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# Penal power in America: Forms, functions and foundations

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*Abstract:* In this article I discuss the exercise of penal power in contemporary America with a view to explaining its historical causes, its contemporary forms and functions, and its social foundations. I argue that the leading characteristic of American penalty today is not degradation, retribution, racial caste-making, or neoliberal discipline but instead the imposition of penal controls. The remainder of the article develops some hypotheses about the social and political roots of that distinctive form of punishment. Re-connecting penal controls with patterns of crime and violence, I highlight the deficits of social control and social capital that set America off from comparable nations and I trace the sources of these deficits to the structure and operation of certain American institutions as well as the limited capacities and patterned dispositions of the American state.

*Keywords:* penalty, political economy, criminal violence, social control, social deficits, state capacity, penal control, mass penal control.

How should we understand the extraordinary deployment of penal power that operates in the US today? That is the question I address in this article. I will approach it primarily as a research question, though it also has implications for criminal justice reform—a subject that is high on America’s political agenda at the present time.

Most of the existing research on this question is historical in nature, tracing the build-up of punishment from the 1970s to 2010. And most of it focuses on America’s very high rates of imprisonment or what has come to be known as ‘mass incarceration’. But here I want to address comparative as well as historical questions, and to consider other forms of penal power as well as incarceration. I want to ask why America is an international outlier on virtually every dimension of criminal punishment, and to reflect on what this might tell us about the relationship of penal power to other forms of social control and state action. The analysis I present is schematic,

but I hope that a provisional and somewhat provocative outline will be of interest nevertheless.

The comparative scholarship on penal policy is still at an early stage of development, but the most promising work associates cross-national differences in punishment with differences in levels of inequality (Wilkinson & Pickett 2009); differences in welfare state regimes (Cavadino & Dignan 2005); and differences in types of political economy or ‘varieties of capitalism’ (Lacey 2007; Lacey & Soskice 2017).<sup>1</sup>

It seems to me that these macro-social analyses point us in the right direction and I attempt to build on them in what follows. But they are primarily accounts of correlations and covariance, and each grows vague when it comes to specifying the mechanisms and processes that link the macro-structures they discuss with the phenomena of crime and punishment.<sup>2</sup> One of the contributions I make here is to say a little more about these linkages—some of which become more apparent when we attend to the details of historical research on processes of penal change and social and economic transitions. And whereas each of these analyses associates penal policies with the social-structural contexts in which they develop, I also focus on the problem-solving work that penal systems endeavour to do, and particularly their relationship to changing patterns of crime and violence.

The explanatory framework I develop seeks, *first*, to reconnect America’s extraordinary use of penal power with its distinctive levels of criminal violence and social problems, particularly those problems associated with social disorganisation and cumulative disadvantage, such as drug addiction, untreated mental illness, homelessness, domestic violence, family breakdown, suicide, low birth weight, infant mortality, child poverty, and so on; *second*, to trace how these patterns of crime and punishment—and more generally the social problems and state responses characteristic of the United States—have been structured over time by distinctive forms of government and political economy; and, *third*, to highlight the crucial role played by processes of informal social control—and by what I call ‘social control deficits’—in linking social and economic structures with the phenomena of crime and punishment. The aim of this framework is thus to connect penal policy with overarching structures of political economy but also with underlying patterns of violence, crime, and insecurity.

<sup>1</sup> Other important contributions include: Whitman (2003); Sutton (2004); Lappi-Seppälä (2008); Pratt & Ericksson (2013) and the essays in Reitz (2017).

<sup>2</sup> Recent work by Lacey & Soskice (2015; 2017) has begun to address this question of causal mechanisms with greater specificity.

## ESTABLISHING THE PHENOMENON: AMERICA'S DISTINCTIVE USE OF PENAL POWER

I begin by specifying the thing to be explained: America's distinctive deployment of penal power. There are at least six separate dimensions on which American punishment is 'exceptional' or, as I would prefer to say, an *outlier* when viewed in a comparative perspective.<sup>3</sup>

(i) *Imprisonment rates*: The per capita imprisonment rate of America as a whole is more than eight times higher than the Western European average (Walmsley 2016). And although there is great internal variation, the mildest US states have incarceration rates that are higher than the harshest of the Western European nations and higher than all but one of the Eastern European countries (Lappi-Seppälä 2008).

(ii) *Penal supervision*: America's use of correctional supervision is five times greater than the European average. It is also much more conditional and control-oriented. Probation and parole in the US today are not primarily forms of social assistance or social work: they are modes of constraint and control (Simon 19993; Rhine & Taxman 2017; Van Zyl Smit & Corda 2017).

(iii) *Monetary penalties*—criminal fines and reparations—are used much less frequently in the US than in other Western jurisdictions (O'Malley 2009). Fines are deployed against corporations and traffic violators, but very rarely against individual felons and even misdemeanors are mostly dealt with by jail and probation rather than fines (Kohler Hausmann 2014; 2105).<sup>4</sup> Moreover, when fines are used by criminal courts today, they are mostly 'add-on' sanctions, tagged onto a sentence of probation or jail—rather than stand-alone punishments.

(iv) *Extreme penalties*: Thirty-one American states and the federal government still have the death penalty on their penal codes; there are currently some 2,900 death-sentenced offenders on death row; and ten or twelve states still carry out executions with some regularity. By contrast, no European nation any longer retains the death penalty (Garland 2010). More importantly—and again, quite distinctively, all fifty states and the federal government now sentence offenders to imprisonment for terms of Life Without Possibility of Parole (LWOP)—another extreme sentence that

<sup>3</sup>Many analysts talk of the 'exceptional' nature of American crime and punishment—see the contributions to Reitz (2107)—but as I argue in Garland (2010; 2017) this is not the most helpful way to frame the issues. On the US as an 'Outlier Nation' see Karabel & Laurison (2011). I also avoid the common tendency to describe US penalty as comparatively 'punitive'—because it seems to me that this term begs a number of questions; including the question of how patterns of punishment relate to underlying patterns of crime. US penal practice is certainly degrading and harsh, perhaps distinctively so, but I will suggest that this is less the effect of a harsh culture (Whitman 2003) and more the outcome of a demand for maximum penal control in a context of minimalist public funding.

<sup>4</sup>In 2004 less than 1 per cent of federal felony cases resulted in a fine (O'Malley 2009).

is not permitted to nations that are signatories of the European Convention on Human Rights. Currently there are approximately 50,000 American prison inmates sentenced to spend the whole of their natural lives in custody with no prospect of early release (Nellis 2013).

(v) *Sentence lengths and time served in prison* are much longer in the US than elsewhere. Lappi-Seppälä (2008; 2017) estimates that sentences of American courts are, on average, between three and four times longer than in Western Europe. And the likelihood of a custodial sentence following a criminal conviction is very much higher in the US than elsewhere (Subramanian & Shames 2013).

(vi) Finally, there are *collateral consequences*—by which I mean the imposition of disqualifications, exclusions, banishment, deportation, and public criminal records as a consequence of a criminal conviction. These penal consequences are much more extensive and much more enduring in the US than elsewhere (Jacobs 2015; Demleitner 2017). There are thousands of such provisions, many of them imposed by local administrative laws and regulations (Travis 2002; Mauer & Chesney-Lind 2002).<sup>5</sup> And though recent scholarship and advocacy have begun to bring them to public attention (Manza & Uggen 2006; Alexander 2010; Lerman & Weaver 2014), most of these measures are low-visibility restrictions, largely unknown to the general public.

These then, are six dimensions along which American penalty currently<sup>6</sup> exhibits a distinctive, outlier status when compared with other Western nations.<sup>7</sup> Readers will notice that I do not include in this list the over-representation of African-Americans and people of colour in the correctional population—a feature of American penalty that is of great moral and political significance and that many regard as a defining characteristic of the system (Alexander 2010; Cole 1999; Loury 2008). I choose to omit this because it seems to me that this characteristic is neither distinctive to the US

<sup>5</sup> According to the American Bar Association's National Inventory, there are 44,500 statutes in the US that impose collateral consequences.

<sup>6</sup> An absence of reliable data prevents us from knowing whether the US was an outlier in these respects over the long term. I believe we should be skeptical of the standard claim that, before 1975, US incarceration rates used to be close to the Western European norm, running at about 160 per 100,000, since that number excludes the jail population and neglects to mention that for much of the 20th century Southern states used modes of punishment—convict leasing, chain gangs, and prison farms—that were not enumerated as imprisonment.

<sup>7</sup> There are other contrasts that go in the same direction. American prison regimes appear to be harsher than elsewhere in the developed world, with high levels of violence and frequent resort to force and isolation (Whitman 2003). Rehabilitation, education, and treatment seem to be more available in other nations than in the US (Subramanian & Shames 2013). And the emerging practice of imposing administrative costs and 'pay-to-stay' charges on offenders and their families is more extensive in the US than elsewhere (Gottschalk 2015). That American police kill civilians at a much higher rate than occurs elsewhere in the liberal democratic world is another mark of America's distinctive form of criminal justice (Karabel 2015).

nor exceptional in its extent. Other nations also exhibit massive ethnic and racial disparities in punishment. In Australia, for example, Aboriginal people are 2.5 per cent of the general population and 27 per cent of prison inmates.<sup>8</sup> Similarly, there is evidence that the incarceration rates for ethnic minorities in Canada<sup>9</sup> and in England and Wales<sup>10</sup>, exceed that of the US.<sup>11</sup> Moreover, the meaning of ‘over-representation’ in this context deserves more careful consideration since the most appropriate denominator is not the number of people in the general population—the figure conventionally used—but rather the number of offenders in each demographic group (Pease 1994).

### AMERICAN PENALTY AS A HISTORICAL INDIVIDUAL

There is, then, good reason to believe that the US currently deploys a quite distinctive apparatus of comparatively severe punishments; a penalty that is, as compared to other nations, an outlier on several important dimensions. How might we explain these characteristics?

One preliminary problem for this inquiry is that there is no such thing as ‘America’ when it comes to the deployment of penal power (Garland 2010; Zimring 2017). Criminal punishments are separately imposed by the fifty states, the federal government, and by thousands of local jurisdictions—and there is great variation across these different entities.

So how can one analyse the overall pattern? How can we talk sensibly about American penalty while acknowledging its internally differentiated character?

I suggest we deal with this issue by conceptualising contemporary American punishment as a ‘historical individual’ in the sense that Max Weber gave to the term. Weber defines a historical individual—modern capitalism, for example—as ‘a complex of elements associated in historical reality which we unite into a conceptual whole from the standpoint of their cultural significance’ (Weber 2002; 2011). Adopting Weber’s approach allows us to talk about American penalty as a single, culturally meaningful complex, thereby uniting for analytical purposes an entity that we acknowledge to be legally and geographically differentiated. In contemporary culture and politics, America’s penal system has become a meaningful topic of discussion and

<sup>8</sup> <http://copylinemagazine.com/2015/01/28/race-justice-news-racial-disparities-in-uk-and-australian-prisons-exceeds-those-in-u-s/>

<sup>9</sup> <http://www.sentencingproject.org/news/race-justice-news-native-americans-in-the-justice-system/>

<sup>10</sup> <https://www.theguardian.com/society/2010/oct/11/black-prison-population-increase-england>

<sup>11</sup> France does not permit ethnic or racial classification of prison inmates, but ethnographers report a massive over-representation in prison of migrants and citizens of North African descent (Fassin 2016).

debate—its existence as a significant cultural object—and it falls to social scientists to analyse that object and explain its conditions of existence.

Having invoked the spirit of Max Weber, I want also to recall some of the methodological lessons that he taught: lessons that are especially pertinent to our topic but are often forgotten by commentators.

*First:* Distinguish originating causes from subsequent functioning. Explanations of historical emergence are not the same as explanations of contemporary reproduction. The meaning and effects of any practice or institution tend to change over time, so we should resist the temptation to project today's understandings back onto the past. That mass incarceration has come to operate as a mode of racial stratification (Western 2006; Alexander 2010) or of governing neoliberal insecurity (Wacquant 2009a) does not mean that it was developed with these purposes in mind.

Policy changes regularly generate consequences that were not originally anticipated. If we want to assert, for example, that the racial disparities associated with the War on Drugs were anticipated and intended by the architects of that policy, we will need to adduce the relevant historical evidence—one cannot simply point to the effects and infer the intention.

We should also observe what happens when unanticipated consequences *do* become apparent. Consequences that are unintended at Time 1 may become apparent at Time 2; at which point a choice to continue the practice is, in effect, a choice to embrace these consequences. So if an inquiry into the emergence of mass incarceration produces a story of adverse unintended consequences, we should proceed to ask 'why was this phenomenon tolerated once these unintended effects became apparent?'

*Second:* Avoid retrospective projection. There was no plan to build mass incarceration; no campaign to mount a decades-long march through the state and federal legislatures.<sup>12</sup> Multiple, diverse processes, dispersed in time and space, produced the differentiated assemblage of penal practices and institutions that currently exists. The supposed unity and coherence of 'mass incarceration' is largely a function of having given it a collective name and viewing it as a single problem.

*Third:* Specify mechanisms! A full explanation must describe how empirically identifiable actors and actions gave rise to causal processes and produced patterned outcomes. If our claim is that a particular level of inequality, or welfare state regime, or variety of capitalism gives rise to a specific set of criminal justice outcomes, we have to capture that process at the level of individual action and organisational process.

<sup>12</sup>It is true that there were frequent campaigns to persuade state legislatures across the nation to adopt specific policies—e.g. victim rights, or Three Strikes laws—and organisations such as the American Legislative Exchange Counsel played a key role in this. My point is that there was no overall campaign linking all the reforms of the thirty-year, nationwide, transformation that produced the present.

*Fourth:* Interpretive accounts must be adequate to the level of meaning. Analyses of penal change or of penal functioning should provide an account of the meanings that key actors attached to their actions, bearing in mind that the same event or undertaking may have different meanings to the various actors involved. An analysis that claims that mass incarceration is a functional mode of governing neoliberal insecurity (Wacquant 2009), or of recreating racial subordination (Alexander 2010), must show the forms of meaningful action that produce these outcomes and should account for any discrepancy between what was meant, what was done, and what outcomes eventuated.

*Fifth:* Distinguish functional uses from dysfunctional effects. An institution that is useful for some groups may be damaging for others; and practices producing net benefits in the short term may produce net costs at a later point (cf. Merton 1996). Functional explanations of mass incarceration (e.g. Wacquant 2009a) should specify how that institution does and does not serve the interests of definite social groups over specified time periods and provide supporting evidence for these claims.

*Sixth:* Adopt a dispassionate, value-neutral approach. The question of punishment is highly salient in American politics today and its value-laden character makes it all the more difficult to avoid biased premises and partisan interpretations. Committed scholarship that deals with politically charged subjects may be inclined to overlook inconvenient facts or draw back from unwelcome conclusions, thereby failing to reflect the moral and political complexity of the phenomenon in question.

With these considerations in mind, we can embark on our analysis, beginning with a descriptive account and then proceeding to explanation.

## **THE NEW IMPERATIVE: PENAL CONTROL**

In setting out our descriptive account, a strategic place to start is with a focus on differences and commonalities. As I noted above, American penalty is a complex assemblage of laws, policies, and practices that has emerged, piecemeal, over the last forty years. Far from being the realisation of some national plan, it is the cumulative result of multiple contributing causes; operating at the local, state, and federal levels; prompted by different events and considerations; involving diverse political actors and coalitions; and enacted in thousands of laws, policies, and enforcement practices.<sup>13</sup> But despite this multiplicity and variation, it is a remarkable fact that for forty consecutive years, all fifty states and the federal government have moved more or less

<sup>13</sup>I draw here on the ‘new generation’ sociological scholarship that focuses on state-level penal history and emphasises this variation and contingency: for an excellent overview, see Campbell & Schoenfeld (2013).



continuously in the same expansionist direction (Zimring 2010; Wagner 2014). And, even more remarkably, I would suggest, there is a common thread that runs throughout this vast range of historical moments, political contexts, and penal laws—a fundamental principle that links together these diverse reforms and provides an operational logic that underpins the whole penal apparatus in its day-to-day routines. This common principle is not something vague and generic such as ‘law and order’, ‘harsh justice’, or ‘tough on crime’ but instead a specific form of penal power that I will call ‘penal control.’

Criminal punishment comes in several distinct forms, as the ideal type classification set out in Table 1 illustrates.<sup>14</sup> Penal afflictions, penal levies, penal controls, and penal assistance are distinct forms of punishment, each of them commonly found in penal history and still in widespread use today.<sup>15</sup> What is striking is that, in recent decades, American criminal justice has come to rely overwhelmingly on only one of them—punishment as penal control—in contrast to the contemporary penal systems of other Western nations where penal levies and penal assistance are much more prominent.

**Table 1:** Forms of punishment.

Penal Afflictions	Capital punishments; corporal punishments; maiming; public shaming; stigmatising, etc.
Penal Levies	Fines; deductions; prelevements; restitution; compensation; damages; forfeiture; community service; public works, etc.
Penal Controls	Imprisonment; confinement; supervision; exclusion; banishment; incapacitation; disqualification, etc.
Penal Assistance	Correctional treatment; restorative work; mediation; drug therapy; remedial education; counselling; job training, etc.

Penal control is, I believe, the fundamental principle and basic imperative that runs throughout this whole historical period and across this vast institutional landscape. (The degrading, cheap-and-mean aspects of American penal institutions—as described by Whitman (2003) or Lynch (2009)—are, I believe, a secondary characteristic: the result of an under-funded penal state tasked by a tax-averse, anti-government electorate with imposing control on the cheap.) If we review the list of distinctive features I set out above, no fewer than five of them describe how American

<sup>14</sup> Specific penal sanctions may combine one or more of these modal characteristics: e.g. a criminal record or a branding can function as an afflictive stigma as well as an incapacitating control; a probation or custodial order may provide assistance as well as control, and so on.

<sup>15</sup> Afflictive forms of punishment have declined in the modern Western world, though they were a core feature of pre-modern punishment and are still common in many parts of the world (Geltner 2014; Garland 2010).

criminal justice imposes more extensive forms of control (extreme penalties, frequency and length of prison confinement, frequency and length of correctional supervision, extent and duration of collateral consequences, etc) while the sixth concerns America's reluctance to use monetary penalties—penal levies that, whatever their other advantages, and however much they are utilised elsewhere, impose little in the way of penal control.<sup>16</sup>

The leading characteristic of the American penal landscape today is not harshness (Whitman 2003), or racism (Alexander 2010), or neoliberalism (Wacquant 2009a). Its basic imperative is the imposition of penal control—an imperative that is now embodied in penal codes, in the culture of enforcement, and in the legal provisions (such as mandatory penalties and 'truth-in-sentencing' legislation) that limit the discretion of penal actors and oblige them to impose effective and long-lasting penal controls on criminal offenders.<sup>17</sup> And if we focus on this fundamental principle we will be able to glimpse some important affinities (another Weberian concept) that link America's distinctive penalty with two distinctive features of the American state and American society—a set of linkages that will, in turn, point us to the underlying causal processes driving the recent development of American penalty.

The first of these features is the weakness of social organisation, social integration, and informal social control that affects so many of America's cities and above all its poorest communities of colour.<sup>18</sup> These structural weaknesses—I will term them 'social deficits'—have been produced over time by the operation of relatively untrammelled market forces; overlaid by the continuing legacies of racial division, disadvantage, and segregation (Kerner Commission 1968/2016; Krivo *et al.* 2009; Omi & Winant 2014); and reproduced by economic and social disinvestment—much of

<sup>16</sup>The death penalty is typically enacted and imposed in America today as an expressive, retributive gesture and a symbol of tough-on-crime politics (Garland 2010). But it delivers the ultimate form of penal control—even when, as is usually the case, death sentences are commuted to sentences of life imprisonment without parole. Collateral consequences are mostly forms of exclusion, restriction, and incapacitation. Disenfranchisement is an important exception, but it dates from an earlier time and the current trend is for these political disabilities to be repealed. Welfare benefit ineligibilities are a mixed case: exclusion from public housing is framed as public safety for other residents, but there are elements of cost-saving punishment and deterrence here too. The fact that these collateral consequences are not well publicised—they are sometimes described as 'invisible punishments' (Travis 2002)—suggests that deterrence is not their main aim.

<sup>17</sup>Public suspicion and distrust extend beyond offenders to include the soft-on-crime officials who might turn them loose or fail to lock them up. As I note below, the sentencing revolution was as much about controlling judges and parole boards as it was about controlling criminals.

<sup>18</sup>Social deficits in the US are by no means restricted to urban communities and minority groups. Most people below the poverty line live in rural areas, and there are more poor whites than blacks or Hispanics. But many poor blacks live in segregated urban neighbourhoods with high concentrations of poverty and disadvantage—a fact that multiplies the detrimental effects of poverty and generates higher levels of disorder and disorganisation (Denton & Massey 1998).

which was a consequence of government policies (Wilson 2011). Social deficits are the result of processes of cultural adaptation, accommodation, and coping that link structural circumstances with collective behaviours and give rise, over time, to high rates of criminal violence, social problems, and other forms of social dislocation (Wilson 1997; 2011; 2012; Sampson 2012; Sharkey 2013).

These structural conditions are also associated with low levels of trust—which also have consequences for crime and punishment. Distrust of others and distrust of government are dimensions of America's low levels of solidarity that have been shown to be positively associated with high levels of violence (LaFree 1998; Roth 2012; for comparative evidence on levels of trust and crime rates, see Karstedt & LaFree 2006). And it seems likely that America's emphasis on penal control expresses an underlying distrust of others: above all, anyone convicted of a criminal offence and any criminal justice professional who might release dangerous offenders rather than protect the public.

The second characteristic associated with the extensive use of penal control is the comparatively limited control capacities and dispositions of the American state. The American state has long been distinctive in its relative emphasis on market-freedoms rather than social protections—an orientation that distinguishes it from comparable states elsewhere and has had the effect of limiting its capacity (and its disposition) to deal with problems of social disorganisation other than by penal means.<sup>19</sup> When American state actors—at federal, state, or local level—decide to address a specific social problem (such as drug abuse, criminal violence, homelessness, or mental illness) they have fewer positive, effective means at their disposal than do nations with more developed and more extensive social states.<sup>20</sup> The result is that American criminal justice is frequently charged with tasks—such as care and control of the mentally ill, the drug addicted, and the homeless—that other nations allocate to social service agencies. And on those occasions where non-penal approaches have been tried—e.g. public health approaches to drug abuse in New York in the early 1960s or social welfare approaches to crime control during the federal 'war on poverty'—these initiatives have foundered for lack of experience, support, and resources (Fortner 2015; Kohler-Hausmann 2015; Hinton 2016). Before long, these more positive efforts were judged to have been ill-conceived failures and political opinion quickly reverted to the default of a penal approach.

<sup>19</sup> America's welfare state regime can be classified as a market-protecting liberal regime and is thus grouped together with other liberal regimes such as those of Australia, Canada and New Zealand. But within that classification, the US is, on most measures, at the extreme end of the distribution. On the distinctive characteristics of the US state and its penal power, see Garland (2010; 2013).

<sup>20</sup> This is not to deny that there is a plethora of local programmes and initiatives in most American jurisdictions. The point is that the comparative weakness of the American welfare state's social provision for lower income groups ensures government exerts less positive, pro-social influence over individuals, families, and communities.

## **Sentencing reform and the build-up of penal control**

If we review the historical processes that produced today's penal apparatus, we observe control issues continually taking prominence and shaping the direction of penal change.<sup>21</sup> Of course the historical record is by no means univocal, and there is considerable disagreement about why American punishments became so much more severe after 1975. But there is very little disagreement about *how* this happened, or about the *proximate* causes that brought the current system into existence (Garland 2013). These proximate causes were: (i) changes in sentencing law and practice; (ii) changes in back-end 'resentencing'—i.e. parole, remission, and pardons; and (iii) changes in prosecution practice (Tonry 2016; Pfaff 2017).

The following pages describe how these legal changes emerged and how, over time and in a variety of ways, they expressed an overweening concern with public safety and a singular commitment to penal control as the appropriate response.

### **PHASE 1: SENTENCING REFORM**

The long-term upwards movement of America's prison and jail populations began in the 1970s with a Sentencing Reform movement that, in retrospect, can be seen as the first phase in a thirty-year, multi-phase sentencing law revolution. Prior to 1975, most states (and the federal system) adopted an 'indeterminate sentencing' model, the chief aim of which was to individualise the treatment of offenders, rehabilitating where possible and incapacitating where necessary (Reitz 2012). The sentence imposed by the court was a provisional, indeterminate one stipulating an open-ended term of custody (e.g. 'one year to life') to be served in a state penitentiary (or a 'correctional institution' as prisons came to be known). A parole board would later recalibrate the court's sentence in light of the offender's risk profile and response to treatment—with the consequence that most offenders were released early after serving only a fraction of their sentences. 'Good time' laws allowed additional reductions as rewards for compliant behavior (Jacobs 1992).

These arrangements eventually attracted widespread criticism. Indeterminate sentencing robbed punishments of certainty and reduced their deterrent value; discretionary release opened the way to arbitrariness; and 'individuation' was a recipe

<sup>21</sup>That increased penal control is the recurring outcome of so many different political processes in so many different settings strongly suggests that it is a functional response to a generalised problem. For the classic version of this argument, see Karl Polanyi's account of the re-assertion of social protections in the laissez-faire era (Polanyi 1944).

for unfairness and inequality. When research suggested that correctional treatment did little to reduce recidivism, the writing was on the wall (Garland 2001; 2016).

The sentencing law reforms passed between 1975 and 1984 were a reaction to these problems. Their chief aim was to establish standards that would constrain discretion, minimise disparities, and subject sentencing powers to legal regulation. The new ideal was the ‘determinate’ sentences, proportionate to the offence, not tailored to the offender. Many states (and the federal government) abolished parole, enacted sentencing guidelines, and established sentencing commissions to oversee their new systems.

The legislative activity of the 1970s and early 1980s transformed the politics of sentencing. Instead of being administered by experts behind the scenes, questions of sentencing now became political questions, discussed in newspaper editorials and debated on the floors of legislative chambers. To the on-looking public, the revelation that most felons were released much earlier than the sentence length imposed by the court appeared less as a sensible way of motivating rehabilitation and more as a scandalous leniency. In a political climate increasingly dominated by ‘law and order’, the liberal aims that initiated the reform movement gave way to more conservative goals. Tough-on-crime conservatives joined liberals in demanding an end to sentencing discretion, not because they worried about discrimination but because they distrusted criminal justice personnel and wanted to prevent them jeopardising public safety by releasing dangerous felons. The legislative drive, from this point onwards, was not to enhance sentencing equity but instead to mandate penalties that would protect the public. Such was the political concern to guarantee effective penal control that it soon overcame the judicial opposition to mandatory sentencing and eventually dissolved the discretionary powers of penal officials.

American sentencing turned on its axis. By the 1960s, indeterminate sentencing had been more firmly established in the US than anywhere else (Pifferi 2016) and American courts imposed very lengthy sentences that were altogether unknown in other nations—the idea being to make a deterrent show of harshness, safe in the knowledge that the court’s sentence would later be reduced by parole and good time. Thirty years later, very lengthy sentences were still being imposed, but now they meant what they said. As Tonry (2016) observes, the old practice of announcing high—but effectively meaningless—maximum sentences helps explain why US prison terms are now so much longer than those imposed elsewhere.

## PHASE 2: THE WAR ON DRUGS

The impact of the ‘War on Drugs’ is one of the most discussed and least understood issues in current debates about the build-up of American penalty. The phrase itself (which dates from remarks by President Nixon in the early 1970s—see Hinton (2016)) refers to the nationwide movement to criminalise the possession and sale of banned substances, imposing harsh, often mandatory, penalties—such as New York State’s Rockefeller Drug Law of 1973 or the federal Anti-Drug Abuse laws of 1984, 1986, and 1988—backed up by vigorous enforcement at the local level.

Many commentators regard this wave of legislation as the primary cause of mass incarceration and its racial consequences, pointing to the fact that a majority of federal prisoners are serving time for drug offences, and to the marked racial disparities that characterise drug law enforcement (Alexander 2010; Hinton 2016). But while critics are right to deplore the drug war’s harsh racial effects it is important to observe that the policy aims originally motivating these efforts were rather more complex and, for my purposes, rather more revealing.

The Rockefeller Drug Laws, to take an important example, emerged following a series of failed efforts to deal with the crime and disorder generated by widespread heroin use in neighbourhoods like Harlem in New York City (Fortner 2015; Kohler-Hausmann 2015). In response to community demands for action to alleviate these problems, New York authorities initially put in place a public health, penal–welfare approach, providing non-penal treatment to addicts and reserving criminal penalties for ‘pushers’. When these efforts—which were under-resourced and poorly implemented—did little to reduce the problem, Governor Nelson Rockefeller shifted to a markedly penal approach, enacting harsh mandatory penalties for possession as well as for sale. Rockefeller’s decision was no doubt a political one, shaped by his presidential ambitions and his wish to be seen as a ‘law and order’ conservative. But it is striking that his tough approach attracted vocal support from African-American community leaders (Fortner 2015)—just as the Federal Anti-Drug Abuse Acts of the mid-1980s would garner strong support from the Congressional Black Caucus (Forman f.c.). Whatever its subsequent history, the War on Drugs was initially viewed by some of its proponents as a necessary, good faith effort to relieve poor urban communities of the blight of street drugs and the neighbourhood crime and violence associated with them.<sup>22</sup>

<sup>22</sup>Miller (2016) and Forman (f.c.) point out that community activists generally called for an ‘all of the above’ approach to the drug problems in their neighbourhoods—favouring social and public health remedies as well as law enforcement ones. But when the former failed to materialise, or to appear effective, many lent their support to increased policing and penal control.

As a crime-control tactic, this focus on drug offences offered several advantages. To prosecute crimes of violence, the authorities must typically rely on the willingness of witnesses to come forward and a showing of criminal intent on the part of the accused—both of which can be hard to obtain. The laws prohibiting drug possession and sale created offences that were easier to prove and that could be proactively enforced by police stops and ‘buy and bust’ methods.<sup>23</sup> They thereby provided a new and potentially more effective means of apprehending and convicting violent offenders, gang leaders, organised criminals, and ‘drug czars’—and their penalty scales were calibrated accordingly. This was why, for at least some of its supporters—above all for prosecutors and police—the War on Drugs was a proxy war, a set of crime-control measures directed not at recreational drug users but at violent criminals (Stuntz 2013; Lynch 2016).

An additional motivation—perhaps the most significant one in the long term—derived from the fact that a focus on drug control provided the federal government with a plausible basis for becoming more directly involved in crime control at a time when crime was becoming a problem of urgent concern to large numbers of voters. Historically, American criminal justice had been a matter for state and local government and the US Constitution placed strict limits on the extent to which federal authorities could involve themselves in the business of crime-control. But with crime growing in political salience, national politicians looked for ways to involve themselves more actively and thereby reap some of the political rewards of responding to public concerns (Gottschalk 2006; Stuntz 2013, Hinton 2016). This involvement initially took the form of establishing federal agencies such as the Law Enforcement Assistance Agency to coordinate or fund local law enforcement. But the criminalisation of drugs opened up a new and more direct form of federal involvement since illegal drugs could be deemed a form of ‘interstate commerce’—a domain over which the federal government did have jurisdiction. Waging a war on drugs was, for the federal government, a means of circumventing constitutional limitations, expanding its law enforcement apparatus (Hinton 2016), and engaging the politics of law and order at the national level.

From the 1980s on, Congress passed anti-drug abuse laws and federal prosecutors, federal courts, and federal penitentiaries began to enforce them with increasing vigour. But ultimately the War on Drugs would mostly be fought by local police and county prosecutors, so federal authorities also took steps to incentivise action at this level, providing generous subsidies for local drug-law enforcement and enacting forfeiture statutes that allowed local law enforcement to retain the proceeds of drug crime

<sup>23</sup>See Dubber (2005) on possession offences as a means of relaxing evidentiary burdens for the prosecution.

investigations.<sup>24</sup> Over time, these incentives would produce a massive enforcement over-reach. A drug war supposedly aimed at serious violent offenders would eventually sweep up masses of petty offenders and low-level street dealers and sentence them to prison terms that bore little relation to their culpability or to any threat they might pose to the public (Tonry 2016; Hinton 2016; Lynch 2016).

### **PHASE 3: THE WAR ON CRIME**

The most notorious phase of recent sentencing history is the ‘law and order’ period that ran from the mid-1980s to the mid-1990s, with the US Congress encouraging, subsidising, and emulating the states in the pursuit of ‘tough on crime’ policies (Garland 2001). These policies aimed to ensure public safety, express public anger, and satisfy victims by increasing the certainty and severity of penalties. The lesson of Willie Horton in the 1988 presidential race (Anderson 1995) had been well learned: henceforth there were to be no dangerous offenders let loose on the public and no politicians seen as soft on crime.

To secure these goals, legislators took near-total charge of punishment, stipulating in advance the precise penalty to be imposed; depriving judges, parole boards, and prison officials of sentencing discretion; and empowering hard-charging prosecutors who could be relied upon to be aggressive in locking-up ‘bad guys’ (Lynch 2016). In a flurry of legislative activity, states across the nation passed mandatory minimum sentences (targeting drug offences, sex crime, and gun crime); Three-Strikes laws (which could send third-time felons to prison for life); Truth-in-Sentencing laws (which gave the states federal subsidies for prisons in return for guarantees that state prisoners would not be given early release); and Life Without Parole sentences (Tonry 2016). Tight legal controls were thus imposed upon sentencers and penal officials who were mandated to impose extensive penal controls on offenders and inmates.

In this context, the working practices of probation and parole offices were transformed, with a new emphasis on risk management, revocation, and the re-imprisonment of supervisees who failed to meet the conditions of their licences.<sup>25</sup> By 2000, 34 per cent of all prison admissions resulted from parole revocations rather than new crimes. In some states the figure was higher than 50 per cent. Correctional

<sup>24</sup>The 1984 Comprehensive Crime Control Act permitted local law enforcement to seize as much as 90 per cent of cash and property from accused drug dealers (Hinton 2016: 312)

<sup>25</sup>As Simon (1993) points out in an analysis that connects penal policy with the wider political economy, the difficulty of securing employment or housing for ex-felons in the wake of deindustrialisation and reduced social support created insurmountable problems for a parole system dedicated to assistance and resettlement.



supervision had transformed itself from a form of social assistance to a mode of penal control.

Meanwhile, prosecutors became the most powerful actors in the system, and many used the leverage provided by mandatory sentences and sentence enhancements to pile on charges, obtain guilty pleas, and elicit information about other offenders and offences (Lynch 2016; Pfaff 2017). In the 1970s, approximately 66 per cent of cases resulted in a plea bargain. By the 1990s the figure was more than 95 per cent (Wright 2012). Without this mass production of guilty pleas—and the effective end of due process and trial by jury that it entailed—mass incarceration would not be sustainable.

In this recalibrated system, the cumulative effect of prior convictions took on a new meaning. Because a subsequent offence could result in a mandatory prison sentence that was two or three times longer than the sentence for the first offence, prior convictions operated as multipliers. And given the number of people who pass through the system, and their high rates of recidivism, criminal justice became a self-sustaining growth machine. The system also exhibited the sociological law of cumulative disadvantage—groups such as young black men who received a disproportionate level of criminal justice early in their lives would subsequently receive enhanced sentences and be disproportionately subject to imprisonment.

The eventual impact of these laws—which would continue to authorise draconian sentences long after crime and violence rates steeply declined<sup>26</sup>—was to double the size of an already swollen prison population and project this population far into the future. As for individual offenders, the new sentencing norms meant that vast numbers of people were sentenced to terms of confinement that were measured not in months and years but in ‘decades and lifetimes’ (Tonry 2016).

Instead of adjudicating the blame-worthiness of individuals and punishing them accordingly, the new system was designed to sequester and incapacitate masses of offenders for lengthy periods of time. Over time, the principle of proportionality disappeared—particularly in respect of drug offences (now punished as severely as violent crime) and criminal history enhancements (which increased an offender’s sentence by multiples of two, three, or even four). So did any concern with parsimony or the liberty interests of convicted offenders (Tonry 2016). America’s penal system became profoundly illiberal and unequal. Convicted offenders came to be seen as too risky to circulate in public and altogether undeserving of 8th Amendment protections. America’s system of criminal justice became a system of criminal control (Garland 2001).

<sup>26</sup> The post-1990 pattern of crime rate declines coinciding with prison rate increases is often presented as evidence that the two are unconnected. Such an interpretation ignores the effect of time lags and stored-up consequences.

Today, after two decades of declining rates of crime and violence, it is difficult to appreciate the climate of opinion that produced draconian measures such as the Violent Crime Control and Law Enforcement Act of 1994—and politicians associated with these laws are now being made to pay a price. But it is important to recall, along with all the populism, racism, and opportunism of political officials, that homicide levels and public concern about violent crime were, in these years, at an all-time high (Enns 2016).<sup>27</sup> Even a system as illiberal, unequal, and oppressively racialised as American criminal justice was not entirely devoid of genuine public purpose and community-safety motivations as it emerged over time. Over the forty years during which American sentencing was caught up in an ongoing revolution, a multiplicity of separate projects, plans, and purposes unfolded. In the process, the conservative politics of the war on crime came to displace the liberal politics of sentencing reform and to overlay the community politics of public safety, with the result that an imperative of penal control came to dominate the entire system. The criminal justice system that exists today is the result of complex interactions rather than the realisation of an overall plan or a single set of motivations. But, for all this dispersion and conflict, an emergent principle has continually been asserted and supported: the imperative of penal control.

### **SOCIAL AND POLITICAL CAUSES**

These shifts in law, policy, and practice—each of them increasing the extent, the intensity, and the certainty of penal control—were the proximate causes that together created the penal system that exists today. But what were the broader forces that moved law and policy in this direction and that created a penal system that is much more extreme than that in any comparable nation? And why did this diversity of causal processes give rise to the monotonous demand for more penal control? This, it seems to me, must be a distinctively American story. In the years after 1980, other Western nations also experienced increased crime, disruptive social change, economic insecurity, and neoliberal politics. Many became more punitive, more restrictive, decreasing welfare and increasing prison. But none matched the extent or intensity of American penalty (Walmsley 2016; Lappi-Seppälä 2008; Tonry 2009). So why has the US been more prone to the use of penal control than has any other nation in the developed world? In the remainder of this article, I discuss four theories of historical change—each of which offers a different causal narrative for understanding American

<sup>27</sup> As Kleiman (2016) observes, in 1994, the nation's homicide figures topped 23,000 for the fourth year in a row, and no one could know that this number was about to decline and to keep on decreasing for the next twenty years. Today the annual number of homicides is around 14,000.

penalty and the forces that brought it about.<sup>28</sup> Building on these accounts – and developing significant points of disagreement—I conclude by sketching an alternative framework for the study of American penalty.

### **(i) Mass incarceration as racial subordination**

The most provocative and widely read account of contemporary American punishment is *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) by legal scholar and civil rights activist Michelle Alexander. Alexander argues that mass incarceration, together with the multiple disqualifications imposed on felons, amounts to a new racial caste system that consigns poor black men to a second-class citizenship, barring them from government housing, welfare benefits, and political participation, permitting their discriminatory treatment in employment, and ensuring that masses of them will cycle in and out of prison.

According to Alexander, this system emerged in the wake of the civil rights movement as a means of restoring blacks to a subordinate social status similar to the one that operated in the Jim Crow South. Because explicit race controls were outlawed by civil rights reforms and are expressly prohibited in today's political culture, the New Jim Crow is premised not on race but on a supposedly 'colour-blind' criminality. But Alexander insists that contemporary law enforcement and, above all, the 'War on Drugs' are thoroughly racialised, operating in ways that target poor, minority youth and ensuring that mass incarceration and its disabilities exclude millions of African Americans from participation in American democracy.

*The New Jim Crow* is a work of real political importance. More than any other intervention, it can be credited with putting the problem of mass incarceration on the American political agenda, and (together with Black Lives Matter) initiating a growing social movement that now presses for criminal justice reform. And Alexander is clearly right to deplore the racial disparities generated by the War on Drugs and accurate in describing the overall effect of disfranchisement, disqualification, and discrimination as a form of second-class citizenship for former felons, one third of whom are black. In light of America's history, a diminished citizenship status disproportionately occupied by blacks inevitably takes on the appearance of a racial caste system.

However, as others (Forman 2012) have pointed out, around 40 per cent of prison inmates are white, which means that millions of white people are also condemned to

<sup>28</sup> Despite differing emphases, these four accounts overlap at many points, with each pointing to some or all of the following: a rightward shift in the American electorate, a backlash against civil rights, rising public concern about street crime and disorder, the fusion of crime and race issues forged by the Republican Party's southern strategy, the rise of 'law-and-order' politics, and the mobilisation of cross-party support for tough-on-crime measures.

this second-class citizenship. Indeed, if federal and state authorities were to release all of their black prison inmates tomorrow, the US would still have the largest prison population and rate of incarceration in the world—which means that a racial explanation leaves much of America’s distinctive penalty unexplained. American criminal justice is undoubtedly racially skewed in its operations and effects but not to the extent that Alexander claims, and not primarily for the reasons that she alleges.

Alexander presents her indictment with the forensic skill of a first-class litigator, so it is no surprise that she cites the War on Drugs as her leading example of racialised punishment. As many commentators have observed, survey evidence suggests that blacks and whites consume (and perhaps sell) illicit drugs at about the same rates, but law enforcement focuses much more on blacks; and people of colour are disproportionately imprisoned for drug offences. Little wonder then, that the War on Drugs is Exhibit A in Alexander’s critique.

But the problem with this analysis is that the unequal racial justice that occurs in respect of drugs is not so evident in regard to other offences. When it comes to violent crime, for example, blacks (that is to say poor black males) have a disproportionately high level of involvement in offending—and their rates of punishment are not significantly different from their rates of crime (FBI 2013; Western 2006). And this matters, because most prisoners in America’s prisons are serving time not for drug offences but for violent crimes.<sup>29</sup>

Nor was the War on Drugs unrelated to the problem of criminal violence. Recall that in the 1970s and 1980s, communities of colour and their political representatives were deeply concerned about drug-related crime and violence in their neighbourhoods, which is why they called for tough punishments and supported legislation such as the Rockefeller Drug laws of 1973 and the Federal Anti-Drug Abuse Acts of 1986 and 1988 (Fortner 2015; Forman 2012). As we have seen, the War on Drugs was, at least in part, a ‘proxy war’ strategy for apprehending and convicting violent offenders by other means. Its origins—and much of its original support—lay not in an attempt to suppress recreational drug use but in an effort to address the associated problem of violent street crime. Even the notoriously ‘racist’ sentencing disparity between crack cocaine possession and powder cocaine possession can be understood (though not justified) in these terms. ‘Crack’ is cocaine packaged for the poor. And when it took hold in poor communities it generated an enormous amount of street crime and violence. In contrast, the consumption of powder cocaine by Wall Street reprobates and affluent drug users generated very little visible violent crime. Crack was more severely

<sup>29</sup> 52 per cent of state prisoners are currently incarcerated for crimes of violence. Only in the federal prison system—which houses about 10 per cent of American prisoners—do drug offenders form a majority of those incarcerated (BJS 2013).

punished not because it was associated with blacks but because—rightly or wrongly—it was perceived to be associated with waves of crime and violence.

Contra *The New Jim Crow*, the creation of a racial caste can best be understood not as deliberate policy of racial subordination but instead as the unintended but foreseeable result of overreaching law enforcement operating in a class- and racially-stratified environment—a result that was long tolerated because there were no organised political forces advocating for poor black men (Stuntz 2001) and, it must be said, because the lives of these individuals are not highly valued by policymakers, politicians, and the American public. It was the established hierarchies of race and class—together with the differential levels of violence and worklessness that these hierarchies fostered—that ensured that penal power concentrated its effects on poor communities of colour: a story of class overlaid by race, not of race alone. The fact that, in contrast to black high-school dropouts, college-educated blacks are less likely to be imprisoned today than they were in the 1970s (Western 2006) provides further support for this interpretation.

The fact that the racial and class effects of penal policy have been tolerated and reproduced long after they came to light tells us a great deal about America's power structure and the value placed on the lives and liberties of poor black people. Penal controls are always imposed by one group on another, and in 1990s America, the crime fears of suburbanites and the white middle class counted for much more than the lives of young black men and the welfare of their families and communities. Only with the emergence of Black Lives Matter in 2013 has this situation been publicly contested in an organised way.

A final point: segregated areas of concentrated poverty were the worst affected by drugs, crime, and violence—meaning that they were the locus of victimisation and calls for action but also that they were communities where many violent offenders lived and which attracted tough enforcement, stop and frisk, buy and bust, etc. This, in turn, produced a disproportionate number of black arrestees and convicted, imprisoned offenders. These racial disparities thus made their way into criminal justice (where they were subsequently amplified by the multiplier effects of 'prior convictions') because of concerns about crime and its control, not by dint of racism as such. And this is important politically as well as analytically, since it points to the need to address the structural racism of economic and social organisation rather than assume that the problem is primarily one of discrimination by police and penal officials. Established hierarchies, social divisions, power structures, and biases will shape how any social policy is implemented—even when the policy is colour-blind, race-neutral, or race-sensitive. But the racial disparities that are produced by law enforcement and criminal justice are not the foundation of the problem. These processes build on and amplify racially disparate patterns of criminal involvement and criminal vulnerability—

disparate patterns that are a product of structures of economic and social exclusion and of intergenerational transmission of cumulative disadvantage.

## **(ii) American penalty as neoliberal governance**

Sociologist Loïc Wacquant argues a different but equally provocative thesis in his book, *Punishing the Poor: the Neoliberal Government of Social Insecurity* (2009a).<sup>30</sup> Wacquant's thesis is that America's expanded penal system is a means of reinforcing America's increasingly precarious labour market and controlling the disruptive social fallout of the austerity and insecurity now faced by working people and, above all, by poor, unskilled, black males.

According to Wacquant, prison growth is an unspoken but strategically integral element of the neoliberal policies that have dominated US politics since the late 1970s. On this account, America's prison system expanded to contain a surplus population thrown out of work by deindustrialisation and deprived of social support by the roll-back of the Keynesian welfare state. In this socioeconomic context, the threat of imprisonment operates—alongside scaled-back and increasingly conditional welfare benefits—as a means of pressurising individuals to accept low-wage work. Like the Poor Law and the workhouse before it, today's system of imprisonment operates as a 'less eligible' adjunct to the labour market. Its message is: accept the terms of employment or become subject to welfare discipline and penal control (see also Soss *et al.* 2011). Wacquant argues that the build-up of the penal system is an integral part of neoliberal strategy and not a pragmatic response to crime rates or criminal victimisation. There is, he insists, a 'crime-incarceration disconnect' (Wacquant 2009b: 144). According to Wacquant, 'the level of incarceration in a given society bears no relation to its crime rate' (2009b: 158)—and any attempt to link the two is mere ideology.<sup>31</sup>

Wacquant is right to insist that labour-market insecurity, intensified by segregation and concentrated poverty, provides a structural context that helps explain the massive imprisonment of poor, black, working-age males. (These same structures also determine the educational careers, health outcomes, family formation, alcohol and drug use, and rates of violence of the groups in question.) And he is right to insist that neoliberal economic and social policies, including the 'welfare reforms' of the 1990s, have served to reinforce rather than alleviate these effects. But on closer inspection, it seems clear that America's welfare state has changed rather less than Wacquant claims: as Shannon (2013) points out, working-age, able-bodied males never had a 'social

<sup>30</sup> See also, *Prisons of Poverty* (Wacquant 2009b) which contains many of the same arguments.

<sup>31</sup> '... the discourses that seek to connect crime and punishment in America have no validity other than ideological' (Wacquant 2009b: 159).

right to assistance' and it is women and children, not young men, who have felt the main impact of the 1996 Act.

Similarly, Wacquant's claim that prison expansion was a neoliberal strategy, intended to pre-empt the disruption that its economic policies would bring in its wake, remains an unsupported—and ultimately implausible—assertion for which he supplies no persuasive evidence. Although one might claim that mass incarceration has come to operate as a functional support for neoliberal policies by warehousing a surplus labour population and penalising illegal alternatives to low-waged work, there is no evidence that any neoliberal thinker ever strategised in this way or proposed any such policy of punishment.<sup>32</sup> And given that neoliberals generally oppose the build-up of the state apparatus and state power, and might be expected to propose less expensive means of propping up their labour-market regime, Wacquant's explanation looks like the kind of post-hoc functionalism that Weber warned against.<sup>33</sup> A more likely explanation is that the problem of crime—itsself structured by free-market inequalities and social neglect—gave rise to popular demands for tougher punishment which, in turn, disproportionately affected the dispossessed and illegally employed inner-city black males. The association between neoliberalism and increased punishment is better viewed as an emergent outcome, not a precipitating cause or intention. And rather than see the build-up of penal controls as a pre-emptive strategy in anticipation of the 'social fallout' that neoliberalism might produce, it seems more likely that these controls were developed in response to the high-crime environment and public safety concerns that characterised the 1980s and 1990s (Garland 2001).

Wacquant is also fundamentally mistaken when he insists that there is a 'disconnect' between crime rates and punishment rates—a position that he argues most expressly and emphatically but which is also embraced by writers such as Tonry (2009), Alexander (2010), Mauer (2006), and Hinton (2016) who say much the same thing. Support for this 'disconnect' thesis is summoned up by pointing out that punishment and crime did not change in lockstep; that American imprisonment rates continued to increase during the 1990s even as crime rates fell; and that many other countries experienced crime rate rises but none of them reacted by creating mass incarceration; *ergo*, they say, there is no causal connection.<sup>34</sup> But these arguments are

<sup>32</sup>The explicitly neoliberal critique of mass incarceration and excessive correctional expenditure by the group 'Right on Crime' tends to support the view that a massive and increasingly expensive penal state was no part of any neoliberal agenda (Gottschalk 2014).

<sup>33</sup>The mistake is to assume that right-wing parties and their signature policies are 'neoliberal' when in fact these parties are coalitions and their policies are an eclectic, contradictory mix. See Garland (2001) on the coalitions between neoliberals and neoconservatives with roots in the Republican Party in the US and in Britain's Conservative Party, and the importance of that distinction for understanding penal policy.

<sup>34</sup>For an alternative view, see Western (2016), who argues that crime rates and penal rates are *not* unrelated though they do not change together in lockstep. 'Punishment is not determined by crime, but crime

largely specious. Policy effects typically take a considerable time to occur, since processes of problem definition, political mobilisation, legislative enactment, and implementation often unfold over years or decades, creating a temporal gap between the problem and the response. American property crime rose steeply from the 1960s to the 1980s, as did violence and homicide, which did not peak until the early 1990s. Throughout that period and beyond, the American public came to regard crime as one of the most serious problems facing the nation, and political representatives scrambled to put new laws and policy responses in place (Garland 2001; Flamm 2005; Enns 2016). That rising imprisonment rates lagged behind rising crime rates and continued to increase even as crime rates showed a sustained decline is evidence of these temporal processes (and of the stored-up consequences I described above) not proof of a ‘crime–incarceration disconnect’.

The relationship between crime rates and penal policies is an empirical issue that will vary across time and space, but our approach to this empirical question will be shaped by theoretical assumptions. A founding principle of the sociology of punishment (Garland 1990) is that penal phenomena are not to be understood as a simple reaction or response to crime, but instead have their own dynamics and determinations. Punishment is a social institution not an automatic reaction or a mechanical response. But to assert this principle is not to assert that penal policies are unrelated to crime rates, crime perceptions, crime fears, and theories of crime causation and crime control. Crime affects punishment insofar as it produces a volume effect (changes in the number of cases processed) or a policy effect (changes in penal tactics or strategy intended to respond to perceived crime problems). When the latter effect occurs, it generally does so slowly and in a mediated fashion. Real or perceived changes in crime rates or in the nature of crime affect policy to the extent that they generate shifts in public or professional opinion that subsequently gain political traction, legal enactment, and practical enforcement. The relationship is a complex, mediated one—but a significant one nevertheless.

As for the comparative claim that other nations experienced crime rate rises without resorting to mass incarceration, we need to bear in mind two facts. One is that, in most such nations, imprisonment rates did rise in the wake of crime rate rises, even if these increases were modest by comparison with the US (Walmsley 2016; Miller 2016).<sup>35</sup> The second, and more important, is that crime problems in the US are quite

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and violence are ripe with the potential for punishment because they occur in the context of social policy failure and poverty.’

<sup>35</sup>According to Lappi-Seppälä (2008), differences in prison rates across Western European nations are not correlated with differences in crime rates across these nations. I think this finding makes sense: penal policy is relatively autonomous of crime rates and nations with similar levels of crime may develop rather different penal policies. But it does not follow that penal policy is never driven by crime rates and by



different from those typically experienced by the nations of Western Europe. As Zimring and Hawkins (1997) pointed out years ago, and as Miller (2015, 2016) Roth (2017) and Gallo *et al.* (2017) have recently reminded us, America has extraordinarily high rates of homicide and these comparatively high rates increased dramatically between the 1960s and the early 1990s. High levels of life-threatening violence change how people react to crime. The salience of crime, the fear of crime, and the public demand for forceful crime-control are liable to be much greater where the crime mix is weighted towards lethal violence and—to remind ourselves of another salient difference—where guns are routinely present in the background of social life.

For many communities in the US—and above all for poor, black, urban communities—crime is not a social nuisance or a quality of life issue: it is an existential threat. No other developed nation has homicide levels that are remotely comparable to those in the US, even following twenty years of falling US murder rates. Consequently, fear of crime in America—where homicide is a leading cause of death for young males, and *the* leading cause for black males aged fifteen to thirty-four—is not the equivalent of the crime fears that affect more peaceable societies.

I don't know why so many serious commentators deny that penal policies are, to some degree, shaped by crime levels and by the public perceptions and sentiments that form around them. But I suspect the reason is ideological. I suspect they believe that explanations that foreground crime and violence, or view penal policy as a policy response to crime and violence, are inherently 'conservative' and ought to be avoided lest they appear to provide a justification for mass incarceration. Better, these commentators assume, to insist that penal policy is purely political, or racial, or neoliberal and to subject it to a political critique, leaving the difficult problems of crime and violence out of the discussion. But if this is the rationale for such a position, it is fundamentally misconceived. There is nothing intrinsically conservative about pointing to underlying problems of crime and victimisation. Nor does it depoliticise penalty to insist that, however much politics and ideology shape penal laws and their enforcement, at its core penal policy involves some attempt to contain, control, and otherwise discourage crime.

Interpersonal violence is a product of social and economic structures, mediated by patterns of social control and cultural adaptation, and enacted in specific social situations by particular individuals. It is a patterned phenomenon, not a random one, and those most prone to violence are disproportionately drawn from highly disadvantaged circumstances. To recognise that certain communities exhibit very high rates of

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associated public fears, resentments, and political mobilisations. And where rates of serious crime are on an altogether different scale—as is the case with US violence rates—one would expect penal policy also to operate at a different level.

violence is *not* to blame their residents—and certainly *not* to link race and violence.<sup>36</sup> It is to call attention to a major social problem that is (in the US) disproportionately experienced by communities of colour, a problem that is intimately linked to the problem of mass incarceration, and that ought also to be made a priority for remedial governmental action. The poor, urban communities of colour that experience the most incarceration are the same communities most affected by street crime and criminal violence. Far from disconnecting penal policy from the crime problem we need to bracket these together and trace their genesis back to larger structures of political economy and state action.<sup>37</sup>

Alexander and Wacquant may well be right in their account of the functional effects of mass incarceration, but neither is correct in their causal accounts of its emergence. Racism and neoliberalism should be viewed not as primary motivating causes but instead as structural contexts in which *both* crime problems *and* penal policies emerge, are given meaning, and produce effects.

### **(iii) Crime control as a recipe for governing**

In his book, *Governing Through Crime: How the War on Crime Transformed American Democracy and created a Culture of Fear* (2007) socio-legal scholar Jonathan Simon offers a third—and more explicitly political—explanation for America's expansive penalty. Simon describes how law-and-order politics became an attractive option for elected officials, and especially for state governors, in a post-1970s era when economic transformations made it much more difficult for elected officials to distribute New Deal-style social provision benefits to constituents in return for political support. Simon argues that the newfound appeal of a 'war-on-crime' and a victim-centred politics prompted vote-seeking politicians to use crime control—and its associated rhetoric and techniques—as an all-purpose template for governance in areas as diverse as education, housing, workplace relations, and family policy. American penalty, on this account, is the outcome of a default political strategy of 'governing through

<sup>36</sup> Black crime typically occurs at elevated rates only where black disadvantage is layered and concentrated. Where these socio-economic effects are removed, offending rates for blacks are no higher than for other groups. White rates of crime and violence are also elevated in the US compared to elsewhere, and are also concentrated in areas of social and economic deprivation. And of course most crime and violence is intra-racial (Sampson & Wilson 2005).

<sup>37</sup> I should stress that poverty and unemployment do not directly cause crime or violence—and anti-social behaviours are plentiful among the rich and privileged (Hagan 2010). But concentrated poverty and social exclusion undermine the strength of a group's collective efficacy (Sampson 2012) and lead to failures of socialisation and social control in families, schools, labour markets, and communities—which in turn give rise to crime. Socialisation, social control, social integration are all made more difficult by the stress of chronically scarce resources.

crime' and Simon's book documents the extent to which penal control recipes have, since the 1980s, become pervasive throughout American society.

I regard this thesis as largely correct in its descriptive claims but it leaves an important causal question unanswered. Simon is persuasive when he describes crime control as a prominent theme in recent state and federal government and he is similarly convincing when he points out that the demise of the New Deal settlement has meant that American politicians are now less able to win support by distributing social and economic benefits to their constituents (Fraser & Gerstle 1990). But what his analysis does not explain is why the decline of the earlier political quid pro quo led to the emergence of the current one. Why this new formula and not some other?

We need to ask *why* crime control recipes have become so central to American political action and so appealing to American popular audiences. What are the circumstances prompting demands for penal-style controls, not just in criminal justice but also in schools, city planning, shopping malls, public housing, and workplaces? And why is penal control—rather than other more pro-social interventions—the default response of American governments to every symptom of deviance and disorder? The answer, it seems to me, must point to the social control deficits that I have described above—deficits that grew worse in the period Simon describes, just as other pro-social forms of state action came to be politically discredited, retrenched, and restricted (Garland 2001; Fraser & Gerstle 1990; Hinton 2016).

#### **(iv) Social change, social control, and social order**

The final narrative I want to discuss is developed in *The Culture of Control: Crime and Social Order in Contemporary Society* (Garland 2001) a study of changing US and UK crime-control policies and their social causes. In that book I argue that structural transformations in social ecology—brought about in the mid-20th century by economic growth, social emancipation, and consumer capitalism—generated not just new freedoms, opportunities, and affluence but also a new set of risks and problems. Chief among these problems was increased rates of crime and violence, a widespread phenomenon that gave rise to 'high-crime societies' and their associated cultural and political characteristics. I then traced how, from the mid-1970s onward, various actors within the state and civil society reacted to these new risks, producing, inter alia, a reactionary 'culture of control' with consequences for social and penal policy as well as for the conduct of everyday life. The decline of penal-welfarism, the rise of penal populism, the shift to a risk-averse criminal justice, the expansion of private security, and the emergence of mass imprisonment were all, or so I argued, concomitants of these late modern socio-economic transformations and the political and cultural adaptations that followed in their wake.

*The Culture of Control* is not a comparative study and it nowhere addresses the question of why America is an outlier in its use of penal power. But the book does deal with the interaction between changes at the level of social and economic structures, and changes in patterns of informal social control and state action. And it does highlight the role that criminal violence—and associated public fears, resentments, and political mobilisations—played in articulating these socio-economic developments and channeling a series of social and political responses to them. *The Culture of Control* argues that the effect of the economic and social changes of the post-war decades was to deplete existing social controls and to generate new risks, new crime opportunities, and higher levels of crime and violence. Over time, the collective experience of crime and insecurity prompted a patterned response, both in state agencies and in civil society—a response that I described as a new ‘culture of control’. It seems to me that this same analytical framework—linking economic and social structures to patterns of crime and punishment *via* an analysis of (formal and informal) social control—can be put to work for our present purposes. In other words, the framework I developed for historical purposes in *The Culture of Control* can be reworked as a basis for thinking comparatively about American penality, highlighting the connections between America’s penal practices, its political, economic, and social structures, its patterns of informal social control, and the problems and policies to which these give rise.<sup>38</sup>

### **SOCIAL STRUCTURE, SOCIAL ORGANISATION, AND SOCIAL PROBLEMS**

It is an established social science finding that high levels of crime, violence, and other social dislocations are associated with low levels of social capital, social integration and informal social control (Sampson, 1987; Sampson *et al.* 1997; Sampson & Wilson 2005; Morenoff *et al.* 2001; McCarthy 2002). And a series of comparative research studies strongly suggests that social capital, social integration, and informal social control—in families, schools, communities, and neighbourhoods—are on average less developed and more unequally distributed in the US than in comparable nations; with areas of concentrated poverty and cumulative disadvantage in American cities exhibiting very serious levels of disorganisation and endemic social problems (Messner & Rosenfeld 1997; Avendano & Kawachi 2014; Darroch *et al.* 2001; Banks *et al.* 2010;

<sup>38</sup> Because it focused on parallel developments in the US and the UK, rather than contrasts between them, Garland (2001) said little about the role of America’s distinctive political system in shaping penal policy. For a detailed discussion of that issue, see Garland (2010).

Singh & Kogan 2007; Williams & Collins 2001).<sup>39</sup> America's 'social control deficits'—which are preponderantly though by no means exclusively experienced by communities of colour<sup>40</sup>—exist for reasons that are historical and institutional, among which are the following: (i) long-term legacies of slavery, segregation, and discrimination (Wilson 2011); (ii) an extraordinary political commitment to free markets and private sector solutions (Garland 2016); and (iii) the under-development of a social state, especially as it affects the urban poor and people of colour (Katz 2013). In the past, programmes associated with the New Deal and the Great Society worked to reduce these problems, and succeeded to some extent (Jencks 2015). But since the rise to dominance of neoliberalism in the 1980s, American social and economic policies have mainly worked to reproduce these characteristics rather than alleviate them.

Social and economic structures provide the settings in which civil society institutions such as families, schools, churches, and communities undertake the ongoing work of socialisation and social control, so it is hardly surprising that the chronic stresses imposed by these structures on certain sections of the population result in failures of social control and the emergence of social problems. These social and economic structures also provide the contexts in which governmental action is undertaken, so it is also no surprise that American welfare policies are designed to support and reinforce market relations and to de-emphasise social interventions that provide social and economic protections to those who are ill-served by market processes. There is, in other words, a series of linkages that ties together America's political economy, governmental processes, high levels of crime, and extraordinary levels of punishment. And this, it seems to me, is how we should frame the question of America's extraordinary use of penal power.

## CONCLUSION

I have argued that we should think of American punishment not primarily as a form of retribution, or racial oppression, or neoliberal governance but as a specific form of penal power that emphasises control above everything else. Despite diverse local concerns and motivating circumstances, the sentencing revolution of the last forty

<sup>39</sup>This finding does not necessarily confound the traditional Tocquevillian view of the US as a society with a weak state and a strongly associational civil society. Such strengths do exist, even if they have been diminished in recent decades—see Putnam (2010). The point is that America's very high levels of inequality, together with minimalist state protections for poor communities and families, gives rise to communities that exhibit very high levels of disorganisation and dysfunction.

<sup>40</sup>Several recent studies have observed that sections of America's white working class have recently been experiencing serious problems of disorganisation and dysfunction: see Chen (2016).

years has amounted to one long, cumulative process of extending, deepening, and guaranteeing penal control. American criminal justice has abandoned retributive fundamentals such as ‘proportion’ and liberal principles such as ‘parsimony’ (Stuntz 2013; Tonry 2016). The penalties that follow on a repeat offence have nothing to do with retributive proportion and everything to do with imposing control. The sentences handed down to drug or sex offenders have little to do with culpability and everything to do with perceptions of dangerousness and disorder. And each element of America’s sentencing revolution expresses distrust of government, fear of dangerous criminals, and a public safety imperative demanding the incapacitation and control of anyone convicted of a crime.

American criminal justice today is best understood not as a system of criminal punishment but as a system of penal control—a large-scale network of intensive, long-acting constraints and controls. Concerns about public safety and the need to impose control are explicitly and repeatedly stated in public discourse and in the political arguments that were made to justify these penal measures.<sup>41</sup> In the 1980s and 1990s, representations of popular sentiment repeatedly revolved around questions of public safety and the need to protect innocent people from violent crime. Politicians presented their proposals not as harsh punishments or wild vengeance but as guaranteed, long-lasting, thoroughgoing controls. Prison works! Three Strikes and You’re Out! Life Without Prospect of Parole. Mandatory Sentences. Truth in Sentencing. The slogans say it loud and clear (Garland 2001). So too do today’s leading reform proposals, nearly all of which take care to preserve the imperative of penal control by targeting non-violent, non-repeat, non-sexual offenders (Gottschalk 2014).

American criminal justice is distinctively committed to what we might call ‘mass penal control’ because, as compared to other developed nations, American society exhibits an institutionalised pattern of social control deficits and because the American state is disposed to respond to these problems by means of penal control rather than by other means. The tragedy is that these penal control measures do little to address the underlying problems of social disorganisation, even if they do succeed in curbing crime rates to some extent. Indeed, in these more fundamental respects, penal control is counterproductive, especially when exercised on a massive scale. It destroys human and social capital; it dis-integrates and excludes (Lynch & Sabol 2004; Moore 1996; Clear & Rose 1998; Rose & Clear 1998; Western *et al.* 2004). The penal controls of the state, exercised on a massive scale, work to undermine society’s capacity for social control, not to build that vital capacity.

<sup>41</sup> As Foucault (2015) notes, we need not deploy hermeneutics or deep analysis in order to identify strategic considerations: the aims of political actors can generally be read on the surface of their statements and in the substance of what is said.

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