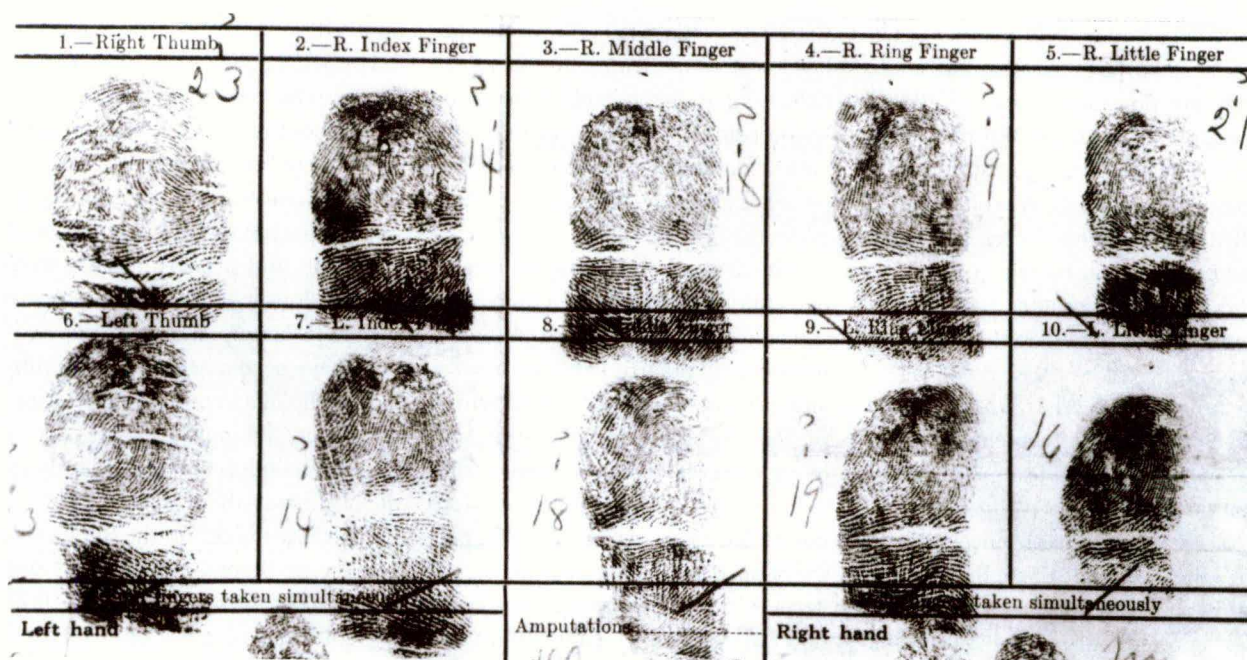




FUEL TO THE FIRE

THE FOLLY OF NEOLIBERAL PRISON REFORM

Marie Gottschalk

AMID DEFICIT-ALLERGIC NEOLIBERAL politics, everyone can agree on the appeal of budgetary savings. So now it is not just liberals going after mass incarceration. A group of brand-name conservatives, including Newt Gingrich, Grover Norquist, and, most recently, former governor Rick Perry of Texas, has endorsed various budget-cutting initiatives that would reduce prison populations. Utah Senator Mike Lee, an influential Tea Party Republican, has delivered speeches on “the challenge of over-criminalization; of over-incarceration; and over-sentencing.”

This bipartisanship has fostered a wave of optimism; at last it seems the country is ready to enact major reforms to reduce the incarceration rate. But it is unlikely that elite-level alliances stitched together by mounting fiscal pressures will spur communities,

states, and the federal government to make deep and lasting cuts in their prison and jail populations and to dismantle other pieces of the carceral state, such as felon disenfranchisement and the denial of civil liberties, employment, and public benefits to many people with criminal convictions.

For one thing, the carceral state has proved tenacious in the past. Four decades ago, states were in dire financial straits, and there was widespread disillusionment across the political spectrum with indeterminate sentences and the functioning of prison rehabilitation programs. The 1971 Attica prison uprising prompted an outpouring of public interest in making prisons more humane and reducing their populations. A number of national advisory commissions called for a moratorium on prison construction, and the director of the Federal Bureau of Prisons predicted that the Attica uprising would be “a positive step forward for prison reform” over the long run. The New York State Special Commission on Attica noted the enormous impact of racism on criminal justice and concluded, “The problem of Attica will never be solved if we focus only upon the prisons themselves and ignore what the inmates have gone through before they arrive at Attica.”

At the time, there were widespread expectations that the country’s incarcerated population—which was fewer than 200,000 people, less than 10 percent of what it is today—would shrink. Instead it exploded. The race to incarcerate that began in the 1970s has persisted for decades amid fluctuations in the crime rate, public opinion, and economic conditions.

If there is to be serious reform, we will have to look beyond the short-term economic needs of the federal and state governments. We can’t rely on cost-benefit analysis to accomplish what only a deep concern for justice and human rights can. Indeed, cost-benefit analysis is one of the principal tools of the neoliberal politics on which the carceral state is founded.

IN ORDER TO see how neoliberalism lies at the root of the carceral state, we need first to recognize who is affected. Racism plays a significant role, ensuring that blacks are vastly more likely than whites to be imprisoned. However, there is more to the story.

In *The New Jim Crow* (2010), Michelle Alexander persuasively, eloquently, and mournfully demonstrates that the emergence of colorblind racism in the post-civil rights era poses a major obstacle to justice. But while

drug laws and law enforcement policies are culprits in mass incarceration, they are not alone. Drug offenders comprise only 20 percent of offenders in state prisons. Violent offenders comprise about half. We could release all drug offenders today, but without other significant changes in laws and penal policies and practices, the United States would still have an incarceration crisis.

Indeed, that crisis would persist even if the country were not locking up any African Americans at all. As the war on crime has been winding down on some fronts, it has been gearing up on others. One of these has opened up in rural, predominantly white areas reportedly facing the scourges of methamphetamine, heroin, and prescription drug abuse. And since the 1990s, politicians and policymakers have been laying the institutional and political groundwork for a large-scale war against sex offenders.

The carceral state also has dramatically expanded its capacity to apprehend, detain, punish, and deport immigrants. The hard-line politics, policies, and rhetoric that fueled the prison boom of the 1980s and 1990s have been retrofitted for a new population. Now they support institutions

that dissolve the distinction between law enforcement and immigration enforcement. In a notable shift, today 35 percent of federal prisoners are Latino, making them the largest ethnic or racial group in the federal prison system.

The United States, with just 5 percent of the world's population, incarcerates almost one-third of the all the women and girls confined to jails and prisons worldwide. And while the white incarceration rate of 400 per 100,000 is low compared to the rates for African Americans (2,300 per 100,000) and Latinos (1,000 per 100,000), it is still about two-and-a-half to seven times the national incarceration rates of other Western countries and Japan.

To relate these troubling facts is not to deny the deep vein of racism coursing through American criminal justice. It is only to suggest that racism is not the only ideology at work.

In addition to racism, neoliberalism sustains the carceral state. The commitment to privatization is at work in the expansion of for-profit prisons, immigrant detention facilities, and privately run parole and probation services. The precariousness bred by a welfare-averse politics maintains a

steady flow of inmates. The main drivers of penal policy reform at the elite level are cost-benefit analyses and concerns about recidivism, not concerns of justice or human rights.

The Great Recession raised bipartisan expectations that states would close jails and prisons because they could no longer afford to keep so many people locked up. But these expectations have been met largely with publicity rather than far-reaching reforms. Moreover, staking the penal reform agenda on budget cuts only reinforces the neoliberal ethos.

The Pew Center on the States, the Council of State Governments, and the U.S. Department of Justice sit at the epicenter of these budget-based efforts. They have joined to promote schemes largely aimed at saving money by reducing the recidivism rates of ex-offenders and by diverting some low-level offenders from prison. Many of these programs focus on people reentering society after prison. Others are examples of justice reinvestment, a "data-driven" approach that aims to reduce incarceration rates and return the savings to communities hit hardest by the carceral state. The three Rs—reentry, justice reinvestment, and recidivism—have dominated discussions of penal reform in Washington, D.C., and in many state capitals.

Yet even in a cash-strapped state, criminal justice may not be an obvious arena for savings. Although corrections has been one of the fastest growing items in state budgets, second only to Medicaid for two decades now, it still comprises a small portion of spending. In the 2010 fiscal year, state expenditures on corrections totaled \$48.5 billion, less than 3 percent of the nearly \$2 trillion in total expenditures. States spend more than twice as much on highways.

And vested interests will fight against attempts to dismantle the carceral state. Prison guards' unions, state departments of corrections, law enforcement associations, the private

Natural Intelligence

Ben Purkert

The plural of anything is bound to be sharper:

countless birds spelling V above my head.

Where they land, a field must slightly compress,

hardening under their cool weight.

Wing-shadows held against their breasts.

Each bird only tries to be

what it is, and people call this intelligence.

We write it down, star it somewhere in our notes.

When our minds wander, they go alone.

corrections industry, and the financial firms that devise bonds and other mechanisms to fund prison infrastructure all stand in the way of a deep reduction in the incarcerated population. (By a deep reduction, I mean lowering today's incarceration rate of 700 per 100,000 residents to about 175 per 100,000, the level before the prison boom began in the mid-1970s. If that seems radical, consider that if today's incarceration rate were cut only in half, the United States would still be the most punitive Western country by far.)

Evaluating penal reforms by vetting them on the cost-benefit scales to determine whether they reduce crime while saving public money reinforces the tight linkage in the public mind between punishment and crime. But this relationship is misleading. As a 2014 National Research Council paper concludes, "Most studies estimate the crime-reducing effect of incarceration to be small and some report that the size of the effect diminishes with the scale of incarceration."

Going deeper, hitching the movement against mass incarceration to fiscal burden fortifies the bipartisan coalition in federal and state government that sees eliminating deficits and debt as its top priority. The zeal to cut deficits, though, is in truth a zeal to cut the welfare state. David Stockman, President Ronald Reagan's first budget director, admitted as much when he explained that the White House strategically wielded deficit hysteria to slash and burn social programs, shrink the government's role in welfare and other services, and further the cause of privatization. Norquist is the nation's foremost anti-tax crusader, widely known for his desire to shrink the government "down to the size where we can drown it in the bathtub."

But this assault on the welfare state, Social Security, public-sector jobs, health and social services, public schools, and investment in high-crime communities helps to produce the crime that the carceral state was purportedly built to control. Thus there

is little reason to believe that today's budget-driven reform movement will do much to eliminate sources of crime or the politics that have encouraged mass incarceration and the aggressive expansion of the carceral state.

The three-R approach to limited penal reform manifests a core commitment to neoliberalism and to what some sociologists call the death of the social. Problems such as crime, poverty, mass unemployment, and mass incarceration are no longer seen as having fundamental structural causes

Cost-benefit analysis can't accomplish what deep concern for justice and human rights can.

that can be ameliorated via policies and resources mobilized by the state. Rather, these problems are regarded as products either of fate or individual action. Thus, instead of state action, reformers focus on devising micro interventions at the local and community levels to change the behavior of individuals. The delegated engineers for these micro interventions are private-sector, nonprofit, or state-employed specialists in a very particular area, such as substance abuse, anger management, or résumé writing. In short, we live in an age of do-it-yourself social policies. Anyone deemed unable or unwilling to change must be banished—either to the prison or to the prison beyond the prison represented by probation, parole, community sanctions, drug courts, and immigrant detention. Many of these people are also condemned to civil death thanks to felon disenfranchisement and permanent criminal records that prevent access to employment, housing, and public goods.

Breaking the stranglehold of neoliberalism on penal policy will require

a fundamental shift in attitudes. Politicians, criminal justice officials, and the public would have to consider a safe, healthy, humane, and dramatically smaller penal system to be a credible and desirable policy goal in and of itself.

WHILE DOUBLING DOWN on neoliberal policy clearly won't solve the problem of criminalization, we also need to resist the belief that the only way to raze the carceral state is to tackle the root causes of crime—massive unemployment, massive poverty, and the high levels of social, political, and economic inequality.

The carceral state is a product of policies that can be undone over a few years, even if the structural determinants of crime remain. To grasp this, one need only appreciate, as experts on crime and punishment generally do, that changes in public policies, not criminal behavior, propelled the decades-long prison boom in the United States.

Major decarcerations in other places and at other times—Finland in the 1960s, Germany in the 1980s, and California under Governor Ronald Reagan—came about primarily as a result of comprehensive changes in penal policy rather than by sustained attacks on structural problems and the root causes of crime. The changes we now need are no mystery. While continued support for reentry is important, we cannot focus only on those who are being released. We need to greatly reduce the number of people who are sent to jail or prison in the first place and to decrease sentence lengths and time served. In short, we need comprehensive sentencing reform guided by the principle that prison should be reserved primarily for people who pose grave threats to public safety.

To this end, we need to repeal mandatory minimum, truth-in-sentencing, and habitual offender laws, including three-strikes statutes, and to rein in sex offender registration, notification, and civil commitment. We also need

to reinvigorate the parole process and insulate it from politics to ensure that every offender—including serious, violent, and sexual offenders, even those serving life sentences—is entitled to a meaningful parole review.

Successful decarceration will not be achieved solely by taking the prisoners out of the prisons. Those reentering society need significant educational, vocational, housing, medical, and economic support to ensure that the communities they are returning to are not further destabilized. If we are serious about alternatives to incarceration, then community-based mental health and substance abuse programs will need major infusions of cash so that the penal system is no longer the primary means of addressing these public health problems.

And the widespread practice of condemning people with criminal records to civil death would have to cease, so that reentry is truly possible. People returning from prison should be permitted to vote, to serve on juries, and to access public benefits, such as student loans, food stamps, and public housing. Employment and licensing restrictions levied on ex-offenders should be narrowly tailored and reserved for specific instances when public safety concerns are compelling.

Some of these reforms would require new legislation, but the carceral state was not built by punitive laws alone, and it can be dismantled, at least in part, by a change in sensibilities. The carceral state was born when police officers, parole and probation agents, judges, corrections officials, attorneys general, local district attorneys, and federal prosecutors began to exercise their discretion in a more punitive direction as they read the new cues coming from law-and-order politicians.

That discretion could be turned toward lenience. President Obama and state governors have enormous, largely unexercised, freedom to grant executive clemency. Federal judges have considerable wiggle room to depart from the federal sentencing guide-

lines, as the Supreme Court confirmed in *United States v. Booker* (2005) and reconfirmed in *Gall v. United States* (2007). The Department of Justice could put an end to overcrowding in federal penitentiaries by calling a halt to the federal war on drugs. The Federal Bureau of Prisons (BOP) could “eliminate thousands of years of unnecessary incarceration through full implementation of existing ameliorative statutes,” according to a report by the American Bar Association. For example, the BOP and many state departments of corrections could release more infirm and elderly inmates early via a process known as compassionate release.

Prosecutors may be the linchpins of penal reform. The late legal scholar William Stuntz described them as the “real lawmakers” of the criminal justice system because they enjoy vast leeway in charging and sentencing decisions. Attorneys general and district attorneys also set the tone and culture of their offices and determine how prosecutors working under them exercise their discretion.

By changing their behavior, prosecutors could have a profound impact on lowering incarceration rates and reducing racial disparities in sentencing without any statutory changes. For example, district attorneys could end the widespread practice of overcharging. They could shift the standard for charging from probable cause to likelihood of conviction, which would result in fewer prosecutions. Or they could decide that their offices won’t prosecute certain low-level offenders, as some have done.

Maverick district attorneys can engineer wider shifts in penal policy. The upset victory of David Soares in Albany’s 2004 race for district attorney provided important momentum to the decade-long “Drop the Rock” campaign to repeal New York State’s draconian Rockefeller drug laws.

Major reductions in the prison population won’t happen unless law enforcement officers buy in. Without

their support and coordination among them, attempts to reduce the prison population will remain an often-futile game of whack-a-mole, where single-minded focus on any one or two fixes leaves the highly adaptive carceral state otherwise intact.

The specific changes needed in penal policy to slash the number of people in jail and prison are no mystery. The real challenge is to create a political environment that is more receptive to such reforms and to make the far-reaching consequences of the carceral state into a leading political and public policy issue. To that end, many state and local groups have formed to battle various aspects of the carceral state, including felon disenfranchisement, supermax prisons, abuse of transgender prisoners, exorbitant telephone rates charged to inmates, shackling of pregnant women during labor, employment discrimination against former offenders, stop-and-frisk, and police brutality. Some of these organizations, such as the Chicago-based Voice of the Ex-Offender (VOTE), are led by prisoners and ex-offenders, who face enormous obstacles to political action.

WITH COMPREHENSIVE changes in penal policy and the culture of law enforcement, dramatic cuts in the incarceration rate and the carceral state are possible over the next few years. But high levels of violent and serious crime in poor communities—especially those that are predominantly African American—will continue to be a major social problem, though ending the war on drugs should reduce some violence.

Alleviating the root causes of poverty and inequality will take a long time. In the meantime, no compelling public safety concern justifies keeping so many people from poor communities locked up and so many others at the mercy of the prison beyond the prison. The demands of justice and human rights compel thoroughgoing change, whatever the cost-benefit analysis returns. **BR**

Copyright of Boston Review is the property of Boston Review and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.