

WALTER C. RECKLESS MEMORIAL LECTURE

Thinking About Prison and its Impact in the Twenty-First Century

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INTRODUCTION

As is now well known, the United States has attained the dubious distinction of maintaining the world's largest prison population, both in absolute and per capita terms. This "race to incarcerate," a record three decade rise in imprisonment, has resulted in a combined prison and jail population of 2.1 million, yielding an incarceration rate of more than 700 per 100,000 population. This rate surpasses that of Russia (which in recent years has achieved substantial reductions in its inmate population through widespread amnesties) and is about five to eight times the rate of most other industrialized nations. Thus, we have the incongruity of the wealthiest society in human history using prison to a degree previously unknown in any democratic society. Regardless of one's political ideology or beliefs regarding crime control policy, this should be a disturbing development to all.

Analysts contend that these developments have their origins in one or more interrelated political dynamics. These variously include a "tough on crime" movement more focused on the electoral prospects of political leaders than actual social impact; an increasingly conservative public and political climate; a means of social control of the African American population following the demise of the Jim Crow era; and an attempt by a postmodern state to impose a sense of authority over seemingly intractable social disorder. These theoretical approaches are all worthy of analysis, but let us assume for the moment that the goal of mass incarceration has been as stated by its proponents; that is, to enhance public safety through one or more of the various ways that incarceration can produce reductions in crime.

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My goal in this analysis is not to address this issue in great detail, but to propose some general findings. I think it is fair to state, based on the evidence and analyses developed by key researchers in the field, the following propositions:

- Mass imprisonment has had an impact on crime, but one that is considerably less than its proponents have claimed.
- To the extent that prison produces significant impacts on crime, we are now well past the point of diminishing returns in this relationship.
- Even to the extent that prison produces reductions in crime, this finding does not tell us whether incarceration is *more* effective than other social interventions in producing these outcomes.
- Approaches to reducing crime that do not involve additional investments within the criminal justice system have received less attention in the research community and are rarely a subject of sustained analysis in political debate.

Continued analysis of these relationships is important, of course, in order to aid in the development of public policy. But as we have entered the era of mass imprisonment, a new set of dynamics has come into play that calls for an understanding of the ways in which the effect of prison on society is both quantitatively and qualitatively different than in previous times. These effects have been conceptualized as collateral consequences of imprisonment, and they take the form, as my colleagues and I have described in our recent book, of "invisible punishments."¹ They are "invisible" both in the sense that they are rarely acknowledged in the courtroom when they are imposed, and equally rarely assessed in public policy discourse. These themes, and their effects on individuals and communities, should be the subject of careful scrutiny by observers of prison dynamics.

I. A FRAMEWORK FOR ASSESSING COLLATERAL CONSEQUENCES

In recent years, we have begun to see increasing scholarship and policy attention devoted to the collateral consequences of imprisonment. The reentry movement is still evolving, but in general it has taken as part of its mission a commitment to addressing the multi-faceted ways in which imprisonment affects entire communities. Within the legal community, the American Bar Association adopted a new set of standards on collateral sanctions in August 2003² which lay

¹ INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

² These standards are found in AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004).

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out a legal and philosophical rationale for the consideration of the appropriateness of such penalties and the means by which they may be imposed. And popular media coverage is now beginning to provide us with stories both of the challenges faced by people returning from prison, and the hardships endured by their loved ones during the period of incarceration.

There is now an initial framework for thinking about these issues, and in some areas we are seeing data-driven analysis to help us understand the impact of these dynamics. But in many respects we can only speculate about how mass imprisonment will shape the contours of family and community life in the coming years since we are still in the relatively early stages of this phenomenon.

In this essay, I will try to frame some of the effects of mass imprisonment and to assess what we know about their impact to date. In doing so, we should keep in mind that while prison has always affected the individuals who are incarcerated and their families, the scale of imprisonment now both magnifies those effects and expands their reach. In addition, the racial dynamics of imprisonment, while also a historically critical feature of incarceration, have become the central component of this social policy. While we could assess a broad range of effects of mass imprisonment, I will review five areas which are illustrative of the kind of analysis we should be undertaking. These are as follows:

- The increasing barriers to reintegration facing people with a criminal conviction;
- The impact of mass imprisonment on families and communities;
- The changing relationship between imprisonment and public safety;
- The effects of mass imprisonment on democratic life; and
- The economic distortions produced by mass incarceration.

A. *Barriers to Reintegration*

Imprisonment has always been a profound experience for persons convicted of crimes. There are prisons that are better or worse than others, and ones that offer a decent amount of programming and concern for well-being. Ever since the inception of the prison, though, isolation from family and community, and the dehumanization that is an inevitable element of incarceration, have been defining aspects of the institution. We can debate whether imprisonment is necessary or appropriate in any particular case, and that is a perfectly reasonable discussion, but the conditions under which offenders are imprisoned and the circumstances under which they return to the community affect all prisoners and the society to which they return.

Once a prison term is completed, the transition back to the community is almost always laden with difficulty. What in many cases is a situation of limited connections with the world of work becomes even more problematic with the stigma of imprisonment attached to former offenders. And particularly in an economy increasingly diverging into a high skills/high technology sector and a

broad low skill service economy, few offenders have promising prospects for advancing out of the bottom rungs of the job ladder.

While these barriers to reentry have always been onerous, public policy initiatives of recent years have made this process considerably more challenging. This has been the result of the complex ways in which "tough on crime" political rhetoric has translated into social policy. Beginning in the 1970s, and continuing much more vigorously in the 1980s and 1990s, policymakers at all levels of government have enacted a series of changes to sentencing policy designed to incarcerate more persons and to keep them in prison for longer periods of time. Caught up in the "get tough" rhetoric, policymakers have had to expand their reach beyond just sentencing enhancements, and have enacted a new generation of collateral sanctions that impose serious obstacles to a person's life prospects long after a sentence has been completed.

Many obstacles are related to initiatives of the "war on drugs," with a seemingly endless series of restrictions being placed on people convicted of a drug offense. Depending on the state in which one lives, an 18-year-old with a first-time conviction for felony drug possession now may be barred from receiving welfare benefits for life, prohibited from living in public housing, denied student loans to attend college, permanently excluded from voting, and if not a citizen, be deported. The irony of these barriers is that many only pertain to drug offenses, not to people convicted of murder, rape, or other serious offenses.

Getting a job with a prison record has always been challenging, but the new dynamics of imprisonment extend this problem to non-offenders as well in African American communities. Essentially, given the ubiquitousness of a prison record, many employers now assume that virtually all black men have one. This creates a real dilemma for considerations of policy reform to aid in prisoner reentry.

One policy option promoted by the American Bar Association and others in recent years has been to limit consideration of conviction records unless specifically related to job requirements. While this seems reasonable at first glance, research by economist Harry Holzer and his colleagues demonstrates how such a policy may actually result in greater harm to black applicants due to the racist nature of hiring practices.³ Holzer finds that when employers do not have access to criminal records, they tend to believe that virtually *all* black male applicants must have a record, and so discriminate against them. But by making records available, those black men who do not have convictions are able to demonstrate this and therefore increase their hiring prospects.

These dynamics take place within an employment market still characterized by racist attitudes and hiring practices, and one that is compounded by considerations of a criminal record. The work of sociologist Devah Pager

³ Harry J. Holzer et al., *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 205 (Mary Pattillo et al. eds., 2004).

demonstrates the degree to which this disadvantages African Americans.⁴ In her study of hiring policies in Milwaukee, she matched black-white pairs of job applicants who applied for a variety of positions. Some indicated they had a criminal conviction, others not. Remarkably, whites with a felony conviction were called back for interviews at the same rate as blacks with comparable credentials and no criminal record. Thus, black men are essentially born with the stigma of a felony conviction.

B. *Impact on Families and Communities*

As with offenders, imprisonment has always posed a set of burdens on the family members of people in prison. These have included financial strains, psychological burdens, and social stigma. All of these dynamics still exist, but mass imprisonment has created a considerably greater level of effects in many neighborhoods.

Many effects relate to the growing number of children who have a parent in prison. Current estimates place this figure at 1.5 million, but the racial dynamics of imprisonment produce a figure of seven percent, or 1 in 14, for black children. Since these figures represent a one-day count, the proportion of black children who experience parental incarceration *at some point* in their childhood is considerably greater.

How these children experience the imprisonment of their parents is largely a phenomenon about which we can only speculate at this point. The reason for this is that we have never witnessed a time when prison affected such high numbers of families. Some observers speculate, for example, that with imprisonment having become such a common experience in low-income communities of color, the stigma attached to it has diminished, and conceivably there are even informal networks of social support that develop among children and families.

While theoretically possible, this seems rather unlikely given prevailing social and cultural norms. Being the child of a "criminal" hardly seems like a status worth boasting about. Anthropologist Donald Braman's study of families of prisoners in Washington, D.C. confirms that shame and stigma are often still the norm:

Low-income families often rely on extended networks of family and friends to cope with poverty and hardship Perhaps the most significant consequence of stigma among families of prisoners, then, is the distortion, diminution, and even severance of these social ties. Stigma related to incarceration is powerful, in part, because the families know that the very same relationships on which they have come to

⁴ Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

depend can be turned against them, as social networks that provide resources are transformed into social networks of approbation.⁵

How children experience the incarceration of a parent is also likely to vary considerably depending on many factors. For a start, these include whether it is a mother or father who is imprisoned. Mothers in prison are far more likely than fathers to have been caretakers of their children prior to their imprisonment, and often were single parents. Those who are lucky may have a relative who can take in the children; those who are not may see their children placed in foster care.

In addition to the widespread experience of parental incarceration, children in low-income communities of color are now growing up with a strong likelihood of spending time behind bars. One of every three black boys born today can expect to go to prison if current trends continue. While black children may not know these precise figures, their life experiences certainly communicate this reality, as they witness older brothers, cousins, and neighbors cycling in and out of prison. Some observers have contended that prison has become a "rite of passage" for young men today, and that it is almost welcomed as a badge of honor in certain communities. I am skeptical of such claims because they fail to explain why defendants fight so hard to win in court or to avoid a prison term.

But even if prison is not such a rite, it is increasingly viewed as an almost inevitable aspect of the maturation process for many low-income children of color, in the same way that the expectation of going to college is the norm in many middle class communities. How, then, does this affect the messages that parents, teachers, ministers, and others try to communicate to young people about the value of hard work leading to success in life, when all around there is little in the way of traditional success to be observed?

It is difficult to imagine that there is a strong public policy rationale in support of the structural damage to families that is created by mass incarceration. Proponents of continued prison expansion would no doubt suggest that this is an unfortunate, but necessary, consequence of a policy intended to control crime. But as these collateral effects become increasingly widespread, they threaten to offset any gains that may accrue through incarceration. And as I will discuss below, the crime control impact of mass incarceration is also an increasingly problematic area in which to document success.

C. *Impact on Public Safety*

Criminologists have explored over many years the relationship between incarceration and crime. The relationship turns out to be more complex than one might assume at first, and a challenging one to measure as well. But the era of

⁵ Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT*, *supra* note 1, at 131.

mass imprisonment adds new wrinkles to this relationship, essentially due to the scale at which prison is used.

We can see this in two dimensions. First, as a prison system expands, it is almost inevitable that there will be a point of diminishing returns in crime control. That is, the additional costs expended to apprehend and imprison offenders will not outweigh the costs of crimes prevented. ("Cost" is a difficult issue to define when speaking of victims of crime, but we would generally want to calculate some combination of actual fiscal costs along with an evaluation of the social costs, which may or may not lend themselves to easy quantification.)

These dynamics come about through the general sorting process of the criminal justice system. Whatever one may believe about the efficiency of the system, in general it is the case that persons who commit more serious crimes, or more frequent crimes, are more likely to go to prison than persons who are further down on the scale of severity. Thus, at any level of incarceration there will always be a high likelihood that persons convicted of murder or rape will receive a prison term upon conviction. But as the prison system expands—particularly to the degree it has in the U.S. since 1970—the overall mix of offenses and severity inevitably declines. Essentially, there are only so many murderers to be caught and there is little that can be done to increase these figures substantially.

The most significant contributor to prison expansion in recent decades has been the "war on drugs." Overall, the number of persons awaiting trial or serving a sentence for a drug offense in prison or jail has increased from about 40,000 in 1980 to 450,000 today. There are many reasons to critique this policy, but for these purposes we can examine the effectiveness of massive drug prosecutions on public safety.

The key distinction between drug incarcerations and the use of prison for most other offenses relates to the "replacement effect" that comes into play in drug cases. In an extreme case, when a serial rapist is incarcerated there are no additional rapists produced to take on the opportunity to engage in these violent offenses. But when a street corner drug seller is imprisoned, it is far from clear that there is any immediate impact on drug selling. As long as a market for drugs exists in that neighborhood, there is an almost endless supply of potential sellers willing and able to enter this potentially lucrative market.

The "diminishing returns" effect of imprisonment can be seen for other offenses as well. Consider the increasing numbers of property offenders within the prison system. High-rate burglars, for example, are often incarcerated if for no other reason than they are bound to get caught sooner or later due to the frequency of their criminal activity. But as imprisonment becomes more commonplace, lower rate burglars are increasingly more likely to be locked up as well, and so the value of *lambda*, or the frequency at which persons in prison have committed crimes, declines over time.

Two additional dynamics speak to the crime control effects of mass imprisonment on communities of color in particular. The first relates to the effect of imprisonment on community stability, or the impact on the informal means of

social control that play a role in public safety. Emerging research in this area suggests that there may be a "tipping point" beyond which the negative effects of large-scale imprisonment outweigh any reductions in crime. That is, at a modest level the incapacitating effects of prison serve to reduce the amount of crime committed in a certain neighborhood. But as that level of incarceration increases, neighborhoods become more destabilized as people cycle in and out of prison on a regular basis.

Some would question why this is a problem, if these people are identified offenders. While indeed they have been convicted of a crime, precious few of them are "24/7" criminals. In addition to engaging in crime, they are also parents, workers, consumers, and child care providers. As such, they make a contribution to the community that is also removed when they are sent to prison. In the case of a serious violent offender, few people would worry about this tradeoff, but the balance of effects becomes more complex for less serious offenders.

A related effect regards the role of law enforcement in communities of color. Policing can only be effective when it is accomplished in cooperation with the community. In addition to the much publicized cases of racial profiling in recent years, the sheer numbers of African Americans who are incarcerated has served to reduce confidence and trust in the justice system among many black Americans. To be clear, this hardly represents a condoning of criminal activity, but rather an expression of very conflicted views of people living in communities that are beleaguered both by crime and by high rates of imprisonment. At an extreme, this leads to informal actions of jury nullification. Indeed, law professor Paul Butler has even advocated this as a strategy for jurors serving in drug cases in black communities.⁶ He argues that the negative consequences of expanded imprisonment in such cases far outweigh any benefits to the community. Anecdotal evidence in major news media includes such stories as a black woman serving on a jury in a murder case in Washington, D.C. who voted to acquit the defendant because she didn't "want to send another young black man" to prison.⁷ Such messages from the ground up should alert us to the deeply felt sense of oppression that is increasingly prevalent in many communities.

D. *Impact on Democratic Life*

At the time of the founding of the nation, the vast majority of the American population was ineligible to participate in democratic life. As wealthy white men granted themselves the right to vote, large segments of the population were specifically excluded. These included women, African Americans, illiterates, poor people, and felons. Over the course of two hundred years, restrictions for all

⁶ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

⁷ *Id.* at 723.

groups except people with a felony conviction have been lifted, and we now look back on those former times with a great deal of national embarrassment.

The exclusion of people with a felony conviction from voting raises a host of important questions about the meaning of democracy, but these were mostly of theoretical interest until recent years. With a relatively modest prison population prior to 1970 (modest compared to today, although considerably higher than other industrialized nations even in 1970), the number of persons excluded by means of a felony conviction was also relatively modest. But the dramatic rise in the prison population, and probation and parole populations as well, has swelled the ranks of the disenfranchised concomitantly. Today, more than four million Americans are unable to vote as a result of a felony conviction in the forty-eight states and the District of Columbia that employ disenfranchisement policies for varying categories of felons and ex-felons. If there was previously any doubt about the practical effect of these laws, that skepticism was shattered by the historic Florida 2000 Presidential election experience. That election was decided by just 537 votes, while an estimated 600,000 former offenders—people who had completed their sentences—were ineligible to vote due to that state's restrictive policies.

The racial inequities in the criminal justice system unsurprisingly translate into substantial disparities in voting eligibility as well. While an estimated two percent of the national population is disenfranchised, the rate for African American men is thirteen percent, and in some states is well over twenty percent. These high rates affect this population directly, of course, but they spill over into political influence of black communities generally. When such high numbers of black men in many urban neighborhoods are unable to vote, the voting power of that whole community is impacted in relation to neighborhoods with relatively low rates of incarceration. This is not to suggest that all African Americans vote as a bloc, but clearly different racial, ethnic, and social groups often have priorities in the political world that may set them apart from other demographic groups.

The full impact of these policies is difficult to gauge, but anecdotal evidence and new scholarship suggest that the impact may be considerably greater than the actual numbers of people with current or previous felony convictions. First, there is a great deal of misinformation about the scope of these laws, both among people with a felony conviction and electoral officials. Reports to this author and others make it clear, for example, that ex-felons in a number of states incorrectly believe they have permanently lost the right to vote even though that is not the policy in their state. Local election officials are often misinformed as well. A survey of officials in all counties in New York State found great inconsistencies in the documentation required for a person to demonstrate that he or she had completed parole supervision and was therefore eligible to register.

New evidence also indicates that disenfranchisement effects may go beyond the *legally* disenfranchised population as well. A study of voter turnout shows that in the most restrictive states voter turnouts are lower, particularly among African Americans, even among persons who are not themselves disenfranchised as a result of a felony conviction. It will take further investigation to determine why

this is the case, but it may be related to the communal nature of voting. Voting as a civic duty is a task we engage in with our families and communities. Family members often talk of electoral prospects at home, drive to the polls together, and see their neighbors there. But when substantial numbers of people in a community are legally unable to participate in this process, it is likely to dampen enthusiasm and attention among others as well.

Ironically, forty years after the passage of the Voting Rights Act, the intersection of criminal justice policies and disenfranchisement is resulting in greater numbers of African Americans and other people of color losing their right to vote each year. As long as that trend continues, any claims to being a fully democratic nation will be increasingly suspect.

E. *Economic Impacts*

A final means by which mass incarceration exerts an effect on public policy regards the economic distortions that are produced by large-scale prison expansion. This comes about in several ways.

First is the increasing tendency to locate prisons in rural areas. Prison officials have long sought to build prisons in non-metropolitan areas, primarily due to the lower cost of land, but this trend has accelerated considerably over the past twenty years. Whereas in previous times rural officials had often resisted prison siting in their communities, many now actively lobby for such construction. At a time of manufacturing job loss and the decline of the family farm, many local leaders have come to view prison construction as a welcome source of job creation. Any new prison is likely to remain in place for at least fifty years, and so this appears to offer localities a secure source of employment.

Surprisingly, recent scholarship suggests that this is not in fact the case. Several national and regional studies have demonstrated that rural counties that host prisons show no positive benefits in per capita income or reduced unemployment compared to non-prison areas. These findings are counterintuitive, since prisons clearly create a substantial number of jobs.

There are likely to be two key factors that explain these counterintuitive findings. First, while prisons do create jobs, those jobs do not necessarily go to people in those communities. A person working at a gas station today may not have the skills or civil service priority to become a prison guard when a new institution opens. And in rural areas, many people are accustomed to commuting long distances for work, so guards at other prisons may choose to transfer to a newly opened institution. Second, aggressive pursuit of new prisons may create an imbalance in a county's overall economic development strategy. Energies devoted to prison lobbying may detract from other pursuits that might prove to create even greater numbers of jobs. In addition, there is the stigma attached to becoming viewed as a "prison town." How many of us think of a family trip to Attica as a pleasant way to spend a summer vacation?

Prison expansion in rural areas is also affected by the dynamic created by the census count. For census purposes, prisoners' "usual residence" is considered to be the location of the prison, not their home community. In sparsely populated areas, large prison facilities can result in significant distortions of the local population. In Florence, Arizona, for example, two-thirds of the town's 16,000 residents are people in prison. Since the census count is used to determine political apportionment and funding streams, such towns have a population that is artificially inflated for these purposes. One study estimates that each prisoner brings in between \$50 to \$250 annually to the local government in which he or she is housed. Thus, a new 500-bed prison may yield about \$50,000 in new revenue. Similarly, rural prison towns gain political clout through their enhanced population (although prisoners themselves generally cannot vote), while the urban areas from which most prisoners are drawn become further deprived through the loss of political influence and resources.

Another means by which mass incarceration produces economic distortions occurs through the diversion of resources. Given the scale and concentration of incarceration, many urban neighborhoods now experience unprecedented levels of incarceration. In densely populated Brooklyn, New York, researchers have identified "million dollar blocks" in which taxpayers are allocating \$1 million annually to house persons from that block in prison and jail. Suppose that the average time served in prison was reduced by just ten percent and the resulting savings of \$100,000 were devoted to alleviating crime-producing problems in one of these blocks. One can imagine a broad range of programs and services that would hold the potential of strengthening family and community resources and by doing so, produce positive effects on crime reduction.

III. CONCLUSION

The landscape I have portrayed here is a rather bleak one, but unfortunately I believe it presents an accurate portrayal of current policies and their impact. I would be remiss, though, not to acknowledge that there are countervailing forces at work and a new generation of thinking about these problems and possible solutions.

Within the field of sentencing, the once "reform" concept of alternatives to incarceration has now become established practice in virtually every courtroom in the country. For example, in the heyday of the drug war in the late 1980s the idea of diversion to treatment would have been considered provocative, but today this concept is widely endorsed. We can debate the extent to which such approaches have been successful or could be expanded, but it is clearly significant that they have achieved this level of recognition.

Practitioners at all levels of the justice system are experimenting with new ways of accomplishing their goals as well. Within law enforcement, the community policing movement of the past two decades has shifted the dialogue, at least in part, from a goal of increasing arrests to one of problem-solving. Some

leaders in corrections are now beginning to embrace the philosophy of restorative justice, which not long ago was primarily the province of faith-based reformers. Here, too, we might critique these initiatives from a variety of perspectives, but we should not underestimate the shift in approach.

Promising as these developments may be, they are inherently hindered by two primary obstacles. First is the difficulty in enacting changes to prevailing sentencing policies and practices. Unwise and unproductive sentencing policies can be legislated by policymakers in a matter of hours, but they often take years to undo. And in a broader sense, the national approach to crime is deeply embedded in a punitive and individualistic approach to social policy. This has not always been the case in this nation, and is certainly not the style adopted in many other countries. Changing this political and social dynamic remains the real obstacle to a more effective and humane crime policy.