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Detention, Democracy, and Inequality in a Divided Society

By
GLENN C. LOURY

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I have been asked to react to three articles presented in this volume—one by Benjamin Justice and Tracey L. Meares (which examines the civic curriculum implicit in the work of juries, judges, and the police); one by Aliya Saperstein, Andrew M. Penner, and Jessica M. Kizer (which uses Adolescent Health Longitudinal Survey [Add Health] data to explore how perceptions of race are affected by contact with the criminal justice system); and one by Jason Schnittker (which identifies how psychological correlates of imprisonment impact former inmates' mental health during reentry). In what follows, I offer a few thoughts, which were stimulated by these articles.

While thinking about the links between “detention” and “democracy,” I am put in mind of the writings of the late William Stuntz, specifically his book *The Collapse of American Criminal Justice* (2010), in which he is concerned with the interplay between local

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democratic governance on one hand, and the severity and inequality of punishment policy, on the other. Whereas some observers argue that the United States is more punitive than France (say) because the punishment policymaking process in the United States is more democratic—less deference is given here to experts who are insulated from the passions of the electorate than is the case in continental Europe—Bill Stuntz suggests that exactly the opposite is the case. He argues, and I agree with him, that the (race x class) inequalities in incidence of punishment in America today are mainly due not to some generalized antiblack racial animus but, rather, to a shift over two generations in the manner by which crime control policies and punishment judgments are taken: because of plea bargaining, prosecutors exercise more power than juries do. As the result of a thicket of constitutional protections, federal appellate judges now have more influence than trial judges. In the wake of population decentralization trends and due to current mechanisms of metropolitan governance, voters in suburban and ex-urban communities have a good deal more to say than do voters in central cities about state-level sentencing policies, even though they are much less affected by the consequences of those policies. More generally, argues Stuntz, the law has grown more specific and extensive in the definition of criminality and has increasingly left less room for the exercise of discretion in its application. Mass incarceration, on his telling, reflects a disjunction between the “locus of control” and the “locus of interests” in policy formulation.

Stuntz’s argument is that a fundamental source of contemporary inequality in punishment is the alienation of local urban populations from the exercise of democratic controls over the apparatus of punishment. As some pro-law enforcement writers like to stress, these are the populations bearing the brunt of the misbehaviors of the law breakers in their midst. And yet, as many law enforcement skeptics have emphasized, these are also the populations most closely connected to law breakers via the bonds of social and psychic affiliation. This ambiguous relationship—this intimate proximity to both sides of the offender-victim divide, this wealth of local knowledge combined with keen local interests—according to Stuntz, is an essential ingredient for the proper doing of justice. Thus, for Stuntz, hyper-incarceration and the (racial) inequalities that it has bred can be seen to be largely a product of the “political agency problems” engendered by separation of local communities—where both the depredations of crime and the enormous personal costs of its unequal punishment are being experienced—from any means of effective control over the administration of criminal justice.

Thinking about the links between “detention” and “democracy” also puts me in mind of Danielle Allen’s (2002) *The World of Prometheus: The Politics of Punishment in Ancient Athens*. This text links the practice of punishment with the evolution of democracy in ancient Athens, but its argument—which complements that of Stuntz—is quite relevant to our current-day concerns. Allen sees direct citizen participation in bringing charges against fellow citizens and deciding their disposition—access to which was mediated by factors of class, gender, and servitude status—as having a crucial role in establishing, and in shaping the character of, Athenian democratic practice. Allen’s work is also interesting

because she relies on her critical readings of classical Greek drama—Aeschylus specifically—giving us punishment as dramaturgy.

In my own book, *Race, Incarceration and American Values* (Loury 2008), I argued that punishment on the scale with which we are currently undertaking it in the United States is deeply troubling and profoundly threatening to our democratic aspirations. One compelling reason to think so is often overlooked but an inescapable fact—that punishment is rooted in violence. This fact bears directly on matters of civic pedagogy, for prisons institutionalize the necessary though problematic violence that is routinely undertaken by the state on behalf of the citizenry in the service of maintaining order. In so doing, prison dehumanizes corrections officers and inmates alike. Too much violence is a decidedly bad thing in a democratic republic motivated by the ideals of equality. And the violence is not only physical. There is also a 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 on this scale and with this degree of inequality is made to seem natural, inevitable, necessary, and just. This mystification is a pedagogic byproduct of mass imprisonment.

Moreover, although social control and the management of the unruly are the primary functions served by institutions of punishment, social affirmation—construction of the virtuous “we”—is another, less celebrated but no less central, function. As I see it, intellectuals have a responsibility to de-mystify—that is, to expose and lay bare the underlying ideological terrain. There is no small irony here: America, with great armies deployed abroad under the figurative banner of “freedom,” harbors the largest custodial infrastructure for the mass deprivation of liberty on the planet. (The United States consigns nearly as great a fraction of its population to a lifetime in prison [more than 50 per 100,000 residents] as do Sweden, Denmark, and Norway find it necessary to imprison for terms of any duration whatsoever.)

Furthermore, it should be borne in mind that we are not talking here about the mere enforcement of law and punishment of law-breakers. In fact, what we are discussing when we speak of punishment and prisons is social policy writ large. We in the United States have witnessed in recent decades the emergence of a uniquely American form of social policy, with profound implications for the quality of American democracy. As a “second line of defense,” if you will, prison now deals with individuals whose human development has not been adequately fostered by other societal institutions. Though not due to any coordinated plan, it remains the case that, de facto, the manner and extent to which we punish criminals is now a fundamental element of the American social contract—a key component of the nation’s broad strategy for managing social marginality and social dysfunction. American institutions of punishment operate in conjunction with and interact powerfully with social welfare, education, employment and job training, and mental health and other social initiatives. These institutions have perforce become a principle 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 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-control and prosocial attitudes that typically insulate youths against law-breaking. Thus, in *Imprisoning Communities* (2007), Todd Clear concludes from a review of evidence: “deficits 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” (p. 10). 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.”

Given that we are concerned here with civic pedagogy, it should be kept in mind that the incarcerated and their families are not passive in their alienation. Rather, they construct meaningful worlds for themselves amid the storm. They truck up to prisons to visit a kid, or a parent, or a partner going through a rite of passage that soon enough becomes all too familiar. They bail somebody out, knowing they might lose the money. They deal with relatives who steal from them. They are—one and the same persons—“victims” as well as “perps.” The political dichotomy of “us” versus “them” is morally fraught, since any given one of “us” falls, depending on the day, or the hour of the day, to one side or another of that divide. A biographic life is lived to either side of the line. But an imagined life, though it may have staggered back and forth across the line many times over its course, can still be seen as unified in its righteousness and its condemnations.

Finally, to conclude in a somewhat speculative vein, permit me to observe that in my book *The Anatomy of Racial Inequality* (2002) I have proposed a theory in which durable racial inequality is understood as the outgrowth of a series of vicious circles of cumulative causation: the “social meaning of race”—that is, the tacit connotations associated with “blackness” in the observer’s imagination, especially the negative connotations—biases the social cognitions of observing agents, leading them to make detrimental causal misattributions. People have difficulty identifying with the plight of those whom they mistakenly assume simply to be “reaping what they have sown.” This lack of empathy undermines public enthusiasm for egalitarian racial reform, thus encouraging the reproduction through time of racial inequality. Yet absent such reforms, the low social conditions of (some) blacks persist, the negative social meanings ascribed to blackness are thereby reinforced, and so the racially biased social-cognitive processes are reproduced, completing the circle. As they navigate through the epistemic fog, observing agents find their cognitive sensibilities being influenced by history and culture, by social conditions, and by the continuing construction and transmission of civic narrative. Groping along, these observers—acting in varied roles, from that of economic agent to that of public citizen—“create facts” about race, even as they remain blind to their ability to unmake those facts and oblivious to the moral implications of their handiwork. As I see it, mass imprisonment has become a central factor in this tragic and morally troubling process.

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