployed abroad under the figurative banner of "Freedom," happens to harbor the largest custodial infrastructure for the mass deprivation of liberty on the planet.

Here's another idea to ponder: What we are talking about here is not merely the enforcement of law and the punishment of law-breakers. We are discussing social policy -- writ large. And, what we have been witnessing in the U.S. in recent decades, when viewed in comparative context, is the emergence of a uniquely *American* form of social policy. Though not arrived at through any coordinated plan, it is nevertheless the case that, *de facto*, the manner and extent to which we punish criminals is now a fundamental element of the American social contract. It is, *de facto*, a key component of the nation's broader strategy for dealing with social marginality and social dysfunction. It is a "second line of defense," if you will, dealing with individuals whose human development has not been adequately fostered by other societal institutions. It operates in conjunction with and interacts powerfully with social welfare, education, employment and job training, mental health and other social initiatives. It is a site for the (re)production of social stratification, for the (re)enforcement of various social stigmas, and for the (re)enactment of powerful and uniquely American social dramas.

The present American regime of hyper-incarceration is said to be necessary in order to secure public safety. This, to my mind, is not a compelling argument. Behavioral theories of deterrence have had some trouble being confirmed in the data. In a recent, careful review of the evidence on this question, econometrician Steven Durlauf and public policy expert Daniel Nagin wrote:

The key empirical conclusion of our literature review is that there is relatively little reliable evidence for variation in the severity of punishment having a substantial deterrent effect, but there is relatively strong evidence that variation in the certainty of punishment

has a large deterrent effect. . . . One policy-relevant implication of this conclusion is that lengthy prison sentences, particularly in the form of mandatory minimum type statutes such as California's Three Strikes Law, are difficult to justify on a deterrence-based crime prevention basis.

Furthermore, by adopting a more holistic view of the complex connections between prisons and communities, we can immediately recognize the significance of the "revolving door" aspect of punishment – the fact that almost everyone who goes to prison is eventually released, most after just two or three years. Evidence suggests that for these hundreds of thousands of ex-offenders released each year, time behind bars will have actually diminished, not enhanced, their odds of living crime-free lives: by lowering employability, severing ties to communal supports, and hardening attitudes. The fact – amply demonstrated by analysts for a number of American cities – that incarceration in large urban areas is highly spatially concentrated means that the ill effects of having spent time behind bars may diminish the social opportunities of others who reside in the most heavily impacted communities and who themselves have done nothing wrong. Spatial concentration of imprisonment may actually foster criminality because it undermines the informal social processes of order maintenance, which are the primary means of sustaining pro-social behavior in all communities.

In some poor urban neighborhoods, as many as one in five adult men is behind bars on any given day. As the criminologist Todd Clear has written, "[T]he cycling of these young men through the prison system has become a central factor determining the social ecology of poor neighborhoods, where there is hardly a family without a son, an uncle or a father who has done time in prison." The ubiquity of the prison experience in poor, minority urban neighborhoods has left families in these places less effective at inculcating in their children the kinds of delinquency-resistant self controls and pro-social attitudes that typically insulate youths against law-breaking. As Clear concludes from his review of the evidence, "[D]eficits in informal social controls that result from high levels of incarceration are, in fact, crime-promoting. The high incarceration rates in poor communities destabilize the social relationships in these places and help cause crime rather than prevent it." Put differently, the relationship between prison and public safety is complicated in view of the fact that "what happens in San Quentin need not stay in San Quentin."

Disparities by social class in the incidence of imprisonment are enormous. This fact -- that the incidence of punishment varies inversely with social status – raises profound moral concerns that, to my mind, rival in importance the traditional concern for retribution. That prisoners come mainly from the most disadvantaged corners of our unequal society should trouble us because prisons both reflect and exacerbate this inequality. The factors that lead young people to crime – the "root causes" as it were—have long been known: disorganized childhoods, inadequate educations, child abuse, limited employability, delinquent peers. These are factors that also have long been more prevalent among the poor than the middle classes, though it has for some time been unfashionable to speak of "root causes." Nevertheless, as Bruce Western stresses in his comprehensive empirical survey of this terrain, "punishment" and "inequality" are intimately linked in modern America, and the causality runs in both directions: punishment disparities reflect socio-economic inequalities; but, they also help to produce and to reinforce them. This is part of what I mean when I say that punishment policy is *de facto* social policy.

It is likewise with racial disparities. The role of race in this drama is subtle and important. More African American male high school dropouts are held in prisons than belong to unions or are enrolled in any (other) state or federal social welfare programs. It has been estimated that nearly 70% of African American male dropouts born between 1975 and 1979 had spent at least one year in prison for a felony conviction before reaching the age of thirty-five. As scholars (some of them sitting in this room) have shown, such racial disparities are not mainly the result of overt racially discriminatory practices (though such practices surely exist.) But, this hardly exhausts the moral discussion, for what might be called “tacit racism” — a kind of malign racial neglect— seems to be operative here: America’s punishment institutions have garnered public support at times *because of*, and at other times *despite*, the massive racial disparity of their incidence.

My suspicion – impossible to prove to the econometrician’s satisfaction, I suspect – is that these policies would never have been allowed to expand to such an extent if those subject to their depredations had not mainly been people of color.

That racial differences in the incidence of incarceration are huge can be no surprise since, for one thing, the subordinate status of black ghetto-dwellers – their social deprivation and spatial isolation in America’s cities – puts them at greater risk of embracing dysfunctional behaviors that lead to incarceration. Moreover, it is by now clear that punishment policy in America serves expressive, not merely instrumental, ends. American voters and their politicians have wanted to “send a message,” and have done so with a vengeance. In the midst of such dramaturgy – necessarily so in America – has always lurked a potent racial subplot.

Still, just look at what we have wrought. We have established what, when viewed from my farsighted perspective of 30,000 feet, looks to the entire world like a system of racial caste in the centers of our great cities. I refer here to millions of stigmatized, feared, and invisible people. How has it come to be that the extent of this disparity -- between the children of the middle class and the children of the disadvantaged to achieve their full human potential -- is virtually unrivaled elsewhere in the industrial, advanced, civilized, free world?

One reason why I find the ideological justification of the present American punishment order to be so obviously rooted in mystification is because it ignores the fact that the broader society is implicated in the creation and maintenance of these damaged, neglected, feared, and despised communities. People who live in these places are aware that outsiders view them with suspicion and contempt. (I know whereof I speak in this regard, because I am myself a child of the black ghetto. I am connected intimately to these ghetto-dwellers by the bond of social and psychic affiliation. While in general I am not much given to advertising this fact, it seems appropriate to do so now.) The plain historical truth of the matter is that North Philadelphia, the West Side of Chicago, the East Side of Detroit, or South Central Los Angeles did not come into being by accident or because of some natural processes. As the sociologist Loïc Wacquant has argued – persuasively, to my mind – these social formations are man-made structures that were created and have persisted because the concentration of their residents in such urban enclaves serves the

interests of others. As such, the desperate and vile behaviors of some of the people caught in these social structures reflect not merely their personal moral deviance, but also the shortcomings of our society as a whole. “Justice” operates at multiple levels – both individual and social.

Defenders of the current regime put the onus on law-breakers. “If they didn’t do the crimes, they wouldn’t have to do the time,” it is said. Yet, this pure ethic of personal responsibility could never justify the current situation. Missing from such an argument is any acknowledgement of social responsibility—even for the wrongful acts freely chosen by individual persons. In saying this I am not making a “root causes” argument: “he did the crime, but only because he had no choice.” Rather, I am arguing that the larger society is implicated in his choices because we have acquiesced in arrangements which work to our benefit and his detriment, and which shape his consciousness and sense of identity in such a way that the choices he makes, choices which we must condemn, are nevertheless compelling to him. Put simply, the structure of our cities with their massive racial ghettos is yet another causal factor in the production of deviancy amongst those living there. Recognition of this fact has far-reaching implications, it seems to me, for the conduct of public policy. It goes right to the question of what goals we ought to be trying to achieve through our punishment institutions, and how we should weigh the enormous costs they impose upon our fellow citizens.

To the extent that the socially marginal are not seen as belonging to the same general public body as the rest of us, it becomes possible to do just about anything with them. Yet, in my view, a pure ethic of personal responsibility could never provide an adequate foundation for justifying the current situation. In making this claim, I am not invoking a “root causes” argument (he did the crime, but only because he had no choice) so much as I am arguing that society as a whole is implicated in the offender’s choices. We have acquiesced in structural arrangements that work to our benefit and the offender’s detriment and that shape his consciousness and sense of identity such that his choices, choices which we *must* condemn, are nevertheless compelling to him.

Here is another big idea. It has to do with the true meaning of ‘justice.’ In his influential treatise, *A Theory of Justice*, the philosopher John Rawls distinguishes between principles that should govern the distribution of primary goods in society and the very different principles that should determine the distribution of the “negative good” of punishment. He explicitly states that justice in the distribution of economic and social advantages is “entirely different” from justice in the realm of criminal punishment. He even refers to “bad character” as relevant to punishment. As I understand Rawls, his famous “difference principle”—arrived at in “reflective equilibrium” from his hypothetical “original position”—presupposes the moral irrelevance of the mechanisms by which inequalities emerge. (For example, in his view “ability” is a morally irrelevant trait, a manifestation of luck. So, unequal individual rewards based on differences in ability cannot be justified on the grounds of desert.) Yet because he does not see the mechanisms that lead to disparities of punishment as being morally irrelevant, he would not apply the difference principle when assessing the (in)justice of such inequalities, since they are linked to wrongdoing.

In my view, justice is complex because the consequences wrought by our responses to wrongdoing also raise questions of justice. The phrase “Let justice be done though the heavens may fall” is, for me, an oxymoron; no concept of justice deserving the name would accept mass suffering simply because of blind adherence to an abstract principle (such as “do the crime, and you’ll do the time”). It is common for ethicists to say things such as “social welfare should be maximized subject to deontological constraints,” meaning that actions like distributing body parts taken from a healthy person to render ten other persons healthy cannot be morally justified. But this conviction should go both ways: abstract moral goals should be subjected to constraints that weigh the consequences induced by such pursuits. In the realm of punishment, retribution against offenders and notions of deserved punishment exemplify deontological principles. But even if current incarceration policies perfectly embodied these principles (and that is an eminently dubious proposition), it still would not be sufficient to justify such rigid adherence to moral obligation. For the reason that the effects of mass incarceration—on families and communities who may themselves have done nothing wrong—can cause sufficient harm, the principled claims that punishment is deserved should not be allowed to dictate policy at whim. A million criminal cases, each one rightly decided, can still add up to a great and historic wrong.

I close with a “narrative defining” question for the audience – my final big idea, if you will: Should we understand the racial disparity of punishment in America as an accidental accretion of neutral state action applied to a racially divergent social flux—a grand instance of a system’s tendency toward ‘disparate racial impact’ with the chips having fallen as they may, so to speak? Or, alternatively, is this powerfully salient feature of contemporary American social life better understood as the residual effect of our history of enslavement, violent domination, disenfranchisement and discrimination?

In other words, is the massive racial inequality in the incidence of punishment in this country a necessary evil, given our need for retribution and order maintenance? Or, is it an abhorrent expression of who Americans have become as a people at the dawn of the 21st century?

It’s a difficult question, I admit, one that each of us must decide for ourselves – though I must also confess that, as a social scientist, as a public intellectual, and especially as an African American male -- a baby boomer born and raised on Chicago’s South Side -- I incline toward the latter view. GL