

Report of the U.S. Programs Justice Working Group

May 7, 2012

Working Group Co-chairs: Bryan Stevenson, Monique Dixon, Lenny Noisette

Board and Staff Members: Sherrilyn Ifill, Yochai Benkler, Aryeh Neier, Diana Morris, Zoe Hudson, Andy Ko, Kima Taylor. Maria Archuleta and Laura Silber of the OSF Communications team also participated in some of the working group meetings.

Outside Experts: Dr. James Austin, President, JFA Institute; Stephen B. Bright, President and Senior Counsel Atlanta, Southern Center for Human Rights; Steve Hawkins, Chief Program Officer and Executive Vice President, National Association for the Advancement of Colored People; Cynthia Ellen Jones, Associate Professor, American University, Washington College of Law; A. Thomas McLellan, Professor of Psychiatry, University of Pennsylvania

Special Guests: Sanho Tree, Director of the Drug Policy Project, Institute for Policy Studies; Ron Daniels, President, Institute for the Black World 21st Century

Questions to be addressed at the U.S. Programs May Board Meeting:

1. What are the board's initial reactions to and questions about the possibility of adopting the goal of reducing U.S. incarceration levels by 50% within 10 years?
 - Are there significant messaging and framing benefits to setting such a goal?
 - Assuming that the goal would be pursued by targeting substantial resources to efforts in particular jurisdictions, what are some criteria that should inform site selection?

The Justice Working Group held three two-hour meetings in furtherance of its charge to explore reform opportunities in the areas of criminal justice and drug policy, with the ultimate goal of informing the board regarding potential future priorities in these critical areas of our work. This memo describes the working group's process and summarizes its discussions to date. We note areas of consensus, including preliminary goals the group identified, and areas of disagreement; identify unanswered questions and areas where further exploration is warranted; pose questions on which the group seeks board input at this time; and describe plans for remaining work.

I. Working Group Process and Summary of Discussion Topics

The Justice Working Group began its work with an initial meeting during which it had a broad discussion of reform challenges and opportunities in its areas of focus, uninhibited by the particulars of U.S. Programs' current work. The group devoted its two subsequent meetings to more in-depth discussions of criminal justice and drug policy, respectively.

The group identified key reform priorities and opportunities in a number of areas, many of which are consistent with the current work of the Criminal Justice Fund. For example, participants recommended that the foundation support advocacy for early parole of individuals serving long sentences for violent offenses, and for limiting return to jail or prison for technical violations of probation or parole rules. Working group members also noted that in pursuing incarceration reduction, we should focus on sentencing reform for both nonviolent crimes and violent offenses; that it is important for overall reform to examine and challenge excessive punishments, such as life without parole and the death penalty; and that the foundation should explicitly address racial and economic biases that exist in the criminal justice system.

Among newer areas for exploration in the criminal justice area, working group members suggested that there should be increased efforts to explore ways to defund the criminal justice system, including conducting an economic analysis to compare the costs of victimization with the costs of law enforcement and incarceration, and noted that pretrial justice issues presented potential opportunities, including bail reform, limiting prosecutorial discretion, and improving indigent defense services. As more fully discussed below, the working group enthusiastically supported the adoption of a specific and ambitious goal of reducing incarceration by 50% within 10 years.

Regarding drug policy, the group identified a number of priorities. Consistent with activities that U.S. Programs has long supported through our justice system work or more recently through the Closing the Addiction Treatment Gap and the Campaign for New Drug Policy, members suggested that drug use and addiction should be viewed as a public health concern rather than a criminal justice issue. The working group believed that health care reform is an opportunity to expand access to drug addiction treatment and establish an infrastructure for a health-centered drug policy. The working group noted that much of current advocacy has successfully discredited the "war on drugs", but that the reform community has yet to develop a consensus on an alternative approach. Working group members agreed that ideally, drug possession should be removed from the criminal justice system entirely, and that at minimum, there should be continued efforts to decriminalize drugs.

Among the ideas promoted was that drug policy reform should advance approaches to address drug abuse through the use of sanctions that encourage users to get treatment within and outside of the criminal justice system, and the development of a health services model to more fully address drug use and its attendant consequences. There was strong support for focusing on marijuana reform, although as discussed below, the specific scope of such efforts was subject to debate.

II. Criminal Justice Reform Efforts

In their second meeting, working group members engaged in a more focused discussion of criminal justice reform efforts.¹ The working group discussed the policies and conditions that led to increasing levels of incarceration over the past forty years and identified factors that now make the environment conducive for dramatically reducing the prison population, including: the crime rate is now what it was forty years ago; a number of states (or areas within certain states) have current rates of incarceration more in line with those that existed before the explosion of imprisonment; and a handful of states have begun to reduce their levels of imprisonment.

The group also discussed a range of specific policy changes which collectively could reduce substantially the current national prison population, including: reducing the average length of stay in prison; challenging mandatory minimum sentencing and truth in sentencing laws; eliminating the return to prison for technical violations of parole; decriminalizing “victimless crimes,” such as drug possession and status offenses; and promoting “good time” credits that allow people to be released from prison and/or complete parole supervision sooner. Working group members expressed concern that in promoting such changes, we should be careful not to advance alternatives that will simply place more people in the community under more intensive custody and community supervision; therefore, we should also focus on reducing the number of people on parole/probation.

The working group also discussed the need to be mindful that certain strategies, if not carefully implemented and explained, could benefit some groups at the expense of others. For example, focusing on reforms that would benefit individuals convicted of nonviolent offenses could make reforms related to violent offenses more difficult, and death penalty abolition efforts that advocate for life without parole as an alternative sentence could make challenging harsh sentencing more complicated.

The working group had a robust discussion of the value of setting a specific and ambitious goal related to reducing incarceration, such as reducing imprisonment by 50 percent in 10 years. Having a clear goal would provide not only a benchmark for evaluating strategies but also a communications frame that would allow the foundation to articulate consistently a very different vision of what our country’s criminal justice system should be. Additionally, since such a goal could not be established without reducing the number of individuals incarcerated for lengthy periods for more serious offenses, it embraced the goal of addressing excessively harsh and extreme punishments as well.

¹ Working group members consulted written materials in connection with the second and third meeting. One article reviewed is included with the board materials. A full list of these readings, all available on KARL, is attached.

The working group also discussed the constituencies that would need to be engaged in such an effort and preliminarily discussed some framing that could be effective. The group questioned whether the high economic costs of incarceration alone would be sufficient to persuade the public to reduce the prison population and noted the importance of helping the public understand the ineffectiveness of current practice, such as returning individuals to prison for minor technical violations of parole or imprisoning someone for writing a bad check.

Although the working group identified structural racism in the justice system as an important concern, it had only limited time to grapple with the issue. The group discussed how the “New Jim Crow” movement is using narrative and rhetoric about historical and systemic racism, and noted some emerging debate about whether this “provocative” frame was broadly effective. The group also debated - but did not resolve - whether, when, and how we should “lead with race” in policy reform efforts.

Related to both the question of structural racism and that of communications/messaging more broadly, the working group acknowledged that we must grapple with how best to respond to the heightened fear and hatred of one another and develop a narrative about why all citizens should be concerned about the current failures of the justice system. The group discussed the need to engage in some polling to help us understand what the public thinks about crime and punishment in order to determine how best to respond.

III. Drug Policy Reform

In its third meeting, the working group engaged in an in-depth discussion of drug policy reform.² The working group discussion operated from a general agreement that current prohibitionist and law enforcement dominated approaches to the issue of drugs in the United States are problematic and need to be addressed. The most robust discussion centered on how best to move drug policy to one based on public health concerns. This discussion included the need for advocacy for more readily accessible and effective treatment for substance abuse and on the value of approaching drug use from a “health services” model that would develop systemic responses to drug use and misuse from a broader perspective. A number of working group members noted that even if we are successful in reducing or ending prohibitionist practices, the extreme socioeconomic challenges faced by communities affected by drug use will need to be addressed. A broadly conceived health services approach could contribute to the development of a continuum of services that would address not only substance use issues but underlying health/mental health and social service needs of communities heavily impacted by drug use and least resourced to deal with its attendant consequences.

The group also had a broad discussion regarding how to remove responses to drugs from the orbit of criminal law enforcement and the courts. Some participants suggested that OSF should foster a discussion about the range of possible responses to drug use and drug commerce within a regulatory continuum to challenge a prevailing acceptance of the false dichotomy set up by opponents of reform: that drug policymaking is a choice only between full prohibition (a zero tolerance war on drugs) or unchecked access to and use of drugs (unregulated legalization). It

² Two outside guests, Sanho Tree and Ron Daniels, joined this discussion (their bios included in the attachment).

was also suggested that the United States should look to other countries for effective non-prohibition approaches to drug policy reform.

The working group explored how emerging advocacy efforts within the African American community are beginning to address the dual challenges of excessive and racially disparate drug law enforcement and the negative impact of drugs, including drug use in particular. It was noted that some activists have come to the conclusion that eliminating prohibition should be a goal but that most faith leaders were not yet supportive of such an approach, suggesting that continued work with this key constituency was critical. On a related, albeit broader point, the working group acknowledged the importance of engaging parents around the concern for how any pullback from prohibition would affect children and the need to advocate for strong policies and practices that would protect children in any alternate model to managing drugs.

There was a specific recommendation that the foundation should support the legalization of marijuana, in part justified by the need to remove from law enforcement the ability to use marijuana arrests as a means of social control in low-income communities. It was agreed, given the high numbers of arrests and prosecution for marijuana offenses across the country, especially involving young men of color, that marijuana reform has the potential to benefit large numbers of people.

IV. Areas of Consensus and Disagreement, Preliminary Goals Identified, Unanswered Questions

Criminal Justice

Working group members confirmed the importance of the key priority areas of current work, in particular the focus on reducing incarceration and the commitment to challenging harsh sentencing practices. The latter includes the death penalty and lengthy sentences imposed on people convicted of serious offenses. Group members were largely supportive of adopting an ambitious goal with respect to incarceration reduction, and specifically discussed the goal of reducing incarceration by 50 percent within 10 years. Among the acknowledged benefits of such a goal are that it is measurable and would provide a concrete vision of a dramatically different criminal justice system about which the foundation could develop effective messaging, and as such it has value both internally and externally. One working group member thought this theme could overlap well with a range of USP priorities. Some working group members cautioned that we would need to be realistic about the level of investment that would be needed to attain such a goal, as well as the pace at which we could proceed toward accomplishing it.

Among the policy reforms identified that would support our incarceration reduction efforts, the working group was most enthusiastic about the reform of parole and probation technical violations, as it believed that the public support for changing these policies would be the most easy to garner. The group noted the challenge of pursuing such a strategic effort in a way that would not undercut the effort to challenge long sentences for conviction of violent offenders. Support for the use of validated risk assessment instruments in parole proceedings offers some hope, as effectively designed tools could help make the case that individuals convicted of serious offenses are often least likely to pose a significant public safety risk.

Some members expressed support for work on improving pretrial justice, in particular pretrial detention practices and indigent defense representation. Others suggested work to address abuses of police discretion. It was noted that pretrial detention and indigent defense are areas in which we might collaborate with our international colleagues. Subsequent conversations revealed some concern that work on “front-end” issues would do little to advance the goals of reducing the prison population and challenging extreme sentences. Some working group members noted that abuse of police discretion is inextricably related to questions of racial bias and suggested that it would be important to consider how addressing this problem relates to the racial justice issues being explored by the Race and Marginalized Populations working group.

Drug Policy

There was broad consensus that the foundation should advance advocacy and other efforts that reframe drug use and drug markets as problems best addressed outside of the criminal justice system. This includes addiction treatment as an alternative to criminal sanctions and the development of a health services model that could address a broader range of issues associated with drug use. There was disagreement about the value and effectiveness of efforts to address drug abuse through the use of sanctions that encourage users to get treatment, such as drug courts which require treatment in lieu of incarceration or family court orders that require treatment as a condition of maintaining or regain child custody. Participants suggested that it would be useful to explore whether a sanctions-based approach could be expanded outside of the formal court system.

There was equally strong consensus that the foundation should engage more fully in efforts to reform current enforcement practices as they relate to marijuana. In discussions with individual members after the full group meeting, however, it became clear that there was a difference of opinion regarding whether such reform efforts should be support for decriminalization, i.e., reducing the legal responses to minimize or eliminate the functional role of criminal justice system actors, or for legalization, with regulatory rules, taxation, etc. There was also some disagreement about the extent to which “problematic” marijuana use existed and needed also to be attended to through health services. Beyond marijuana, there was even less consensus, both about what should be the appropriate policy goal regarding other drugs and about what role, if any, the foundation should play in efforts to promote reform beyond advocacy for more appropriate sentencing practices.³ The group identified a number of issues that need further exploration, including: the need to address the varying degrees of harm caused by different drugs; concerns around moving drugs out of the criminal justice system while still wanting to discourage drug use; the racial dynamics at play in current drug enforcement practices; lack of confidence about the effectiveness of drug treatment; and greater exploration of effective approaches to prevention of drug use.

³ While not specifically discussed in working group meetings, it is important to note that George Soros and Aryeh Neier decided last year that the foundation officially supported the legalization of marijuana but took no position regarding the legalization of other drugs. The foundation has developed a policy statement (still in draft form) to reflect its current position on drug policy reform, which is attached.

The working group agreed that any communications strategy should promote the idea that drug use/misuse is a public health and not a criminal justice concern, to be addressed by public health professionals rather than law enforcement. The working group also generally agreed that policy makers and the general public need a menu of alternatives to the drug war. There was some discussion regarding the importance of supporting local experimentation of alternatives to current law enforcement practices. One example offered, an “amnesty” program for individual charged with drug offenses, was received with both interest and skepticism.

V. Areas for Further Discussion and/or Exploration, Next Steps

We plan to schedule additional working group meetings in the weeks following the May board meeting to explore some of the unresolved questions identified above. The working group will more carefully consider the current scope and focus of our criminal justice reform work, to inform staff’s thinking about areas where expansion or contraction might be appropriate.

With respect to our drug policy reform efforts, we will use the late spring to engage with key partners, such as Ethan Nadelmann⁴ of the Drug Policy Alliance, as well as leaders in the health and addiction treatment world, to help the working group further grapple with the many questions remaining from our preliminary discussions.

For the May board meeting, we seek the board’s input on the following questions to help advance our refinement of our criminal justice work:

1. What are the board’s initial reactions to and questions about the possibility of adopting the goal of reducing U.S. incarceration levels by 50% within 10 years?
 - Are there significant messaging and framing benefits to setting such a goal?
 - Assuming that the goal would be pursued by targeting substantial resources to efforts in particular jurisdictions, what are some criteria that should inform site selection?

⁴ Nadelmann participated in recent foundation-wide discussions regarding drug policy, which contributed to the development of the policy statement referenced in footnote 3, and is regularly consulted by Campaign for New Drug Policy staff.

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Vision Statement

The Open Society Foundations seeks to advance drug policies that promote health and social stability, while ensuring public safety, human rights, equality and the freedoms of open societies.

The war on drugs has failed, and reforms of national and global drug policies are urgently needed. Drugs remain widely available and continue to have damaging social and economic effects on individuals and their families and communities. Punitive law enforcement measures against people who use drugs, and use of the military to curb production and trafficking of drugs, have had devastating consequences, harming communities, impeding health services, and violating human rights.

Our work on drug policy is guided by commitment to the following principles:

- Respect for human rights and evidence at the heart of drug policymaking.
- Open debate on drug policy reform and experimentation by governments with new approaches.
- Ending the criminalization of drug use and possession of drugs for individual use.
- Availability of appropriate health services for all people who use drugs, and an end to detention in the name of treatment.
- Drug law enforcement that contributes to reduction of violence and respects individual human rights.

Justice Working Group Bibliography

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Open Society Foundations – U.S. Programs

Justice Working Group Member Biographies

James Austin, Director, JFA Institute

Dr. Austin has over twenty-five years of experience in correctional planning and research. He is the former director of the Institute on Crime, Justice and Corrections at George Washington University in Washington, DC. He serves, or has recently served, as director for several large U.S. Department of Justice-funded research and evaluation programs. He was jointly appointed by the Department of Justice and the Georgia Department of Juvenile Justice to monitor the State's compliance with the issues specified in a Memorandum of Agreement.

Dr. Austin has also served as the project director of the Bureau of Justice Assistance-funded corrections options technical assistance program, which provides a wide variety of assistance to local jails, probation, parole, and prison systems. He also directed two BJA projects that focused on juveniles in adult correctional facilities and a national assessment of adult and juvenile private correctional facilities. He also assists parole boards in Nevada, Pennsylvania, Louisiana, Kentucky, and Maryland to develop risk assessment systems for prisoners eligible for release. And he serves as an advisor to The Urban Institute's "Returning Home" Initiative.

Dr. Austin has authored numerous publications, was named by the American Correctional Association as its 1991 recipient of the Peter P. Lejin's Research Award, and received the Western Society of Criminology Paul Tappin Award for outstanding contributions in the field of criminology. Dr. Austin received a Bachelor of Arts degree in Sociology from Wheaton College in Illinois in 1970, a Master of Arts from DePaul University in Chicago in 1975, and a Ph.D. in Sociology from University of California, Davis in 1980.

Yochai Benkler, OSF U.S. Programs Board

Yochai Benkler is the Berkman Professor of Entrepreneurial Legal Studies at Harvard, and faculty co-director of the Berkman Center for Internet and Society. Since the 1990s he has played a part in characterizing the role of information commons and decentralized collaboration to innovation, information production, and freedom in the networked economy and society. His books include *The Wealth of Networks: How social production transforms markets and freedom* (Yale University Press 2006), and *The Penguin and the Leviathan: How Cooperation Triumphs over Self-Interest* (Crown 2011).

His work is socially engaged, winning him the Electronic Frontier Foundation's Pioneer Award for 2007, Public Knowledge's IP3 Award in 2006, and the Ford Foundation Visionaries Award in 2011. It is also anchored in the realities of markets, having been cited as "perhaps the best work yet about the fast moving, enthusiast-driven Internet" by the Financial Times and named best business book about the future in 2006 by Strategy and Business. Benkler has produced reports or served in an advisory capacity for a range communications and intellectual property regulators

and policy makers at the national and international levels. His work can be freely accessed at www.benkler.org

Stephen Bright, President & Senior Counsel, Southern Center for Human Rights

Stephen B. Bright is president and senior counsel of the Center and teaches at Yale Law School. He served as director of the Center from 1982 through 2005, and has been in his present position since the start of 2006. He has taught at Yale since 1993.

Subjects of his litigation, teaching and writing include capital punishment, legal representation for poor people accused of crimes, conditions and practices in prisons and jails, racial discrimination in the criminal justice system, judicial independence, and sentencing. He has tried cases, including capital cases, before juries and argued cases before state and federal appellate courts. He has twice argued and won cases before the United States Supreme Court, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (hear oral argument), and *Amadeo v. Zant*, 486 U.S. 214 (1988) (hear oral argument). Both cases involved racial discrimination in the composition of the juries. He has testified on many occasions before committees of both the U.S. Senate and House of Representatives. He has also taught at the law schools at Harvard, Georgetown, Emory and Northeastern. His and the Center's work has been the subject of a documentary film, *Finding for Life in the Death Belt*, (EM Productions 2005), and two books, *Proximity to Death* by William McFeely (Norton 1999) and *Finding Life on Death Row* by Kayta Lezin (Northeastern University Press 1999).

He received the American Bar Association's Thurgood Marshall Award in 1998, the American Civil Liberties Union's Roger Baldwin Medal of Liberty in 1991, the National Legal Aid & Defender Association's Kutak-Dodds Prize in 1992, the National Association of Criminal Defense Lawyers' Lifetime Achievement Award in 2008, several honorary degrees and other recognition set out in the *curriculum vitae* below. The *Fulton Daily Law Report*, Georgia's legal newspaper, named Bright "Newsmaker (and Agitator) of the Year" in 2003 for his contribution to bringing about creation of a public defender system in Georgia.

Monique Dixon, OSF U.S. Programs Staff, Working Group Co-Chair

Monique L. Dixon, J.D., is the Director of the Criminal and Juvenile Justice Program of OSI-Baltimore. She is responsible for developing, monitoring, and evaluating criminal and juvenile justice funding strategies for OSI-Baltimore, which seeks to reduce the overuse of incarceration as well as its social and economic costs.

Prior to joining OSI-Baltimore, Dixon served as senior staff attorney at Advancement Project in Washington, D.C., a non-profit civil rights organization. In that capacity, Dixon assisted grassroots community organizations, lawyers, and public officials throughout the country with community-centered policing, education, voting rights, and affordable housing issues. She also co-authored several reports on zero tolerance school discipline policies that lead youth from schools to prisons. Dixon joined the Advancement Project after working with the Public Justice Center—a Baltimore-based, non-profit legal organization. She served as the Center's first Equal Justice fellow where she spearheaded the Center's juvenile justice reform project, utilizing litigation and legislative advocacy to reform Maryland's juvenile correctional facilities.

Dixon, a member of the Bars of Maryland and the District of Columbia, has committed her entire legal career to public interest and civil rights law practice. She is a graduate of the University of Maryland school of Law.

Steve Hawkins, Chief Program Officer and Executive Vice President, NAACP

Steve Hawkins began his career as an attorney with the NAACP Legal Defense Fund, where for nearly six years he represented African American men facing the death penalty throughout the Deep South. During this period, Steve investigated and brought litigation that led to the successful release of three Black teens who were wrongfully convicted in Tennessee.

Steve left the Legal Defense Fund to become executive director of the National Coalition to Abolish the Death Penalty based in Washington, DC. In this role, he developed several initiatives that addressed racial disparities in capital sentencing, including a campaign that ultimately led to eradication of the death penalty for juvenile crimes.

After eight years at the NCADP, Steve moved into philanthropy, first serving as a senior program manager at the JEHT Foundation, specializing in a range of criminal justice issues, and then as a program executive at Atlantic Philanthropies, where his work included directing the foundation's investment in a \$60 million campaign to preserve and defend human rights against national security abuses. Steve obtained his undergraduate degree from Harvard College and his law degree from New York University School of Law. He served as law clerk to the late Honorable A. Leon Higginbotham of the United States Court of Appeals for the Third Circuit.

Zoe Hudson, OSF U.S. Programs Staff

As a senior policy analyst at the Open Society Foundations, Zoe Hudson focuses primarily on women's rights and public health. Hudson works to promote the relevancy of her issues to the broader advocacy community in Washington, D.C.

Prior to joining the Foundations, Hudson was the director of the Election Reform Initiative at the Constitution Project. There, she staffed a bipartisan committee to develop recommendations to reform federal election laws. Many of the recommendations were adopted in the Help America Vote Act. Before that, Hudson worked as a senior policy analyst at the Health Privacy Project of Georgetown University, providing legislative analysis and representation on issues of medical privacy. She also served as the director of Field and Government Relations for Parents, Families and Friends of Lesbians and Gays (PFLAG) where she coordinated a field network of 350 chapters and worked as a federal government lobbyist. Hudson holds a BA in Liberal Arts from Grinnell College.

Sherrilyn Ifill, OSF U.S. Programs Board Chair

Professor Sherrilyn Ifill is nationally recognized as an advocate in the areas of civil rights, voting rights, judicial diversity and judicial decision-making. She teaches Civil Procedure, Legal Writing, and a seminar on Reparations, Reconciliation and Restorative Justice. Professor Ifill has also taught Constitutional Law, Environmental Justice, Complex Litigation, as well as seminars on Voting Rights, Equal Protection, and Judicial Decision-making. Professor Ifill co-founded with Professor Michael Pinar the Reentry of Ex-Offenders Clinic.

Professor Ifill writes about the importance of judicial diversity and impartiality in judicial decision-making. Her articles about race, judging and judicial selection have led to Professor Ifill's recognition as an expert on these subjects. She has appeared on NBC Nightly News as well as local network news broadcasts as a consultant and expert during recent Supreme Court confirmation hearings. Professor Ifill also writes about the history of racial violence and contemporary reconciliation efforts. Her book about truth and reconciliation commissions for lynching entitled, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the 21st Century* was released by Beacon Books in February 2007.

Prior to joining the Faculty in 1993, Professor Ifill served as an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. in New York, where she litigated voting rights cases, including *Houston Lawyers' Association v. Texas*, in which the Supreme Court held that judicial elections are subject to the provisions of the Voting Rights Act. During her tenure at Maryland law school, Professor Ifill has continued to litigate and consult on cases on behalf of low-income and minority communities.

Professor Ifill is a frequent guest on The Marc Steiner Show, a public affairs program on WYPR, the Baltimore NPR affiliate, where she talks about race and the law, and her op-ed articles often appear in the *Baltimore Sun*, *Jurist*, and the *AFRO American* newspapers. As a voting rights expert, Professor Ifill appeared regularly as the election expert on BET News with Ed Gordon during the contested November 2000 presidential election, and continues to serve as a political and election analyst on local television and radio programs.

Professor Ifill serves as the Board Chair for the Open Society Foundations – U.S. Programs and is on the board of the Open Society Institute in Baltimore and the Enoch Pratt Free Library in Baltimore City. She is a member and Co-Director of the Children's Choir at Mt. Calvary African Methodist Episcopal Church in Towson, Maryland.

Cynthia Ellen Jones, Associate Professor, American University, Washington College of Law

Cynthia Ellen Jones is an associate professor at the American University, Washington College of Law, in Washington, DC. She teaches Evidence, Criminal Law, Criminal Procedure, and "Race, Crime and Politics." She was awarded the American University Faculty Award for Outstanding Teaching in 2011. Professor Jones researches, writes and lectures on the reforms needed to prevent wrongful convictions and serves on the Board of Directors of the Mid-Atlantic Innocence Project. Prof. Jones is the Chair of the Board of Trustees of the Public Defender Service for the District of Columbia ("PDS"), a member of the Board of Trustees for the Pretrial Justice Institute, and the director of the American Bar Association's Racial Justice Improvement Project.

Professor Jones has published several works, including "*Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*," 42 Am. Crim. L. Rev. 1239 (2005); "*The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*," 77 Fordham L. Rev. 2893 (2009); and "*A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*" 100 J. Crim. Law & Criminology 415

(2010). Professor Jones co-authored *Mastering Criminal Procedure I* and *Mastering Criminal Procedure II*. She also wrote and co-produced “*Fighting Evidence with Evidence*,” an animated short film on the Federal Rules of Evidence, for which she was awarded the 2009 “Teaching with Technology Award” from the American University Center for Teaching Excellence.

Professor Jones has developed an innovative, media-infused presentation entitled “*Evidence In Action*.” This acclaimed seminar on the Federal Rules of Evidence has been presented at numerous bench and bar conferences across the country, including the Louisiana State Bar Association, the Virginia State Bar, the National Bar Association, the Federal Fourth Circuit Judicial Training and the District of Columbia Superior Court. Professor Jones also works with the Federal Judicial Training Center to provide instruction on the Federal Rules of Evidence to newly-appointed United States District Court judges.

Professor Jones earned a Bachelor’s of Arts in criminal justice at the University of Delaware in 1986 and graduated *magna cum laude* in 1989 from American University, Washington College of Law. She clerked on the D.C. Court of Appeals for Hon. Frank E. Schwelb and worked as an associate at the law firm of Dickstein, Shapiro and Morin. Professor Jones also worked as a staff attorney at PDS for five years, representing clients in juvenile, misdemeanor, felony, appellate and post-conviction cases. Prior to becoming the Executive Director of the Public Defender Service in 2000, Professor Jones served as the Deputy Director of the D.C. Pretrial Services Agency where she developed and improved community supervision programs that provided alternatives to pretrial detention.

Andy Ko, OSF U.S. Programs Staff

Andy Ko manages the the Open Society Foundation's Campaign for a New Drug Policy, which is a part of U.S. Programs' Criminal Justice Fund. From 2001 to 2008, he directed the Drug Policy Reform Project at the American Civil Liberties Union of Washington. There he was responsible for legal, political, and public education strategies to reform local, state, and federal drug policies, with an emphasis on racial disparities and over-incarceration caused by the "War on Drugs." From 2008 to 2010, he was State Strategies Counsel for the ACLU's national Drug Law Reform Project, doing similar work with the ACLU's network of national projects, state affiliates and reform allies.

Andy began his career in 1989 as a staff attorney and Skadden Fellow with the Homeless Rights Project of the Legal Aid Society of New York City, pursuing impact litigation and providing individual representation to families in New York City's shelter system. In 1997, Andy took a position as a staff attorney with Columbia Legal Services in Washington State and provided legal services to low-income individuals, immigrant groups, and clients from tribal communities. Tufts University, BA 1985 (International Relations and History), New York University School of Law School, JD 1989 ... but learning most of what he knows in various places north of California and west of the Dakotas.

Thomas McLellan, Professor of Psychiatry, University of Pennsylvania

A. Thomas McLellan (born May 29, 1949, in Staten Island, New York) is a psychologist and professor of psychiatry at the University of Pennsylvania and founder and Executive Director of

the Treatment Research Institute, a not-for-profit research and evaluation institute in Philadelphia.

McLellan received his B.A. from Colgate University and his M.S. and Ph.D. from Bryn Mawr College. He received postgraduate training in psychology at Oxford University. He has since worked for the Veterans Administration Medical Center in Philadelphia and the University of Pennsylvania.

McLellan was the principal developer of the Addiction Severity Index (ASI) and the Treatment Services Review (TSR), widely used substance abuse instruments. He has served as an adviser to many government and nonprofit scientific organizations, including the Office of National Drug Control Policy, the National Practice Laboratory of the American Psychiatric Association, the Swiss National Science Foundation, the World Health Organization, and the Greek government. McLellan served as the Deputy Director of the Office of National Drug Control Policy under the Obama administration.

Among McLellan's many honors and awards are the Life Achievement Award of the American Society of Addiction Medicine in 2003 and the 2002 award for Distinguished Contribution in Addiction Medicine from the Swedish Medical Association. He has served as Editor-in-Chief of the *Journal of Substance Abuse Treatment*.

Diana Lee Morris, OSF U.S. Programs Staff

Diana Morris is Acting Executive Director of U.S. Programs at the Open Society Foundations and the director of the Open Society Institute-Baltimore, a field office established in 1997 to understand and address the local and state social and economic dynamics at play that impede opportunity and justice.

From 1991-1997, she served as the executive director of the Blaustein Philanthropic Group, a set of eight family foundations based in Baltimore that awards local, national and international grants. Previously, Morris was a program officer at the Ford Foundation, first for refugee and migrant rights (1982-1987) and then for human rights and social justice for Eastern and Southern Africa (1987-1990). Morris began her career as an attorney-adviser for human rights and refugee matters in the Office of the Legal Adviser at the Department of State. She holds an AB from Smith College and a JD from Boston University and is a member of the New York State Bar.

Morris served as president of the Association of Baltimore Area Grantmakers from 1996-2000 and was a member of its board from 1994-2001. She is a member of the board of directors of the Baltimore Substance Abuse Systems and the chair of the board of the Safe and Sound Campaign. She was named to The Daily Record's Top 100 Women in Maryland in 1999 and 2001. Morris is a recipient of a Special Recognition Award from the Maryland Legal Services Corporation and a Public Service Award from Boston University Law School.

Aryeh Neier, OSF U.S. Programs Staff

Before joining the Open Society Institute and the Soros Foundations as President in September 1993, Aryeh Neier spent 12 years as Executive Director of Human Rights Watch, of which he was a

founder in 1978. Prior to that position, he worked for the American Civil Liberties Union for 15 years, including eight as national Executive Director.

Mr. Neier served as an Adjunct Professor of Law at New York University for more than a dozen years (1978-1991) and has lectured at a number of the country's leading universities and at universities in many other countries. He is a member of the American Academy of Arts & Sciences and the recipient of six honorary doctorates (State University of New York-Binghamton, Hofstra University, Hamilton College, American University, University of Connecticut, and John Jay College of Criminal Justice), the American Bar Association's Gavel Award and the International Bar Association's Rule of Law Award.

The author of six books (*Dossier* (1975), *Crime and Punishment: A Radical Solution* (1976), *Defending My Enemy* (1979), *Only Judgment* (1982), *War Crimes* (1998), and *Taking Liberties* (2003), Mr. Neier has also contributed chapters to more than 35 books.

He has been a frequent contributor to *The New York Review of Books* and has also published in such periodicals as the *New York Times Magazine*, the *New York Times Book Review*, *Foreign Policy*, *Dissent* and a number of law journals. For a dozen years he wrote a column on human rights for *The Nation*. He has contributed more than a 150 op-ed articles to newspapers, including the *New York Times*, the *Washington Post*, the *Boston Globe*, the *Los Angeles Times*, and the *International Herald Tribune*. Many of his articles have been syndicated internationally.

Mr. Neier was born in Nazi Germany and became a refugee at an early age. An internationally recognized expert on human rights, he has conducted investigations of human rights abuses in more than 40 countries around the world. For more than a quarter of a century, he has been directly engaged in efforts to promote compliance with international humanitarian law (the laws of armed conflict) and in the global debate on accountability and bringing to justice those who have committed crimes against humanity. He played a leading role in the establishment of the international tribunal to prosecute those responsible for war crimes and crimes against humanity in the former Yugoslavia.

Leonard Noisette, OSF U.S. Programs Staff, Working Group Co-Chair

Leonard Noisette is the director of the Criminal Justice Fund for U.S. Programs at the Open Society Foundations. In this role, Noisette leads the foundation's efforts to reduce mass incarceration, end harsh punishment, and eliminate racial disparities and secure a fair and equitable system of justice.

Noisette has spent his entire professional career working in the criminal justice arena. He has worked with the New York City Legal Aid Society, and was a founding member and longtime executive director of the Neighborhood Defender Service of Harlem, an innovative public defender office renowned for its leadership in the development of community-based, full service representation of clients. Through his position there, Noisette was involved in local, statewide and national efforts to address the many deficiencies in the U.S. criminal justice system.

During the years of the Clinton Administration, Noisette participated in the Justice Department's work to improve indigent defense and defense-prosecution relations. From 1999-2001, he was a member of the Executive Session on Public Defense, sponsored by the Federal Bureau of Justice Assistance and Harvard University's Kennedy School of Government.

Noisette has served on the boards of the New York State Defenders Association and the National Legal Aid & Defender Association. He is an adjunct professor at Fordham and Columbia University Law Schools, and is an active member of numerous bar associations

Bryan A. Stevenson, OSF U.S. Programs Board, Working Group Co-Chair

Bryan Stevenson is the Executive Director of the Equal Justice Initiative in Montgomery, Alabama, and also a Professor of Law at the New York University School of Law. His representation of poor people and death row prisoners in the deep South has won him national recognition. He and his staff have been successful in overturning dozens of capital murder cases and death sentences where poor people have been unconstitutionally convicted or sentenced.

Mr. Stevenson has been recognized as one of the top public interest lawyers in the country. His efforts to confront bias against the poor and people of color in the criminal justice system have earned him dozens of national awards including the National Public Interest Lawyer of the Year, the ABA Wisdom Award for Public Service, the ACLU National Medal of Liberty, the Reebok Human Rights Award, the Olaf Palme Prize for International Human Rights, and the prestigious MacArthur Foundation Fellowship Award Prize. He is a graduate of Harvard Law School and the Harvard School of Government. He has published articles on race, poverty and the criminal justice system, and manuals on capital litigation and habeas corpus.

Kima Joy Taylor, OSF U.S. Programs Staff

Kimá Joy Taylor, MD, MPH, is the National Drug Addiction Treatment and Harm Reduction Program Director at the Open Society Foundations. Prior to joining the Open Society Foundations, Taylor served as the deputy commissioner for the Baltimore City Health Department.

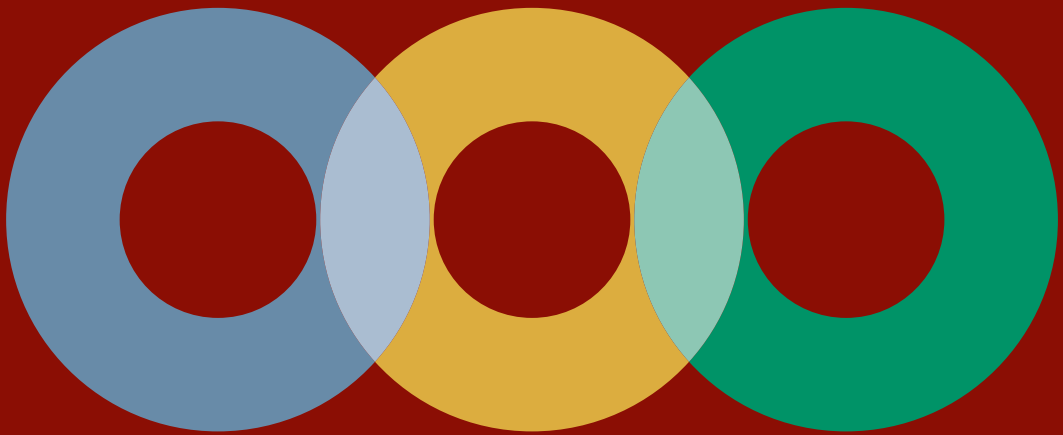
During her tenure at the health department she tried to create more cohesive and integrated public health services for citizens at risk. Before coming to Baltimore, she served as the health and social policy legislative assistant for Senator Sarbanes, with issue areas including Social Security, TANF, pharmaceuticals, Medicare, Medicaid, and other health care policy and women's issues.

A board-certified pediatrician, Taylor is a graduate of Brown University, Brown University School of Medicine, and the Georgetown University residency program in pediatrics. From 1998 to 2002, Taylor cared for uninsured and underinsured patients at a community health center in Washington, D.C., and created a city-wide coalition to advance literacy in pediatric primary care. She worked with other community organizations to empower youth such that they will realize their abilities, grasp opportunities, and improve the world at large.

In 2002, Taylor was awarded a Commonwealth Foundation fellowship in minority health policy at Harvard University. During the fellowship, Taylor's research focused on exploring state legislative remedies for racial and ethnic health disparities.

RACE, CRIME, and PUNISHMENT

Breaking the Connection in America



EDITED BY Keith O. Lawrence

ESSAYS BY Michelle Alexander • Eric Cadora • Blake Emerson • Ian Haney López
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Drugs Are Not the (Only) Problem: Structural Racism, Mass Imprisonment, and the Overpunishment of Violent Crime

JONATHAN SIMON

The huge scale and racial disproportionality of America’s prison population seem an increasing problem for the nation, an embarrassment in the eyes of a world quite interested in our penal practices generally. Indeed, for perhaps the first time in our history, our penal system is clearly a good deal more racist than the society it purports to represent. Events like the grotesque murder of James Byrd some years back tell us more about the racial climate in Texas prisons (where both Byrd and his white attackers had spent time) than in Jasper, Texas, where the murder occurred—just as the outrageous overprosecution of the six black teenagers convicted of beating a white student in Jena, Louisiana, is a story more about the prosecution complex in America than about traditional southern racial conflict.

State legislatures seem to be getting it. New York managed to repeal the Rockefeller drug laws (a name that linked the great pro-civil rights Republican of his generation to the harshest penal laws of its time, telling us a lot about the complexity of race and this issue). California voters even rejected an artfully worded crime initiative that promised community safety through long prison terms for gang members and larger police budgets.

Much of the progress in recent years has come from a strategy aimed at delegitimizing the incarceration approach to drug crime, especially for drug possession and use. The “drugs-first” approach has a lot of appeal. Harsh punishment for drug crime runs into several powerful critiques that are gaining traction with many Americans:

- Prison for drug crime is distinctively associated with racial disparity. The whole selection of drugs deemed illegal in the United States is deeply racialized from the start. Drug enforcement policy and the harshest prison sentenc-

es seem focused on the drugs most associated with minorities and especially African Americans (e.g., crack cocaine).

- For many drug users, treatment seems a more humane and effective approach, while other drugs, particularly marijuana, could well be handled through a muscular civil regulatory approach.
- When people consider drug crime on its own terms, they do not consider it an inherently serious crime. Fear of drug crime is mostly associated with violence generated either by the drug trade or by the actions of drug-addicted users.

But this progress on rolling back some use of prison for drug crimes will not, by itself, end mass incarceration in America. Instead, we need to turn to a topic that has lot less appeal than criticizing the war on drugs: the overpunishment of violent crime.

I have come to believe that our approach to punishing violent crime is the hardened back of mass imprisonment (to use an unusual metaphoric contrast to the soft underbelly) in America. We cannot extricate ourselves from mass imprisonment with a strategy exclusively based on moving drug offenders out of prison. As Marie Gottschalk argues in her very fine book on mass imprisonment and the death penalty:

While the drug and sentencing ballot initiatives vary greatly, they share some common features. They risk reinforcing a disturbing distinction between deserving and undeserving offenders. Many of these initiatives sanction throwing the book at drug dealers, recidivists, and violent offenders, thus reinforcing powerful stereotypes about crime and criminals that may help bolster the fundamental legitimacy of the carceral state.¹

At its best, the drugs-first strategy will produce an incarceration rate in America that is 25 to 45 percent lower than it is now but that remains two or three times the norm for the twentieth century. This prison population will be just as concentrated with people of color² and from neighborhoods (now often rural as well as urban) of multiple disadvantages.

At worst, given our current practice of excessively punishing violent crime, a drugs-first strategy may only anchor a sensibility that will lock us into mass imprisonment and distort the way America rebuilds its urban landscape over the

coming decades. “Violence” is a fuzzy category—for example, Is emotional abuse violence? Does threat of violence constitute violence?—and one highly prone to racial stereotyping.³ Through four decades of a war on crime, we have lost the capacity to judge appropriate punishment, and we must confront our fears rather than avoid them. Only by confronting our fear of violent crime can we hope to frame a sustainable scale of punishment that ceases to exacerbate structural racism in America.

In the remainder of this chapter, I consider one category of violent crime that is relatively free from classification problems and racialized stereotypes: murder. I suggest that the political expediency of focusing justice reform on drug users and other, less-frightening prisoners will ultimately fail, and that we need instead to find a politically viable way to question the overpunishment of violent crime, beginning with murder.

MURDER BY DEGREES

The law of murder is one of the great innovations in American jurisprudence. English common law considered all criminal homicides, except for a few narrow categories treated as manslaughter, to be murder, and they carried a mandatory death sentence. In the United States, beginning in Pennsylvania in 1794, murder was early on divided into two levels: first and second degree. Capital punishment was available only for first-degree murder, and then only at the discretion of the jury. This became the near-universal rule in the United States, until it was complicated by the U.S. Supreme Court’s death-penalty decisions in the 1970s.⁴ (England did not follow this path until the Homicide Act of 1957 created a category of less serious homicide, for which a life sentence in prison was the normal punishment.)

Americans also innovated in manslaughter jurisprudence. While common law only permitted the mitigation of murder down to manslaughter in a narrow set of categories (the most famous being “sight of adultery”), American judges began to broaden these categories. In the twentieth century, following the Model Penal Code, most states made manslaughter open to any killing done under circumstances likely to create an extreme emotional disturbance in ordinary people.⁵

Ever a magnet for public attention, homicides in the nineteenth century became a major topic that helped sell the first mass-market newspapers. This helped murder to emerge as the dominant crime in the public imagination around the middle of the nineteenth century.⁶ A wave of efforts to abolish the death penalty in the early

nineteenth century left murder practically the only crime punishable by death on a regular basis.⁷

In the twentieth century, murders similarly preoccupied radio, television, and the Internet. Mass-media coverage of homicide helps to inform the public understanding of serious crime and drives campaigns for harsher punishment. The structure of modern homicide law was well adapted to addressing the media's demand for harsh punishment. The death penalty was available (and widely used in the first half of the twentieth century) to address those killings that most alarmed the public. The vast majority of other people convicted of murder received either a very long term of years in prison or, often, a life sentence. Few served such long times, because the parole process—largely invisible to the public—favored an eventual release date for all life-sentenced prisoners who avoided trouble and actively sought rehabilitative programming.

Criminology, which has always enjoyed a popular as well as elite following in America, also played a role in elevating murder in the public imagination. Criminology has long viewed murder as the ultimate expression of a criminality that shows its early presence in delinquency and minor criminality.⁸ Burglary, robbery, or rape may constitute serious violations of the victims' rights, but they are also feared because they could result in a murder (which is why the latter two remained capital crimes even in the twentieth century).

The modern law of murder and manslaughter can be considered, in some respects, a triumph of progress. For much of the twentieth century, the law of murder as it existed in the larger industrialized states played an important role in containing demand for severe punishment and in regulating the overall scale of punishment. (This is a theoretical assertion on my part, but the logic of this claim can be outlined.) The law limited the field of convicted killers exposed to the death penalty and gave juries discretion to decide imprisonment for life, even in aggravated cases. The length of punishment for those people not sentenced to death for murder was largely transferred to administrative agencies often known as “parole boards,” which had authority to decide when imprisoned killers could be released (usually after a minimum term of years).⁹

It is difficult to assess empirically how effective this legal and administrative structure was at dissipating populist demands for severe punishment. While homicide is not one of the most frequent reasons for committing a person to prison, homicide sentences wield a disproportionate impact on prison popula-

tions because of the relatively long sentences. The parole board was generally an excellent administrative solution to extend the punishment-limiting capacity of laws for murder and manslaughter, because it moved a decisive portion of the punishment decision to a point in time quite distant from the crime or even the trial and set it apart from the public eye, in the inner workings of a (supposedly) expert-based administrative agency.¹⁰ However, the war on crime and the politicization of parole decisions that it produced have fundamentally transformed this modern structure into a monolithic edifice of extreme punishment.

In the United States, punishments of three or more decades for even the least aggravated murders are becoming common.

Prison sentences for murder have escalated dramatically in the United States since the 1970s, and they are markedly and more generally harsher than punishment for homicide almost anywhere else in the world.¹¹ Even where capital punishment is practiced, few of those people who are not executed are subjected to more than a decade or two in prison. In the United States, however, punishments of three or more decades for even the least aggravated murders are becoming common (and may reflect the minimum punishment, as many murder convicts seem likely to die in prison).

WHY DEGREES OF MURDER MATTER: THE CALIFORNIA EXAMPLE

In California, someone guilty of criminal homicide of another person faces—in theory—very different punishments depending on what grade of murder or manslaughter he or she is convicted of.¹² At the top of the punishment scale is the death penalty, or life in prison without possibility of parole for first-degree murder with special circumstances. *First degree* generally means that the killing was either planned or took place during one of a list of dangerous felonies.¹³ Special circumstances include killing a police officer, multiple victims, and so on.

Next down is first-degree murder without special circumstances. The penalty for this is twenty-five years to life, meaning that parole eligibility begins after twenty-five years. California considers a killing that was not planned (but also not mitigated by some extreme emotional provocation) or was carried out in the course of another felony (but not the listed ones in the first-degree statute) to be second-degree murder, which carries a term of fifteen years to life. Finally, if the judge or

jury finds that the defendant killed in the “heat of passion” (extreme emotional disturbance), the offender will face a determinate sentence of three, six, or eleven years.

As every first-year law student learns, the concepts that separate first- and second-degree murder (premeditation and deliberation) or murder and manslaughter (heat of passion) are notoriously ambiguous and dependent on cultural logics. With so much at stake, the law can seem inherently arbitrary and capricious—or, even worse, predictably unfavorable to minorities and the poor. However, few courses in criminal law dwell on the fact that only the bottom line between murder and manslaughter really matters today.

In California, the death penalty is rarely carried out and, due to the politicization of parole, very few paroles are ever granted. Tough-on-crime governors have appointed to the parole board (known as the Board of Prison Terms) mostly former law enforcement officials or crime victims, who are unlikely to be sympathetic to life prisoners. Few lifers who have served their minimum sentence, and thus are eligible to have a parole release date set by the board, actually get such a date.

Moreover, since 1988 California law has required the governor to review each parole release granted and either approve or disapprove it. Recent governors have rejected more than 98 percent of parole releases approved by the board. Thus, a mere fraction of 1 percent of the thousands of eligible lifers gets an approved release date in a typical year. In other words, while more than one thousand new life prisoners arrive in California prisons every year, and more than ten thousand are eligible for parole each year, only an average of about twenty-three actually get released.¹⁴ There are now more than thirty-seven thousand life prisoners in California.¹⁵

This situation creates a monolith of extreme punishment that constitutes an increasingly large and indigestible block of prisoners in California prisons. At the top end of the spectrum, legal challenges and lack of sufficient lawyers to represent the prisoners sentenced to death mean that executions are extremely rare. While nearly seven hundred prisoners are on death row, only thirteen executions have occurred since they resumed in the early 1990s.¹⁶ Thus the complex legal distinctions that separate special circumstances, first-degree murder, and second-degree murder have come to mean relatively little in terms of the quantity of punishment faced (although the *quality* of punishment is probably more severe for death row inmates, due to a security regime that keeps most of them locked in a cell twenty-three hours a day). For all practical purposes, anyone sent to prison in California for murder is likely to die there—and not at the hands of the state.¹⁷

Punishment for murder has become the remainder of the prisoners' natural life, which is extreme compared to past policies and to most of the rest of the world. In the 1970s, for example, a first-degree murderer in California who played the rehabilitation game behind bars and avoided serious disciplinary problems could expect to be paroled in as little as ten or fifteen years (five less for second degree). In most of the rest of the world, murderers serve fewer than twenty years. (In Finland, most life prisoners are released after ten years.) Yet today, California prisons are full of men and women who have spent twenty-five, thirty, or thirty-five years constructing meticulous rehabilitation records with virtually no chance of getting out of prison before they die. This situation is not only unjust—at least in the minimalist sense that it renders meaningless the distinctions that the law explicitly draws—it also plays a significant role in anchoring the larger structure of overpunishment and mass imprisonment in America.

Many of us who want to wean America from its addiction to prisons have focused on drug users and other minor and nonviolent offenders. Indeed, this approach often contrasts nonthreatening offenders with dangerous and violent offenders who belong in prison for long terms. Wasting prison space on “druggies” and minor offenders, the argument goes, makes it harder to keep violent offenders in prison.

I believe that we need to combine this reform with a serious effort to question and reverse the overpunishment of violent crime, especially murder. I am deeply sympathetic to the view that drug users, low-level drug sellers, and minor violators of property and public order do not belong in prison. However, a strategy that focuses only on minor criminality is limited in how far it can reverse the level of imprisonment (e.g., we might end up with only three times, rather than six times, the prison population of the 1970s). Indeed, an emphasis only on the shallow end of the punishment spectrum may counterproductively reinforce the tendency to overpunish—so that, in the long run, any reductions gained through alternatives to incarceration for the shallow end may be modest.

HOMICIDE AS A REGULATOR OF PUNISHMENT

If murder anchors one end of a continuum, with delinquency and minor crime at the other end, two interrelated implications arise: (1) Murderers are the ultimate criminals who are capable of and likely to engage in crime of all sorts; and (2) minor offenders may seem relatively harmless now, but they may be on their way up the continuum toward murder.

American criminology and criminal law have long positioned homicide as the principal crime against the modern legal subject, one that reveals the threat to life that is intrinsic in all crime.¹⁸ The focus on minor delinquency as a starting point for intervention has been the primary lesson of criminology as public policy since the turn of the past century. The notion is that the juvenile delinquent who skips school and commits acts of vandalism is manifesting underlying criminalizing tendencies that, left unchecked, could escalate up the chain of crime all the way to murder.

Against this background, we can see that the overpunishment of murder may have effects all the way down the range of crimes. Three kinds of effects stand out in particular: prospect theory, loss aversion, or reference effects; the net-widening effects of “dangerousness”; and the racialization of punishment.

Prospect theory, loss aversion, or reference effects

A well-known result in behavioral economics is that when consumers assess the reasonableness of an item’s price, they are influenced by the price of another item that serves as the reference point or price. The so-called reference price establishes a level below which consumers feel that they are getting a good deal, and above which they feel they are experiencing a loss. So, for example, the high price tag on a \$40 surf-and-turf special probably makes it more likely a diner will spend \$29 on a steak or \$19 on a pasta dish without complaining about the cost.

Similarly, natural life sentences for even nonaggravated murder set a reference price for crime that makes extreme but less-severe punishments for other crimes seem appropriate. Decades in prison for crimes like robbery, burglary, and drug dealing may not seem disproportionate when compared to the severity of execution or life in prison without parole.¹⁹

Net-widening effects of dangerousness

Severe punishment reinforces the view that murderers are permanently dangerous. This perception can extend to include minor criminality, given the common view that there is a continuum of criminality to which both murderers and minor criminals belong. In practice, this means that reductions in the use of imprisonment for drug users, public order violators, minor property crime offenders, and other less-serious offenders may easily be reversed if a more serious crime is committed by someone on parole or probation for a less serious crime—something likely to occur,

given the large number of people on parole or probation nationwide.

Racialization of punishment

Criminologists and many policy makers recognize that the War on Drugs has contributed to the enormous racial disproportionality of the American penal population. Drug use is distributed quite evenly across major demographic groups, while punishment for drug crimes is radically skewed toward African Americans and Latinos.²⁰ But the racialization of the drug war is intertwined with the racial coding of violence in America. High levels of violence in the African American community have been a criminological topic since the nineteenth century. While the causes of this are many, rooted in poverty and discrimination, the strong association between African Americans and homicide that has developed since the 1960s (with a pattern emerging then of approximately half of all homicide victims and perpetrators being African American) contributes mightily to racial disproportionality in the punishment of drug crimes. The well-documented police focus on young black men is driven by ecological presumptions about the presence of guns, the potential for violence, and the pressure to drive down homicide rates, but the immediate result of such policing tactics generally is more drug arrests and convictions.²¹

Drug use is distributed quite evenly across major demographic groups, while punishment for drug crimes is radically skewed toward African Americans and Latinos.

These effects suggest that a strategy of reducing the level of punishment at the high end for murderers is an essential component of any approach to substantially reducing our use of imprisonment. If we attack the mass-imprisonment problem by reducing the punishment of murderers, we can create a cascade of positive effects leading to more reductions in punishment.

Consider, for instance, what could happen if we reset the “reference price” for non-homicide sentences. If murder were punished at twenty years (the global norm), there would be no property offenders serving life terms, as there are now under California’s three-strikes law. Indeed, the entire hierarchy of punishments would require dramatic reduction in order to avoid violating strong popular beliefs that some crimes are more deserving of punishment than others and that murder is the most deserving.²²

Reducing the length of murder sentences would help diminish public belief in the permanent dangerousness of murderers, because the low rate of recidivism

among released prisoners would become more widely known.²³ Criminologists have long documented the fact that prisoners who are released after serving time for homicide crimes have among the lowest recidivism rates, both for other homicides and crimes generally.²⁴ Such a demonstration of redemption will reduce the temptation to incapacitate minor criminals out of fear they are on a trajectory toward murder. (There may be risk factors that can help predict when a pattern of lawless behavior is likely to become violent, such as mental illness combined with a history of previous violence, or an escalating pattern of domestic violence, but they do not apply to the vast majority of people convicted of minor drug, public order, or property crimes. The public's legitimate desire to prevent homicide can be more effectively served through interventions targeted at these well-defined cases, including a more assertive civil commitment system for the mentally ill.)

The up-front political costs of reducing homicide penalties are likely to be large, but once the changes are made the virtuous circle of positive effects will reduce the public's propensity to fall back on long, incapacitative sentencing as a panacea for unfathomable risks. In contrast, the politically expeditious path we are on now—trying to separate low-end crimes from those involving violence, especially homicide—has tremendous risk of collapsing; indeed, quieter efforts have regularly done so in recent years.

If we continue to attack mass imprisonment by focusing on removing drug users and low-level offenders, we may achieve some reduction in the prison population—but unless we do it very carefully, we may create a cascade of negative effects. The most consequential one will be to reinforce the message that we need to rededicate prisons to incapacitating people convicted of murder and other violent crimes. At present, we already do so, and the argument that we need more prison space for this purpose implies that current levels of punishment for violent crimes are too low.

By failing to diminish public fear of violence linked to the category of crime, this strategy leaves its own modest reforms vulnerable to sudden reversals if, as is inevitable, a person on parole who is kept out of prison for a minor crime goes on to commit a violent crime. After such an event, the media and politicians will focus on the fact that under previous policies the minor offender would have been in prison at the time of the violent crime and thus safely incapacitated (ignoring, of course, the fact that the offender would have been released at some point). When that happens, demand will build to reverse policies of limited decarceration, even for nonviolent offenders.

ADDITIONAL COMMENTS FROM THE PUBLIC FORUM

JONATHAN SIMON: I attack what I think has become a sacred cow for those of us in the anti-incarceration movement: an agenda or a strategy that I will call “drugs first.” The essence of this strategy is to say to the public that too many druggies are in the prison system. So let’s pass a law mandating treatment, not jail, and move some of those people out into the community.

Much of the “drugs-first” strategy has had the perverse consequence of actually reinforcing the public’s belief that there’s an enormous problem with violent crime in America, and that only mass incarceration can solve it. So a tag line that is becoming typical is, “Let’s get the druggies out of prisons so we’ll have more room to punish violent criminals.”

Now, first of all, the sentences for violent crime, and murder especially—although this runs the gamut—have gone up. Nationwide, something like around 40 percent of the overall growth in incarceration since the 1970s is represented by this violent crime problem. So if all we’re doing is chipping away the druggies first and leaving that violent block in there, we’d still be left with a disproportionately large prison system.

But the problem becomes worse because the focus on drugs falls prey to two things I want to highlight. One is the enormous popularity of criminology in

American culture, which from the nineteenth century on has viewed murder as the only ultimate outcome of a criminal career that begins with minor crime and delinquency. That is sort of the story of criminology. Criminology wants to show you that this wayward youth, who could be intervened on now, could become a murderer if allowed to continue on this path. Probably the most famous example is Lee Harvey Oswald who, when he was arrested for truancy as a fourteen-year-old, had a probation officer predict on paper that “someday he’ll murder someone if we don’t do something about this.”

Now, many Americans have come to accept the premise that minor crime is important because it’s on a path that leads to violent crime, which means that a strategy of decriminalizing violent behavior has a natural backlash tendency to it. As soon as something happens—like the home invasion in Connecticut a couple of summers ago, where a couple of minor criminals took over a home, raped and murdered the kids, and set fire to it—that’s seen as a poster child for the death penalty. It also reinforces the idea that it’s worth keeping relatively minor criminals in prison for a long, long time.

The other feature that I think is particularly important is the racialization of violence. From the nineteenth century on, homicide actually has been a disproportionately black crime in America. There

are a lot of good explanations for it, but the bottom line is when we overpunish violent crime, we are by nature selectively picking out a population of color to punish harshly.

Second, because our laws have gotten so extreme (and California may be the extreme case) we have created an “indigestible block” of prisoners. In California, anything from first-degree murder with special circumstances down to second-degree murder—which is basically spousal killing, impulsive killing that’s not mitigated down to manslaughter, a lot of road rage cases, etc.—basically, all of those folks are going to serve natural life in prison. Even if you’re sentenced to death, you are almost certain not to be executed in California. Currently, there are about thirty thousand prisoners in the California prison system in that life status. California law requires the governor to personally approve every parole of a lifer, which means that none happened under Gray Davis, none happened under Pete Wilson. A handful have happened under Arnold Schwarzenegger. Approximately a thousand lifers come to California prisons every year; approximately five leave. So you can see how the math works.

Right now, it’s very hard for me to imagine how to start the sound-bite campaign that says, “Let’s be nicer to murderers.” It’s a really hard political sell, but consider the benefits of it.

Q: *What is the way to introduce this issue of overpunishment of violent crime?*

Also, who is supposed to bring that message? It’s not going to be any elected official, and the public isn’t going to listen to academics. Is it ministers? Is it philosophers? Is it some sort of expert? Do we medicalize the question and have somebody wearing a white coat and a stethoscope say, “We’ve done lots of public health studies, and it turns out that breaking a window when you’re fourteen does not indicate that you’re going to become a murderer”?

SIMON: I’m dubious, because criminologists have known for years that essentially once you cross forty your chances of ever committing a crime of any sort again, let alone a violent crime, go down astronomically. Yet we keep people decades past that birthday. And I don’t know that repeating that will make any difference.

If television networks like MSNBC are going to devote so much broadcast time to prisons, maybe they could do life histories in the nineteenth-century way where you actually tell stories about people in prisons, because they’re often very sympathetic folks. Now, obviously there is a murder victim family out there somewhere whose pain is unending. We also have to understand the importance of violence in our society as a driver of this. A lot of us who oppose mass incarceration have been in denial about the role that high violent crime rates in the ’60s and ’80s played in driving home the message that this is an appropriate kind of governmental response. So since we have a gift in the recent crime decline—and you

in New York City may have the greatest opportunity of all, because your crime decline was roughly twice what the rest of the country experienced—that creates an opportunity to begin to individualize these cases and to tell stories about people’s lives.

A lot of Americans believe that a black version of Hannibal Lector is most of what is locked up in the murder wards of our prisons. Again, this feeds into this criminological cultural heritage we have. One of our strategies has to be to become “anticriminologists” in this sense. Murder and most violent crimes should not be seen as the developmental outcome of some kind of criminality track, in the way a polyp becomes a cancer. It’s much more like an accident. People commit violent acts through a lot of combinations of circumstance, through situational factors. Background obviously can play a role, but the idea that the person who commits a murder is therefore the sort of supercriminal who can commit any crime if you let them out is widely believed by Americans. But when you meet people in San Quentin who killed their partner or got in a road rage incident on the highway and are now twenty years older than that event, they’re not really frightening people. And by and large they’ve done a lot of good work on themselves.

The current pessimism about the fiscal crisis might offer another opportunity to communicate this—although as long as people believe that violent crime is what’s being contained by mass incarceration, the price point at which it becomes

too expensive is very high. I don’t know how high it has to get before people will be open to reversing things.

Q: *This proposal clashes somewhat with a lot of people’s ideas about individual responsibility. How do we change that popular understanding?*

SIMON: I teach criminal law, and our modern, contemporary criminal law is already shockingly indifferent to individual responsibility in a lot of ways. Accomplice liability has been enormously expanded to sweep up all kinds of people for violent and drug crimes. The proliferation of crimes that are essentially systemic—such as being a felon in possession of a weapon, regardless of why you were in possession of that weapon—has moved us away from this nineteenth-century notion of individual responsibility.

Now, there may be a lot of twenty-first-century reasons to not be stuck on individual responsibility, but it seems to me that some return to a serious discussion about whether our criminal justice system actually does honor individual responsibility would be in keeping. And, in fact, when you meet some of the lifers that I have in San Quentin, what strikes you is that these people have taken responsibility for their crimes. They’ve spent decades working on themselves, trying to seek redemption to whatever extent they can from their victims, to get educations. They are really impressive stories, and yet they’re being told by the system, “You’ll never get out because we think even an eighty-nine-year-old man might,

you know, hit somebody over the head with their crutch or something, there may be some risk involved.” That’s all about risk and very nonfocused on individual responsibility.

Q: *I’ve got a fact question for you, Jonathan. You said that since the nineteenth century murder has been mostly a black affair and that there are reasons for that. The thing that came to my mind was the drug trade, but are there other factors involved you want to tell us about?*

SIMON: Since the nineteenth century, criminologists have been aware of the disproportionately high rate of blacks both as victims of murder and perpetrators of it. As we know, homicide is overwhelmingly an intraracial experience in America. I think it’s really been exacerbated since the ’60s. Approximately half of all homicide victims in America are

black, and we assume that about half of the perpetrators are black as well.

As for explanations, criminologists in the ’80s looking at the crack epidemic pointed to proliferation of guns among young people. The increase in gun ownership by a certain number of young people made other young people feel that they had to have those guns in order to play peer roles. And once guns are introduced into an essentially adolescent society, you are going to have a lot of homicides. That’s one of the reasons why this developmental model of crime that views the murderer as the sort of superpredator is so wrong. Any fourteen- or fifteen-year-old will do unbelievably horrible things, given the right circumstances and the right equipment, but that doesn’t mean that for the rest of their lives they need to be in a cage.

Notes

1. M. Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge: Cambridge University Press, 2001), 258.

2. For instance, in 2004, non-Hispanic blacks constituted 41 percent of all state prisoners serving time for murder, compared to 33 percent of all state prisoners serving time for burglary and 45 percent of all state prisoners serving time for drug offenses. See Sourcebook of Criminal Justice Statistics Online, <http://www.albany.edu/sourcebook>, table 6.001.2004.

3. Several cognitive science experiments available online provide tests of implicit bias in the assignment of dangerousness based on race. See <https://implicit.harvard.edu> for a test associating weapons with African American and white faces.

4. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); F. Zimring and G. Hawkins, *Capital Punishment and the American Agenda* (Cambridge: Cambridge University Press, 1989).

5. C. Lee and A. Harris, *Criminal Law: Cases and Materials*, 2nd ed. (St. Paul, Minn.: Thomson/West, 2009).

6. K. Halttunen, *Murder Most Foul: The Killer and the America Gothic Imagination* (Cambridge, Mass.: Harvard University Press, 1998).

7. S. Banner, *The Death Penalty: An American History* (Cambridge, Mass.: Harvard University Press, 2002).

8. Lots of criminological research has suggested that murder is frequently a highly contingent event that reflects not an escalating degree of criminality but the intersection of multiple factors.

9. D. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in the Progressive Era* (Boston: Little, Brown, 1980).

10. S. L. Messinger et al., "The Foundations of Parole in California," *Law & Society Review* 19 (1985): 69.

11. The most recent estimate of the length of prison sentences for murder comes from an analysis of felony sentences in the seventy-five largest counties in the United States between 1990 and 2002, published in 2006. According to this analysis, the median sentence for murder is now 20 years (240 months) and the mean sentence is 25.6 years (308 months). See B. A. Reaves, *Violent Felons in Large Urban Counties*, Bureau of Justice Statistics Special Report (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, 2006), 8.

12. California Penal Code §187 (a): Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

13. California Penal Code §189: All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

14. J. Irwin, *Lifers: Seeking Redemption in Prison* (New York: Routledge, 2009), 2.

15. A. Nellis and R. S. King, *No Exit: The Expanding Use of Life Sentences in America* (Washington, D.C.: Sentencing Project, 2009), 7.

16. See <http://www.deathpenaltyinfo.org/executions>.

17. This sets a huge premium on getting murder down to manslaughter because it guarantees a release at the end of a fixed sentence. The legal doctrine of *heat of passion*, which distinguishes manslaughter from murder, is probably the most culturally determined of all, but I'll leave that problem for another time.

18. H. Wechsler and J. Michael, "A Rationale of the Law of Homicide, Part I," *Columbia Law Review* 37 (1937): 729.

19. David Garland raises the question of whether it is not escalation in the punishment of these serious-but-not-homicide crimes that drives increases in the severity of punishment for murder. It is true that some of the first extreme sentences arose in antinarcotics crimes. For example, the infamous Rockefeller drug law of 1973 made sale of two ounces or more of a controlled substance (including marijuana) punishable by fifteen years to life in prison. The Rockefeller laws permitted parole. Even more severe antidrug laws have been adopted in Michigan, many other states, and under the federal sentencing guidelines, resulting in decades

of imprisonment for sufficiently large quantities of drugs. The sequencing of homicide penalties and drug laws in the various states should be carefully examined. As a whole, drugs (at least “hard” drugs) came to be linked to the possibility or even likelihood of death during the 1970s and 1980s; selling large quantities of drugs in this respect might be seen as a kind of murder. Indeed, the Rockefeller laws explicitly linked the penalties for drugs to the penalties for second-degree murder.

20. M. Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (New York: Oxford University Press, 1995).

21. Recent empirical research provides some support for the theory that racialized policing of drugs in Seattle is driven by a police emphasis on crack cocaine. More than any other recent drug, crack and its distribution have been associated with gun violence and homicide. See K. Beckett et al., “Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle,” *Social Problems* 52 (2005): 419–41.

22. A. Ristorph, “Desert, Democracy, and Sentencing Reform,” *Criminal Law & Criminology* 96 (2006): 1293.

23. This reflects several factors. Many second-degree murder convictions involve the killing of a close personal friend, intimate, or business associate. The circumstances that led to the killing may have built up over years and involved unique associations unlikely to repeat themselves. Also, where parole from a life sentence is involved, prisoners have powerful incentives to engage in therapy, education, and other practices held out as essential to a positive parole file. (For examples of many such transformations, see Irwin, *Lifers*.) With years to spend in prison under the best of circumstances, many people convicted of murder genuinely seek opportunities for repentance and self-knowledge, and they work to heal the world around them.

24. A. Roberts, K. Zgoba, and S. M. Shahidullah, “Recidivism among Four Types of Homicide Offenders: An Exploratory Analysis of 336 Homicide Offenders in New Jersey,” *Aggression & Violent Behavior* 12 (2007): 493–507.

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