



Neoliberal Penalty: Politics and Practices of Punishment in the USA

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It is commonly held that during the 1970s penal politics in the U.S. started to move from a correctional or rehabilitative perspective to a retributive and punitive ratio. In the effort to avoid any monocausal or linear, and sometimes tautological, explanation (politics of punishment as a mere structural imperative of neoliberal economy, or as an implication of a larger cultural change) – and by illustrating your significantly different view on the subject[1] – may you rather point out the conditions of possibility of such an evolution?

You are right to want to set aside explanations that rest on broad cultural change – for instance, the idea of a new “culture of control”. The very notion of culture represents a reification of complex social processes, an aggregation of actions and agencies, that does far too much work and hides rather than elucidates the social processes at play. Bruno Latour has done marvelous work deconstructing the notion of society, and it is now our turn to do the same with the idea of culture.

But I would also caution against placing too much emphasis on the shift in the 1970s – and especially against portraying the shift as one toward *more punitiveness*. That would ignore the brilliant insights of thinkers like Erving Goffman, especially in his work on *Asylums*, or of Michel Foucault in his book *Madness and Civilization*, or David Rothman. These authors traced a continuity of confinement throughout the twentieth century – a continuity that spanned those various “total institutions”, as Goffman labeled them. Not just the prison and jail, but the sanatoria and leprosaria, the almshouses for the poor and infirm, the orphanage, the asylum, and the juvenile home.

It is too easy to forget about those other total institutions. And too dangerous. In my research on mental hospitalization in the United States, for instance, I discovered extraordinarily high rates of institutionalization in the early twentieth century. We are used to thinking of mass incarceration in the United States through the lens of imprisonment only, and to refer to the period prior to the mid-1970s as one of “relative stability” followed by an exponential rise. As a literal matter, this is of course right – if all we are describing is physical detention *inprisons*. But if we include institutionalization in mental hospitals – confinement in those other closed facilities – the entire twentieth century looks different: during the 1940s and 50s, the United States consistently institutionalized in mental hospitals and prisons at rates above 700 persons per 100,000 adults, reaching peaks of 778 in 1939 and 786 in 1955.

So I would challenge the idea that our admittedly unique penal practices since the 1970s – the massive use of warehouse prisons, for instance – amount to a novel or higher degree of social control. There is far more continuity throughout the twentieth century in terms of the levels of confinement, control, and surveillance.

To make sense of this continuity, I would suggest, we need to explore the influence of neoliberal economic discourse on the penal sphere. What we have witnessed since at least the mid-eighteenth century is the emergence of a concept of natural order that has significantly affected our punishment practices. By natural order, I am speaking of the notion of an economic system that is viewed as autonomous and achieves equilibrium without government intervention. This notion of natural order – which I would trace to French Physiocratic thinkers such as François Quesnay, Dupont de Nemours, and Le Mercier de la Rivière during the period 1756 to 1767 – shaped a discourse of neoliberal rationality that eventually metamorphosed into our contemporary idea of market efficiency.

It is precisely this idea of market autonomy and efficiency that facilitates the growth of the prison. It makes it easier to resist government intervention in the marketplace and to embrace criminalizing any and all deviance. It facilitates passing new criminal statutes and wielding the penal sanction more liberally – because that is where government intervention is legitimate and necessary, there and there alone. By marginalizing and pushing punishment to the outskirts of the market, neoliberal rationality effectively reinforces the penal sphere.

It is within this context that we would need to explore variations over time – for example, the wave of privatization in the United States and abroad, in Great Britain for instance, during the 1970s and early 1980s, which coincided with the most recent shifts in penal practices. I am thinking of the increased faith in market efficiency at a global level that culminated with the fall of the Berlin wall. This momentum toward the free market – which marked the 1970s and 80s and had significant ramifications in a wide range of industries, from airlines and communications to what were often viewed as more traditional state and local services – facilitated the turn to criminalization and thus the shift from other forms of social control.

I do not intend this as a monocausal or linear explanation, nor as a mere structural imperative. In fact, what I am trying to tease out has little to do with superstructure – but instead with the logic and rationality, the mode of reasoning that dominates in the United States today, or at least, before the economic and financial meltdown of 2008! It is this logic of natural order of the market – this rationality, this mode of reasoning – that made possible, or as you suggest, that points out the conditions of possibility of our penal evolution.

According to your definition, we have entered the “actuarial age”, where institutions and state or local agencies increasingly rely their activities on group-based generalizations and predictions (individuals’ actions are presumptively inferred from the registered behaviors and perceived characteristics of the social group to which actors are routinely ascribed). You have extensively warned against such cognitive procedures: but is it reasonable to claim their dismissal while we consider them helpful, if not necessary or natural, in any other sphere of public and private life? May you describe the practical virtues of randomization in punishment and policing against what you call the “ratchet effect” of probabilistic methods? Would randomization have costs in terms of accuracy and efficiency? Could there be a good profiling?[2]

The increased use of actuarial instruments to predict future dangerousness is indeed another one of the chief characteristics of our penal times – though here again, the methods were first developed and used in the 1920s. Here again, there are important continuities throughout the twentieth century. There is in fact a fascinating history of the development of these instruments that traces back to the University of Chicago in the late 1920s – but not to the Chicago school of economics this time, rather to the equally-renowned Chicago school of sociology.

It is interesting to note the continuity of these methods with the logic of rational choice and neoliberalism. Today, most of the economic models that justify and defend the use of these actuarial tools rest on a notion of natural efficiency and market equilibrium.

Now, you ask why I would challenge these instruments. The first and foremost reason is that, even if you adopt entirely the logic of the economists, these instruments may actually undermine the primary goal of law enforcement. Though this may sound counter-intuitive, it is surprisingly correct: assuming rational choice theory, the use of probabilistic methods may increase the overall amount of targeted crime depending on the relative responsiveness of the profiled individuals (in comparison to the responsiveness of those who are not profiled) to the shift in the level of law enforcement. The ultimate effect on crime will depend on how members of the two different groups react to changes in policing or punishment: if the higher-offending, profiled persons are *less* responsive to the policy change, then the overall amount of profiled crime in society will likely *increase*. In other words, profiling on higher past, present or future offending may be entirely counterproductive to the central aim of law enforcement – crime minimization – even if that were our primary goal.

I am here, of course, accepting the basic assumptions of the economists – my first response is, in this sense, an internal critique. But there are other reasons to be skeptical of these actuarial methods. Even if we reject neoliberal rational choice theory, the reliance on probabilistic methods is likely to produce a distortion in our carceral populations. It creates an imbalance between, on the one hand, the distribution of demographic or other group traits among the actual offender population and, on the other hand, the distribution of those same traits among the population of persons with criminal justice contacts, such as arrest, conviction, probation, incarceration, parole, or other forms of supervision and punishment. Simply put, the profiled population becomes an even larger proportion of the carceral population – larger in relation to its representation among actual offenders – than the non-profiled population. This in turn aggravates and compounds the difficulties that many of the profiled individuals have obtaining employment, pursuing educational opportunities, or simply leading normal family lives.

It is in this sense that I argue that the proliferation of actuarial methods has begun to bias our conception of just punishment. The perceived success of predictive instruments has rendered more natural theories of punishment that are based on prediction of future dangerousness. It favors theories of selective incapacitation and sentencing enhancements for repeat offenders. Yet the actuarial instruments themselves represent nothing more than fortuitous advances in technical knowledge from disciplines, such as sociology, psychology, and police studies, that have no normative stake in the justice of criminal punishment.

It is for these reasons that I urge us, instead of embracing the actuarial turn in the penal field, to celebrate the virtues of randomization. These arguments against prediction have freed me to explore the virtues of chance. And as soon as I began to investigate randomization, I realized that random sampling, it turns out, is the only way to achieve a carceral population that reflects the actual offending population. Random sampling is the only way to fulfill a central moral intuition regarding just punishment, namely that similarly situated individuals should have the same likelihood of being apprehended when they offend regardless of ethnicity, gender or class.

I realize this sounds counter-intuitive. To many, it sounds simply absurd. But if you think about it closely, and study these models, I think you will agree with me that there are far more virtues to randomization than we tend to acknowledge. It goes against the grain – against our desire for reason and rationality. It goes against all of our modern instincts. But I think it is actually right – which is why I argue that we need to recognize the limits of reason and the celebrate virtues of randomization. We need to get beyond our modernism and our quasi-religious faith in boundless reason. We need, in a post-modern way – in a manner *beyond* our

modernist instincts – to respect the limits of critical reason.

If we permit minor misdemeanors, such as loitering and vagrancy, we encourage more serious crimes: this is the so-called “broken windows theory” that revolutionized policing in most western societies over the last three decades (and that during the 1990s appeared in Italy too, although poorly codified). You claim it is false. May you explain why? And may you summarize how it was embraced by policymakers and progressive reformers?[3]

The broken windows theory is one of the most remarkable articles of marketing that we have witnessed in the last twenty or thirty years. Its appeal in the United States and abroad is simply astounding – and built, I would argue, on smoke and mirrors.

The history is pretty well known by now, I should think. The theory was first embraced and deployed by New York City mayor Rudolph Giuliani and police commissioner William Bratton in July 1994, when they began implementing an order-maintenance policing strategy emphasizing proactive and aggressive enforcement of misdemeanor laws against quality-of-life offenses, such as graffiti writing, loitering, public urination, public drinking, aggressive panhandling, turnstile jumping, and prostitution. It quickly spread across the United States to many – but not all – localities. It was at about the same time in Chicago, for instance, that the city council enacted an anti-gang loitering ordinance prohibiting citizens from standing together in any public place if a police officer reasonably believed that one or more of them were gang-members.

The international appeal of the broken windows approach has been equally remarkable. In 1998 alone, representatives of over 150 police departments from foreign countries visited the New York Police Department for briefings and instruction in order-maintenance policing. For the first ten months of 2000, another 235 police departments – 85 percent of them from abroad – sent delegations to the NYPD headquarters. And as a result, the theory has been exported to many European countries – to France, where many today call for “tolérance zéro”, to the United Kingdom, which enacted ASBO’s (anti-social behavior orders) modeled precisely on the broken-windows theory, and also to Italy, as you note, where there have been renewed calls for order-maintenance.

But despite its popularity, there is absolutely no evidence that the broken windows theory is correct. The simple, but startling fact is that, still today, almost thirty years after its first articulation in the *Broken Windows* article, the theory has not been established. Despite repeated claims that the theory has been “empirically verified” there is no reliable evidence that the broken windows theory works. In fact, the existing data suggest that the theory is not right, and that there is no significant connection between disorder and crime when antecedent neighborhood characteristics like poverty, residential stability, and the collective trust in the different neighborhoods are held constant. While there may well be indirect neighborhood effects of disorder, there is still today no evidence that “disorder” is causally related in a significant way to increased serious crime.

Paradoxically, the popularity of broken windows is due, in large part, to the dramatic growth in incarceration rates. Order-maintenance presents itself as the only viable alternative to three-strikes and mandatory minimum sentencing laws. But although the approach is marketed as an alternative to mass incarceration, the strategy in fact has significant negative effects on the carceral population. In New York City, for instance, the quality-of-life initiative produced between 40,000 and 85,000 additional adult misdemeanor arrests per year during the period 1994-1998, and an even greater number of stops and frisks, during a period of sharply declining

crime rates. In Chicago, the police department vigorously enforced the anti-gang loitering ordinance, resulting in the issuance of over 89,000 orders to disperse and the arrest of over 42,000 people during the period 1993-1995. All of these interventions, naturally, fed into the increased detentions.

So the real problem is that, today, order-maintenance crack-downs are not an *alternative*, but rather an *addition* to the severe penalties that dominate criminal justice. The broken windows theory, aggressive misdemeanor arrests, and intensive stops and frisks have become, not a *substitute*, but a *supplement* to the severe punishments that characterize our society – a supplement that feeds into and itself produces a dramatic increase in detentions, arrests, and criminal records.

What we are left with today is both severe penalties for major offenders and severe treatment for minor offenders and ordinary citizens, especially minorities – a double barrel approach with significant effects on large numbers of our citizenry. The problem, in a nut shell, is that order-maintenance crack-downs permeate our streets and police station houses, *while* severe sentencing laws pack our prisons. We are left with the worst of both worlds.

In an European's eyes capital punishment in the U.S. seems to be an almost incomprehensible but deeply consolidated practice. Yet you argue that it will be abolished in the next forty years. Can you specify the reasons for such a prediction? And can you make clear in what way you maintain that the interplay of two diverse elements – namely, an elite political leadership and ordinary acts of resistance – should lead to that outcome?[4]

I am not speaking out of any optimism, that is not of my nature. I'm focusing instead on the most recent statistics, which I believe are extremely revealing. The United States witnessed significantly decreasing numbers of executions and capital sentences during the first decade of the twenty-first century – despite a continuing political shift toward crime-control policies, as evidenced by the steadily increasing rate of incarceration throughout the country. And it is important to note that, of the 42 executions that were carried out in 2007, the state of Texas accounted for 26 (or 62%) of the total, and only nine other states participated in the statistic. This reflects the fact that the death penalty in the United States has become predominantly a Texas phenomenon and that, putting aside Texas (and occasionally a few other outlier states like Alabama or Georgia or Virginia), very few executions are being carried out in the rest of the country.

The decrease in the annual number of executions has gone hand-in-hand with a similar decrease over the period in the number of persons sentenced to death in the United States. The declining trend in the imposition of capital sentences is not only true at the national, aggregated level, but also at the individual state level. Even in a state like Texas, prosecutors and politicians have tempered their enthusiasm for death sentences. In addition, the number of abolitionist states has increased since the United States Supreme Court approved capital punishment in 1976. Since then, Massachusetts, North Dakota, Rhode Island, New Jersey, New York, and Vermont joined the ranks of eight other abolitionist states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, West Virginia, and Wisconsin) that had never legalized capital punishment.

These statistics, I would argue, reflect a series of unexpected developments at the individual state level. New York state reinstated and flirted with the death penalty in the early 1990s, but after several years, ultimately rejected capital punishment. A Republican governor in Illinois, George Ryan, imposed a moratorium on the death penalty because of the mounting number of wrongful convictions and then commuted the death sentences of all inmates on Illinois' death

row. The Supreme Court overturned its prior decisions and restricted the substantive scope of the death penalty, prohibiting its use in the case of juveniles and persons with mental retardation. In over 125 cases, persons accused of capital crimes and sentenced to death were exonerated after an average of almost 10 years on death row. In December 2007, Governor Jon Corzine of New Jersey signed a bill abolishing the state's death penalty. At about the same time, the Supreme Court effectively imposed a temporary moratorium on the death penalty while the justices considered the legality of lethal injection. And, according to reliable reports, in other states like Maryland, New Mexico and South Dakota, legislative efforts to repeal the death penalty are in place.

Of course, it is also difficult to speak of the United States "as a whole" – putting aside the federal death penalty – given the unique federalist structure of the country in the area of penal administration. Regardless, it is likely that the political forces that have shaped these trends toward abolition will continue to exercise pressure on the United States and individual retentionist states in this country. And the gradual convergence of a number of retentionist states toward abolition of the death penalty, in combination with the increased role of international legal and political opposition to capital punishment, in all probability will lead the United States Supreme Court to ban capital punishment as a federal constitutional matter. The numerical trend and political momentum toward abolition likely will play an important role in the decision; but so will the greater role of international law in the Supreme Court's interpretation of the Eighth Amendment's "evolving standard of moral decency".

Though it is difficult to chart the likely path of abolition, it is most probably that, within retentionist states, the transition to abolition will occur as a result of elite political leadership and ordinary acts of resistance. Experience has shown that abolition of the death penalty is rarely the result of loud and explicit democratic politics, but is instead more often the product of slightly counter-majoritarian, at times elite-driven judicial or political maneuvers. Abolition most often occurs against the backdrop of mild popular support for the death penalty. As such, it often entails an *expenditure* of political capital: it is not an issue that *builds* political capital for emerging leaders, but instead one that requires using existing political capital.

Another important but rarely discussed factor that promotes abolitionist reform are ordinary acts of resistance by those who are either knowingly or unconsciously uncomfortable with capital punishment or truly opposed to the ultimate punishment. These men and women – a clerk at the county courthouse, an employee at the local police department, a secretary in the prosecutor's office, sometimes even a judge or law clerk – gummy up the system and slow death penalty cases down, sometimes to a snail's pace. Texas is, again, the outlier here, but it is revealing precisely for that fact: the reason that many other states are far less efficient than Texas at executing death row inmates is the product of ordinary, minor acts of resistance, sometimes conscious but often unconscious.

What changes, if any, may we expect in the penal politics from the new U.S. administration?

I do not expect that the new administration of Barack Obama will make significant changes in the penal field. As you may know, president-elect Obama favors the death penalty. In his best-selling book, *Audacity of Hope* (2006), Obama specifically wrote that «While the evidence tells me that the death penalty does little to deter crime, I believe there are some crimes – mass murder, the rape and murder of a child – so heinous that the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment». And in fact, Obama went out of his way to object to the Supreme Court's decision last spring striking down the death

penalty for the non-homicidal rape of a child. In this sense, Obama is in fact strongly pro-death penalty.

In terms of his other positions, president-elect Obama is a mainstream centrist Democrat, along the lines of Bill Clinton. He favors the COPS program (more police officers funded by the federal government) initiated under the Clinton administration, and states that he will make a federal priority of combating clandestine immigration.

True, there are some differences of tone with prior politicians. Obama has expressed shock, for instance, at the effects of mass incarceration on young black men. There are also some differences on specific policies. Obama opposes the crack/powder cocaine sentencing disparities that have so deeply impacted the racial imbalance of the penal system, and he also wants to affirmatively combat racial profiling. These are important. But I do not anticipate that they will lead the new administration to radically change the current trajectory of penal politics in this country.

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[1] See B. HARCOURT, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, "Texas Law Review", 84, 2006, pp. 1751-1786. See also *From the Asylum to the Prison: Rethinking the Incarceration Revolution – Part II: State Level Analysis*, "U of Chicago Law & Economics, Olin Working Paper", n. 335, on line at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970341.

[2] B. HARCOURT, *Against Prediction: Punishing and Policing in an Actuarial Age*, University of Chicago Press, Chicago (IL) 2007.

[3] B. HARCOURT, *Illusion of Order: The False Promise of Broken Windows Policing*, Harvard University Press, Cambridge (MA) 2001.

[4] B. HARCOURT, *Abolition in the U.S.A. by 2050: On Political Capital and Ordinary Acts of Resistance*, "U of Chicago Law & Economics, Olin Working Paper", n. 434, on line at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1278080#. To learn something more about the importance and originality of Harcourt's work, visit his website: <http://bernardharcourt.com>.