Ending Mass Incarceration is a Moral Imperative

The movement to name, blame, and shame mass incarceration has arguably achieved considerable success in just the last few years. The idea of putting more people in prison as a way to bring security and social order to American cities has largely run its course, and prison is now seen for the first time in decades as itself a social problem, at least as serious as crime. Prison populations are dropping (if slowly and mostly under court order). Politicians openly discuss alternatives to prison (although mostly for nonviolent, nonserious, and nonsexual felonies), and the media discusses mass incarceration as at least a failed public policy, if not a looming crisis. Yet the structure of sentencing laws, prosecutorial attitudes, policing practices, and court routines that produce high incarceration rates and overcrowded prisons remains very much intact. How far will the present legal and cultural momentum against mass incarceration take us?

For those of us who believe that mass incarceration has been a profound political and social catastrophe for the United States, there is every reason to be concerned that improving economic conditions, coupled with the continuing traction of crime victimization fear and racialized stereotypes on common sense assumptions and routines in American life, could stall or even reverse progress. The carceral future could look a lot like the carceral present, perhaps a bit smaller—300 per 100,000 on average rather than 400—still highly racialized, and given the labels of “violent,” “serious,” or “sexual” likely to be laid on those left, ever more securitized and devoid of programs. I call this “mass incarceration lite,” and if we end up accepting something like this, it will be as great a shame as the incompleteness of the civil rights movement of the 1960s.

I call “torture on the installment plan,” the inevitable progression of chronic illness in the absence of effective individualized care. This is not an accident or a feature of a handful of bad actor states. The conditions in California that led the Supreme Court to approve a partial dismantling of mass incarceration policies to reduce chronic overcrowding were extreme, but not necessarily unrepresentative. Overcrowding is the norm in state prisons in the United States, and the difference between California and most states may be the absence of a battle-hardened group of prisoner rights lawyers, such as the lawyers for the prisoners in Brown v. Plata who have litigated inhumane conditions for over twenty-five years.

We shall have to see whether more federal trial courts will take up the encouragement of Brown to investigate unconstitutional conditions produced by mass incarceration policies in other states. In the meantime we should carry Brown’s strong message that prisons which ignore health needs “are incompatible with human dignity and have no place in a civilized society” directly into the legislative and administrative debates about crime policy.

Justice Kennedy’s language is as close as American courts come to saying, “You’ve got a big human rights problem on your hands.”

Insisting that mass incarceration is a human rights problem is in tension with a different slogan raised by those who oppose mass incarceration, but believe sustained reductions require winning the public’s confidence by asserting that mass incarceration is an excessive and wasteful system of crime control that can be replaced by a correctional system based on “evidence-based” programing. The call for evidence-based programs offers an important rejoinder to those who defend the current scale of mass incarceration as necessary to prevent a recurrence of the higher levels of violent crime experienced in the late 1980s and to a large extent since the late 1960s. Criminologists, many of whom were experts in support of the prisoners during Brown, can point to numerous ways that mass incarceration policies promote recidivism, including failing to use proven rehabilitative methods in prison, failing to invest in “reentry” strategies aimed at keeping released prisoners from returning to criminal life patterns, and confining, without treatment, too many people whose

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problems arose from untreated mental illness in the first place.

Because mass incarceration is a human rights problem, it requires a solution as an urgent priority ahead of the still speculative promise of evidence-based penological treatment and improved reentry supervision strategies. Although few continue to defend expanding imprisonment as a tool to reduce crime, and many propose alternatives to incarceration for some categories of felons (the nonviolent, nonserious, nonsexual), substantial shrinkage of the prison population is resisted by politicians who are turning the rhetoric of evidence-based penology into a rationale for going slow. Instead of offering significant plans to restructure policing and criminal sentencing, and exercising administrative and legislative measures to bring relief to the currently imprisoned and those burdened by past incarceration, these politicians would stabilize and even grow the prison population. The claim that only prison population reductions achieved through “evidence-based” prison rehabilitation or reentry programs designed to reduce recidivism are compatible with public safety is misleading and risks fostering the kind of correctional system that will continue to violate human dignity. It is misleading because mass incarceration–style sentencing systems in most states and the federal criminal system were not intended to reflect the future dangerousness of offenders; indeed, many of them forbid consideration of individualizing details in favor of a harsh, but indiscriminate, mix of retributive crime-based punishment and group-based general incapacitation.

California’s harsh determinate sentencing system is exemplary. Sentences in California are generally based on crime and criminal record, with the judge choosing among three terms (the judge’s choice is now advisory to avoid Sixth Amendment defects). This is overlaid by the notorious Three-Strikes law and other sentence enhancements intended to allow prosecutors more leeway to incapacitate offenders they deem dangerous, but with no “evidence-based” factors required. California’s enormous prison population, at least as of Brown v. Plata, was in no systematic way a collection of the most crime-prone people in the state. Thus, California’s recent insistence that it cannot identify enough prisoners who would be safe to release in order to comply with the prison population targets affirmed by the U.S. Supreme Court in Brown v. Plata, and reaffirmed by the three-judge court only a few months ago, ignores that every year it releases nearly 100,000 prisoners based on the expiration of their determinate sentences, and heedless of any individualized risk they pose. To borrow and twist Justice Alito’s alarming metaphor in his Plata dissent, a government can hardly complain about having to unleash “an army division” of potential criminals on the population when it regularly unleashes an entire “field army” of prisoners by virtue of its sentencing laws.

Further, the language of evidence-based penology risks helping defenders of the status quo stabilize mass incarceration and prevent the reforms necessary to conserve the human dignity of the incarcerated because it continues to make criminal risk the anchoring value around which correctional practices should be based. Those being released from contemporary prisons may indeed commit crimes in the future, as indeed may any of us, but it is the distinctive feature of mass incarceration’s very tendency to overreach and to damage that, compared to past cohorts of former prisoners, they are more likely to be at risk from the mental and physical illnesses that have been deepened by incarceration and less likely to be professional criminals with criminal skills and social capital.

II. Expand the Racial Justice Critique of Mass Incarceration Beyond the War on Drugs

Few tags have damaged mass incarceration more than the idea that it represents a new “Jim Crow,” a system of racial ordering designed to transform and sustain the system of white supremacy that goes back to slavery. Yet as mass incarceration slims down through reducing the use of incarceration for drug possession offenses, the sting of the new Jim Crow critique is likely to lessen, and the cross-racial urgency of suppressing violent crime is likely to bring renewed legitimacy to a system that may remain just as inhumane. Violent crime, enhanced sentences for which already represent the main source of state prisoners, presents a much closer match between estimates of the underlying criminal behavior and the demography of prisoners. In short, the new Jim Crow argument, if reduced to the war on drugs, is likely to leave most of mass incarceration in place, in terms both of its historically unprecedented scale and of the high portion of African American and Latino prisoners.

But the link between mass incarceration and racism does not run through numbers alone. Although the racial disproportionality of African American and Latino prisoners began before mass incarceration, it is unlikely that the dehumanization of prisoners under mass incarceration would have been as politically sustainable without the lack of empathy and human connection that, more than positive discrimination, is the cutting edge of racism. Moreover, our penology contains a propensity to degrade while punishing that is incomprehensible without our history of slavery and racial domination. How else to comprehend the Thirteenth Amendment, which abolished slavery but allowed it to remain as a punishment for serious crimes? Our willingness to embrace a criminal justice system based on group-based crime repression is a direct consequence of this history.

The human rights condemnation of mass incarceration should be of a piece with the racial justice condemnation. The mass internment of Japanese Americans—citizens and residents—during World War II is a powerful precedent for the kind of merging of racism and popular fear, even hysteria, that has driven mass incarceration in the last generation. Under an executive order signed by President Roosevelt, local military commanders were given authority
to declare particular geographic regions off-limits to persons of Japanese origin. This was immediately done for the entire Pacific coast, leading to the resettlement of more than 100,000 people, mostly to internment camps in the western deserts where an entire population of citizens (nearly 80 percent) and other permanent legal residents, none of them convicted of any crime, were confined for the duration of World War II. Few today would disagree with Congress’ own retrospective judgment in 1988 that the internment was a result of “race prejudice, war hysteria, and the failure of political leadership.” Although the internment was a national policy, much of its political motivation came from California, a state whose combination of aspirationalism and fear seems to make it especially prone to episodes of mass human rights violation.

### III. End the War on Crime

The comparison with the wartime internment of Japanese Americans also highlights the war context of mass incarceration. Unlike Jim Crow, which constituted the long-term settlement of post–Civil War irregular conflict in South, mass incarceration belongs to a period of self-conscious wartime footing, in which racial patterns of social control were rationalized and legitimized as necessary, if regrettable, measures necessitated by an extreme and unacceptable threat associated racially with the population being subjected to mass internment, incarceration, or supervision. Although the “war on crime” was never declared by Congress, as our more recent “war on terrorism” was, numerous presidents and congresses, as well as state governments, have affirmed it.

Wars inevitably racialize the populations they define. In the era of the war on crime, police have been sent into neighborhoods to repress crime, and correctional officers have been invited to consider themselves police on the toughest beat of all. But if crime is a war, then the enemy constitutes all the young men of fighting age in the territory under threat. If crime is a war, then victory comes from making that territory off-limits to those defined demographically as the enemy. These are not metaphors, but the very terms in which New York Police Department’s Stop and Frisk campaign was carried out, and the very way in which California’s Supermax Pelican Bay prison was built.

The growing outrage at police and correctional forces for preemptive violence based on racial profiling and prejudice or bias (implicit or even explicit) is a long time coming, but improvement will take more than better training and monitoring, under court orders or otherwise; it will take a political decision to end the war on crime. President Obama recently gave a speech calling for a fundamental change in the way the country addressed terrorism. He was not declaring the threat over, but recognizing the need to back away from a war footing and the messages that sent to both government agents and citizens alike. The president and other political leaders need to make similar statements about crime. This should go along with acknowledgment that the war on crime has failed to provide real security to many communities in the United States, and that renewed efforts to prevent young people from engaging in deadly violence will go along with an end to collective punishment and harassment of youth in high-crime neighborhoods.

### IV. Reconstitute Sentencing Commissions

To many who dream of weaning our criminal justice system away from mass incarceration, the gold standard of reform is the establishment of a sentencing commission with authority to rescale the overall use of imprisonment, and considering discretion over imprisonment. There is much to be said in favor of a comprehensive approach as opposed to the often stealth and ad hoc strategies that have thus far been relied on to reduce prison populations in California and nationally. But a sentencing commission constituted under present conditions would almost certainly reflect the hegemony of law enforcement agencies and their official victim representative organizations that have dominated sentencing policy during the war on crime. A sentencing commission organized to meet the current perspective would likely entrench mass incarceration, minus a few unsustainable and deeply unpopular aspects of the war on drugs. The result would be what I’ve already called mass incarceration lite.

A sentencing commission or another vehicle for comprehensive legislative reform of sentencing laws needs to be infused, either internally or by a parallel body, by public investigation of mass incarceration in each state to understand its causes and consequences for each community. It took activists more than thirty years to get the U.S. government at the highest levels to discuss the human rights dimension of the wartime internment of Japanese citizens and residents, and more than forty years for final acknowledgment of that wrong and a measure of financial compensation. A commission was appointed and made important public findings about the causes and consequences of internment.

All of these elements are suggestive of what would be needed to make sure that a sentencing commission does not become a face-lift for mass incarceration. A commission must be charged with taking public testimony about the context of mass incarceration’s rise, including peaks of violent crime in the early 1970s and early 1990s, and encouraged to recommend specific features of sentencing reform necessary to make sure mass incarceration is truly rooted out and not simply pasted over. This would include identifying necessary institutional reforms to protect against future moments when wartime or warlike hysteria makes mass violations of human rights temporarily palatable.

South Africa’s much discussed Truth and Reconciliation Commission provides an important model for some of the goals that such a mass incarceration commission in each state should have, although without some of the trickiest legal features of the latter (e.g., the power to grant effective legal immunity). These commissions would have power to cut through the intellectual security perimeters...
states continue to maintain around prisons, and allow prisoners, including those in the deepest security units, the opportunity to testify publically and without chance of reprisal.

V. Amend the Constitution to Codify the Wrongs of Mass Incarceration

Of course, even congressional acknowledgment of U.S. wrongdoing in the wartime internment of Japanese Americans did not prevent the United States from violating the human rights of tens of thousands of citizens and residents of Middle Eastern origin after the terror attacks of September 11, 2001. If recognition of mass incarceration as a major human rights crisis is both to support on going efforts to repair and restore the communities most damaged by it, and prevent future turns of our law enforcement and correctional agencies away from the protection of human dignity that must be their central mission, it should ideally lead to new legal settlement that could be invoked in legislatures and enforced in courts. In the United States, that means a constitutional amendment. Those are infamously difficult to obtain, as advocates of the equal protection of women and of balanced budgets (to name but two) have discovered. However, as these two also reflect, efforts to obtain a constitutional expression can provide a powerful organizing and motivating tool for movements. Although there is no amendment in the Constitution ensuring equal rights for women, as was formally considered by the states in the 1970s, courts today legally enforce a constitutional right against gender discrimination in a variety of forms. Likewise, the balanced budget has no constitutional force at the national level, but deficits have been a constraining consideration in American politics for a generation, and have a number of powerful legislative and administrative platforms to recharge themselves.

For the language of a constitutional amendment, the simplest approach would be to adopt the language now in Article 5 of the Universal Declaration of Human Rights:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

This language has been repeatedly endorsed by the United States in the context of international treaties, and a strong legal argument can be made that the meaning of the Eighth Amendment’s prohibition on “cruel and unusual punishment” is already coterminous with the meaning of Article 5. However, the European Court of Human Rights has interpreted precisely the same language in Article 3 of the European Convention of Human Rights in a manner significantly more protective of prisoners than that currently available to U.S. prisoners from the Supreme Court. The language of degrading treatment might be read by the Court to expand protection of prisoners to something closer to the European standard. The language of “treatment” would also extend protection to detainees under civil commitment (in immigration prisons and mental hospitals), who are currently unprotected by the Eighth Amendment.

VI. Conclusion: A Tale of Two Risks

This generation faces two risks in responding to the weakening of mass incarceration. One is to exaggerate the importance of reducing incarceration and overly moralize the case against mass incarceration. Such a crusade might lead to a spike in crime and a popular backlash that could produce growing prison populations. From this perspective, a wiser course is to partner wherever possible with law enforcement and to build on the growing consensus for evidence-based corrections. The other risk is to understate the importance of deep reductions in incarceration and fail to draw strong normative judgments about mass incarceration as a public policy.

A focus on mass incarceration as a human rights problem is the right balance of risks. The creation of a sentencing and prison system that can conserve human dignity is an objective that will allow us to build effective partnerships with law enforcement and correctional agencies, who in turn will find that core to their own mission as the war on crime winds down. Likewise, a core part of what will define a correctional system as dignified is whether it offers evidence-based programming to prepare prisoners for reentry. The recognition that mass incarceration resulted in the torture of some and, by exposure to that risk, the degradation of most other prisoners is also necessary if reform efforts are to be wide and deep enough to uproot the hold of mass incarceration. This recognition should include a broad effort to restore the rights and privileges of the formerly incarcerated. It will also sustain the legal pressure that may be necessary to drive the ongoing reductions in the scale of the prison population that are necessary if remaining prisoners, who are likely to be even older and sicker than the current stock, are to receive constitutionally adequate health care.

Notes
2. See generally Marie Gottschalk, Caught: Race, Punishment and Neoliberalism (forthcoming).
4. Id. at 1928.
6. The three-judge court is a special federal judicial body required by Congress in the Prison Litigation Reform Act as a condition for any judicial order that will effectively limit state control of prison populations. 18 U.S.C. § 3626(a)(3).
7. See Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics (1997); Loic Waquet, Deadly Symbiosis: When Prison and Ghetto Meet and Mesh, 3(1) Punishment & Soc’y 94–133 (2001); Michelle Alexander, the
Section 1 of the Thirteenth Amendment to the US Constitution provides that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

In addition to war time internment of the Japanese and mass incarceration, these include forced sterilization of mental patients and the shutting down of the state border to economic refugees during the Great Depression. See generally Joan Didion, Where I Was From (2003). Jonathan Simon, Governing Through Crime: How the War On Crime Transformed American Democracy and Created A Culture of Fear (2007).

Article 3 provides in full: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” As an example of the expansive direction of the Article’s interpretation, consider the recent decision of the Grand Chamber of the European Court of Human Rights, finding the equivalent of a Life Without Parole Sentence to violate Article 3. See Vinter and Others v. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10) 9 July 2013.