



Why is America So Punitive?

**A Report on the Deliberations of
The Interdisciplinary Roundtable on
Punitiveness in America**

**Held at
John Jay College of Criminal Justice
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Acknowledgements

We would like to express our gratitude to the John D. and Catherine T. MacArthur Foundation which has a long history supporting research that leads to social change. In this instance, the Foundation hoped that a cross-pollination of perspectives could unpack the phenomenon of punitiveness in the operations of the American criminal justice system and, more importantly, illuminate the path forward to a more humane and effective response to crime. The Roundtable thus joins a larger portfolio of research and programmatic initiatives at MacArthur that are designed to find ways to reduce America's reliance on incarceration while promoting public safety and justice.

About Us

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John Jay College of Criminal Justice of The City University of New York is an international leader in educating for justice, offering a rich liberal arts and professional studies curriculum to upwards of 15,000 undergraduate and graduate students from more than 135 nations. In teaching, scholarship and research, the College approaches justice as an applied art and science in service to society and as an ongoing conversation about fundamental human desires for fairness, equality and the rule of law.

John Jay is a community of motivated and intellectually committed individuals who explore justice in its many dimensions. The College's liberal arts curriculum equips students to pursue advanced study and meaningful, rewarding careers in the public, private, and non-profit sectors. Its professional programs introduce students to foundational and newly emerging fields and prepare them for advancement within their chosen professions.

Author Bios

Bettina Muenster is the Executive Associate for Research and Special Project to President Jeremy Travis at John Jay College. In that position she manages the President's speeches, testimonies and publications, functions as liaison to internal and external stakeholders, coordinates various events and initiatives, and directs the prestigious Presidential Internship Program. In the past, she has worked part time as Research Assistant for the Center for Court Innovation, conducted research under the supervision of JJC Presidential Scholar, Scott Atran, and as Research Assistant for Charles B. Strozier, Director of the Center on Terrorism at John Jay. Ms. Muenster graduated from John Jay College with a BA/MA degree in Forensic Psychology and a Masters Certificate in Terrorism Studies in 2006.

Jennifer Trone has more than 20 years of professional experience in the nonprofit sector, helping organizations use communications strategically to spread insights, influence and inspire others, and garner support. Working as a consultant since 2008, her clients include nonprofit organizations, government agencies, foundations and academic institutions. She also serves on the Board of Directors of Skylight, a human rights media organization. Prior to working independently, Jennifer was Communications Advisor to the first Prosecutor of the International Criminal Court, Communications Director of the Commission on Safety and Abuse in America's Prisons, and before that, a senior staff member at the Vera Institute of Justice.

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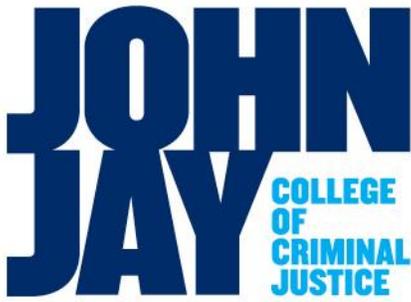
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Howard Zehr, widely known as “the grandfather of restorative justice,” Co-director of the new Zehr Institute for Restorative Justice

Table of Contents:

Acknowledgements & About Us.....	1
Author Bios.....	2
Roundtable Participants	3
Table of Contents.....	4
Introduction by President Jeremy Travis.....	5-8
Section I – An Unprecedented Opportunity for Change.....	9-11
Section II – The Great Build Up: How Did We Get Here?.....	11-14
Section III – Punishment through the Lens of History: Racism in America.....	14-17
Section IV – American Exceptionalism: A Comparative Approach.....	17-23
Section V – The Psychology of Punishment: On Blame and Responsibility.....	23-27
Section VI – The Role of Religion: Retribution versus Forgiveness.....	27-29
Section VII – Making Policy: The Power and Limitations of Data.....	29-33
Section VIII – Conclusion: An Emerging Movement in a Challenging Time.....	33-35



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Dear colleagues:

In April 2015, a remarkable group of 32 national and international scholars met at John Jay College for two days to address a complex and profound question: “Why is America so punitive”?

This question comes at a critical time in American history. A new national consensus seems to be emerging that America should reduce its levels of incarceration, reform police practices, cut back on the extent of criminal justice supervision, and address the alienation between the justice system and the public, particularly communities of color. More fundamentally, there is renewed interest, from both ends of the political spectrum, to find ways to limit the exercise of state power in the name of crime control. At the same time, there is widespread recognition that achieving deep and lasting reform will require a new framework for how to respond to crime, the victims of crime, and those who violate the law – a framework that the public understands and embraces. Given this sense of simultaneous optimism and challenge, the time seemed ripe for a discussion of American views on punishment. The Interdisciplinary Roundtable on Punitiveness in America was created in the hopes that a group of distinguished scholars, representing different disciplines, perspectives and countries, could help shape this important national discussion.

The idea of convening the Roundtable arose in conversations I had with Julia Stasch and Laurie Garduque, President and Director of Justice Reform, respectively, of the John T. and Catherin D. MacArthur Foundation. We had collaborated on another, closely related project, the National Academies report on the causes and consequences of high rates of incarceration in the United States¹. The project had been co-funded by MacArthur and the National Institute of Justice; I had chaired the consensus panel that produced the report. We realized that the National Academies report, which had carefully reviewed the research on the causes of the prison boom, had not been able to address a fundamental question which lies behind the statutory changes, political dynamics and economic shifts that gave rise to tough on crime policies: simply put, why is America so punitive? We recognized that the mandate of the National Academies committee was limited to incarceration, so the resultant report did not examine other expressions of punitiveness. Furthermore, the topic of punitiveness does not easily lend itself to a review of the evidence that lies at the heart of

¹ Jeremy Travis, Bruce Western and Steve Redburn, editors. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press, 2014.

the work of a National Academies consensus panel. Finally, the assignment given the panel was to focus on the American experience, so the panel could not systematically consider the use of punishment and prison in other countries. This recognition of the importance of the general topic of punitiveness, the necessity to consider comparative perspectives, and the importance of interdisciplinary exploration led to the creation of the Roundtable with funding generously provided by the MacArthur Foundation. At John Jay College, intellectual leadership on the scope and composition of the Roundtable was provided by two members of the John Jay faculty, Dr. David Green of Political Science and Dr. Maria Hartwig of Psychology. We were ably assisted by Bettina Muenster, Executive Associate for Research and Special Projects in my office.

In many ways, the report of the National Academies provided a backdrop for the discussions of the Roundtable. That report documented the unprecedented growth of incarceration in the United States over the last four decades, examined the causes for that growth, and provided an extensive review of the evidence on the consequences of this unprecedented expansion of this country's use of prison as a response to crime. The report presented data that have become a familiar part of the public discourse on the state of the American criminal justice system:

- Since 1970, the United States prison population has risen 700%, rendering it the world's leading jailer of its own citizens.²
- The rate of incarceration, as a number per 100,000 residents, had increased over the same time from 161 to 767.³
- Today, the U.S. holds approximately 25% of the world's prisoners but makes up only 5% of the world's population.⁴
- Reflecting the racial disparities in incarceration rates, today one in three African-American men has a chance of being sentenced to a prison term of at least a year in his lifetime.⁵
- 2.7 million children currently have a parent in prison, representing 3.6% of all minor children. For African-American children, the rate is 11.4%.⁶
- The population under community supervision has increased by approximately 280% from 1980 to 2008.⁷
- The population in American jails has grown from 200,000 in 1973 to 2.2 million in 2009.⁸

In public discussions, these statistics are frequently complemented by powerful and painful narratives of individuals currently or formerly incarcerated who have endured the harshness of jail or prison life. These narratives include individual experiences in solitary confinement and triple-celling

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ The Sentencing Project. (2013). *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*. http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf.

⁶ The Pew Charitable Trusts. (2010). *Collateral Costs: Incarceration's Effect on Economic Mobility*.

http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf.

⁷ James, N. (2011). *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*. <http://www.nationalcia.org/wp-content/uploads/Correctional-Statistics-Reintegration-into-the-Community.pdf>.

⁸ *The Growth of Incarceration in the United States (2014)*.

or more severe overcrowding. They describe the detrimental impact of the deprivation of fundamental services while incarcerated, whether treatment for addiction or mental illness, access to educational and vocational programs, or simple contact with family members. These personal stories also describe the obstacles to reintegration upon release, including barriers to employment, housing, and full citizenship. In these ways, and so many others, American sentencing and correctional policies have created an environment that diminishes human dignity for those incarcerated, extends punishment way beyond the prison walls, and places an immense burden on individuals, families, communities and society at large.

Against this backdrop and consistent with the belief that now is the time to reevaluate the country's approach to punishment, Roundtable participants were asked to tackle these questions:

1. At the most basic level, what motivates individuals, cultures, and institutions to punish?
2. By what mechanisms can we explain the exceptionalism of American punitiveness? That is, why does America differ from other Western countries in its approach to punishment?
3. Can the pattern of this "American penal exceptionalism" be altered through changes in criminal justice and punishment policy?
4. If so, how might this be accomplished? What strategies are most likely to be effective in influencing American penal policy?

The Roundtable hosted 32 scholars and experts at the top of their fields for a two-day session to discuss the American propensity to resort to harsh punishment. The Roundtable meeting was quite different from the typical academic symposium. The diversity of disciplines represented around the table – psychology, sociology and journalism; economics and political science; history, religion and philosophy; criminology and the law – by itself guaranteed fresh insights and creative conceptual tensions. Furthermore, the inclusion of several European scholars provided a resourceful counterpoint to American perspectives. Finally, the topic – understanding punitiveness in America in relation to the reality of mass incarceration – represented a departure from traditional scholarly inquiries.

To launch the conversation and provide useful thematic context, seven papers were commissioned and shared with the group ahead of the meeting. Authors briefly presented their papers at the Roundtable, setting the stage for a lengthy interdisciplinary discussion that I facilitated. Papers were presented in the following order:

1. Bruce Western, Harvard University, "Recent Trends in Punitive Criminal Justice in the United States."
2. James Q. Whitman, Yale Law School, "Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice."
3. Mark R. Fondacaro and Megan J. O'Toole, John Jay College of Criminal Justice Graduate Center, "Psychological Perspectives on Punishment: Retributive and Consequentialist Responses to Crime."

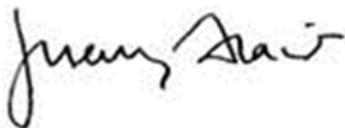
4. Jonathan Jacobs, John Jay College of Criminal Justice, “Punitiveness: A Philosophical Perspective.”
5. Andrew Skotnicki, Manhattan College, “Theological Approaches to Wrongdoing, Punishment, and Forgiveness.”
6. Hannah Walker and Naomi Murakawa, University of Washington and Princeton University, “Political and Policy Perspectives on Punishment: No Exit? The Limits of Carceral State Retrenchment.”
7. Khalil Gibran Muhammad, “The Long Arm of the Past: Historical and Racial Perspectives on American Punitiveness.”

This report is intended to represent a distillation of some of the key insights and critical exchanges from a very rich two-day discussion. It has been prepared by Bettina Muenster, who served as administrative coordinator of the Roundtable, and Jennifer Trone, an experienced writer on criminal justice topics. The format includes quotes taken from the proceedings, interviews with selected participants, and excerpts from the above seven papers. The report also features topical segments in boxes throughout the text. These sidebars were not part of the two-day deliberations but serve to provide additional context on an issue or program worth highlighting. All proceedings, including this report, the edited interviews, the program and bios of participants, and comprehensive background information on the rationale of the Punitiveness Roundtable are available on a webpage specifically created for this initiative. That webpage can be accessed here:

<http://johnjay.jjay.cuny.edu/punitivenessinamerica>.

I wish to thank the MacArthur Foundation for its support of this exploration of this important topic. I am also grateful to Professors Green and Hartwig, Bettina Muenster, presidential interns Elissa Gomez, Ossama Ayesh, and Ana Paredes and consultant Jennifer Trone for their invaluable contributions to this project. They brought this concept from idea to reality. We are all indebted to the members of the Roundtable for lending their insights to this discussion and for their personal commitment to this project. Over the longer term, we hope that the Roundtable discussion results in new opportunities for collaboration across disciplines and beyond national boundaries. We are gratified to see this already happening. On a broader level, we hope that this discussion, and this report, generates the type of introspection and reflection necessary for deep and lasting change in criminal justice policy in this country.

Sincerely,



Jeremy Travis

Section I – An Unprecedented Opportunity for Change

When John Legend accepted his Oscar for Best Original Song from the film “Selma” in February, 2015 and said, “the struggle for justice is right now,” he pointed to mass incarceration in particular. “We live in the most incarcerated country in the world. There are more black men under correctional control today than were under slavery in 1850,” Legend emphasized, drawing on the insight Michelle Alexander crystallized in her book *The New Jim Crow*.⁹

A speech like that would have seemed impossible before *The New Jim Crow* became a bestseller, before the National Academy of Sciences report informed the debate about whether mass incarceration has had any real benefits to offset the staggering human and financial costs,¹⁰ before Ferguson erupted in riots sparked by the death of Michael Brown, and before the steady decline in crime nationally created space for widespread reflection. While recent history is far more complex than the sum of these few developments, the tough-on-crime ethos that gripped the nation for decades clearly has given way to a different kind of national sentiment (See: “America’s Missing Black Men” on the following page¹¹).

Once a highly divisive area of public policy – Newt Gingrich fought the 1994 Crime Bill on the grounds that it was not tough enough – crime and punishment is often described today as the only issue on which there is bipartisan agreement. In March of last year, Newt Gingrich joined Van Jones, former advisor to President Obama, and others to host a “Bipartisan Summit on Criminal Justice Reform”¹² where Republican Governor of Georgia Nathan Deal fought back tears recalling the sense of pride and accomplishment he saw among a class of drug court graduates.¹³ The Koch brothers, stalwart supporters of conservative causes, have emerged on the national stage as champions and financial backers of criminal justice reform, working with progressive advocates such as the Center for American Progress, the ACLU and Van Jones’s #cut50 campaign.¹⁴ “When you’ve got more than 2 million people behind bars, I’ll fight alongside anybody to change those numbers,” Jones has said.¹⁵

“The good news in the...reform field now is, everyone and their mother is for ending mass incarceration.”

Michael Jacobson

⁹ Sze, Jack. *Common and John Legend Powerful Academy Awards (The Oscars 2015) Speech Transcript*. Filmed February 2015. YouTube video, 01:45. <https://www.youtube.com/watch?v=Sy2WPTArfQU>.

¹⁰ *The Growth of Incarceration in the United States (2014)*.

¹¹ Amy Chozick and Michael Barbaro, “Hillary Clinton Addresses Race and Justice In Impassioned Speech,” New York Times, April 29, 2015. Accessible at <http://www.nytimes.com/2015/04/30/us/politics/baltimore-forces-presidential-hopefuls-to-confront-a-jarring-crisis.html?rref=homepage&module=Ribbon&version=topNews®ion=Header&action=click&contentCollection=Home%20Page&pgtype=article>.

¹² Bipartisan Summit on Criminal Justice Reform. March 26th, 2015. <http://www.bipartisansummit.org/livestream.html>.

¹³ Ibid.

¹⁴ Hulse, Carl. (2015). *Unlikely Cause Unites the Left and the Right: Criminal Justice Reform*. New York Times. <http://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html>.

¹⁵ Ball, Molly. (2015). *Do the Koch Brothers Really Care About Criminal-Justice Reform?* The Atlantic. <http://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/>.

America's Missing Black Men

In late April, as the city of Baltimore continued to simmer following the death in police custody of Freddie Gray, presidential candidate Hillary Clinton delivered an impassioned speech in which she said there is something “profoundly wrong” when 1.5 million black men are “missing” from their communities because of incarceration and premature death. “From Ferguson to Staten Island to Baltimore, the patterns have become unmistakable and undeniable,” she said. “Not only as a mother and grandmother, but as a citizen, a human being, my heart breaks for these young men and their families. ... We have to come to terms with some hard truths about race and justice in America.” As Clinton states, there is a tremendous number of “missing” black men due to the rates of incarceration found in the United States. An article released in April 2015 by the New York Times indicates that for every 100 black women not in jail, there are only 83 black men. For every 100 white women, there is only one white man missing. The absence of these men has “far-reaching consequences,” such as the disruption of family formations and decreased rates of marriage for black men. With this in mind, Clinton called for a reform of the justice system and an “end to an era of mass incarceration.”

The field of philanthropy is providing significant support to this growing movement. Since 2006, the Pew Charitable Trusts has supported and conducted intensive technical assistance to states and published landmark research documenting the high cost and poor public safety results of current sentencing and corrections policies. More than 30 states have revised their incarceration policies as part of the initiative, which in 2010 became formalized as the Justice Reinvestment Initiative, a public-private partnership between Pew and the federal Bureau of Justice Assistance. A few other examples of philanthropic leadership: In February 2015 the John D. and Catherine T. MacArthur Foundation launched a \$75 million effort focused specifically on reducing jail populations.¹⁶ In November 2014, the Open Society Foundations made a \$50 million grant to the ACLU to support the organization's national campaign to end mass incarceration.¹⁷ Social entrepreneur Neil Barsky provided seed funding to create a nonprofit news organization that focuses exclusively on criminal justice; The Marshall Project, with veteran New York Times editor Bill Keller at the helm, launched in November 2014. In recent years, the Laura and John Arnold Foundation has supported groundbreaking research to spark and guide criminal justice reform focusing specifically on the pretrial process.¹⁸ Working with a dazzling array of organizations of varied political ideologies, the Arnold Foundation played a lead role in forming the Coalition for Public Safety in February 2015, yet another vehicle to promote Left-Right alliances.¹⁹

“Understanding why we punish can in fact help inform and change the way we hold people accountable for their wrongdoing.”

Laurie Garduque

To many it seems that the United States has reached a tipping point, while more skeptical people believe that the commitment to reform is a mile wide and an inch deep. The question thus remains: What can be done to foster a movement with both depth and breadth? Precisely because events are occurring at a rapid pace

¹⁶ MacArthur Foundation. (2015). <http://www.macfound.org/press/press-releases/macarthur-launches-75m-initiative-reduce-americas-use-jails/>.

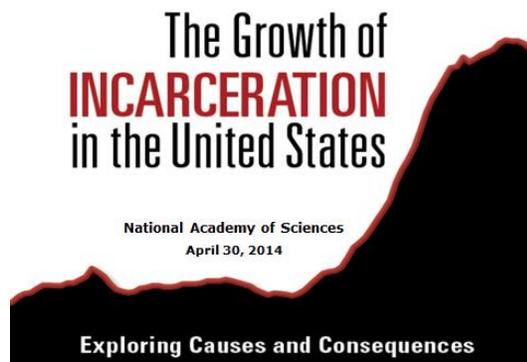
¹⁷ ACLU. (2015). <https://www.aclu.org/criminal-law-reform/aclu-awarded-50-million-open-society-foundations-end-mass-incarceration>.

¹⁸ Laura and John Arnold Foundation. Criminal Justice Initiatives: <http://www.arnoldfoundation.org/initiative/criminal-justice/>.

¹⁹ Arnold, J. and Arnold, L. (2015). *Fixing Justice in America*. Politico Magazine. <http://www.politico.com/magazine/story/2015/03/criminal-justice-reform-coalition-for-public-safety-116057>.

and there is so much rhetoric already in play, it seems important to step back and frame the issues through a wider lens.

Section II - The Great Build Up: How Did We Get Here?



“Why are we this way? What has happened to the country?”

Jeremy Travis

Because high incarceration rates have been a feature of the American landscape for so long, it is easy to view this reality as normal. Indeed the U.S. prisoner population could not be so large without normalizing reliance on incarceration as a response to crime and underlying social problems. But historical data show that for much of the 20th century, the incarceration rate in the United States was relatively low and stable.

According to *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, the landmark study by the National Academy of Sciences mentioned above, between 1925 when the United States first began to systematically count the number of people confined in state and federal prisons nationally and 1972 the incarceration rate hovered around 110 prisoners per 100,000 residents, rising to a high of 137 in 1939 coinciding with the Great Depression. Because reliable counts of the jail population nationally were not available until much later, that long-term trend is unknown. What is clear, however, is that the combined prison and jail population grew rapidly and continuously through the last quarter of the 20th century, and continued to increase, albeit at a slower pace, for several more years, reaching a high of 767 incarcerated per 100,000 residents in 2007.²⁰

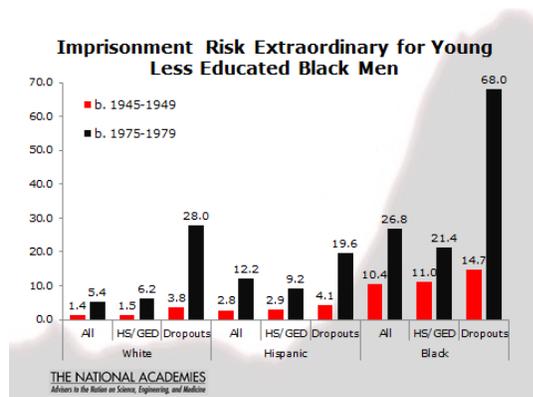
“I think that the general public is completely unaware of the sheer scale of what is going on...”

Jan de Keijser

Even accounting for the fact that the incarceration rate diminished slightly after 2007 (dropping to 698 per 100,000 in 2014), the growth in absolute numbers – in

²⁰ The Sentencing Project (2015). *Trends in U.S. Corrections: U.S. State and Federal Prison Population, 1925-2014*. http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

other words, the tally of people behind bars on a given day in the United States – has been enormous. In 1972 there were roughly 330,000 people in prison and jail.²¹ By 2013, that number had mushroomed to 2.2 million people, or about one out of every 144 Americans²². Moreover, as sociologist Bruce Western has observed, most of the growth in the prisoner population occurred at the very bottom rung in American society, involving mainly young men who never finished high school – a disproportionate number of whom are black or Latino.



“For this segment of the population, already acutely disadvantaged to begin with, serving time in prison became commonplace.”

Bruce Western

The biggest year-to-year drop in the prisoner population since the buildup began has been 1.8 percent, from 2011 to 2012.²³ At that rate, according to the Sentencing Project, it would take until 2101, or nearly a century, to bring the prisoner population down to the level it was in 1980 before the most punitive laws were passed.²⁴ Moreover, according to projections by the Pew Charitable Trusts published in 2014, the country is not even headed in the right direction in the short term. Pew projects that state prison populations are expected to grow by about three percent by 2018.²⁵

Standing in stark contrast to this reality is the ambition of #cut50, the campaign that Van Jones is leading. Their goal is to reduce the prisoner population by half in the next ten years. Viewed in the light of history, that might seem like a modest goal. A return to the low and stable rate of incarceration rate that existed before the buildup would require cutting the prisoner population by roughly 85 percent.

What happened to create the carceral state that exists today? As conveyed in the National Academies report, the mainstream historical account typically begins with President Nixon’s war on crime and drugs, as a reaction to actual rises in

“[T]he sense that bad guys were being let off on mere technicalities created a climate of political vengefulness, ferocity, whatever you might like, that’s had disastrous consequences in the United States.”

James Whitman

²¹ The Sentencing Project (2005). *Incarceration and Crime: A Complex Relationship*. http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf.

²² The Sentencing Project (2016). *U.S. Prison Population Trends 1999-2014*. http://www.sentencingproject.org/detail/news.cfm?news_id=1987&id=107.

²³ The Sentencing Project. (2013). *U.S. Prison Population Declines for Third Consecutive Year*. http://sentencingproject.org/detail/news.cfm?news_id=1720.

²⁴ Ibid.

²⁵ The Pew Charitable Trusts. (2014). *States Project 3 Percent Increase In Prisoners by 2018*. <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/states-project-3-percent-increase-in-prisoners-by-2018>.

crime and, more broadly, to the sweeping social changes and unrest of the 1960s. Policies became tougher under President Reagan with the passage in 1984 of the Comprehensive Crime Control Act that paved the way for harsh federal sentencing guidelines. Given the bi-partisan spirit that characterizes current interest in criminal justice reform, it is worth noting that Senator Ted Kennedy and other liberal Democrats initially championed guidelines as a way to make the system fairer, but conservatives gained control of the process and produced a set of guidelines that essentially required long sentences for a host of crimes regardless of mitigating factors.

States began passing their own punitive laws in the 1980s, a trend that was accelerated in 1994 by the Violent Crime Control and Law Enforcement Act, better known as the Crime Bill.²⁶ The largest single piece of criminal justice legislation in history, it provided financial incentives for states to expand police departments, pass tough-on-crime sentencing laws, and build prisons. State legislatures pursued so-called truth-in-sentencing reforms designed to ensure that offenders spent more of their sentence behind bars. States also curtailed or even abolished parole, established mandatory minimum sentences, and passed three strikes-type laws that required especially stiff penalties for repeat offenders.

At the local level, aggressive law enforcement, which gained considerable support under the “Broken Windows Theory” of policing, and equally aggressive prosecution, sent greater numbers of people to jail for minor crimes. Jails across the country now process 11.7 million admissions annually, many involving individuals who cycle in and out of jail, a significant proportion of whom are mentally ill.²⁷ A combination of rising bail amounts, greater reluctance among judges to release defendants using mechanisms other than bail, and backlogged criminal courts also mean that people who have not been convicted of a crime are routinely stuck in jail for days, weeks or even months.²⁸

Importantly, states and the federal government continued to pass punitive policies – some of which have been curtailed in recent years – even as crime rates nationally were declining.²⁹ In particular, by the time the 1994 Crime Bill became law, rates of both violent and property crimes were already on the decline. Only drug crimes as measured by arrests continued to increase.³⁰

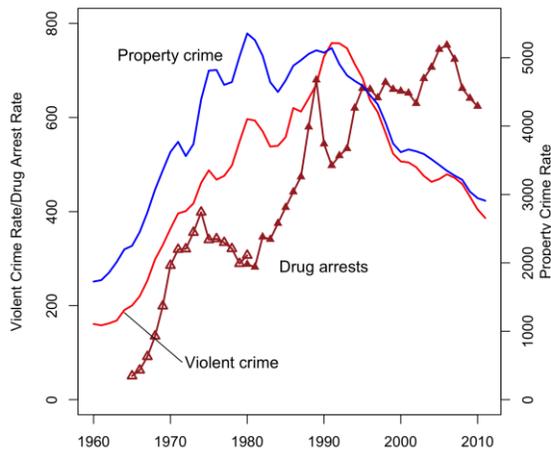
²⁶ Violent Crime Control and Law Enforcement Act of 1994: <https://www.ncjrs.gov/txtfiles/billfs.txt>.

²⁷ Subramanian, Ram. (2015). *Incarceration's Front Door: The Misuse of Jails in America*. Vera Institute of Justice.

²⁸ Ibid.

²⁹ Eckholm, Erik. (2015). *In a Safer Age, U.S. Rethinks Its 'Tough on Crime' System*: <http://www.nytimes.com/2015/01/14/us/with-crime-down-us-faces-legacy-of-a-violent-age-.html>.

³⁰ *The Growth of Incarceration in the United States* (2014).



Source: National Research Council. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press, 2014.

It is tempting to conclude, as many people did and some still do, that locking up ever larger numbers of offenders is what triggered and sustained the steady decline in crime. But a significant body of research analyzed in the National Academies’ report casts doubt on that assumption, and the report concludes that the effect is unlikely to have been large. Michael Tonry, a distinguished professor at the University of Minnesota and expert on comparative law and policy, also points out that over the same time period crime rates plummeted in many countries that did not implement the kind of extremely punitive policies prevalent in the United States.

Referring to the legislators who passed such punitive laws, Glenn Loury reminded everyone at the Roundtable that blame for the buildup is widely shared. Loury, a distinguished professor of social sciences and economics at Brown University, wondered whether some kind of truth and reconciliation process would be both healing and conducive to meaningful and lasting change.

“A lot of people have blood on their hands.”

Glenn Loury

Section III - Punishment through the Lens of History: Racism in America

Cataloging the punitive policies that took shape in the 1970s, 1980s and 1990s does not explain why those policies had such appeal. Khalil Gibran Muhammad, a professor of history and director of the Schomburg Center for Research in Black Culture, urged the Roundtable members to look deeper into American history to understand the essence of why America is so punitive. As early as the 17th century, leading Puritan ministers equated sin with blackness and virtue with whiteness, Muhammad explained. For most of this country’s history, according to Muhammad, “every generation of criminal justice advocates have used, to varying degrees, racial disparity in criminal offending by blacks based on the available

“The idea of black criminality is embedded in the cultural DNA of the country.”

Khalil Gibran Muhammad

facts: colonial witness testimony, antebellum newspaper accounts, or more recently, modern uniform crime reports.”³¹

Near the turn of the 20th century, according to Muhammad, many of the nation’s pioneering demographers and statisticians built an enduring framework for how to study and understand differences between blacks and whites in all spheres of life – health, education, family, housing, jobs, and crime and punishment. This approach, in turn, consistently reconfirmed the view that black people are trapped by inherent or learned pathologies. In this view, these early studies contributed to policies that resulted in black people being subject to heightened law enforcement and more punitive punishment. They also provided support for the “nothing works” philosophy that ended meaningful investment in rehabilitation for offenders of all races. Simply citing data in the absence of understanding this historical context, he contends, is dangerous (See: “Lessons from History” in the text box below).

“America didn’t face a crime problem that was racialized; it faced a race problem that was criminalized.”

Naomi Murakawa

Lessons from History

In his recent study on the history of *The Black Child-Savers*, Geoffrey Ward explains how “history offers distinct insight into the phenomenon of *race effects*, a term researchers use in data analysis to characterize the statistical significance of race variables (e.g., the race of the accused or victim.” The past “reveals dimensions and mechanisms of race relations, including how racial ideology, politics and structures took shape and changed over time in this institutional context.” Ward argues a particular compelling case, using the changing demographics of youth confinement since the 19th century. Racial disparity was close to zero or non-existent in the 1880s at the dawn of legalized segregation or the Jim Crow period. White youth represented nearly 90% of the confined juvenile population as compared to non-white at 10%. By the dawn of the 20th century, fifty years after the Civil Rights movement, the numbers had swung dramatically in the opposite direction. Non-white youth represented more than 60% of the confined population as compared to just under 40% for white youth. Without an appreciation for history, some researchers might explain this shift as evidence of greater delinquency rather than changing policy. After all, the shift happened coincident to the expansion of racial democracy in the mid-20th century. In this formulation there would be no context for measuring punitiveness beyond disproportionate minority confinement. Since many researchers until recently have assumed that racism is less of a driver of punitiveness the closer one gets to the present, the salient interpretation would be that behavior drove the shift. – Excerpt from Khalil Gibran Muhammad’s Discussion Paper

Naomi Murakawa, a professor of African American studies, argues that the conventional narrative about the rise of mass incarceration is truncated and backwards: It did not start with Nixon’s war on crime and drugs; it started much earlier. Building on this perspective, Muhammad points to the following lessons of history, culled from a growing body of scholarship in this area – lessons that in his view show that the country is still struggling with its racial history.

“Whiteness is inseparable from definitions of citizenship and punishment in the United States.”

Khalil Gibran Muhammed

Under the regime of slavery, enslaved individuals as well as freed blacks were usually punished outside the formal penal system, typically in capricious and brutal ways – most notably through the use of lynching and the threat of it (See: the following text box: “Lynching in America: Confronting the Legacy of Racial

³¹ Unpublished paper by Khalil Gibran Muhammad (2015). *The Long Arm of the Past: Historical and Racial Perspectives on American Punitiveness*. All additional references not listed here taken from Roundtable proceedings or paper.

Terror”³²). That changed once slavery was abolished, although not for the better. American history from Reconstruction to the present shows how the criminal justice system was used to control the black population, tactics that by and large the public supported. Calls for punitive criminal justice policies in both the south and the north were often explicit or barely concealed appeals to white voters discomfited by the erosion of race privilege or the conditions of poverty and crime that characterized communities where blacks typically lived. Even as later criminal justice laws were race neutral in language to comply with higher constitutional standards, they were anti-black in enforcement. In this way, Muhammad explains, elected officials and the public perpetuated racism in America while consigning stereotypical racist figures to the past.

“We’ve always had racist public opinion, but we haven’t always had mass incarceration.”

Marie Gottschalk

Lynching in America: Confronting the Legacy of Racial Terror

This recent report by Equal Justice Initiative (EJI) titled, *Lynching in America: Confronting the Legacy of Racial Terror*, documents how the end of the Civil War launched the racial terror of lynching, which is the murder of an alleged offender with or without a trial, in the United States, particularly in the South. In order to maintain racial control and segregation, people in Southern states utilized lynching. The EJI states “[r]acial terror lynching was a tool used to enforce Jim Crow laws and racial segregation – a tactic for maintaining racial control – by victimizing the entire African American community.” According to the EJI, “terror lynchings peaked between 1880 and 1940 and claimed the lives of African men, women, and children who were forced to endure the fear, humiliation, and barbarity of this widespread phenomenon unaided.” Perpetrators of these horrific acts of violence have never been held accountable for their actions and nearly all lynchings were conducted without a legal conviction. Of all the lynchings committed after 1900, only one percent of lynchers had been criminally convicted. Lynchings reinforced racial inequality and the legacy of racial segregation and subordination for years to come. The EJI report, the most comprehensive published to date on the topic, confirms 3959 lynchings committed between 1877 and 1950, documenting lynchings of black people in twelve Southern states. “[M]ore than eight in 10 American lynchings between 1889 and 1918 occurred in the South, and more than eight in ten of the nearly 1400 legal executions...since 1976 have been in the South” with a disproportionate amount of those executed being African American. Many of these individuals were murdered for infinitesimal offenses, such as accidentally bumping into a white woman. When the era of lynching ended in the mid-twentieth century, capital punishment took over as a form of lethal punishment applied disproportionately to African American men and is described by the report as “a direct descendent of lynching.” The many legacies of racial terror have yet to be addressed. The South still holds more monuments to the Confederacy than to those thousands who died in the terror lynchings. The suffering experienced by the African American community must be “engaged, heard, recognized, and remembered before society can recover from mass violence.”

It is this very severing of the past from the present, Muhammad argues, that allowed most people to overlook for more than three decades the racist intent and effects of the Rockefeller Drug Laws, for example. Society today tends to address racism in the criminal justice system by comparing racism that existed during the segregation era. This comparison leads to a misconception of the extent to which we are racist today, as we tend to be more critical of historical actors than ourselves – thus, justifying our current laws and policies as race neutral. It also allows people to overlook the creative and hard work by black communities that

³² Equal Justice Initiative (2015). *Lynching in America: Confronting the Legacy of Racial Terror*: <http://www.eji.org/files/EJI%20Lynching%20in%20America%20SUMMARY.pdf>.

helped to lead the country to where we are now, a moment when meaningful reform of the criminal justice system is a priority.

As important as negative views of blackness have been to the development of extremely punitive criminal justice policies, prisons and jails today also house enormous numbers of whites and Latinos. The imprisonment rate for whites is roughly 400 per 100,000 U.S. residents – that is 2-to-2.5-times higher than incarceration rates in European countries that we consider our closest cultural peers.³³ University of Pennsylvania Professor Marie Gottschalk, a political scientist, makes the point that even if every black person held in a U.S. prison or jail was released, there would still be a mass incarceration crisis in this country. Gottschalk argues that those punished as a group, regardless of their race, have more in common than they do with the rest of America. Noted scholar David Garland, a professor at NYU Law School, agrees. “It’s the enormous social distance between us, the privileged, and them, the lower classes,” he says, “that enables mass incarceration.”

Glenn Loury also emphasizes that racial disparities in punishment are mirrored by racial disparities in victimization. “The state has an obligation to protect people of color, yet we continue to be unsuccessful in that.” David Garland agrees. Why is it, he asks, that we still haven’t addressed the high levels of violence in America that continue to claim the lives of mostly young, black men?

“Even if racism got us into the problem, it doesn’t follow that the best way to frame the complaint is around race. ‘Black lives matter,’ yes, but wouldn’t cases of brutality of whites in combination make a stronger argument and lead to real change?”

Glenn Loury

“[I]t’s the astonishing levels of stratification and inequality in this country, and the remarkably brutal treatment of the poor, many of whom are people of color.”

David Garland

Section IV - American Exceptionalism: A Comparative Approach

Although the United States accounts for about five percent of the world’s population, it houses nearly 25 percent of the world’s prisoners.³⁴ In terms of incarceration rates, the magnitude of the difference between America and other countries is astounding.

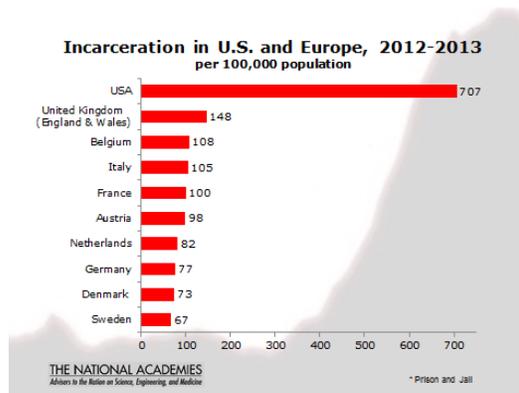
According to statistics published in 2013 by the International Centre for Prison Studies and highlighted in the National Academies Report, at 707 inmates per 100,000 U.S. residents, the incarceration rate in America is more than four-and-a-half times the United Kingdom’s rate of 148. In Canada, another natural comparison, the rate is 118. Most western European countries have even lower rates. The rate in France is 100; in Germany it’s 77. Rates in the four Scandinavian countries, which according to Stockholm University Professor Vanessa Barker, could be described as “Nordic exceptionalism,” range from 73 to 58. The only developed country with a rate of incarceration anywhere close to where the U.S. stands now is Russia, with 474 prisoners per 100,000 residents.

“[W]hen I look at the United States and incarceration, the war on drugs, is the prime suspect. I think [it’s] one of the prime causal factors driving these mass incarceration rates.”

Jan De Keijser

³³ Gottschalk, Marie. *Jacobin Magazine. It’s Not the Drug War*. March 5, 2015: <https://www.jacobinmag.com/2015/03/mass-incarceration-war-on-drugs/>.

³⁴ *The Growth of Incarceration in the United States* (2014).



What’s driving these differences? Simply put, incarceration has become a common form of punishment in America, even for many first-time and nonviolent offenders, and prison sentences are much longer. European countries, according to Jan de Keijser, a professor of political science at the Institute of Criminal Law and Criminology in The Netherlands, rely much less on incarceration as a form of punishment. Moreover, it’s almost unheard of to sentence anyone to more than 20 years in prison, and typical sentences are considerably shorter. In Germany and the Netherlands, between 91 and 95 percent of all prisoners are sentenced to two years or less and 75% of those have their sentences suspended leaving very few who actually serve time in prison. By contrast, the average stay in American prisons is 3 years.³⁵ According to James Whitman, the Ford Foundation Professor of Comparative and Foreign Law at Yale Law School, in Europe, defendants are considered “particularly troubled and challenging social welfare state clients” rather than irredeemable individuals.³⁶

While not disputing these facts, David Garland cautions against simplistic international comparisons. An expert in socio-legal studies, Garland argues that what’s needed are more complex international studies that explore different types and rates of punishment in the context of different types and rates of crime. The high rates of homicide and gun violence in the United States are unusual in the world, he emphasizes. The purpose of such research, Garland argues, is not to justify harsh punishment but to better understand the underlying social problems and develop solutions that are more effective than harsh punishment.

Those who craft and administer criminal justice policies in the United States have long been reluctant to explore the alternative policies and philosophies of European systems. Today, however, there are clear signs of curiosity about and openness to ideas from across the Atlantic. Toward the end of his tenure as director of the Vera Institute of Justice, Michael Jacobson who now runs the Institute for State and Local Governance at CUNY, brought a small group of

“[I]f you're going to have real rehabilitation or individualized treatment, or a presumption of mercy, you really have to see the people who are in prison as human beings.”

Anne-Marie Cusac

“Under [European] human rights law, every person has inherent dignity, which includes being able to imagine a better life, and when you put someone in prison for the rest of his or her life, that’s no longer possible. It’s simply wrong to take a person’s life away.”

Michael Tonry

³⁵ Subramanian, R and Shames, A. (2013) *Sentencing and prison practices in Germany and the Netherlands: Implications for the United States*. New York: Vera Institute of Justice.

³⁶ Unpublished paper by James Q. Whitman (2015). *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*. Additional references not listed here taken from Roundtable proceedings or paper.

senior corrections administrators to visit prisons in Germany and The Netherlands.

In recalling the experience, John Wetzel, Commissioner of Corrections for the state of Pennsylvania, later wrote in an opinion piece published in the National Journal: “For those of us who visited Germany and The Netherlands, the approach to sentencing and the prison philosophy we saw astonished and inspired us. Not only are far fewer people imprisoned, but even those who have committed serious violent crimes serve far shorter sentences. . . . Prison policies grounded in the belief that prisoners should be treated with dignity were startlingly effective—and have eminently pragmatic implications here at home.”³⁷

It would not be the first time the United States attempted such a shift. In 1967, prior to the prison boom and while crime rates were on the rise, the Commission on Law Enforcement and Administration of Justice established by President Lyndon Johnson recommended retooling America’s correctional facilities to promote rehabilitation as a way to reduce crime. But just as that project got underway, political and public commitment to rehabilitation evaporated, replaced by the view that “nothing works,” a pessimism that spread rapidly and proved to be impervious even to credible research demonstrating the opposite.

A wide body of psychological research documents the human tendency to judge and punish others harshly. As psychologist Mark Fondacaro points out, when people perceive that someone has harmed them, they retaliate. Moreover, neuroscience shows that the act of punishing is satisfying, at least in terms of basic brain chemistry – it activates the dorsal striatum, a subcortical region of the brain associated with anticipation of reward. The same mechanisms are at play even when someone is not the victim but is punishing as a third-party.³⁸ Judge Morris B. Hoffman has coined this response as “the punisher’s brain.”

Public opinion surveys also reveal widespread punitive attitudes. Even in The Netherlands, for example, roughly 80 percent of people surveyed believe sentences for offenders are too lenient, according to Jan de Keijser. “This is true today and has been true for decades.” Public opinion has remained consistent over time even when actual sentences became tougher and even as members of the public consistently express strong confidence in the justice system. “So their views don’t add up,” he says.

Maria Hartwig, a professor of psychology at John Jay College, has conducted research on social judgments here in the United States and in her native Sweden. According to Hartwig, even people who believe in harsh punishment and want it applied in response to a particular crime are not actually satisfied by it afterwards. It feels somehow empty.

“We have to recognize that it’s always easier to tap into negative emotions like anger and vengeance than to apply reason and restraint. We have to constantly ask ourselves, What if I had committed a crime? What if I were in prison? And that’s very hard to do in the United States where the political rhetoric is mostly about ‘us’ and ‘them.’”

Sonja Snacken

“People blame, that’s clear. But do they want retribution?”

Maria Hartwig

“We don’t allow the death penalty, not because we don’t believe there are truly heinous crimes, but because we believe that applying the death penalty would lower both the offender’s and our own dignity.”

Sonja Snacken

³⁷ Turner, Nicholas, Wetzel, John. *Treating Prisoners With Dignity Can Reduce Crime*. National Journal, May 22, 2014.

³⁸ Unpublished paper by Mark R. Fondacaro and Megan J. O’Toole (2015). *Psychological Perspectives on Punishment: Retributive and Consequentialist Responses to Crime*. Additional references not listed here taken from Roundtable proceedings or paper.

Courts throughout Europe – in particular the European Court of Human Rights – function to restrain both the individual urge to punish harshly and the ability of politicians to leverage such sentiments, however superficial they might be. Sonja Snacken, a professor at Vrije University in Brussels, studies the nexus between punishment and human rights law and has been involved for many years in setting standards and monitoring prison conditions in Europe. According to her, the central question from a human rights perspective is: Do we want to grant human rights to people who have violated our rights? Corrections officers in Norway, for example, are taught that treating prisoners humanely is something they should do for their own good, because a pattern of callous or brutal treatment will negatively affect their own lives, families and communities (See: “Contrasting Approaches for Maximum Security”³⁹).

Contrasting Approaches to Maximum Security

The United States is an outlier in another important way: The nature of incarceration is altogether different here. The March 29 issue of the New York Times Magazine included not one, but two articles on prison and the culture of confinement. Offenders confined in the federal supermax prison in Florence, Colorado, known as ADX, “spend their days in 12-by-7-foot cells with thick concrete walls and double sets of sliding metal doors (with solid exteriors, so prisoners cannot see one another). A single window, about three feet high but only four inches wide, offers a notched glimpse of sky and little else.” A slot in the interior cell door offers practically the only opportunity for contact with other people. Former warden Robert Hood has described it as a “clean version of hell.” Lawyers representing ADX prisoners have argued that the conditions literally drive people crazy – and not in the garden variety way in which the word “crazy” often implies, but in deeply disturbing ways that would shock anyone with a conscience. The lawsuit itself is emblematic of a growing consensus in the United States that solitary confinement is indeed so damaging it truly should be a last resort or even banned – not an easy task in America where correctional facilities tend to be large, typically bereft of rehabilitative programs and other meaningful activities, and increasingly filled with mentally ill people who often pose a risk to themselves or others. A concrete wall surrounds Norway’s Halden Prison, also reserved for the most serious and dangerous offenders, but life inside is designed to resemble, as much as possible, the features of normal life on the outside. Rather than a barren yard, the buildings abut a blueberry forest. The furnishings are hardly stylish but neither are they bolted to the floor or otherwise obviously fitted specifically for a prison. Prisoners live in communal housing units, shop for fresh food and prepare their own meals in kitchens where the equipment includes several sharp knives. At Halden, the deprivation of liberty is viewed as punishment enough; anything more punishing would not only be excessive but also counterproductive to the goal of reintegrating prisoners back into society. Life sentences have been outlawed in Norway and most other European countries. “Better out than in” is the unofficial motto of the Norwegian Correctional Service. Halden was built after reintegration became a priority, and “every aspect of the facility was designed to ease psychological pressures, mitigate conflict and minimize interpersonal friction.” Although roughly half the prisoners were convicted of violent crimes, violence inside the prison, among the 251 inmates or between inmates and staff, is very rare. Supermax prisons like ADX were designed to provide confinement in its most punishing form on the theory that lifers have little or no incentive to behave. But many scholars and others point out that living conditions in many, if not most, U.S. correctional facilities would strike most observers as inhuman – if average Americans had any opportunity to observe life in prison, that is.

“In Europe, the answer is clear,” Snacken says. “Courts confirm and protect the basic dignity and human rights of offenders even in the face of opposing public opinion.” The “never again” conviction that flows from reckoning with mass atrocities committed during the Second World War has a strong influence on the

³⁹ Jessica Benko, The New York Times (March 26, 2015). *The Radical Humaneness of Norway's Halden Prison*.

nature of punishment, she explains. Scientific evidence about the damaging effects of incarceration, along with the ability of Europeans to promote victims' rights without tying those rights to harsh punishment for offenders, has also helped to sustain a human rights perspective on criminal justice policy, according to Snacken. "European courts have no problem striking down laws that create the possibility of a life sentence," Michael Tonry emphasizes. David Green, a Professor of Political Science at John Jay College of Criminal Justice, points out that Europeans never lose focus of the "ultimate goal of eventual reentry and integration into society."

"It's about doing what's right for this particular problem, but connecting the crime and punishment issue to the larger society."

Vanessa Barker

Nick Turner who directs the Vera Institute of Justice, an institution known for its rigorous empirical research, agrees. Turner notes that the recidivism rate in Norway, for example, is not much different than the rate in the United States, yet Halden prison, which is reserved for the most serious offenders in Norway, is much more humane than any correctional facility in the United States. Marie Gottschalk argues that the problem is even deeper than that. "It's not just that we've stopped caring about prisoners and their interests, there's a whole segment of the population that we've never cared about."

California's Populist Approach to Punishment

California's prison population increased by 500% between 1980 and 1995 because of the punitive "voter-approved laws." The prisons became so overcrowded that the U.S. Supreme Court had to declare them inhumane. This judgment brought to light the issue of who should be going to prison. "On November 4, 2014, California voters passed Proposition 47, a law that changes certain low-level crimes like drug possession and petty theft offenses from potential felonies to misdemeanors. This will reduce incarceration costs, and those savings will be invested (via grants) into drug treatment and mental health services for people in the criminal justice system, programs for at-risk students in K-12 schools, and victim services." California's legislative analysts predict that the state's annual felony conviction rate will drop by 40,000 and the state and local governments will save hundreds of millions of dollars. According to Adam Gelb, director of the Pew Charitable Trusts Public Safety Performance Project, Proposition 47 was passed by a wide margin (over 58 percent), "sends a strong message to policymakers across the country that people are sick and tired of the old debate between treatment and punishment." This is a groundbreaking step towards reducing punitiveness.

Criminal justice policy in the United States is a populist issue, James Whitman points out, whereas in Europe it is largely left up to a class of professional experts. Europeans would rarely, if ever, let voters decide how to punish offenders as California did in 1994 when the voters passed the infamous three strikes law, or when they modified that law two years ago through Prop 36 by creating a path to release for thousands of lifers, or most recently when voters passed Prop 47 that reclassified many felony offenses as misdemeanor crimes as a

way to relieve the state's overcrowded prisons (See: "California's Populist Approach to Punishment"^{40,41,42,43}).

James Whitman also believes that the emphasis on innocence in American jurisprudence – if not in actual criminal cases – ironically makes it harder to equally protect the rights of the guilty. In his view, it is as if allegiance to due diligence and the ideals of justice abruptly end once someone is convicted. The fact that roughly 95 percent of all criminal cases in America are resolved through plea-bargaining, with prosecutors rather than judges controlling the process, only heightens the potential for excess and abuse in the realm of punishment.

Michael Tonry, whose scholarship spans the United States and Europe, describes the United States as an outlier in terms of the "flimsy process" through which people are sent to prison. "When we took judges out of the picture and moved from indeterminate to determinate sentencing, people stopped empathizing with offenders and gave up trying to apply a punishment that reflects that individual's life circumstances and capacity for change," he says. It's an irony of history, University of Pennsylvania Professor Stephen Morse points out, that the shift to determinant sentencing was motivated initially to make the system fairer, less subject to racial bias in particular. Judge Hoffman suspects that punishment has "exploded" in the United States precisely because of the impersonal way the system now operates. "Maybe we're not getting as much satisfaction from it as we used to?"

For all these reasons, Michael Tonry believes it is essential to frame the American debate about mass incarceration in more than just instrumental terms, such as saving money or reducing recidivism. "The harsh laws we have today weren't created by crunching numbers to produce a cost-benefit analysis," he says, "They were created because people believed that harsh punishment was the right approach, or because the rights of offenders didn't matter, or didn't matter as much as the rights of victims." In other words, however flawed or offensive such arguments might sound to some ears, they are principled, moral arguments and it will take the same kind of arguments to undo those laws in any meaningful way.

In her recently published book, *Caught: The Prison State and the Lockdown of American Politics*, Marie Gottschalk argues that instrumental arguments for reform have built in flaws. A narrow focus on cost-savings, in particular, helps to fuel what she describes as a "race to the bottom." In the wake of the Great Recession, many states eliminated or reduced programs for prisoners, cut back on correctional health care, and even slashed food services, she described in a recent interview. Homicides, assaults, and other acts of violence appear to be on the rise

"The dominance of personal responsibility slash retributivism among American criminal law professionals and law professors is extraordinary these days."

James Whitman

[O]ne of the ways to get at the macro is to start with the micro, and start a kind of worm's eye view of these things."

Shadd Maruna

⁴⁰ California Department of Corrections (September 1997). *Historical Trends: Institution and Parole Population, 1976-1996*.

⁴¹ My Prop 47. (2016). *About Proposition 47*. <http://myprop47.org/about/>.

⁴² Krisberg, B. (2014). *Prop 47: As California Goes, So Goes the Nation*. <http://www.thecrimereport.org/viewpoints/2014-11-prop-47-as-california-goes-so-goes-the-nation>.

⁴³ Domanick, J. (2014). *The Message of California's Prop 47*. <http://www.thecrimereport.org/news/inside-criminal-justice/2014-11-the-message-of-californias-prop-47>.

in federal penitentiaries and in some state prisons as staff positions go unfilled due to budget cuts.⁴⁴ Gottschalk also believes the potential for financial savings is overstated. “States spend roughly two-to-three percent of their budgets on corrections, about half of what they spend on highways. Yes, costs have been rising, second only to Medicaid, but it’s still a drop in the bucket,” she says. Unless Americans base reform of the criminal justice system on deeper principles and goals, incarceration could expand again when states have more money, especially if there’s an accompanying rise in crime.

It is important to remember, Sonja Snacken points out, that the strong human rights laws in Europe limiting punishment do not mean that people in Europe like offenders. The logical next step, according to Shadd Maruna, Dean and Professor of the School of Criminal Justice at Rutgers University, is to broaden the conversation to talk with the punished and not just about them. Right now, Maruna says, we’re “touching different parts of the elephant, but the elephant itself is still invisible.”

Section V - The Psychology of Punishment: On Blame and Responsibility

Among the scholars who gathered at John Jay College in April, the issues of culpability, responsibility, and the designation of blame were discussed at length and sparked a particularly animated debate.

There is a large body of research connecting trauma in childhood to a range of adverse consequences, from low achievement in school to chronic disease in adulthood. The Boston study, described in the text box below, draws a clear line between childhood trauma and incarceration, a finding that Western believes raises an ethical dilemma: “To be something other than cruel, the punitive impulse must be directed at those acting with full moral agency,” Western says.⁴⁵

“Most of us know people who are trying to stay out of trouble, and are talking about making good decisions, or are talking about the bad decisions that they’ve made.”

Mark Fondacaro

⁴⁴ Gottschalk, Marie. *It’s Not Just the Drug War, Progressive Narratives about What’s Driving Mass Incarceration Don’t Quite Add Up*. Jacobin Magazine, March 5, 2015.

⁴⁵ Unpublished paper by Bruce Western (2015). *Recent Trends in Punitive Criminal Justice in the United States*. Additional references not listed here taken from Roundtable proceedings or paper.

The Boston Reentry Study

Bruce Western, a professor of sociology and director of the Malcolm Wiener Center for Social Policy at Harvard's Kennedy School of Government, is one of three scholars leading a small-scale intensive study of what happens to people after they leave prison. The Boston Reentry Study tracks 122 men and women who were released from state prisons to Boston neighborhoods between 2012 and 2013. One of the most salient of the study's findings so far is the prevalence and magnitude of childhood trauma among the 122 participants. More than 4 out of 10 reported witnessing a homicide; roughly a third bear the second-hand scars of domestic violence; and half were physically abused by parents or other adults. One of the participants in Western's study, known to the researchers as "Luis," recalls his mother beating him with wire cables in an effort to instill discipline. She herself suffered from depression, was unemployed throughout Luis's childhood, and was married to a man addicted to heroin. Luis watched several times as paramedics worked to revive his stepfather "Carlos" after he overdosed on heroin. The surrounding neighborhood provided little respite. It too was marked by uncertainty punctuated by violence. Luis witnessed his first murder at the tender age of 10. He was arrested for the first time four years later for assaulting a police officer and was expelled from school as a result. It was the beginning of a life lived as often behind bars as not.

Like Bruce Western, a growing number of scholars believe that a change needs to occur in how criminal responsibility is determined. The assigned punishments need to be expanded beyond retrospective judgments about what a defendant was or was not thinking at the time of the alleged crime and incorporating the biological, psychological and social factors that influenced the person's actions. According to Mark Fondacaro, a century of research on the causes and consequences of human behavior suggests that something other than rational deliberation influences the majority of human behavior, crime included.⁴⁶ Despite these findings, at present, there is an "evil doer theory of crime," which posits that those who commit a crime are guilty both by the act and decision, also known as *mens rea*, to commit a crime (See: "The Guilty Mind"^{47,48,49}).

Such findings upend fundamental concepts of metaphysics and morality, according to Jonathan Jacobs, a professor of philosophy at John Jay College.⁵⁰ To complicate matters, even the concept of rationality is subjective, according to Alan Page Fiske. A psychological anthropologist and professor at UCLA, Fiske emphasizes that people who commit crimes, even violent crimes, are almost always acting within their own moral framework, and often trying to right a perceived wrong committed against them. Such an understanding, according to Fiske, implies that we might punish someone less harshly or that we do not punish them at all.

"The idea is not that punishment is somehow built into the human condition, it's that blame is built in, not punishment."

Douglas N. Husak

⁴⁶ Unpublished paper by Mark Fondacaro (2015). *Psychological Perspectives on Punishment: Retributive and Consequentialist Responses to Crime*. Additional references not listed here taken from Roundtable proceedings or paper.

⁴⁷ DeBonis, Mike. *The Issue That Could Keep Congress from Passing Criminal Justice Reform*. Washington Post. January 20, 2016.

⁴⁸ Kaiser, Matthew G. *WLF Overcriminalization Timeline: Mens Rea, Public Welfare Offenses, and Responsible Corporate Officer Doctrine*. The WLF Legal Pulse. November 16, 2015.

⁴⁹ The New York Times. *Trial Judge to Appeals Court: Review Me*. July 16, 2012.

⁵⁰ Unpublished paper by Jonathan Jacobs (2015). *Punitiveness: A Philosophical Perspective*. Additional references not listed here taken from Roundtable proceedings or paper.

The Guilty Mind

For most crimes, the prosecutor and jury must determine the defendant's "willful intent" to break the law – otherwise known as *mens rea* or guilty mind. This concept has become a critical issue in political debate and on January 20, 2015, The Senate Judiciary Committee heard testimony for what has become a main obstacle in passing the bipartisan bill to reduce sentences for non-violent federal offenses. Congress must decide to what degree prosecutors must prove a defendant's criminal intent in order to win convictions for certain federal crimes. Since its inception, the concept of *mens rea* within the federal system has been severely eroded. Congress has passed many statutes that create federal crimes with no explicit *mens rea* requirement or do not require a guilty mind at all. A study in social science research analyzing the proposed (excluding violence, drugs, guns, pornography, or immigration) legislations of the 109th congress found that 446 new federal crimes were proposed and of those proposed, 57% did not have an adequate *mens rea* requirement and 23 of them ultimately became law. For example, The U.S. Supreme Court, in *United States v. Park*, created criminal liability for a corporate officer who was responsible for the conduct of any employee, even those she was unaware of. *Mens rea* has earned many individuals a seat in federal prison for "evil" conduct they unknowingly committed. Perhaps more alarming is the number of guilty pleas defendants enter, in many cases done in order to receive a lower sentence. In criminal cases, 97% of federal cases and 94% of state cases are resolved by guilty pleas, reinforcing society's "evil doer theory" on crime and the current state of the criminal justice system. A critical question remains: Are the high numbers of guilty pleas a result of a guilty mind or the result of a draconian criminal justice system?

This body of research has yet to penetrate popular culture or inform criminal justice policy, however. The tendency to read simple intentionality into behavior, even when it's not present, persists. Moreover, when judging the behavior of others as opposed to our own behavior, Americans tend to overemphasize interpersonal factors and underemphasize situational factors according to Fondacaro. And at the level of culture, James Whitman notes that the American penchant for individualism and myopic focus on personal responsibility help to fuel both the intensity and scope of punishment in the United States.

Although America's correctional facilities are largely filled with poor people of all races, research by Cathy Spatz Widom, a professor at John Jay College and expert on juvenile crime and the cycle of violence, reveals the strong influence of racial bias (See: "Our Implicit Racial Bias"⁵¹). After controlling for socio-economic factors, arrest rates among the black youth in her study were higher than rates among white study participants, even though as a group the white youth were more likely to self-report engaging in acts of violence. Furthermore, Fondacaro explains that situational and personal factors of the defendant contribute to implicit biases in judgment by the jury regarding the culpability and *mens rea* of the defendant. The ethical imperative in any society, according to Douglas Husak, a professor of philosophy at Rutgers University who has written extensively on the morality of criminal law, is to craft laws and policies that rise above such hard-wired and culturally entrenched responses.

"So I think that the issue of the response of the institutions to the individual, and the way they determine culpability and blame, is an important issue that we can't lose sight of with only a focus on the individual."

Cathy Spatz Widom

⁵¹ Unpublished paper by Mark Fondacaro (2015).

Our Implicit Racial Bias

The largest body of research on implicit biases explores the influence of race. Research dating back to 1976 suggests, for example, that an ambiguous act of aggression such as a shove is likely to be rated more violent when performed by a black person and also more likely to be attributed to that person's dispositional characteristics than when a white person does the shoving. A more recent study showed that mock jurors are more likely to remember information about aggressive behavior by black defendants and to remember information about mitigating factors when the defendant is white. At the level of public policy, research by Rebecca Hetey and Jennifer Eberhardt published last year in the journal *Psychological Science* found that white Americans are more likely to support punitive criminal justice policies, including longer prison sentences for minor offenses, when they believe that a greater proportion of those affected are black. Study participants were presented with photographs of actual prisoners (mug shots) and then asked a series of questions concerning their beliefs about punishment. Those who had viewed mostly black faces were more likely to support harsh punishment compared to those who had viewed a more balanced mix of black and white faces.

Hopes that younger Americans are less biased than their parents' or grandparents' generations are not borne out in research. With the exception of interracial dating, studies show that members of the Millennial Generation, people born after 1980, hold many of the same explicit and implicit racial biases as the previous two generations, Generation X and the Baby Boomers.⁵² While racial biases and built-in tendencies to judge others harshly are not easily undone, they can be trumped by other factors. When Shadd Maruna was teaching at Cambridge University in England, he directed along with Anna King the Cambridge University Public Opinion Project, which specifically sought to unpack opinions about punishment. They found that when people had more information on which to base their opinions, beliefs about a person's culpability, or blame-worthiness, were less indicative of punitive attitudes than were beliefs about whether or not the person could change. "In terms of punishment, peoples' views are more about the future than the past," Maruna notes optimistically.

Howard Zehr is widely known as the "grandfather" of the growing field of restorative justice. Restorative justice aims to meet the needs of victims and hold offenders accountable in ways that are meaningful and healing for both parties. Research in the social sciences supports the use of restorative justice, finding that avoiding punishment rather than inflicting it is more likely to lead to emotional wellbeing for the punisher. Zehr emphasizes that accountability and responsibility function very differently than blame. Blame is something that is applied to someone else; responsibility is something that an individual chooses. The former is passive, the latter active and that distinction makes all the difference, especially for individuals whose life circumstances have provided very little opportunity for them to make constructive choices, choices that embody and even enlarge their best qualities as a person. Tom Tyler and his colleague Tracey Meares are both leading scholars in the field of procedural justice. Their work suggests that compliance with the law is enhanced when individuals, especially traditionally excluded minorities, have a voice in the process, are treated fairly by legal

"The model we're using, threats and imprisonment, is fundamentally wrong. We have to change our understanding of the factors that matter at every stage of the process."

Tom Tyler

"There's very little good research on how to undo implicit biases, especially because talking about biases can actually make the problem worse."

Maria Hartwig

"[I]'d like to get rid of blame and replace it with responsibility."

Howard Zehr

⁵² Clement, Scott. *Millennials Are Just About as Racist as Their Elders*. Washington Post, April 7, 2015. <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/07/white-millennials-are-just-about-as-racist-as-their-parents/>.

authorities, and view legal institutions as legitimate sources of authority that reflect their interests.

Glenn Loury has written widely on the interplay between personal responsibility and larger social forces. In his view, the conversation and mood at the bi-partisan summit on criminal justice reform in Washington, D.C. a year ago, which he attended, suggests a significant change in attitude away from blame and harsh punishment and toward some of the ideas that underlie restorative justice. The concept was also articulated by Marie Gottschalk, who posited that we need to move away from individual culpability and focus on social culpability.

For Laurie Garduque, the dramatic changes in the juvenile justice system, including a 40-60 percent reduction in juvenile incarceration over 15 years – work that the MacArthur Foundation supported extensively – provides some hope that a similar transformation could happen in the much larger system that handles adult offenders. She also notes that social science research and other forms of scholarship were essential to transforming the juvenile justice system. Social science research in the past has shown that vocational training, treatment programs, and community supervision and corrections is quite effective in reducing recidivism in the adult population as well. The challenge is clear – to translate the successes of the juvenile system to the adult system. This is a question we must grapple with today.

“People are no longer wagging a finger or a fist but really trying to understand how someone came to commit the crime and how that person might turn his or her life around.”

Glenn Loury

Section VI – The Role of Religion: Retribution versus Forgiveness

“The first prisons were monasteries. Monks entered an enclosure for life for the purpose of spiritual purification and seeking union with the divine,” notes Andrew Skotnicki, a professor of religion at Manhattan College.⁵³ Moreover, he explains, it was common for bishops as well as secular magistrates to confine troublesome clerics or laypersons for the purpose of spiritual purification and moral renewal. The most influential of these monastic rules, written by St. Benedict in the sixth century, emphasizes the welfare of the confined person. St. Benedict not only used incarceration as a last resort, he made certain that wise older monks regularly visited the prisoner lest he be “devoured by too much sorrow.” Benedict goes on to say, “let love for him be reaffirmed and let everyone pray for him.”

What is most important about this ancient Christian tradition, according to Skotnicki, is that confinement was viewed not as retribution for wrongdoing but as an opportunity for healing and reunion with the larger community of faith. The rationale was that punishment was applied with the understanding that we are all sinners and that the difference between the abbot and the wayward monk is superficial – at some future point in time, the roles easily could be reversed.

“The pain of being apart was punishment enough, no sin is ever the sinner’s alone; its endurance harms all and its cancellation is the responsibility of all.”

Andrew Skotnicki

⁵³ Unpublished paper by Andrew Skotnicki (2015). *Theological Approaches to Wrongdoing, Punishment, and Forgiveness*. Additional references not listed here taken from Roundtable proceedings or paper.

“A restorative justice based upon compassion, rather than retributive justice, is the dominant approach to culpability found in the Bible,” Skotnicki concludes. Our oldest theological traditions are about accepting people for who they are. Restorative justice, which views crime as a violation of relationships and justice as a restoration of communion, is a continuation of this tradition. Such beliefs in the Judeo-Christian tradition, according to Skotnicki, far outweigh beliefs about a vengeful God who delivers harsh punishment (See: “A Different Approach to Punishment”^{54,55,56}).

“Retributivism is not punitiveness. It doesn’t mean you have to be harsh. It doesn’t mean anything of the sort.”

Judge Morris B. Hoffman

A Different Approach to Punishment

Views expressed by the religious right are dramatically different today. Prison Fellowship envisions “a future in which countless prisoners, ex-prisoners, and their families, are redeemed, restored, and reconciled through the love and truth of Jesus Christ.” A number of conservative elected officials are preaching in their own way about second chances for individuals who commit crimes. “We go to church on Sunday because we pray for second chances. We realize the world is full of sinners, all of whom can be forgiven in the eyes of their God,” Connecticut Governor Dannel P. Malloy said recently. “Yet, somehow, in some way, we lost our way. We became more engaged in building prisons and permanent punishment than we were in permanent reform. We exacted a higher and higher price for the offenses committed by an individual.” Governor Malloy offered these words in April 2015 as one of the state’s prisons was officially rededicated as a Community Reintegration Center, reflecting the fact that in Connecticut and nationwide, 90 percent of all people in prison eventually go home. In February of 2015, Mr. Malloy announced his “Second Chance Society” initiative, proposing major reform efforts aimed at reducing the number of incarcerated and facilitating the reentry process to increase former inmates’ prospects to lead a law abiding life.

Though many theologians and other scholars reach this conclusion it does not prevent people from using religion as a way to justify harsh punishment. David Garland, an expert in comparative legal studies, notes that the most religious societies in Europe today are also the most punitive. Similarly, Christian Pfeiffer, a criminologist based in Germany who also studies trends in the United States, notes that people living in the American Bible Belt are more likely to support both corporal punishment for children and very punitive criminal justice policies for offenders. From a theological perspective, according to Skotnicki, the punished in both examples serve as scapegoats, “vessels for the punisher’s own sins, feelings of alienation, and reluctance to be humbled in the eyes of God and community.” In other words, people project their own fears and insecurities on to offenders and justify harsh punishment in the name of God.

“Punitivity is learned... the more you are beaten by your parents, the more punitive is your approach to the world, because you learn that behavior is ruled by punishment.”

Christian Pfeiffer

In her book *Cruel and Unusual: The Culture of Punishment in America*⁵⁷, Anne-Marie Cusac explores the significant role that religion has played in public debate about punishment. According to Cusac, evangelical preachers in the 1970s and 1980s recommended corporal punishment; neo Calvinists even used religion to advocate a return to stoning. Their voices, which were louder than more tolerant views expressed consistently by Catholics, Lutherans and other religious groups

“We forget that forgiveness and mercy are part of our history too.”

Marie Gottschalk

⁵⁴ Prison Fellowship (2016). <https://www.prisonfellowship.org/archived-pages/prison-ministry/>.

⁵⁵ Pazniokas, Mark. The Connecticut Mirror. *A Connecticut prison is rededicated to sending men home*. April 21, 2015.

⁵⁶ New Haven Register Politics. *Malloy proposes ‘second-chance’ measures to reform Connecticut criminal justice*. <http://www.nhregister.com/government-and-politics/20150203/malloy-proposes-second-chance-measures-to-reform-connecticut-criminal-justice>.

⁵⁷ Cusac, Anne-Marie. *Cruel and unusual: The culture of punishment in America*. Yale University Press, 2009.

helped to establish a generation of very punitive criminal justice policies in the United States.

Despite all of religion’s potential pitfalls and actual misuses throughout history, its obvious advantage, according to Andrew Skotnicki, is that a spiritual lens humanizes any issue and softens the heart, reminding the public that people collectively make up big numbers like the 2.2 million individuals incarcerated today⁵⁸ (See: “A Moral and Spiritual Crisis”⁵⁹).

“I wonder if we can have a human rights discourse in this country without it being religious. And if we can, where is it?”

David Green

A Moral and Spiritual Crisis

In March 2015, The New Jim Crow author Michelle Alexander delivered this year’s Women of Spirit Lecture at Union Theological Seminary in New York City, which is a kind of ground zero for people of faith engaged in social change. In addressing the crowd at this sold-out event, Alexander argued that no legal strategy or set of policy arguments alone will end mass incarceration in America. “What we face is a profound moral and spiritual crisis, not merely a failure of public policy,” she said. Alexander called on people of faith and conscience to “build a new moral consensus in this country, a revolutionary understanding about who we are as human beings, who we are as children of God and what we owe one another.” She believes “truly transformative change will come when and only when we change rules, law, policies, and practices because we have opened our hearts and our minds for the better regarding the dignity and value of all people.”

Section VII – Punishment and Policy: The Power and Limitations of Data

As powerful as the image of “mass incarceration” is, Naomi Murakawa believes it does not capture the true scope of the problem, or the “big picture,” as she calls it. Murakawa, a professor of African American Studies at Yale University, prefers to talk about “mass punishment”⁶⁰

“So we are in this sad wasteland where we are morally untethered and I think actually it’s a moment to turn the critical gaze back on ourselves, on the social science that we produce, that we advertise.”

Naomi Murakawa

The enormous number of people locked behind bars in America on any given day – 2.2 million – pales in comparison to the larger universe of 6.9 million people under some form of correctional supervision, many of them for misdemeanor crimes.⁶¹ It is not only the sheer number of people under supervision that is problematic, according to Murakawa, it is also the fact that probation and parole, initially conceived of as helping agencies, have been repurposed for punitive purposes.

Even as more states abolish the death penalty, Americans still serve very long sentences, often leading to their death in prison.⁶² According to the Sentencing Project, one in nine prisoners in the United States, including people convicted as juveniles, is serving a life sentence, some of them with no possibility of parole. In

⁵⁸ Skotnicki, (2015)

⁵⁹ Alexander, Michelle. *The New Jim Crow*. Speech delivered at Union Theological Seminary, NYC on March 4, 2015. <https://utsnyc.edu/michellealexanderlive/>

⁶⁰ Unpublished paper by Hannah Walker & Naomi Murakawa (2015). *Political and Policy Perspectives on Punishment: No Exit? The Limits of Carceral State Retrenchment*. Additional references not listed here taken from Roundtable proceedings or paper.

⁶¹ Lauren E. Glaze and Danielle Kaebler, “Correctional Populations in the United States, 2013,” Washington, DC: Bureau of Justice Statistics, December 2014, NCJ 248479.

⁶² Kehaulani Goo, Sara, 5 Facts about the Death Penalty. Pew Research Center. May 28, 2015.

recommending that Congress cap federal sentences at 20 years, Sentencing Project Director Marc Mauer pressed the lawmakers to seriously consider how much punishment is enough: “What are we trying to accomplish, and where does redemption come into the picture?”⁶³

Katherine Beckett is a sociology professor at the University of Washington. Her research encompasses both the macro dynamics of punishment in America and the individual experience of punishment. Becket emphasizes that many people do transform themselves in prison – change that is vitally important to how they see themselves – yet those narratives have not yet reached a wider audience to influence policy. Beckett believes it is more politically viable to uplift those narratives and argue for reinstating parole than it is to advocate for shorter sentences for people convicted of more serious crimes.

In this context, it is important to remember that many Americans have difficulty accepting once-violent offenders who served their time and are now leading productive lives. Laws that apply only to people convicted of nonviolent crimes – such as “ban the box,” laws that prohibit employers from immediately disqualifying applicants based on their criminal history, and “second chance” laws that seal criminal records – leave many formerly incarcerated individuals with broad collateral consequences that function as never-ending punishment.

In the study by Bruce Western previously mentioned (See the Boston Reentry Study), former prisoners subject to supervision in the community were more likely to be re-incarcerated, usually for violating a condition of their release rather than for committing a new crime– a phenomenon well documented in other research and institutional data.⁶⁴ In many cases, conditions of probation or parole are simply at odds with reuniting with family, finding and maintaining work, and establishing the normal routines of daily life. Some people are even prohibited from carrying a cellphone.⁶⁵ Lingering debt associated with arrest, conviction, and supervision by the criminal justice system also prevents many former offenders from establishing productive, law-abiding lives in the community (See: “Criminal Justice Debt: A Long-Term Shackle”⁶⁶).

“...[W]hy do we cease to care about people who are convicted? Why are they suddenly not objects of compassion and sympathy and identification of any kind?”

Alan Page Fiske

“Sex offenders can be treated, many of them, very effectively in the community, far more effectively than in prison. And I think the public may take onboard that.”

Julian Roberts

“The prison is moving beyond the walls and into the community...”

Marie Gottschalk

⁶³ Dana Goldstein. *Too Old to Commit Crime?* The New York Times, March 20, 2015.

⁶⁴ Unpublished paper by Bruce Western (2015) and Roundtable discussion.

⁶⁵ Gottschalk, Marie. *Jacobin Magazine*.

⁶⁶ Unpublished paper by Hannah Walker & Naomi Murakawa (2015) and Roundtable discussion. Sorensen, Elaine, Sousa, Liliana, Schaner, Simon (2007). *Assessing Child Support Arrears in Nine Large States and the Nation*. Report by the Urban Institute.

Criminal Justice Debt: A Long-Term Shackle

Having a criminal record limits a person's employment and educational opportunities, access to affordable housing, and in many cases, even the right to vote. Involvement with the criminal justice system, even minimally, can also saddle a person with debt. Across the country, the annual number of misdemeanor arrests skyrocketed over the past 25 years, disproportionately rounding up poor people, blacks and Latinos. In addition to fines associated with lower-level offenses, people arrested in some jurisdictions have to pay for their public defender and pay for their probation officer. In some states, people have to pay for food, lodging and other services they receive while in jail. Those who cannot pay off their debts are often jailed as a consequence, despite the fact that debtors' prisons per se have been abolished. According to Naomi Murakawa, professor of African American Studies at Yale University, the median legal financial obligation nationally is between \$7,200 and \$9,100, much of it accrued interest. She describes this debt as a "long-term shackle," explaining that even if someone with debt in the median range – and many people are far more indebted – were able to pay \$100 a month, that person would still be indebted 10 years later. The United States imposes fines and fees regardless of a person's ability to pay, whereas in Europe, German criminologist Christian Pfeiffer points out, so called day fines are calibrated to reflect a person's income. Many commentators have remarked that Walter Scott may have been running when a North Charleston police officer shot and killed him because he was behind in paying child support and was afraid of being sent to jail. A 2007 report of child support debt by the Urban Institute found that 7 out of 10 people in arrears reported less than \$10,000 a year in income yet were expected to pay, on average, 83 percent of their income. This conundrum is one of many that the American criminal justice system seems unable to solve.

If, like Naomi Murakawa, one believes there are already too many people under supervision by the criminal justice system, efforts to reduce the prisoner population by expanding alternatives to incarceration may simply be shifting the locus of the problem rather than solving it. The biggest private-sector prison companies have become "very nimble political actors," says Murakawa, repositioning themselves to provide private probation, parole, electronic monitoring, drug testing, counseling and other mandated services. The task of reigning in mass punishment is daunting, according to Murakawa, precisely because the line between what is considered to be punitive versus rehabilitative – the prison from its alternative – has become so blurry.

Community-based sentences do have the potential to be humane, effective and, in some cases, true alternatives to jail and prison, but the use of such alternatives, according to many scholars, must be accompanied by efforts to rein in the punishment apparatus writ large. "We need to reinvigorate good old-fashioned terms like net widening," Murakawa says, and expand the public health system, for example, instead of putting more and more people in mandatory treatment programs.

Professor Stephen J. Morse, whose own scholarship focuses on individual responsibility and agency, believes there will be substantial resistance to any effort to "define deviance down." While that might be true, standards are already applied unevenly. Both Morse and Gottschalk teach at the University of Pennsylvania, where according to Gottschalk, the use of drugs is tolerated or addressed as a public health issue, while seven blocks away off campus the same behavior will land a person in jail.

"Naomi gives us a vision of a good society, and that's created through social movements."

James Morone

"If we're going to have a public debate and try to change hearts and minds, we're going to have to talk about ... 'defining deviance down'"

Stephen J. Morse

A distinguished professor of political science and public policy at Brown University, James Morone points to past eras in which social problems “handled” through harsh punishment were successfully reframed through a combination of grassroots organizing and political leadership. Repeal of prohibition under President Roosevelt is an apt example, he says, of “turning a moral dilemma into a public health problem.” Building on that idea, Katherine Beckett wonders whether correctional institutions could be repurposed to fill some of the gaps in America’s decimated social welfare system.

“Prisons need to become part of the social welfare system, not exist apart from it.”

Bruce Western

More than once during the two-day meeting of scholars, David Garland emphasized that the public and many policy makers profoundly misunderstand what the criminal justice system can and cannot do. It is a good way to enforce the letter of the law, according to Garland, but it is a poor way to control crime and an ineffectual way to address poverty. “We need other systems for that,” he said.

On the subject of risk assessment tools, which are ascending in currency, Naomi Murakawa argues that these tools lead many people ever deeper into the criminal justice system while providing a way out for a comparative few. Murakawa asserts that black Americans who live in highly policed neighborhoods are more likely to be arrested and their criminal history puts them in a higher-risk category. Higher-risk offenders are supervised more closely by probation officers, who are therefore more likely to detect and punish minor violations, and the cycle continues. Moreover, according to Murakawa, these tools draw on personal factors such as employment history and marital status that are influenced by larger dynamics of race inequality in America.

“Right now we’re applying scientific evidence in a mechanical, antiseptic way without any moral underpinning.”

Nick Turner

“Researchers have devised ever more sophisticated statistical models to measure the extent of black-white disparities in criminal justice,” Marie Gottschalk points out, while “the deep and complex sources of those disparities and how to alleviate them often go largely unexamined.” Greater and greater expertise and more and more data will not always provide the answers. In fact, empirical information may encourage us to avoid the hard questions about who we are punishing and why, Murakawa says.

Beyond the antiseptic quality of what Bruce Western refers to as the “elite technocratic policy conversation,” a narrow focus on data and evidence-based solutions also raises ethical dilemmas. If the goal is rehabilitation and lowering the recidivism rate, Dutch political scientist Jan de Keijser asks, is the State then justified in keeping someone in a program much longer than the amount of time they would have spent in jail or prison? “Where’s the ‘just desert’ in that?”

“People have become comfortable with the idea that basic civility does not extend to prisoners.”

Jonathan Jacobs

For Jonathan Jacobs, such questions underscore the need to apply the particular rigor of philosophy to criminal justice policy. “Philosophy is thinking that is relentless,” he says, explaining that it is self-critical and informed by the world. “Once you have a theory, you’ve stopped thinking.” While the endlessness of such an approach can seem totally impractical at first glance, it is a useful foil for

the solution-of-the-moment that scholars agree tends to overly influence criminal justice policy.

De Keijser is just one of several scholars who worry in particular about hooking reforms to reductions in recidivism. According to Michael Tony, fully two-thirds of offenders, across all western societies, are likely to get in some kind of trouble again. Green observes that the slow, deep and self-imposed process of cultivating individual responsibility is much more important and also much harder to measure. To convey this and other nuanced aspects of crime and punishment narratives are needed, according to Anne-Marie Cusac who both teaches journalism and is a practicing journalist. “Storytelling is a big part of movement building,” she says, adding that research and data should be strategically inserted into a personal story to give it broader relevance.

Like many of the issues the Roundtable scholars took up, the usefulness of data and evidence lies somewhere in between all or nothing. “It’s politically unsalable to simply ignore recidivism rates,” Julian Roberts said. Roberts, a professor of criminology at Oxford University, is an expert in public attitudes about punishment. Data of all kinds are important to support legislative change, according to Todd Clear, the Provost at Rutgers University-Newark with deep understanding of the reform process. Clear emphasizes that the road to reform is not one path but 51 paths, reflecting the variety of experiences at the state and federal level. “Reforms that will make a difference in one state won’t make a dent in another or in the federal system,” he says. This kind of pragmatic approach, he argues, is not at all at odds with one grounded in values and aspirations.

“Rehabilitation is too easily collapsed into simple outcomes like recidivism rates, which places a target on its back.”

David Green

Section VIII – Conclusion: An Emerging Movement in a Challenging Time

On the first day of the Roundtable, President Jeremy Travis asked participants to introduce themselves, state their interest in the issue and their expectations for the two days ahead. The answers were revealing and at times surprising in their depth and breadth, ranging from the very obvious, such as the wish to learn more about what can actually be done, to the more uncommon, such as a professed interest in the evolutionary roots of punishment. Mostly though, it was remarkable to see a highly diverse group of scholars eager to learn about their colleagues’ views and coming together to tackle the issue of punitiveness in America. To be sure, the scholars’ expectations covered the spectrum from pessimistic to optimistic attitudes regarding the possibilities of real reform. For some, there was a mix of emotions, best expressed by Jim Whitman during his introduction: “I’d like to come out of this meeting feeling more optimistic than I do that things might change. But I have to say, pessimism is the spirit in which I arrived, so...”

“[W]hat other practices could we bring to the table that would move us forward?”

Vanessa Barker

While this gathering to explore the question of punitiveness in America may have been the first of its kind, many of the discussion papers and subsequent presentations already reflected cross-disciplinary research and thinking. Some authors referred to their colleagues’ work and referenced their publications

demonstrating a comfortable familiarity with their theories and writings. Many participants ventured into other disciplines in an effort to support an argument, introduce additional factors or circumstances, or present a more comprehensive picture. Throughout the two-day meeting, the need for an understanding of the subject matter beyond any one given discipline was notable and clearly communicated. The honesty and curiosity with which participants engaged in the conversation openly demonstrated the potential for scholarly inquiry across disciplines.

In the afternoon of the second day of the Roundtable convening, Jeremy Travis took a moment to recapture the essence of the deliberations over the past two days before posing the, perhaps most difficult, questions to the group: Where do we go from here? What might a research agenda be? Do we have something that is sustainable through future convenings? What is the role of the scholarly community and the value of scholarly inquiry in particular? How do we frame the issue? How can ideas be translated into policy change?

Although the gathering was not intended to generate specific recommendations, toward the end of the meeting the scholars talked about the value of developing a set of principles to guide the use of punishment, principles rooted in interdisciplinary scholarship and ones that resonate in but are not bound by the current political environment. Roundtable participants agreed that what is significant about the movement to end mass incarceration is that it forces people to question the very nature of punishment in America: who we punish, what we punish, how and why.

The Roundtable participants concurred that the discussion had identified several profound questions that both merit and require sustained investigation: Should the decisions about punishment reflect the inherent dignity of every individual, as codified in international human rights law? Should our laws and policies aim to bring the United States in line with other developed nations (See: “Presidential Leadership”^{67,68,69})? Should punishment be guided in some measure by empathy and understanding that people make choices within limits proscribed by their past experiences and current circumstances, as so much research suggests? Should it convey compassion and mercy, and promote reconciliation between offender, victim and the broader community? Should it be limited in duration in ways that reflect an individual’s capacity to grow and change? Should the criminal justice system recognize and redress mistakes and abuses of history, including the development of mass incarceration?

“[I] wonder if we might be able to bring people together to address this question that’s come up a lot, which is what do victims really need and want? What are they getting? What are they not getting? And how can we begin to bring them into this conversation in ways that are productive.”

Katherine Beckett

“We need to get back to the sentences and prisoner population of the 1970s.”

Todd Clear

“The reason we blame, punish, and forgive is because we’re looking for signals that somebody can return to the fold in a reliable way.”

Judge Morris Hoffman

⁶⁷Horsley, S. (2015). *Obama Visits Federal Prison, A First For A Sitting President*. <http://www.npr.org/sections/itsallpolitics/2015/07/16/423612441/obama-visits-federal-prison-a-first-for-a-sitting-president>.

⁶⁸Baker, P. (2015). *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*. http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html?_r=2.

⁶⁹Davis, J.S., & Harris, G. (2015). *Obama Commutes Sentences for 46 Drug Offenders*. <http://www.nytimes.com/2015/07/14/us/obama-commutes-sentences-for-46-drug-offenders.html>.

Presidential Leadership

The call for reform of the criminal justice system and the concern of mass incarceration in the United States has recently become a prominent matter extending as far as the White House. In a single week in July of 2015, Barack Obama visited a federal prison, gave a speech to the NAACP regarding mass incarceration, and commuted the sentences of 46 drug offenders, indicating the urgency for criminal justice reform in the United States. President Obama met with several inmates at El Reno prison, located just outside of Oklahoma City, on July 16th, where he became the first sitting United States President to tour a federal prison. This visit was sparked by the recent call for criminal justice reform and, more specifically, the continued bipartisan efforts to reduce high rates of incarceration. On July 14, 2015, two days prior to his prison visit, the President gave a speech to the NAACP in Philadelphia, where he discussed the current state of the criminal justice system and the hope he has for serious reform. In his speech to the NAACP, President Obama stated, "We're in a better place because we had the courage to move forward. So we cannot ignore the problems that we have, but we can't stop running the race. That's how you win the race. That's how you fix a broken system. That's how you change a country... If we keep taking steps toward a more perfect union, and close the gaps between who we are and who we want to be, America will move forward. There's nothing we can't do." To drive his words into action, on July 13, 2015, President Obama commuted the sentences of 46 drug offenders in an effort to make amends for the tough-on-crime mind set of the past and to set an example for possible criminal justice reform in the future.

It is impossible to know now whether today's unprecedented attention on criminal justice reform is the beginning of the end of mass incarceration (and mass punishment) or the apex of a decade of quieter and more limited reforms. What is clear from the discussion at the Roundtable, however, is that significant change in the American criminal justice system will require coming to terms with the American views on punishment. This challenge, in turn, requires a deep understanding of our history, the unresolved legacy of slavery, the human emotions of revenge and forgiveness, the principled limits of the power of the State, the role of religion and values in shaping culture, and the dynamics of political power and economic forces. In short, the Roundtable reinforced the hypothesis that animated its creation: that a sustained interdisciplinary scholarly enterprise exploring punitiveness in America can perhaps point the way to a society that is less punitive and more just.

"We as scholars need to say the things that most politicians can't or won't."

Naomi Murakawa

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