

# 18 The Potentials and Limitations of De-Incarceration

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## I. Introduction

In the wake of the fastest and largest accumulation of inmate populations in modern history, the American prison system is now seen as the archetypal case of “mass imprisonment.” Standard definitions reference prison growth’s supposed Western cultural attributes, its extremity, its rapid expansion, and its disparate impact upon poor minorities (Garland 2001). Embedded within this label, intended to distinguish the phenomena apart from ordinary rates of incarceration, is a normative assessment that prison populations are excessive, unjustified, and demanding of reform. This chapter investigates these implications by surveying the potentials and limitations of alternative punitive institutional arrangements.

What’s striking about most philosophical punishment theory is how irrelevant it is to justifying actual punishments. While substantial philosophical attention has been dedicated to justifying criminal punishments, far less work has aimed at specifically justifying imprisonment apart from other techniques. Furthermore, most normative analyses of imprisonment stand apart from punitive philosophy more generally, as they often call for the radical abolition of prison space.<sup>1</sup> I argue this tension stems largely from a dearth of research regarding the comparative potentials and limitations of non-imprisonment forms of punishment.

This chapter first surveys the moral justifications of criminal punishment. Any normative assessment of contemporary imprisonment must first rely upon some justification(s) of criminal punishments more generally. If punishment is unjustified, then punishment by imprisonment is also unjustified. If punishment is justified, it remains uncertain if punishment by imprisonment is justified. If criminal punishments via imprisonment are unjustified, mass imprisonment is also obviously unjustified. If criminal punishments via imprisonment are justified, then what is to be said of mass imprisonment?

As Kant (1781) would say succinctly, “ought implies can.” The normative claim that mass incarceration is demanding of reform, implies that some preferable alternatives are at least feasible. Insofar as all popular paradigms need to provide justified reasons for the imposed harms of criminal

punishments, they also share a commitment to minimizing the social harms of punishments and punitive institutions. Hence, to justify incarceration apart from other punishment types requires some accurate knowledge of imprisonment's unique costs and consequences. Such cost benefit calculations in turn depend upon some comparative assessment regarding the potentials and limitations of alternative schemes.

This chapter surveys research from two sets of social environments in the hopes of better understanding the practicalities of punishment norms other than mass imprisonment. In section III, I survey the empirical research surrounding cross-country incarceration rates. Contemporary nation-states, historically founded by different varieties of the civil law tradition, have avoided mass incarceration relative to common law counterparts. Rather than imprisonment, civil law countries tend to leverage a variety of social monitoring and enforcement techniques more available therein due to larger governmental bureaucracies and more pervasive social welfare programs compared to under the common law. In section IV, I survey research of social environments wherein the relative absence of traditional governments has occurred in stride with a similar absence of punishments via imprisonment. Ancient societies, primitive tribes, and criminal organizations in the underground economy all manage to coordinate complex swaths of human behaviors by leveraging pre-emptive security technologies, reputational mechanisms, restitution payments, and cultural rituals of dispute resolution and apology.

In section V, I ask if these non-incarceral strategies are viable for countries currently enduring mass imprisonment. Simply put, not really. More extensive bureaucratic infrastructures and social welfare programs under the civil law developed over long evolutionary swaths of legal, cultural, and economic history. Hence, developing such in contemporary common law settings would entail large start-up costs and/or radical changes in the institutional organization of legal and political processes therein. Such programs would also likely impede long run economic performance if imposed within common law jurisdictions. Though this type of institutional benchmarking or transplantation seems costly and/or ineffective, the available empirics do imply some potential(s) for genuine institutional innovations without disrupting economic performance.

Second, punishment norms in conveniently stateless societies ought not to be heralded as just or ideal, as they are often viscerally severe relative to contemporary processes. Their strong dependence upon reputational mechanisms similarly limits their cross-viability in contexts with greater population sizes and degrees of ethnic diversity. But, I argue there are meaningful inferences to be garnered by viewing mass incarceration within a broader context that includes these two sets of social environments. Mass imprisonment appears to occur in stride with more hierarchically organized criminal justice systems. In contrast, social environments wherein criminal justice decision making is more localized and decentralized tend to harbor more

adaptive processes of criminal justice decision making and greater potentials for institutional innovation therein. Though apparently harsh, punishment norms in relatively stateless contexts do effectively tend to reduce and avoid social harms relative to the limited viable alternatives within their localities.

To preserve and protect the feedback processes and evolutionary potential(s) of criminal justice institutions, I argue punitive philosophy would benefit from being viewed through a lens of constitutional political economy, wherein justifications and justificatory frameworks are not applied to particular institutional forms of governance or punishment *ex post*. Instead, government institutions, especially punitive enforcements, if necessary, should also be recognized as potentially threatening to social order when excessively imposed. Effective governance is thus a practical task of minimizing the size and scope of centralized authority. Hence, imprisonment is only justified as a form of criminal punishment insofar as it is embedded within a reliable and effective system of checks and balances. Hence, a potentially viable strategy for mass imprisonment reform would be to consistently extend designed checks and balances to preserve decentralized authority similar to those frequently found within the civic adjudication and tort procedures under the common law, into the spheres of criminal justice decision making therein.

## II. Justifying Imprisonment Apart from other Punishments

Insofar as criminal punishment entails the infliction of intentional harm, it requires justification. Several different perspectives aim to provide good reasons for why criminals should be punished. Consequentialists, retributivists, moral expressionists, and others provide different justificatory frameworks with different types of reasons for punishment (Berman 2008; Duff 2013; Bedau 2015). If an act meets the criteria laid out by the correct theory, then it is said to be justified. If punishments meet several criteria across alternative theories, even better (Rawls 1993).

Conspicuously, no such framework seems to provide explicit justification(s) for imprisonment apart from other punitive techniques. All popular justifications for punishment share a common commitment to minimizing harm. Insofar as the need for justification is inspired by the inherently harmful nature of punishment, it also follows that any particular punishment type or institutional provision ought to minimize (or at least aim to minimize) the harms it imposes. If the harms imposed by punishment onto criminals demand justification, then any harms or costs imposed by punishment(s) upon other members of society demand justification as well. Perhaps even more so as non-criminal third parties lack desert. Hence, to provide specific justification for imprisonment or mass imprisonment, one must engage in some comparative assessments across mass imprisonment and other punishment practices regarding their associated social effects.

A strict consequentialist would justify punishments with reference to their preferable effects.<sup>2</sup> Hence, consequentialists tend to focus upon deterrence, incapacitation, and/or rehabilitation as desirable outcomes. Some complain consequentialism proves too much, as it appears to pay little or no attention to proportionality.<sup>3</sup> For example, if hanging a man for petty theft carries enough deterrence, it can be seen as justified from a purely consequentialist standard. Rawls (1955: 9–13) suggests this is more a caricature of consequentialism than an accurate portrayal. In short, assessing the justness of apparently extreme punishments from a consequentialist vantage requires accounting for punishments' full social consequences. Hangings for petty theft would deter behaviors beyond the crimes applied to and such disproportionality can arguably inspire more severe crimes and weaken trust in the rule of law.<sup>4</sup> These indirect effects would need to be accounted for and thus detract from the consequentialist reasons undergirding justified punishments.

So long as the beneficial effects outweigh the direct costs and indirect social harms, punishments are in part justified on consequentialist grounds. But, this does not provide a unique reason for incarceration over other types of punishment. For incarceration to be specifically justified, it must be perceived as "economically efficient" as opposed to merely beneficial. Economic efficiency is a broader concept than mere cost benefit accounting or "technical efficiency" (Farrell 1957). Whereas a punishment is technically efficient insofar as it reaps benefits beyond harms, economic efficiency demands that the practice represents the best available benefit to cost ratio. To be economically efficient, incarceration would have to minimize the social costs of punishment relative to other viable punishment strategies or institutional norms. If incarceration yields benefits above costs, but an alternative scheme yields greater benefits above costs, then the difference in benefits between the two is effectively an additional imposed cost of incarceration. Economic inefficiency weakens a practices justification on consequentialist grounds, as it imposes unnecessary harms upon undeserving individuals.

Furthermore, economic efficiency can provide a justification for punishment even if the consequences of a marginal unit exceed benefits. In other words, a punishment may impose net harms over benefits, but economic efficiency can demand that punishment norms, if presumed necessary for the foundation of social order, at least seek to minimize these harms. While economic efficiency is an obvious component of consequentialism, all popular justificatory frameworks are committed to economic efficiency insofar as they must provide justifications for the harms imposed by punishment and therefore must aim to minimize the harms of punishment amidst feasible alternatives.

Retributivists argue punishment is justified because criminals deserve to suffer in proportion to the harms they impose (see: Moore 1997; Murphy 2007 for recent surveys). Retributions seek to correct the imbalance(s) of justice caused by crimes. Incarceration, at first, appeals to a variety of

retributive standards (see: Mundle 1969; Kleining 1973; Davis 1983). Prisons effectively remove a criminal's liberty akin to how victims suffer from crime. Prison sentences can also be proportionately gauged to accord with the different severities of crimes. But, other forms of punishment could also meet these criteria, such as house arrest, parole, or even corporal punishments.

Imprisonment's application to nonviolent or victimless crimes seems harder to justify with retributive reasons. Selling drugs may impose social costs, but drug dealers do not forsake the liberties of others in a comparable fashion as prison imposes. Thus, if punishments are to be justified on retributive grounds, the particular forms of punishment and the unique types of harms they cause will matter. Imprisonment may be justified for some types of crimes, but not for others. Hence, mass imprisonment outcomes are likely indicative of unjustified or excessive applications of prison sentences.

The essential metric of justification from a retributive perspective is desert. Punishments are justified in so far as criminals deserve to suffer in proportion to the suffering they impose upon others. Hence, if any punishment practice imposes harms upon non-criminal members of society, such effects would need to be grounded upon good reasons. As social harms increase, so too would the justificatory burden. Hence, for imprisonment to be specifically justified via retributive reasons apart from other forms of punishment, some assessment regarding the comparative social costs of different norms is needed.

Similarly, communicative frameworks provide little attempt to justify incarceration specifically. Also known as "moral expressionists,"<sup>5</sup> communicative reasons claim particularly harsh penalties are needed to convey society's unique disapproval of crimes relative to other immoral acts. Offenders perceive a unique message regarding the seriousness of crime when subjected to punishments rather than merely informal shaming (Tasioulas 2006; Bennett 2008). But, there is no specific communicative reason to suspect that severe punishments must take the form of prison sentences over other tactics.

Punishment via moral communication is inherently linked to severity. If the sanctions across different crimes do not comport to their relative severities and harms imposed, then the moral messaging from society to criminals will be warped (von Hirsch 1993: 14–15). Insofar as any punishment type imposes harms upon non-criminal citizens, it would thus also convey a warped message throughout society regarding punitive deserts. Hence, the justificatory standard is again higher for punishment practices with greater social costs.

This chapter does not adjudicate between competing punishment paradigms. Punishments may be justified or not. If not, then incarceration is certainly not justified and mass imprisonment even less so. If punishments are justified they may be so for different types of reasons. What punishment types are most justified and in practical terms how they might be implemented remains uncertain. All popular paradigms share a commitment to

providing justified reasons for the imposed harms of criminal punishment. Greater social costs of punishment types require higher justification standards. Hence, to justify imprisonment apart from other punishment types requires some working knowledge of the potentials and limitations of alternative punishment types.

### III. Contemporary Nation-States Without Mass Incarceration

Empirical research describes in limited detail the cross-country patterns of crime and punishment (Mauer 1995, 2003; Newman 1999; Walmsley 2003, 2011). Nations with shared political, economic, legal, and or cultural institutions tend to harbor similar criminal justice systems and punishment outcomes (see: Cavadino and Dignan 2006a: 3–30, 2006b; Brodeur 2007; Lacey 2008: 3–55, 2012 for thorough surveys). Debate persists regarding what particular institutions or combinations shape imprisonment most and how. Clearly, some nations have experienced mass imprisonment in greater proportions than others, and some nations have effectively avoided it. Hence, it may be useful to investigate institutional commonalities and or punishment norms in those countries that lack mass incarceration outcomes.

Given empirical limitations, more is known about what does not sufficiently explain the global patterns of incarceration than what conclusively does. Casual observation has emphasized a link from Western, liberal, market economies (Rusche and Kirschheimer 1939; Foucault 1975; Wilkins, Newton, and Steer 1991; Wacquant 1999, 2001; De Giorgi 2006) and electoral democracies (Savelsberg 1994, 1999, 2008; Sutton 2000) with mass incarceration. In contrast, more sophisticated analyses show no strong relationship between economic institutions or performance to greater crime and punishment trends (Neapolitan 2001; Sutton 2004; Ruddell 2005). In fact, economic freedom is positively related to crime reporting (Soares 2004a, 2004b) and negatively related to homicide rates (Stringham and Levendis 2010).

Others claim Western societies lack social safety nets necessary for curtailing crime and prison growth. Collective labor interests (Cavadino and Dignan 2006a, 2006b; Downes and Hansen 2006) and welfare redistributions (Sutton 2000, 2004) correlate with lower prison populations and are thus proposed to limit the effects of vengeful public opinions (Flanagan and Longmire 1996; Enns 2014). Empirical verification is mixed. Mocan (2008, 2013) shows, in contrast, vengeful attitudes are incubated in high crime, low individualist, and low wealth contexts. Experimentally, punitive biases transcend demographic identities and political environments (Greene 2007; Houser et al. 2008; Guala 2012; Butler, Conzo, and Leroch 2013).

Econometrics show democratic quality does not correlate with incarceration, and most cultural variables such as social capital do not appear relevant either. Similarly, factors representing labor organization, welfare spending, and other cultural factors like ethnic heterogeneity and trust lose significance

when other institutional factors are included (D'Amico and Williamson 2015). Some weak evidence suggests countries with lower prison populations have more male labor market participation (Sutton 2000, 2004), more judges, fewer homicides, more ethnic homogeneity, higher rates of Catholicism, less corruption, and a higher perception of law and order.

D'Amico and Williamson (2015) show nations with smaller prison population rates tend to have civil legal origins, no death penalties, and fewer years under communism (see also: Ruddell 2005; Greenberg and West 2008; DeMichele 2013, 2014). Such factors dominate other variables, even seemingly relevant trends like homicides.<sup>6</sup> Whereas common law countries like the US host greater incarceration rates, civil law nations like France, Germany, and Scandinavian countries leverage the more pervasive bureaucratic infrastructures therein via “fines, seizure of property, closing down of establishments, and community service (France), day-fines based upon the offender's income, instruction, declaration of guilt without imposition, community service and probation (Germany), psychiatric treatment, probation, community service, treatment within the social services, and fines (Sweden) (Newman, Boulokos, and Cohen 2002),” to monitor citizens' behaviors and impose punitive sanctions without constructing or managing as many prison facilities.

Such empirics do not prove any specific normative implications regarding social optimality (*ibid.*: 607). They merely provide an explanation for the observed fact that common law countries host larger prison populations than civil law nations. But, because prison expansion entails lower social costs under the common law, no specific justification is evident regarding precisely how much more incarceration under the common law is needed or optimal. Spammann (2015) for example, shows that the nations at the highest end of the imprisonment spectrum retain population rates beyond what can be accounted for by efficient institutional diversity.

### IV. Punishments Without Formal States or Imprisonment

While contemporary civil law nations rely less upon incarceration and more upon bureaucratic infrastructures, such mechanisms are essentially complements to imprisonment in a broader basket of criminal punishment types. Incarceration remains the default and standard form of criminal penalty around the globe. In fact, many philosophical definitions of the criminal law relative to civil liability hinge upon the potential of imprisonment. What is criminal is defined by what is subjected to incarceration (Barnett 1996; Duff 2013). Knowing what types of punishments and institutional norms are feasible without incarceration requires looking at a broader sample of social contexts than conventional nation-states.

Ancient legal regimes, primitive tribes, and criminal organizations in the underground economy all possess customary as opposed to formal legal processes; none of which typically entail monopolized governmental authority,

prison facilities, or punishments via incarceration (Leeson 2014a). Despite the absence of a formal government and monopolized prison powers, these contexts host a substantial degree of personal security, property rights enforcement, and predictable conflict resolution procedures. Hence, to conclude that without imprisonment, punishment processes cannot maintain a base level of social order is inaccurate. Social order is at least feasible without leveraging the specific threat of imprisonment.<sup>7</sup>

Punishments in relatively stateless contexts can be more violent than formal legal processes. Ancient customs such as the *Lex Talionis*, or “an eye for an eye,” put in literal terms the harshness of pre-modern punishments, often applied across wide ranges of behaviors, including relatively mild violations. Exiles were de facto death sentences, as life outside the collective meant subjection to constant predation. Similarly, tribal customs typically leverage strict protocols of ostracism, shame, expulsion, and even physical torture against seemingly venial breaches of patriarchal authority (Hoebel 1954). Criminal organizations similarly use violence and coercion to maintain power within their ranks and monopoly profits within their markets and territories (Sobel and Osoba 2009). Last, violent feuds were culturally demanded during interpersonal conflicts across groups (Oppenheimer 1913; Schafer 1965, 1970). The levers of violent enforcement outside the boundaries of formal state legitimacy have sharper and more viscerally severe blades (Seabright 2004; Pinker 2012).

But, simply dismissing customary norms as brutish or archaic obscures many of their operational features.<sup>8</sup> While potent, these pre-modern sanctions were likely less frequent than many perceive. Across cases, death penalties, exile, outlawry, and blood feuding were commonly accepted, but served as secondary mechanisms—final threats to compel suspected violators to comply with preliminary legal processes (Pollock and Maitland 1898: 29–69; Plucknett 1929: 307–14; Parisi 2001). Such procedures often converged on milder outcomes in reality as participants were inclined to seek mutually agreeable terms.

Early legal systems often lacked any meaningful distinction between criminal and contractual law (Maine 1861; Zane 1927; Berman 1983). Even violence was adjudicated via civic rituals and interpersonal, but often publicly performed, rituals of recompense and apology. Claimants were motivated to demand and accept tangible benefits against defendants they could prove responsible for causing harm. Suspects, in turn, were motivated to offer tangible value for compensation and thus avoid deadly or painful sanctions. Customary legal processes across historical, cultural, and geographic contexts tend to converge upon third party standards of arbitration (Posner 1980; Benson 1988), restitution norms (Barnett 1977; Schafer 1970), and similarly ranked scales of penalties (Sellin and Wolfgang 1964; Friedman 1979). To deviate too far from commonly accepted punishment quantities thus meant sacrificing one’s reputation and/or evoking subsequent liability (Stringham and Caplan 2008).<sup>9</sup>

Many seemingly obscure legal customs can be shown to have mitigated against social costs by effectively avoiding more disorderly alternatives. Such norms demonstrate a sort of “bounded” or “ecological” rationality (Simon 1991; Smith 2009) insofar as they represent least bad or cost minimization strategies. Leeson (2014b, 2014c, 2015), for example, explains how even apparently superstitious protocols like ordeals (Leeson 2012) or magical rituals (Leeson 2014a) served functional social roles to resolve conflict, salvage resources, protect order, and maximize group profits amidst communities where said superstitions were taken seriously and technologically superior alternatives were absent.

What is perhaps most striking about such cases is the degree of specialization and adaptability observed therein. Akin to the contextual complementarity observed in animal societies relative to their geographic conditions and genetic reproductive traits (De Waal 1990), or the proprietary innovations of common pool resource dilemmas across contexts (Ostrom 1990), legal processes across non-traditional social settings demonstrate adaptability and complementarity to their local conditions. Property rights are less present and formally defined in environments of relative abundance (Demsetz 1967). Innovative security technologies can deter thefts and verify ownership when transportation is costly and information unreliable (Ellickson 1994; Anderson and Hill 2004). Nonviolent strategies emerge amidst a scarcity of manpower and strong group dependency on collective action. For Inuit tribes, for example, the death or injury of an adult male would have jeopardized the entire community. Hence, conflict resolution occurred through song and dance rituals (Hoebel 1954: 67–99).<sup>10</sup>

Across cases, contextual adaptability seems high in contrast to the uniformity of punishment via imprisonment across nation-states today. The stability of these norms within their respective contexts ultimately depends upon adaptability and thus informational feedback within their respective decision-making processes. Such systems typically existed within relatively decentralized networks of authority and thus possessed a degree of evolutionary feedback via competitive pressure. Without monopolized prison power, law and security providers in customary settings have to maintain the relative consent of their communities. Akin to Olson’s (1993) model of public good provision by state powers or Tiebout’s (1956) model of competitive governance, such incentives promote the adoptions of preferred legal standards, provide effective constraint upon the excessive growth of violent authority, and serve as a deterrent against the application of excessive or inaccurately gauged punishments.

## V. Are Alternative Punishment Norms Feasible?

Some patterns and consistencies can be recognized once mass imprisonment is situated within the broader context of these two sets. Whereas the variance of imprisonment across contemporary nation-states is most strongly

correlated with variables like legal origins and years under communism, such are essentially proxies for the organizational structure of the institution in which legal decision making takes place (Djankov et al. 2003a). In short, the common law has long been accredited as more economically efficient than civil law because of its decentralized properties (Hayek 1960). By conveniently evolving amidst historical conditions of dispersed authority, common law territories hosted competitive incentives for the innovation and adoption of legal norms that preserved and promoted trade and efficiently allocated resources (Glaeser and Shleifer 2002; Djankov et al. 2003b). Thus, economic performance tended to accumulate and thrive more in common law economic spheres (La Porta, Lopez-de-Silanes, and Shleifer 1997, 1998).

Inversely, a similar relationship between organizational centralization and mass imprisonment can be recognized. In short, greater rates of incarceration occur in stride with more hierarchically organized criminal justice decision-making patterns. Communism was a sort of ultimate expression of centralized authority, wherein all matters of society were subjected to the coercive authority of state control (Kornai 1992). While civil law nations allowed greater rates of dictatorial power to inculcate economic decision making, similar cannot be said regarding criminal justice processes therein. While civil legal processes are more codified in both the economic and criminal legal sectors than under the common law, local authorities possess a stronger and more focused discretionary authority to dismiss criminal charges (Merryman 1969; Borricand 1993). The French adopted stronger protections of individual rights in the wake of their violent revolutionary experiences (Farrand 1901; Stuntz 2011: 74–9). And France continued an explicit campaign of decentralized criminal legal power in the wake of WWII (Donovan 2010). Similarly, the vast network of bureaucratic interest groups effectively decentralized criminal enforcement as jurisdictions fought to retain local power once in place (Roche 2007). In contrast, criminal justice procedures under the common law have concentrated in more hierarchical patterns with greater dominance of federal authority since the latter twentieth century (Murakawa 2014; Boettke, Lemke, and Palagashvili 2016). In short, decentralization was crucial for economic growth, while more hierarchically structured criminal justice systems fostered more mass imprisonment. If mass imprisonment is accurately perceived as a form of social inefficiency or institutional failure, these would seem consistent observations.

Viewed in isolation, the punitive techniques of relatively stateless social orders are not particularly desirable for modern liberal societies. But it remains unclear as to how intrinsic these qualities are, or what particular feature such undesirability stems from. It is unclear if such norms would operate differently amidst alternative exogenous conditions, devoid of isolation, underdevelopment, or illicitness. In contrast, their particular features of adaptability seem similarly a byproduct of institutional feedback fostered

amidst relative decentralization and its associated degree of competitive incentives. Again, this seems a consistent observation.

Are the punitive techniques leveraged by nation-states that avoid mass incarceration a viable reform strategy in those contexts currently experiencing mass incarceration? In short, not without costs. As La Porta, Lopez-de-Silanes, and Shleifer (2008: 309) explain, “courts or legislators in a country might bring into one domain a set of tools that has been used in another, based on either philosophical outlook or a desire for consistency, with adverse results.” The common law’s greater economic performance is partially accredited to the absence of more pervasive state bureaucracies and the rent-seeking interests they foster (La Porta, Lopez-de-Silanes, and Shleifer 1997, 1998). Though there is no direct empirical link between economic performance and prison population rates, the institutional resources leveraged within civil law countries, if mimicked in common law countries, would carry large start-up costs and likely sacrifice future economic performance.

But, that is not to say that no feasible opportunities for reform are possible. In short, the greatest opportunities would seem to stem from the lack of observed correlation between economic performance and prison populations in general. In other words, common law countries with high economic performance could reduce their prison population rates without sacrificing prosperity via endogenous institutional innovation. Similarly, we should expect civil law countries to possibly improve their economic performances without necessarily growing their prison populations provided they maintain effective checks and balances against prison growth.

One potentially feasible avenue for reform is to preserve, protect, and expand those institutional features that promote innovation, adaptability, and general evolutionary effectiveness into the social arenas where they are systemically lacking and thus correlated with mass incarceration. In the economic spheres across societies, decentralization goes hand in hand with good economic performance. In the criminal justice spheres across societies, mass imprisonment correlates with centralization. Hence, effective reform may depend upon the application and preservation of decentralization within common law criminal justice systems. How decentralization might be promoted and preserved in common law criminal justice spheres remains uncertain.

## Conclusions

To justify mass imprisonment outcomes requires some preliminary justification for punishment by imprisonment apart from other norms and techniques. All popular justificatory frameworks inherently concede that the justificatory burden of a criminal punishment or punitive institutional scheme increases if it imposes additional social harms. Hence, to justify imprisonment apart from other punitive types requires comparative cost

benefit analysis. To inform such an analysis this paper investigated two sets of social contexts that conveniently lacked mass incarceration outcomes.

The general observations from those contexts are straightforward. Mass incarceration occurs in stride with more hierarchically structured and centrally organized criminal justice institutions. Communist regimes are the most potent expression of criminal justice centralization, followed by contemporary common law nation-states, then civil law nation-states, and finally relatively stateless social orders. If mass imprisonment outcomes are to be interpreted as evidentiary examples of excessive applications of prison sentences, then punishment philosophy ought to take account of systemic relationships between institutional organization and prison outcomes.

Few if any of the observed alternative norms apart from mass imprisonment seem viable as reform strategies within contemporary mass imprisonment contexts without substantial costs. Civil law bureaucracies cannot simply be imposed within common law countries. Hence, some degree of mass imprisonment outcomes may be understood as contextually efficient given a lack of viable alternatives.

Some dynamics of institutional innovation and evolution are also revealed in the observation sets. Adaptability for institutions to comport to local conditions and constraints appears to be dependent upon the processes of institutional choice and exit fostered through local conditions of decentralization. Though punishment norms in relatively stateless social orders appear unjustifiable in visceral severity, they do succeed insofar as they represent institutional strategies of minimizing social costs within their unique environments of limited economic, technological, and scientific development.

Interestingly, such insights stand in contrast to conventional perspectives of both punishment philosophy and political economy of crime and punishment. To close the gap between punishment theory and practice, we should not view incarceration as a default punitive technique in need of justification, nor as an inherently public good threatened by insufficient provision or management: the necessary and appropriate arena for state redistribution and subsidy. Instead, real historical examples of incarceration have tended to be expressions of concentrated state power. Hence, a constitutional approach aimed at promoting and preserving local level authority and avoiding the concentration of state power via punitive authority may be warranted and needed.

## Notes

1 See: Bedau (1972, 2015) and Davis (1972).

2 Duff (2013) surveys Smart (1973) and Bagaric and Amarasekara (2000) as consequentialists. Bentham (1830) is a classic advocate.

3 On proportionality see: Duff (2001), Ryberg (2004) and von Hirsch and Ashworth (2005).

4 "If the punishment is the same for simple theft, as for theft and murder, you give the thieves a motive for committing murder (Bentham 1830: 36)."

- 5 Duff (2013) surveys Duff (2001), Bennett (2008), Markel (2011) as communicative theories. Greiff (2002) borrows Feinberg's (1970) "expressionist" label, Hampton (1984) and Murphy (1985) use the term "moral education." Though minor differences exist across these terms, they are functionally synonymous for our purposes.
- 6 In general and with a variety of control variables and robustness checks, "a one standard deviation increase in homicide rates (about 11 per 100,000) increases the number of prisoners by about 60 (per 100,000) (D'Amico and Williamson 2015: 600)... French, German, and Scandinavian legal origins reduce non-drug related inmates by about 58, 107, and 113, per 100,000 respectively. Communism increases non-drug related inmates by about 279 per 100,000 (*ibid.* p. 607)."
- 7 Friedman (1979), Benson (1988), Leeson (2011, 2012) argue customary legal practices were more efficient than typically recognized. Boonin (2008) argues cases like these suffice to refute the necessary presumption of state sponsored criminal justice provision.
- 8 It also contributes to the difficulty of recognizing the failures of modern imprisonment. Foucault (1975) argued similarly that the modern shift from punishments via public spectacles and physically corporeal sanctions towards the private spaces of jails and penitentiaries, though motivated by humanitarian rhetoric, allowed for a capture and imposition of state power and interests. Rejali (2000) explains the modern rise of unique torture practices by advanced democracies in similar terms.
- 9 Similarly consistent incentive structures mitigate the escalation of violence amidst networks of criminal gangs. Within groups, gangs seek to avoid the costs of violent conflict by imposing internal governance norms and procedures (Leeson 2007; Skarbek 2010, 2011, 2012). Leeson (2009: 82–106) also highlights how credibly signaling extreme violence can be an effective mechanism to conserve violent effort (see also: Gambetta 1996, 2011; Kaminski 2004). Buchanan (1972) even argues that monopolization of criminal markets can reduce violent conflict and the net level of criminal behavior.
- 10 Further examples abound. Pirates, similarly, had strict rules to deter the use of firearms aboard ship, where a bullet to the hull risked the group's livelihood (Leeson 2008). D'Amico (2010) notes that searching for stolen property in Ancient Greece demanded the accuser be naked to avoid the potentials of planted evidence. Kaminski (2004) explains, in prison confines social prestige is often afforded to individuals with productive value. Given resource scarcity humor can itself be a productive trait. Elaborate rule enforcements also exist to coordinate flatulence given the extreme scarcity of fresh air. And, Friedman (2005) outlines seemingly ingenious techniques devised to assure secure delivery of valuable assets in ancient China.

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