

Mass Incarceration: Causes, Consequences, and Exit Strategies

INTRODUCTION

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It is with pleasure that I regularly teach Criminal Law to Harvard Law School students, usually during their first semester of law school. The students are bright, well-educated, and eager; many have had fascinating and enriching experiences in the working world between college and law school. As most law professors do, I always begin my course with an explanation of its importance and relevance to the wider world of law. It is at this point that I am routinely shocked by my students' ignorance—and they by the information I present. When I describe the revolution in incarceration that has occurred in the United States the past four decades—much of it during their lifetimes—they are genuinely surprised by the scale of the changes. The American rate of incarceration has increased more than fivefold since 1972?¹ The current rate is more than 700 per 100,000, yielding a total number well over 2 million people?² The incarceration rate for black Americans relative to white Americans is higher than it was before the Civil Rights Movement?³ The United States has the highest rate of incarceration in the world, many times higher than most European countries, and higher than even the most violent societies and most oppressive regimes on the planet?⁴ “Really?” their faces and voices ask. Really.

The change in American incarceration rates is a shift relative to a previously stable baseline that can only be described as revolutionary—analogous in scale to the increases in global warming, autism rates, or mortgage foreclosures with which my students are far more familiar. The combination of the scale and the invisibility (even to the educated) of this radical change motivated this Symposium. When I was invited to choose a topic as guest editor for this Symposium issue, the choice was an easy one, as I could think of no more urgent issue relating to American criminal justice. In addressing the phenomenon of what

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¹ See MARC MAUER, RACE TO INCARCERATE 1 (rev. ed. 2006).

² See *id.*

³ See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 24-28 (2006) (comparing lifetime risks of incarceration for black men vs. white men born before and after the Civil Rights Movement of the 1950s and 1960s).

⁴ See Nicola Lacey, *American Imprisonment in Comparative Perspective*, DAEDALUS (Summer 2010).

many now call “mass incarceration,”⁵ three central questions present themselves: 1) *Why* did this change occur? Can we identify the causes of this massive shift in our criminal punishment practices? 2) *What* has this change wrought? What are the consequences of mass incarceration for American society? 3) *How* can we reverse course? Are there plausible exit strategies and alternatives? To answer these questions, I have assembled an erudite and diverse group of scholars who offer a variety of perspectives. Though their analyses sometimes diverge or conflict, all of the contributors agree that mass incarceration represents both a momentous change and an unfortunate or even disastrous one. In what follows, I will briefly sketch their arguments and highlight points of convergence and divergence.

Professor Michelle Alexander focuses in particular on the effects of mass incarceration on black Americans.⁶ She draws on her recent book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,⁷ and her prior experience as a civil rights lawyer to make the provocative argument that today’s incarceration practices are the functional equivalent of the Jim Crow laws of an earlier era. Professor Alexander describes the vastly racially disproportionate impact of the so-called War on Drugs, the policy that single-handedly drove much of the increase in incarceration rates. She then elaborates on how incarceration has lasting effects on important rights of many black Americans—such as the rights to vote, to serve on juries, to receive public benefits, to be free from discrimination in employment and housing, and to earn wages free from garnishment as fees or fines. These cumulative effects, argues Professor Alexander, demonstrate that mass incarceration, together with Jim Crow and slavery before it, “have operated as tightly networked systems of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”⁸ For Professor Alexander, the most plausible exit strategy is “a broad based social movement” akin to the original Civil Rights Movement, but one that brings together a wider, multi-racial and multi-ethnic coalition.⁹ In order to forge such a coalition, she urges, “we must map the linkages between the suffering of African Americans in the drug war to the experiences of other oppressed and marginalized groups.”¹⁰

Professor David Cole offers the most hopeful note of the Symposium by observing and documenting all of the ways in which the tide seems to be turning

⁵ See, e.g., Loïc Waquant, *From Slavery to Mass Incarceration*, NEW LEFT REV. 13 (Jan./Feb. 2002).

⁶ Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 6 (2011).

⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁸ Alexander, *supra* note 6, at 20.

⁹ *Id.* at 25.

¹⁰ *Id.* at 26.

against mass incarceration.¹¹ From the recent flattening of the incarceration rate, to the repeal of some of the most draconian drug laws, to innovations with alternatives to incarceration and attempts to assist the “reentry” of those released from prison, signs abound of “what could be the beginning of a trend to reduce reliance on incarceration.”¹² Professor Cole seeks to unearth the causes of this burgeoning trend, noting that budgetary crises of the past few years have led many to question the enormous cost of maintaining such a bloated prison system. At the same time, the fall in the rate of violent crimes and the acknowledged failure of the War on Drugs has cast doubt on the necessity of imprisoning so many. Concerns about innocence, coupled with some reduction in the (still substantial) racial disparities in the criminal justice system have helped many white Americans identify more with those behind bars, and perhaps to focus their fears more on foreign terrorists rather than on ordinary, homegrown criminals. Professor Cole speculates that perhaps a “tipping point” has been reached, at which American society will “begin[] to resist further incarceration.”¹³ He is quick to acknowledge, however, that the changes that have occurred thus far are small relative to the size of the increase in the American prison population over the past four decades, and thus concludes by asking how we might take a “turning point” in incarceration trends and turn it into a “major transformation.” Here, Professor Cole adds to Professor Alexander’s call for a new social movement by noting that the movement’s goals must extend beyond criminal justice policy reform and include “real investments in poverty alleviation.”¹⁴ He notes soberly that the biggest hurdle to such major transformation is closing “the empathy gap” that exists between “the law-abiding and the criminally convicted” and “in particular between the white majority and the inner-city communities from which so many of America’s prisoners come.”¹⁵

Professor Bernard Harcourt intriguingly reminds us that we as a country have already experienced a transformative retreat from mass incarceration of a sort—in the mass deinstitutionalization of the mentally ill.¹⁶ Between 1955 and 1980, the inpatient population in state and county mental hospitals in the United States dropped by 75%, with the vast majority of that decline occurring in a single decade (1965-75). Professor Harcourt identifies three major factors contributing to the deinstitutionalization of the mentally ill, and considers whether there are parallel possibilities for the deinstitutionalization of the criminally convicted. He focuses on the development and use of psychiatric medicines, the development of federal social welfare programs that created financial incentives to channel care for the

¹¹ David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011)

¹² *Id.* at 33.

¹³ *Id.* at 37.

¹⁴ *Id.* at 39.

¹⁵ *Id.* at 40.

¹⁶ Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011).

mentally ill to alternative settings, and the legal challenges to the care and status of the mentally ill that reflected growing public awareness of the problems associated with the status quo. Professor Harcourt warns that the parallel proposals for prisoners that he derives from the experience of the mentally ill (such as medication for aggressive behavior, GPS monitoring and other biometric devices as substitutes for incarceration, federal funding incentives for alternatives to incarceration, and high-profile litigation of prison conditions) “may well involve Faustian bargains.”¹⁷ In particular, he notes two pitfalls to avoid from the earlier experience of deinstitutionalization—the increased racialization of the mental health population after deinstitutionalization and the invigoration of other modes of institutionalization (what he terms “transinstitutionalization”¹⁸). Harcourt concludes that if we are to draw lessons from this earlier era, “the task ahead will be to maximize the silver linings of 1960s deinstitutionalization while avoiding the glaring pitfalls.”¹⁹

Professor Mark Kleiman offers the most well-developed policy alternative to mass incarceration,²⁰ one that starts with the assumption that “crime is a genuine problem of substantial magnitude” and that keeps crime control at the forefront of relevant considerations.²¹ Drawing on ideas that he developed more fully in his recent book, *When Brute Force Fails: How to Have Less Crime and Less Punishment*,²² Professor Kleiman focuses on how to make community corrections work to reduce crime better than our current failed system of mass incarceration, which Kleiman maintains “has become a social problem on the same level as crime itself.”²³ He urges the effectiveness of a system of community supervision that attends to the 5 C’s of effective deterrence: “Concentration of the agent’s attention on a subset of the caseload allows the agent to Communicate a Credible threat of a high-Certainty, high-Celerity [speedy] sanction to every member of that group.”²⁴ Professor Kleiman offers several examples of this model working in the real world—most notably Project HOPE in Honolulu, which produced truly dramatic results in a randomized controlled trial. He concludes by considering how the HOPE concept might be extended to other contexts and by predicting that expenditures on such projects “might be far more cost-effective investments in crime reduction than incarceration.”²⁵ Professor Kleiman’s focus on cost-effective

¹⁷ *Id.* at 57.

¹⁸ *Id.*

¹⁹ *Id.* at 88.

²⁰ Mark A.R. Kleiman, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89 (2011).

²¹ *Id.* at 91.

²² MARK A.R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* (2009).

²³ Kleiman, *supra* note 20, at 91.

²⁴ *Id.* at 102.

²⁵ *Id.* at 105.

deterrence as the best attack on mass incarceration stands in stark contrast to Professor Alexander's call for a new Civil Rights movement and to Professor Cole's insistence on meaningful poverty elimination.

Professor Michael Seidman, like Professor Harcourt, looks to an earlier era for parallels.²⁶ In a provocative analogy, he compares modern American society's response to mass incarceration to the response of people of good will in Nazi-occupied Europe to the Holocaust. Putting aside the obvious disanalogies, Professor Seidman argues that mass incarceration is an "overwhelming evil"²⁷ especially in light of its enormous disparate impact on the African American community. He explains how the interaction of the "economic model" and the "moralism model" of crime control has contributed to the isolation of poor African-American communities in a cycle of increasing crime and punishment.²⁸ He asks whether there are strategies that might disrupt the "self-reinforcing downward cycle" that creates and sustains our current policy of mass incarceration.²⁹ Professor Seidman offers three such strategies of disruption that roughly parallel that possible responses of European citizens to the Holocaust: amelioration (working around the edges to make things marginally better), transformation (large-scale mobilization), and accommodation (using the system's own conservative and even racist impulses to argue for change within it). He does not commit himself to any of these choices, acknowledging that each "has important defects and poses significant dangers."³⁰ Rather, Professor Seidman uses the Holocaust analogy to urge us not to let pessimism lead to "world-weary passivity or complacent indifference."³¹

Finally, Professor Andrew Taslitz offers an understanding of the current "prison state"—and a prescription for its transformation—that is grounded in the state of our democratic politics.³² He articulates a vision of "populist deliberative democracy (PDD)"³³ that involves all social groups in truly informed and deliberative political activity and decision making. He then performs an empirical analysis of inter-state and comparative national data that links the strength of PDD institutions and culture to lower incarceration rates. He uses this analysis to argue that the likely effect of more deliberative and inclusive criminal justice policymaking would be more preventive and rehabilitative approaches to crime control, rather than the highly punitive ones that currently predominate. Professor

²⁶ Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109 (2011).

²⁷ *Id.* at 110, 132.

²⁸ *See id.* at 114, 120.

²⁹ *Id.* at 118.

³⁰ *Id.* at 131.

³¹ *Id.* at 132.

³² Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011).

³³ *Id.* at 134.

Taslitz also explains how the use of “democratic social science”³⁴—social science mechanisms that either mimic PDD or achieve some of its benefits, might be incorporated in current policymaking, so as to moderate excesses in retributivism. Professor Taslitz recognizes that PDD will not be easy to achieve, as its success depends on educating an attentive and open-minded populace, engaging them in small groups, and building empathy across social groups. Here, his prescription dovetails with those of Professors Alexander and Cole, who also emphasize empathy across social groups as key to reversing in any substantial way our current commitment to mass incarceration.

Professor Taslitz closes by offering a general admonition about confronting social injustice and promoting social change: “[D]enouncing the wasteland before us changes nothing. One must first know what seeds to plant, what crops to grow.”³⁵ The six contributions to this Symposium offer a veritable farmer’s catalog for those interested in addressing the problem of mass incarceration. And, as I exhort my first-year Criminal Law students each September, we should all be among those interested in addressing our country’s extraordinary revolution in incarceration. I will close by recalling, as I do for my students, the wise and even prophetic words of Winston Churchill: “The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.”³⁶

³⁴ *Id.* at 175.

³⁵ *Id.* at 196.

³⁶ Winston Churchill, House of Commons speech, given as Home Secretary, July 20, 1910 [Official Report, 20 July 1910; Vol. XIX, c. 1354.].