

Glenn C. Loury

Crime, inequality & social justice

Crime and punishment are certainly contentious topics, and the authors gathered in this issue do not always agree with one another. For my own part, I must confess to having a personal stake in this issue. As an African American male, a baby boomer born and raised on Chicago's South Side, I can identify with the plight of the urban poor because I have lived among them. I am tied to them by the bonds of social and psychic affiliation. I myself have passed through the courtroom and the jailhouse on my way along life's journey. I have twice been robbed at gunpoint. I have known – personally and intimately – men and women who lived their entire lives with one foot on either side of the law. Whenever I step to a lectern to speak about incarceration, I envision voiceless and despairing people – both offenders and victims – who would have me speak on their behalf. Of course, personal biography has no authority to compel agreement about public policy. Still, I prefer candor in such matters to a false pretense of clinical detachment and scientific objectivity. While I recognize that these revelations will discredit me in some quarters, that is a fate which I can live with. Allow me to share a few

critical observations of my own about crime, inequality, and social justice.

One principal point of disagreement among contributors to this volume has to do with how the fact of mass incarceration relates to the social problem of crime. Mark Kleiman claims that mass incarceration is only a partial problem definition; the other part of the problem is crime. This stance is in sharp contrast to that of Loïc Wacquant, who insists that “hyperincarceration” (his preferred term, since only those living in the lower social strata face much risk of imprisonment) isn't really about crime at all. Rather, he says, it's about “managing dispossessed and dishonored populations.” There is merit in both viewpoints. There can be no doubt that public ideas about crime – especially fears of violent victimization – have fueled the imprisonment boom. To speak of a crisis of mass imprisonment without reference to crime is, indeed, to address only one part of the problem. After all, declarations of “war” against crime (and, most noticeably, against *criminals*) are a primary means by which political aspirants now signal their bona fides to their electorates. The long upward trend in crime rates from the mid-1960s to the early 1980s “primed the penal pump” by hardening attitudes and discrediting liberal criminal justice

policies. It is certainly the case, therefore, that the steep rise of imprisonment in the United States is closely intertwined with the social experience and political salience of crime in American life. We cannot understand the one without thinking carefully about the other. Nor can we persuade voters to undo the one without addressing their concerns about the other.

Yet evidence suggests that changes over time in the scale of incarceration have not been caused in any direct way by changes in the extent of criminal behavior. Indeed, linkages between prisons and crime have been anything but simple and direct. Prison populations have been on the rise steadily for more than three decades. However, crime rates increased in the 1970s; fell, then rose again in the 1980s; and increased before sharply decreasing again in the 1990s. For two generations, crime rates have fluctuated with no apparent relationship to a steady climb in the extent of imprisonment. Today, with prison populations as large as they have ever been in American history, crime rates are about the same as they were in 1970, when a then-falling U.S. prison population reached its lowest level in a generation. Prisons and crime cannot be rightly understood simply as opposite sides of the same coin. Incarceration does not exhaust the available means of crime control. Nor does criminal offending directly explain the profound *qualitative* institutional transformation that we have witnessed in the United States over the past two generations.¹

Further, the trend of racial disparity in imprisonment rates cannot be accounted for as a consequence of changes in rates of offending over time. Crime rates, especially for violent offenses, have always been higher among African Americans than whites in the United States. This long-term disparity goes far toward explaining the historical fact of greater im-

prisonment for African Americans. Certainly there is little doubt that those who commit violent crimes should be punished, regardless of race. If more African Americans commit such offenses, more will be imprisoned, and no issues of impropriety would be raised thereby. Yet it is significant that the racial disparity of imprisonment rates has increased dramatically since the prison boom began, largely because of the “war on drugs.” African Americans were vastly overrepresented among persons incarcerated for drug offenses during the 1980s and 1990s, even as African Americans were no more likely to be using or selling drugs than whites. Moreover, despite a sharp drop in violent crime rates, starting in the early 1990s and extending to the present, racial differences in imprisonment rates have begun a slight decline only in the last few years.

As for the links between imprisonment and public safety, the widely held notion that one prevents crime by incapacitating criminals is simplistic. It fails to take account of the fact that for many crimes – selling drugs, for instance – incapacitated criminals are simply replaced by others, there being no shortage of contenders vying for a chance to enter the illicit trade. (It also ignores the reality of criminal victimization within prisons – no small matter.) Furthermore, by adopting a more holistic view of the complex connections between prisons and communities, we can immediately recognize the significance of 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 *diminished*, not enhanced, their odds of living crime-free lives: by lowering employability, severing ties to communal supports, and hardening attitudes.

Thus, the impact of high incarceration rates on the sustainable level of public safety over the long term is ambiguous. The fact – amply demonstrated for the case of Chicago by Robert Sampson and Charles Loeffler in this volume – that incarceration in large American cities is so highly 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 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.”² This 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 lawbreaking. 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.”

The relationship between prison and public safety is complicated in view of the fact that “what happens in San Quen-

tin need not stay in San Quentin.” Nor does the evidence afford us much comfort in the thought that, at the very least, a threat of imprisonment will deter future would-be offenders from breaking the law. Among children exposed to an incarcerated parent or sibling – youngsters who can be assumed to have firsthand knowledge of the penalties associated with law-breaking – the likelihood of their eventual incarceration is actually higher, not lower, than is the case for otherwise comparable children with no such exposure, which attests to the weakness of the deterrent effect of the sanction. Furthermore, in a careful review of the econometric evidence on this question, economist Steven Durlauf and public policy expert Daniel Nagin conclude:

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.³

Disparities by social class in this punishment binge are enormous, and they have far-reaching and often deleterious consequences for the families and communities affected. The prisoners come mainly from the most disadvantaged corners of our unequal society; the prisons both reflect and exacerbate this inequality. The factors that lead young people to crime – the “root causes” – 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.⁴

Racial disparities in the incidence of incarceration are also huge. The subordinate status of African American ghettodwellers – their social deprivation and spatial isolation in America’s cities – puts their residents at great risk of embracing the dysfunctional behaviors that lead to incarceration. Also, it is quite clear that punishment policies serve expressive, not merely instrumental, ends. Americans have wanted to “send a message,” and have done so with a vengeance. In the midst of such dramaturgy – necessarily so in America – has lurked a potent racial subplot. Inequalities by race in the realm of punishment exceed those found in just about any other arena of American social life: at roughly seven to one, the black-white ratio of male incarceration rates dwarfs the two to one ratio of unemployment rates, the three to one nonmarital child-bearing ratio, the two to one black-white ratio of infant mortality rates, and the one to five ratio of net worth. (The homicide rate is a noteworthy exception to this generalization about racial disproportions. For twenty- to twenty-nine-year-old males, the black-white ratio has been in the neighborhood of ten to one in recent years.) It is of some political significance that, for young African American men, coercion is the most salient feature of their encounters with the American state. In this issue, Bruce Western and Becky Pettit report that 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. They estimate that nearly 70 percent of African American male dropouts born between 1975 and 1979 will have spent at least one year in prison before reaching the age of thirty-five.

Given the scale of imprisonment for African American men, and the troubled history of race relations in this country, it can be no surprise that some observers see the advent of mass incarceration as the catalyst for a new front in the long, historic, and still incomplete struggle for racial justice.⁵ Because history and political culture matter, considering the factor of race is crucial to a full understanding and evaluation of our current policy regime. It is true that slavery ended a long time ago. But it is also true that an ideology of racial subordination accompanied the institution of African slavery, and this racial ideology has cast a long shadow. Thus, in his recently published history of the entanglement of race with crime in American political culture at the turn of the twentieth century,⁶ historian Khalil Muhammad contrasts the treatment of two related, but differently experienced, phenomena: crime by newly arrived European immigrants and crime by African Americans. Looking at the emergent statistical social-science literatures of that period, Muhammad makes clear that the prevailing ideological climate in the United States at that time led analysts and critics to construe the many problems of urbanizing and industrializing America in distinct ways. In essence, poor, white city-dwelling migrants were understood to be committing crimes, but the poor African Americans migrating to those same cities were seen as inherently criminal.

Our unlovely history of race relations is linked to the current situation, both as a matter of social causation – since the

structure of our cities, with their massive racial ghettos, is implicated in the production of deviancy among those living there – and as a matter of ethical evaluation – since the decency of our institutions depends on whether they comport with a narrative of national purpose that recognizes and seeks to limit and to reverse the consequences of history’s wrongs. It is certainly arguable (take Loïc Wacquant’s essay in this volume, for example) that managing social dysfunction via imprisonment has now become the primary instrument for reproducing racial stratification in American society.

What does all this tell us about our purportedly open and democratic society? What manner of people do our punishment policies reveal us Americans to be?

Just look at what we have wrought. We have established what, to many an outside observer, looks like a system of social caste in the centers of our great cities. I refer here to millions of stigmatized, feared, and invisible people. The extent of 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. And it is a disparity that is apparently taken for granted in America.

I see the broader society as implicated in the creation and maintenance of these damaged, neglected, feared, and despised communities. People who live in these places know that outsiders view them with suspicion and contempt. The plain historical fact 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 Wacquant emphasizes in this issue, these social formations are man-made struc-

tures that were created and have persisted because the concentration of their residents in such urban enclaves serves the interests of others. 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 moral shortcomings of our society as a whole. Yet many Americans have concluded, in effect, that those languishing at the margins of our society are simply reaping what they have sown. Their suffering is seen as having nothing to do with us – as not being evidence of broader, systemic failures that can be corrected through collective action. As a consequence, there is no broadly based demand for reform – no sense of moral outrage, anguished self-criticism, or public reflection – in the face of what is a massive, collective failure. American political culture, it seems, accepts as credible no account of personal malfeasance other than the conclusion that the offending individual is unworthy.

The legal scholar William Stuntz has recently called attention to the close connection in American history between local control, democratic governance, and inequalities of punishment.⁷ He suggests, persuasively in my view, that increases in the severity and inequality of American punishment have mainly been due to a shift over the course of the twentieth century in the ways that crime and punishment policies are formulated. Because caseloads have grown alongside reliance on plea bargaining, prosecutors have gained power at the expense of juries; because a thicket of constitutional protections has been elaborated, federal appellate judges exert more influence than trial judges; because of population decentralization trends in large urban areas – with judges now elected mostly on county-wide ballots and police no longer drawn preponderantly from the

communities where they make arrests – suburban and ex-urban voters now have a good deal more to say than do central-city residents about crime control policies, even though they are less affected by those policies.

The law, Stuntz argues, has grown more extensive in its definition of criminality and has left less room for situational discretion. Alienation of urban populations from democratic control over the apparatus of punishment has resulted in more inequality and less leniency. There is too much law and too little (local) politics. Local populations bear the brunt of the misbehavior by the lawbreakers in their midst. Yet, at the same time, they are closely connected to lawbreakers via bonds of social and psychic affiliation. Mass incarceration is a political not a legal crisis, one that arises from a disjunction between the “locus of control” and the “locus of interests” in the formulation of punishment policies.

Following Stuntz, I wish to suggest that punishment, rightly construed, is a communal affair; and that an ambiguity of relationship – involving proximity to both sides of the offender-victim divide and a wealth of local knowledge combined with keen local interests – is essential to doing justice. Viewed in this light, hyperincarceration and the (racial) inequalities that it has bred are more deeply disturbing because urban minority communities, where both the depredations of crime and the enormous costs of its unequal punishment are experienced, have effectively been divorced from any means of influencing the administration of criminal justice.

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 pro-

vide 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, which we must condemn, are nevertheless compelling to him.

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.⁸ 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, Rawls sees “ability” as 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 offend-

ers 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 that 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.

ENDNOTES

- ¹ For an illuminating exploration of the deeper roots of this transformation, see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).
- ² Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2009), 10.
- ³ Steven Durlauf and Daniel Nagin, “The Deterrent Effect of Imprisonment,” unpublished working paper (University of Wisconsin-Madison, March 2010).
- ⁴ Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006).
- ⁵ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).
- ⁶ Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2010).
- ⁷ William Stuntz, “Unequal Justice,” *Harvard Law Review* 121 (8) (June 2008): 1969–2040.
- ⁸ The full quote from Rawls is: “It is true that in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults”; John Rawls, *A Theory of Justice*, rev. ed. (1971; Cambridge, Mass.: Belknap Press of Harvard University Press, 1999), 314–315.