

# Race and the Transformation of Criminal Justice

By Glenn C. Loury

The early 1990s were the age of drive-by shootings, drug deals gone bad, crack cocaine, and gangsta rap. Between 1960 and 1990, the annual number of murders in New Haven rose from six to 31, the number of rapes from four to 168, the number of robberies from 16 to 1,784 all this while the city's population declined by 14 percent. Crime was concentrated in central cities: in 1990, two fifths of Pennsylvania's violent crimes were committed in Philadelphia, home to one seventh of the state's population. The subject of crime dominated American domestic-policy debates.

Most observers at the time expected things to get worse. Consulting demographic tables and extrapolating trends, scholars and pundits warned the public to prepare for an onslaught, and for a new kind of criminal—the anomic, vicious, irreligious, amoral juvenile "super-predator" In 1996, one academic commentator predicted a "bloodbath" of juvenile homicides in 2005.

And so we prepared. Stoked by fear and political opportunism, but also by the need to address a very real social problem, we threw lots of people in jail, and when the old prisons were filled we built new ones.

But the onslaught never came. Crime rates peaked in 1992 and have dropped sharply since. Even as crime rates fell, however, imprisonment rates remained high and continued their upward march. The result, the current American prison system, is a leviathan unmatched in human history.

According to a 2005 report of the International Centre for Prison Studies in London, the United States with five percent of the world's population houses 25 percent of the world's inmates. Our incarceration rate (714 per 100,000 residents) is almost 40 percent greater than those of our nearest competitors (the Bahamas, Belarus, and Russia). Other industrial democracies, even those with significant crime problems of their own, are much less punitive: our incarceration rate is 6.2 times that of Canada, 7.8 times that of France, and 12.3 times that of Japan. We have a corrections sector that employs more Americans than the combined work forces of General Motors, Ford, and Wal-Mart, the three largest corporate employers in the country, and we are spending some \$200 billion annually on law enforcement and corrections at all levels of government, a fourfold increase (in constant dollars) over the past quarter century.

Never before has a supposedly free country denied basic liberty to so many of its citizens. In December 2006, some 2.25 million persons were being held in the nearly 5,000 prisons and jails that are scattered across America's urban and rural landscapes. One third of inmates in state prisons are violent criminals, convicted of homicide, rape, or robbery. But the other two thirds consist mainly of property and drug offenders. Inmates are disproportionately drawn from the most disadvantaged parts of society. On average, state inmates have fewer than 11 years of schooling. They are also vastly disproportionately black and brown.

How did it come to this? One argument is that the massive increase in incarceration reflects the success of a rational public policy: faced with a compelling social problem, we responded by imprisoning people and succeeded in lowering crime rates. This argument is not entirely misguided. Increased incarceration does appear to have reduced crime somewhat. But by how much? Estimates of the share of the 1990s reduction in violent crime that can be attributed to the prison boom range from five percent to 25 percent. Whatever the number, analysts of all political stripes now agree that we have long ago entered the zone of diminishing returns. The conservative scholar John DiIulio, who coined the term "super-predator" in the early 1990s, was by the end of that decade declaring in *The Wall Street Journal* that "Two Million Prisoners Are Enough". But there was no political movement for getting America out of the mass-incarceration business. The throttle was stuck.

A more convincing argument is that imprisonment rates have continued to rise while crime rates have fallen because we have become progressively more punitive: not because crime has continued to explode (it hasn't), not because we made a smart policy choice, but because we have made a collective decision to increase the rate of punishment.

One simple measure of punitiveness is the likelihood that a person who is arrested will be subsequently incarcerated. Between 1980 and 2001, there was no real change in the chances of being arrested in response to a complaint: the rate was just under 50 percent. But the likelihood that an arrest would result in imprisonment more than doubled, from 13 to 28 percent. And because the amount of time served and the rate of prison admission both increased, the incarceration rate for violent crime almost tripled, despite the decline in the level of violence. The incarceration rate for nonviolent and drug offenses increased at an even faster pace: between 1980 and 1997 the number of people incarcerated for nonviolent offenses tripled, and the number of people incarcerated for drug offenses increased by a factor of 11. Indeed, the criminal-justice researcher Alfred Blumstein has argued that none of the growth in incarceration between 1980 and 1996 can be attributed to more crime:

The growth was entirely attributable to a growth in punitiveness, about

equally to growth in prison commitments per arrest (an indication of tougher prosecution or judicial sentencing) and to longer time served (an indication of longer sentences, elimination of parole or later parole release, or greater readiness to recommit parolees to prison for either technical violations or new crimes).

This growth in punitiveness was accompanied by a shift in thinking about the basic purpose of criminal justice. In the 1970s, the sociologist David Garland argues, the corrections system was commonly seen as a way to prepare offenders to rejoin society. Since then, the focus has shifted from rehabilitation to punishment and stayed there. Felons are no longer persons to be supported, but risks to be dealt with. And the way to deal with the risks is to keep them locked up. As of 2000, 33 states had abolished limited parole (up from 17 in 1980); 24 states had introduced three-strikes laws (up from zero); and 40 states had introduced truth-in-sentencing laws (up from three). The vast majority of these changes occurred in the 1990s, as crime rates fell.

This new system of punitive ideas is aided by a new relationship between the media, the politicians, and the public. A handful of cases in which a predator does an awful thing to an innocent get excessive media attention and engender public outrage. This attention typically bears no relation to the frequency of the particular type of crime, and yet laws such as three-strikes laws that give mandatory life sentences to nonviolent drug offenders and political careers are made on the basis of the public's reaction to the media coverage of such crimes.

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Despite a sharp national decline in crime, American criminal justice has become crueler and less caring than it has been at any other time in our modern history. Why?

The question has no simple answer, but the racial composition of prisons is a good place to start. The punitive turn in the nation's social policy intimately connected with public rhetoric about responsibility, dependency, social hygiene, and the reclamation of public order can be fully grasped only when viewed against the backdrop of America's often ugly and violent racial history: there is a reason why our inclination toward forgiveness and the extension of a second chance to those who have violated our behavioral strictures is so stunted, and why our mainstream political discourses are so bereft of self-examination and searching social criticism. This historical resonance between the stigma of race and the stigma of imprisonment serves to keep alive in our public culture the subordinating social meanings that have always been associated with blackness. Race helps to explain why the United States is exceptional among the democratic

industrial societies in the severity and extent of its punitive policy and in the paucity of its social-welfare institutions.

Slavery ended a long time ago, but the institution of chattel slavery and the ideology of racial subordination that accompanied it have cast a long shadow. I speak here of the history of lynching throughout the country; the racially biased policing and judging in the South under Jim Crow and in the cities of the Northeast, Midwest, and West to which blacks migrated after the First and Second World Wars; and the history of racial apartheid that ended only as a matter of law with the civil-rights movement. It should come as no surprise that in the post-civil rights era, race, far from being peripheral, has been central to the evolution of American social policy.

The political scientist Vesla Mae Weaver, in a recently completed dissertation, examines policy history, public opinion, and media processes in an attempt to understand the role of race in this historic transformation of criminal justice. She argues persuasively, I think, that the punitive turn represented a political response to the success of the civil-rights movement. Weaver describes a process of "frontlash" in which opponents of the civil-rights revolution sought to regain the upper hand by shifting to a new issue. Rather than reacting directly to civil-rights developments, and thus continuing to fight a battle they had lost, those opponents consider George Wallace's campaigns for the presidency, which drew so much support in states like Michigan and Wisconsin shifted attention to a seemingly race-neutral concern over crime:

Once the clutch of Jim Crow had loosened, opponents of civil rights shifted the "locus of attack" by injecting crime onto the agenda. Through the process of frontlash, rivals of civil rights progress defined racial discord as criminal and argued that crime legislation would be a panacea to racial unrest. This strategy both imbued crime with race and depoliticized racial struggle, a formula which foreclosed earlier "root causes" alternatives. Fusing anxiety about crime to anxiety over racial change and riots, civil rights and racial disorder initially defined as a problem of minority disenfranchisement were defined as a crime problem, which helped shift debate from social reform to punishment.

Of course, this argument (for which Weaver adduces considerable circumstantial evidence) is speculative. But something interesting seems to have been going on in the late 1960s regarding the relationship between attitudes on race and social policy.

Before 1965, public attitudes on the welfare state and on race, as measured by the annually administered General Social Survey, varied year to year independently of one another: you could not predict much about a person's attitudes on welfare politics by knowing their

attitudes about race. After 1965, the attitudes moved in tandem, as welfare came to be seen as a race issue. Indeed, the year-to-year correlation between an index measuring liberalism of racial attitudes and attitudes toward the welfare state over the interval 1950-1965 was .03. These same two series had a correlation of .68 over the period 1966-1996. The association in the American mind of race with welfare, and of race with crime, has been achieved at a common historical moment. Crime-control institutions are part of a larger social-policy complex they relate to and interact with the labor market, family-welfare efforts, and health and social-work activities. Indeed, Garland argues that the ideological approaches to welfare and crime control have marched rightward to a common beat:

The institutional and cultural changes that have occurred in the crime control field are analogous to those that have occurred in the welfare state more generally. Just as the welfare state came to be seen as a race issue, so, too, crime came to be seen as a race issue, and policies have been shaped by this perception.

Consider the tortured racial history of the War on Drugs. Blacks were twice as likely as whites to be arrested for a drug offense in 1975 but four times as likely by 1989. Throughout the 1990s, drug-arrest rates remained at historically unprecedented levels. Yet according to the National Survey on Drug Abuse, drug use among adults fell from 20 percent in 1979 to 11 percent in 2000. A similar trend occurred among adolescents. In the age groups 12- 17 and 18-25, use of marijuana, cocaine, and heroin all peaked in the late 1970s and began a steady decline thereafter. Thus, a decline in drug use across the board had begun a decade before the draconian anti-drug efforts of the 1990s were initiated.

Of course, most drug arrests are for trafficking, not possession, so usage rates and arrest rates needn't be expected to be identical. Still, we do well to bear in mind that the social problem of illicit drug use is endemic to our whole society. Significantly, throughout the period 1979-2000, white high-school seniors reported using drugs at a significantly higher rate than black high-school seniors. High drug-usage rates in white, middle-class American communities in the early 1980s accounts for the urgency many citizens felt to mount a national attack on the problem. But how successful has the effort been, and at what cost?

Think of the cost this way: to save middle-class kids from the threat of a drug epidemic that might not have even existed by the time that drug incarceration began its rapid increase in the 1980s, we criminalized underclass kids. Arrests went up, but drug prices have fallen sharply over the past 20 years suggesting that the ratcheting up of enforcement has not made drugs harder to get on the street. The strategy clearly wasn't keeping drugs away from those who sought them.

Not only are prices down, but the data show that drug-related visits to emergency rooms also rose steadily throughout the 1980s and 1990s.

An interesting case in point is New York City. Analyzing arrests by residential neighborhood and police precinct, the criminologist Jeffrey Fagan and his colleagues Valerie West and Jan Holland found that incarceration was highest in the city's poorest neighborhoods, though these were often not the neighborhoods in which crime rates were the highest. Moreover, they discovered a perverse effect of incarceration on crime: higher incarceration in a given neighborhood in one year seemed to predict higher crime rates in that same neighborhood one year later. This growth and persistence of incarceration over time, the authors concluded, was due primarily to the drug enforcement practices of police and to sentencing laws that require imprisonment for repeat felons. Police scrutiny was more intensive and less forgiving in high-incarceration neighborhoods, and parolees returning to such neighborhoods were more closely monitored. Thus, discretionary and spatially discriminatory police behavior led to a high and increasing rate of repeat prison admissions in the designated neighborhoods, even as crime rates fell.

Fagan, West, and Holland explain the effects of spatially concentrated urban anti-drug-law enforcement in the contemporary American metropolis. Buyers may come from any neighborhood and any social stratum. But the sellers at least the ones who can be readily found hawking their wares on street corners and in public vestibules come predominantly from the poorest, most non-white parts of the city. The police, with arrest quotas to meet, know precisely where to find them. The researchers conclude:

Incarceration begets more incarceration, and incarceration also begets more crime, which in turn invites more aggressive enforcement, which then re-supplies incarceration . . . three mechanisms . . . contribute to and reinforce incarceration in neighborhoods: the declining economic fortunes of former inmates and the effects on neighborhoods where they tend to reside, resource and relationship strains on families of prisoners that weaken the family's ability to supervise children, and voter disenfranchisement that weakens the political economy of neighborhoods.

The effects of imprisonment on life chances are profound. For incarcerated black men, hourly wages are ten percent lower after prison than before. For all incarcerated men, the number of weeks worked per year falls by at least a third after their release.

So consider the nearly 60 percent of black male high-school dropouts born in the late 1960s who are imprisoned before their 40th year. While locked up, these felons are stigmatized: they are regarded as fit subjects for shaming. Their links to family are disrupted; their

opportunities for work are diminished; their voting rights may be permanently revoked. They suffer civic excommunication. Our zeal for social discipline consigns these men to a permanent nether caste. And yet, since these men whatever their shortcomings have emotional and sexual and family needs, including the need to be fathers and lovers and husbands, we are creating a situation where the children of this nether caste are likely to join a new generation of untouchables. This cycle will continue so long as incarceration is viewed as the primary path to social hygiene.

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I have been exploring the issue of causes: of why we took the punitive turn that has resulted in mass incarceration. But even if the racial argument about causes is inconclusive, the racial consequences are clear. To be sure, in the United States, as in any society, public order is maintained by the threat and use of force. We enjoy our good lives only because we are shielded by the forces of law and order, which keep the unruly at bay. Yet in this society, to a degree virtually unmatched in any other, those bearing the brunt of order enforcement belong in vastly disproportionate numbers to historically marginalized racial groups. Crime and punishment in America has a color.

In his fine study *Punishment and Inequality in America* (2006), the Princeton University sociologist Bruce Western powerfully describes the scope, nature, and consequences of contemporary imprisonment. He finds that the extent of racial disparity in imprisonment rates is greater than in any other major arena of American social life: at eight to one, the black-white ratio of incarceration rates dwarfs the two-to-one ratio of unemployment rates, the three-to-one ration of non-marital childbearing, the two-to-one ratio of infant-mortality rates and one-to-five ratio of net worth. While three out of 200 young whites were incarcerated in 2000, the rate for young blacks was one in nine. A black male resident of the state of California is more likely to go to a state prison than a state college.

The scandalous truth is that the police and penal apparatus are now the primary contact between adult black American men and the American state. Among black male high-school dropouts aged 20 to 40, a third were locked up on any given day in 2000, fewer than three percent belonged to a union, and less than one quarter were enrolled in any kind of social program. Coercion is the most salient meaning of government for these young men. Western estimates that nearly 60 percent of black male dropouts born between 1965 and 1969 were sent to prison on a felony conviction at least once before they reached the age of 35.

One cannot reckon the world-historic American prison build-up over the past 35 years without calculating the enormous costs imposed upon the

persons imprisoned, their families, and their communities. (Of course, this has not stopped many social scientists from pronouncing on the net benefits of incarceration without doing so.) Deciding on the weight to give to a "thug's" well-being or to that of his wife or daughter or son's is a question of social morality, not social science. Nor can social science tell us how much additional cost borne by the offending class is justified in order to obtain a given increment of security or property or peace of mind for the rest of us. These are questions about the nature of the American state and its relationship to its people that transcend the categories of benefits and costs.

Yet the discourse surrounding punishment policy invariably discounts the humanity of the thieves, drug sellers, prostitutes, rapists, and, yes, those whom we put to death. It gives insufficient weight to the welfare, to the humanity, of those who are knitted together with offenders in webs of social and psychic affiliation. What is more, institutional arrangements for dealing with criminal offenders in the United States have evolved to serve expressive as well as instrumental ends. We have wanted to "send a message" and we have done so with a vengeance. In the process, we have created facts. We have answered the question, who is to blame for the domestic maladies that beset us? We have constructed a national narrative. We have created scapegoats, indulged our need to feel virtuous, and assuaged our fears. We have met the enemy, and the enemy is them.

Incarceration keeps them away from us. Thus Garland: "The prison is used today as a kind of reservation, a quarantine zone in which purportedly dangerous individuals are segregated in the name of public safety." The boundary between prison and community, Garland continues, is "heavily patrolled and carefully monitored to prevent risks leaking out from one to the other. Those offenders who are released "into the community" are subject to much tighter control than previously, and frequently find themselves returned to custody for failure to comply with the conditions that continue to restrict their freedom. For many of these parolees and ex-convicts, the "community" into which they are released is actually a closely monitored terrain, a supervised space, lacking much of the liberty that one associates with "normal life".

Deciding how citizens of varied social rank within a common polity ought to relate to one another is a more fundamental consideration than deciding which crime-control policy is most efficient. The question of relationship, of solidarity, of who belongs to the body politic and who deserves exclusion- these are philosophical concerns of the highest order. A decent society will on occasion resist the efficient course of action, for the simple reason that to follow it would be to act as though we were not the people we have determined ourselves to be: a people conceived in liberty and dedicated to the proposition that we all are created equal. Assessing the propriety of creating a racially defined pariah class in the middle of our great cities at the start of

the 21st century presents us with just such a case.

My recitation of the brutal facts about punishment in today's America may sound to some like a primal scream at this monstrous social machine that is grinding poor black communities to dust. And I confess that these brutal facts do at times incline me to cry out in despair. But my argument is analytical, not existential. Its principal thesis is this: we law-abiding, middle-class Americans have made decisions about social policy and incarceration, and we benefit from those decisions, and that means from a system of suffering, rooted in state violence, meted out at our request. We had choices and we decided to be more punitive. Our society--the society we have made--creates criminogenic conditions in our sprawling urban ghettos, and then acts out rituals of punishment against them as some awful form of human sacrifice.

This situation raises a moral problem that we cannot avoid. We cannot pretend that there are more important problems in our society, or that this circumstance is the necessary solution to other, more pressing problems unless we are also prepared to say that we have turned our backs on the ideal of equality for all citizens and abandoned the principles of justice. We ought to ask ourselves two questions: Just what manner of people are we Americans? And in light of this, what are our obligations to our fellow citizens, even those who break our laws?

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To address these questions, we need to think about the evaluation of our prison system as a problem in the theory of distributive justice--not the purely procedural idea of ensuring equal treatment before the law and thereafter letting the chips fall where they may, but the rather more demanding ideal of substantive racial justice. The goal is to bring about through conventional social policy and far-reaching institutional reforms a situation in which the history of racial oppression is no longer so evident in the disparate life experiences of those who descend from slaves.

And I suggest we approach that problem from the perspective of John Rawls' theory of justice: first, that we think about justice from an "original position" behind a "veil of ignorance" that obstructs from view our own situation, including our class, race, gender, and talents. We need to ask what rules we would pick if we seriously imagined that we could turn out to be anyone in the society. Second, following Rawls' "difference principle", we should permit inequalities only if they work to improve the circumstances of the least advantaged members of society. But here, the object of moral inquiry is not the distribution among individuals of wealth and income, but instead the distribution of a negative good, punishment, among individuals and, importantly, racial groups.

So put yourself in John Rawls' original position and imagine that you could occupy any rank in the social hierarchy. Let me be more concrete: imagine that you could be born a black American male outcast shuffling between prison and the labor market on his way to an early death to the chorus of nigger or criminal or dummy. Suppose we had to stop thinking of us and them. What social rules would we pick if we actually thought that they could be us? I expect that we would still pick some set of punishment institutions to contain bad behavior and protect society. But wouldn't we pick arrangements that respected the humanity of each individual and of those they are connected to through bonds of social and psychic affiliation? If any one of us had a real chance of being one of those faces looking up from the bottom of the well, not of being the least among us, then how would we talk publicly about those who break our laws? What would we do with juveniles who go awry, who roam the streets with guns and sometimes commit acts of violence? What weight would we give to various elements in the deterrence-retribution-incapacitation-rehabilitation calculus, if we thought that calculus could end up being applied to our own children, or to us? How would we apportion blame and affix responsibility for the cultural and social pathologies evident in some quarters of our society if we envisioned that we ourselves might well have been born into the social margins where such pathology flourishes?

If we take these questions as seriously as we should, then we would, I expect, reject a pure ethic of personal responsibility as the basis for distributing punishment. Issues about responsibility are complex, and involve a kind of division of labor--what John Rawls called a "social division of responsibility" between "citizens as a collective body" and individuals: when we hold a person responsible for his or her conduct by establishing laws, investing in their enforcement, and consigning some persons to prisons we need also to think about whether we have done our share in ensuring that each person faces a decent set of opportunities for a good life. We need to ask whether we as a society have fulfilled our collective responsibility to ensure fair conditions for each person for each life that might turn out to be our life.

We would, in short, recognize a kind of social responsibility, even for the wrongful acts freely chosen by individual persons. I am not arguing that people commit crimes because they have no choices, and that in this sense the "root causes" of crime are social; individuals always have choices. My point is that responsibility is a matter of ethics, not social science. Society at large is implicated in an individual person's choices because we have acquiesced in-- perhaps actively supported, through our taxes and votes, words and deeds--social arrangements that 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, which we may condemn, are nevertheless compelling to him--an entirely understandable response to circumstance. Closed and

bounded social structures like racially homogeneous urban ghettos create contexts where "pathological" and "dysfunctional" cultural forms emerge; but these forms are neither intrinsic to the people caught in these structures nor independent of the behavior of people who stand outside them.

Thus, a central reality of our time is the fact that there has opened a wide racial gap in the acquisition of cognitive skills, the extent of law-abidingness, the stability of family relations, the attachment to the work force, and the like. This disparity in human development is, as a historical matter, rooted in political, economic, social, and cultural factors peculiar to this society and reflective of its unlovely racial history: it is a societal, not communal or personal, achievement. At the level of the individual case we must, of course, act as if this were not so. There could be no law, no civilization, without the imputation to particular persons of responsibility for their wrongful acts. But the sum of a million cases, each one rightly judged on its merits to be individually fair, may nevertheless constitute a great historic wrong. The state does not only deal with individual cases. It also makes policies in the aggregate, and the consequences of these policies are more or less knowable. And who can honestly say--who can look in the mirror and say with a straight face--that we now have laws and policies that we would endorse if we did not know our own situation and genuinely considered the possibility that we might be the least advantaged?

Even if the current racial disparity in punishment in our country gave evidence of no overt racial discrimination and, perhaps needless to say, I view that as a wildly optimistic supposition, it would still be true that powerful forces are at work to perpetuate the consequences of a universally acknowledged wrongful past. This is in the first instance a matter of interpretation of the narrative overlay that we impose upon the facts.

The tacit association in the American public's imagination of "blackness" with "unworthiness" or "dangerousness" has obscured a fundamental ethical point about responsibility, both collective and individual, and promoted essentialist causal misattributions: when confronted by the facts of racially disparate achievement, racially disproportionate crime rates, and racially unequal school achievement, observers will have difficulty identifying with the plight of a group of people whom they (mistakenly) think are simply "reaping what they have sown." Thus, the enormous racial disparity in the imposition of social exclusion, civic ex-communication, and lifelong disgrace has come to seem legitimate, even necessary: we fail to see how our failures as a collective body are implicated in this disparity. We shift all the responsibility onto their shoulders, only by irresponsibly and, indeed, immorally denying our own. And yet, this entire dynamic has its roots in past unjust acts that were perpetrated on the

basis of race.

Given our history, producing a racially defined nether caste through the ostensibly neutral application of law should be profoundly offensive to our ethical sensibilities--to the principles we proudly assert as our own. Mass incarceration has now become a principal vehicle for the reproduction of racial hierarchy in our society. Our country's policymakers need to do something about it. And all of us are ultimately responsible for making sure that they do.