

From Bench to Dock: Putting Judges on Trial

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Historian and civil rights activist Howard Zinn (1994) has famously argued that ‘you can’t be neutral on a moving train’. When events are moving in perilous directions, to avoid taking sides in the name of neutrality is tantamount to resignation. American criminal justice has long been on a treacherous route, if it has not already ‘run off the rails’ and ‘collapsed’ (Stuntz, 2011: 5). This is perhaps most evident in the emergence of what has come to be called ‘mass incarceration’; that is, the excessive overuse of imprisonment and the rapid spread of serious human rights violations inside the country’s prisons over the last four decades or so.

Jonathan Simon, one of the foremost penologists worldwide, has been anything but neutral in his reaction. *Mass Incarceration on Trial* is part of a long series of high-profile publications through which Simon has sought to help reverse the course of the US penal system, not only exposing its grave injustices and deeply harmful consequences thus far, but also proposing concrete ways to radically alter it in the immediate or near future. Elegantly written and passionately argued, *Mass Incarceration on Trial* grapples with mass incarceration through a painstaking examination of a series of court challenges to prison conditions in California, culminating in the Supreme Court’s landmark 2011 decision in *Brown v. Plata* to declare conditions in California prisons unconstitutional and impose a population cap on the state prison system. As well as demonstrating how the judiciary can function as a motor of fundamental penal reform from within the American criminal justice system itself, the book distills the lessons that can be learnt for penal reform activism more broadly, thereby inspiring hope that large-scale progressive change is truly possible. In what follows, I elaborate on some of the book’s major strengths, whilst also raising two interrelated issues: first, the degree to which reliance on the concept of dignity as a guiding principle of constitutional law can promote grassroots change in penal matters; and second, the conditions under which American judges may be more likely to put their decision-making powers at the service of such change.

Mass Incarceration on Trial suggests that an essential but heretofore underused tool for furthering fundamentally progressive penal reform in the US today is invocation of the notion of dignity; a notion that has in recent years become increasingly influential as a constitutional value within the American legal system as a whole, and one that largely formed the basis of the majority opinion in *Brown v. Plata*. According to Simon, a powerful lesson we can –indeed, should– learn from the US experiment with mass incarceration is that ‘human dignity and public safety go together; one cannot flourish without the other’ (Simon, 2014: 9). Simon’s argument is that protecting

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human dignity, whether in the sense of diverting lawbreakers away from prison or eliminating cruel, unusual and inhumane punishment for those put behind bars, has two distinct but interrelated advantages. It is the key not only to protecting lawbreakers' own safety (e.g., by eschewing their exposure to deeply unhealthy custodial conditions), but also to pre-empting or arresting the criminogenic effects of imprisonment that put public safety at risk. To the extent that progressive criminal justice reforms enacted in the 1960s through judicial decisions based on the notion of dignity (e.g., enhanced rights for criminal defendants under the Fifth Amendment, and the protection of prisoners' rights under the Eighth Amendment) proved short-lived because they appeared to underplay or otherwise ignore crime control concerns, the challenge today is to highlight and establish confidence in the consequential utility of human dignity as a means to public safety.

Simon recognises that prison reform litigation based on dignity cannot alone correct the social injustices underlying and reproduced through mass incarceration. But he also argues persuasively that this awareness must inform, as opposed to discouraging, any effort to claim human rights for the victims of mass incarceration. Even though litigation cannot be an effective vehicle for promoting substantive policy change unless other political and social forces are also poised to move in this direction, Simon remains firmly committed to a measured optimism about the power of litigation 'to open small but potentially critical ruptures in the naturalness of legal order and social hierarchy' (Simon, 1992: 940; see also Feeley & Rubin, 1998).

The very concept of human dignity is open to various uses, however, not least because it eludes precise definition. To this extent, the combination of human dignity and public safety can assume different forms than the one envisaged in *Mass Incarceration on Trial*. Indeed, the right to dignity is not necessarily antithetical to, and may in fact come to serve, institutional and other forms of violence committed in the name of the right to public safety. A good example of this can be found in Justice Antonin Scalia's concurring opinion in *McDonald vs. City of Chicago* (2010), a landmark case where the US Supreme Court struck down a gun ban and extended the right to 'keep and bear arms' to fifty states.

For Scalia, a staunch gun-rights advocate who has gone so far as to suggest that Americans may have a constitutional right to own and carry shoulder-mounted anti-aircraft missiles, the right to keep and bear arms amounts not only to a matter of safety in the sense of enhancing self-defence against criminal threats, but also at least in part to a matter of dignity. Scalia, in other words, appears to offer a reversal of the logic espoused by Simon. At the same time as conceptualising dignity merely by reference to 'law-abiding members of the community', Scalia renders their dignity as an end-goal and their safety as a means of achieving it (never mind ample solid evidence from the US and elsewhere that higher gun ownership rates result in higher rates of deaths from firearms). Unsurprisingly, Scalia dissented in *Brown v. Plata*, calling 'outrageous' the prospect of 46,000 prisoners being released under court order insofar as public safety would be jeopardised as a result (Simon, 2014: 152). Although the *Brown* majority chose to take steps to protect prisoners' dignity whilst concurrently affirming that imprisonment is not a necessary or sufficient condition of public safety, this surely is not a guarantee that Scalia's own formula of dignity and safety will not prevail in future cases.

The point here is not just that the elasticity of the concept of dignity implies it can be interpreted and applied in multiple and contradictory ways, including in ways that stand in contrast with progressive aspirations. As Jeffrey Rosen (2015) comments in a recent article he published in *The Atlantic*, the deeper problem with placing one's hopes for progressive policy change in judicial invocation of dignity as a guiding principle of constitutional law lies in 'empowering judges to decide whose dignity trumps when the interests of citizens with very different conceptions of dignity clash'. Other things being equal, it appears questionable whether usage of the language of dignity will provoke the same body of judges who have long contributed so decisively to the rise of mass incarceration with their punitive decision-making under the banner of public safety to revert their *modus operandi* and start pursuing decarceration in order to protect lawbreakers' dignitary rights.² Even if dignity continues to play a role in prison reform litigation from now on, this may well be in the form of public dignity as entangled with public safety; a version of dignity that does not only fail to extend to lawbreakers, but is also practically defined in opposition to their own basic human rights.

One can, of course, trace examples of conservative punitive judges who transformed themselves into liberal advocates of the rights of prisoners and other disadvantaged groups in society. Such change, however, is uncommon and tends to stem from highly idiosyncratic factors, which implies it may not be relied upon as a means of galvanising or otherwise supporting grassroots institutional reforms. It may be, on the other hand, that by delving into trajectories of personal transformation one can discover important clues as to how to trigger large-scale liberalising effects on established patterns of judicial decision-making through cultivating cultural changes within and across the judiciary as a whole.

In this vein, the metamorphosis of Earl Warren, one of America's most influential Supreme Court justices, might lend itself as an instructive case in point. The overwhelming majority of people associate Warren with his tenure as Chief Justice between 1953 and 1969, when he played a crucial role in the expansion of civil rights and personal liberties in the US. Not everyone considers Warren and his court to have been 'radically activist' in terms of aspirations, or, in any case, to have succeeded in promoting far-reaching changes in policy and practice (see, e.g., Stuntz, 2011; Scheiber, 2006;

² The escalation of strict sentencing guidelines and mandatory minimum sentencing laws from the 1980s onwards is often said to lie behind the rise of mass incarceration in the US by having stifled the discretion of judges and forced them into making ever-greater use of long custodial sentences (see, e.g., Murakawa, 2014: 115-119). The rise of mass incarceration, however, was already under way when sentencing guidelines and mandatory minimums began proliferating. At least as concerns the consequences specifically of sentencing guidelines for judicial practice, moreover, it has been argued that whilst judges could have exercised a significant degree of discretion and even given rise to a 'common law of sentencing', in good part because guidelines have often been incomplete and vague, they have instead proceeded to enforce guidelines with a rigour that was not at all required formally (Gertner, 2007; see also Ulmer, 2005). Although judicial discretion has formally increased since 2005, when the Supreme Court declared in *Booker v. United States* that federal sentencing guidelines are merely of an advisory nature, prison rates over the same period have only declined modestly in most states, and have continued rising unabated in several others (*The Sentencing Project*, 2015). Indeed, the majority of federal judges are still supportive of, and practically adhere to, federal sentencing guidelines (Rakoff, 2015; Osler & Bennett, 2014).

Rosenberg, 1991). Warren nevertheless reached progressive rulings in a range of landmark cases, from *Brown v. Board of Education* (which ordered school desegregation), to *Gideon v. Wainwright* (which secured provision of counsel to indigent criminal defendants), to *Mapp v. Ohio* (which made available the exclusionary remedy for police abuse of Fourth Amendment rights), to *Miranda v. Arizona* (which sought to protect the constitutional rights of suspects in custody), to name but a few.

What usually goes unnoticed is Warren's prior service as Attorney General of California during the Second World War, when he gave his approval for what Simon (2014: 171) describes as a profound aberration from democracy; that is, the evacuation and indefinite internment of tens of thousands of innocent Japanese-Americans. For present purposes, the important point here is that Warren's liberalism as Chief Justice is said to have been at least in part the outcome of feeling personally guilty for his illiberalism as California's Attorney General (see, e.g., Reeves, 2015). If so, could it be perhaps that the key to liberalising judicial practice today is attaching shame to excessively punitive decision-making patterns, thereby also instilling guilt into those judges whose decisions have actively contributed to the rise of mass incarceration thus far? *Mass Incarceration on Trial* does not make direct reference to Warren, except to note that the majority opinion he wrote in *Trop v. Dulles*, a lesser known but still important case where a specific noncapital sentence was found to be unconstitutional, broke new ground by introducing the language of dignity into Supreme Court litigation for the first time. Warren's trajectory still lends support to Simon's suggestion that penal reform in the US today 'must begin with remorse for a record of human rights violations that went on for decades' (Simon, 2014: 168).

Simon's primary concern here is not with the judiciary, but rather with 'those officials who led us into mass incarceration, those who planned and operated prisons they knew would deny prisoners basic human rights such as healthcare' (Simon, 2014: 169). In *Mass Incarceration on Trial*, judges are in fact mostly sitting on the bench, rather than in the dock, their role extending to castigating state authorities for their enthusiastic endorsement of excessively punitive policies, thereby hopefully helping to form and spread a new, humanitarian 'common sense' about prisons, prisoners and crime prevention. Indeed, Simon explicitly credits the majority in *Brown v. Plata* with having already achieved the 'judicial shaming' of California's prolonged tolerance of inhumane prison conditions (Simon, 2014: 155). But just as courts can –and do– contribute to shaping broader discourses, so too broader discourses can be applied to assess and influence courts themselves. More to the point, unless one presumes that the judiciary bears no responsibility for the rise of mass incarceration or that it has somehow undergone liberalisation already, there is no reason why judges should be exempted from the shaming they can perform on others. Are judges not those who sent hundreds of thousands of people to prisons they knew would deny prisoners basic human rights?

The argument in *Mass Incarceration on Trial* is that the judiciary has grown increasingly affected by a 'humanitarian anxiety' regarding the effects of mass incarceration; namely, 'revulsion at current practices and a motivation to reform them in the name of decency' (Simon, 2014: 150). Crucially, humanitarian anxiety itself is said to have been triggered amongst judges through their exposure to photographic images of prisoners' suffering,

including notably the images appended by Justice Kennedy to his majority opinion in *Brown v. Plata* (which also apparently brought Justice Kennedy himself into the majority, contrary to his past record as an active supporter of harsh imprisonment). The underlying premise here is that knowledge of the suffering of others carries an intrinsic resolutive potential, bound as it is to animate the universal human capacity for empathy and a sense of moral obligation to intervene remedially. It is implied that, if judges previously failed to take action against mass incarceration and its effects, it is because the suffering of prisoners remained beneath their notice (Simon, 2014: 150).

Prison conditions and prisoners' suffering, however, have not been inconspicuous. If anything –and this, admittedly, is a point I have missed in my own previous work–, the mass media in the US have long afforded a significant degree of visual access inside the country's prisons (e.g., not least through television documentary series such as A&E's *Investigative Reports* and History Channel's *Big House*), directly or indirectly positioning spectators as witnesses to prisoners' pain. It may be true that not all media representations of prisons and their prisoners aim or manage to confront spectators with responsibility to act on prisoners' misfortune; conservative cues, for example, may legitimate harsh prison conditions in the sense of just retribution or public protection against dangerous offenders, real or constructed (see further Brown, 2009). Yet the reason behind inaction against mass incarceration cannot be purely ignorance about its nature and consequences. As members of society, American judges have been just as likely as the rest of the nation to be exposed to mass-mediated images of prisoners' plight, and thereby to have at least an idea of what goes on behind prison walls in the country, not to mention that the judiciary has also had additional access to damning information about custodial conditions through ever-increasing flows of prison reform litigation, already amounting to 20 percent of the entire federal court docket by 1995 (see further Schlanger, 2003; Guetzkow and Schoon, 2015). If, as Simon argues, judges 'are probably the most important audience [prisoners' suffering] could reach', insofar as 'they are the institution most accessible to the excluded and the outcast' (Simon, 2014: 150), then the question of their reaction becomes all the more significant.

Were one to address judicial behaviour solely in terms of 'reaction', however, one would miss what is arguably the most important point. At stake for other audiences is long-standing tolerance and even consensual support for the more or less visible suffering of prisoners. The issue in the case of judges is not so much their passivity or their reluctant and inadequate responses towards the known harmful consequences of mass incarceration, as it is their excessive use of custodial sentences as a form of knowing active imposition of harm on lawbreakers in the first instance. Once due recognition is paid to the fact that judges' role in the rise of mass incarceration has first and foremost been proactive, if also encouraged by various other groups (e.g., political elites, citizen constituencies and trade unions), then it is all the more clear that judicial behaviour needs to be examined by reference to the ways in which judges justify their actions (and inactions) to themselves. The most likely candidate here is a belief in long custodial punishment under harsh conditions as a means of avenging crime and incapacitating purportedly

incorrigible criminal populations that would otherwise undermine public safety.³

This brings us to a further point. In and of itself, knowledge of the suffering of prisoners is an important but insufficient condition for the emergence of ‘humanitarian anxiety’, be it amongst judges or anyone else. Although the empathic emotions that are necessary to induce a sense of responsibility for remedial action cannot be animated when the pain of others remains in obscurity, there is no guarantee that empathy will actually be called forth as soon as the pain of others comes to the surface. Humans do have a natural capacity for empathy, but the expression of empathy is a matter of culture and the politics that shape it. To put the point differently: whether or not empathy is shown to suffering others is largely dependent on the culture that defines the meaning that those others and their condition have for us.

According to research on responses to violence, a crucial precondition of empathy is that sufferers are deemed worthy of empathic reaction, and that failure to react empathically to their predicament is considered to be discordant with dominant moral principles. Conversely, if sufferers carry individual or collective labels that dress their plight in the clothes of deservedness and necessity, empathy towards them is unlikely to emerge; here exhibition of empathy may in fact be prohibited by the moral strictures of the day. Stereotypes that justify the imposition of pain on others and prevent empathic intervention to remedy their misfortune may be durable even against direct, physical visibility of the misfortune at issue, and this regardless of whether or how one may be related to victims (e.g., through kith or kin; see further Cheliotis, 2010). This being the case, to borrow the words of Norwegian philosopher Arne Johan Vetlesen when he writes about the context in which the Holocaust was performed, mass incarceration and the role of judges in its rise and persistence have to be understood as a situation ‘where the victim is not lost from view, but instead remains a focus—a focus whose significance is nothing else than that of *lending the evil to take place its quality as something legitimate (required, necessary) to do*’ (Vetlesen, 2005: 27, original emphasis).

This point essentially supports Simon’s call for anchoring penal reform in the US today to remorse for the long record of human rights violations in the country’s prisons. It also affirms Simon’s insistence that a new discourse about prisoners, prisons and crime prevention also needs to develop and spread across the US: a discourse where prisoners are fully included in the category of human personhood and are no longer labeled as homogeneously and irredeemably dangerous; a discourse where recognition is paid to the dual need for reducing the use of imprisonment and humanising custodial conditions; a discourse, finally, that calls for the decriminalisation of innocuous behaviours and shifts the focus of crime prevention towards regulation of the routine activities and situations in which crimes tend to occur. Indeed, much of what Simon includes in this alternative discourse is requisite for generating the sense of remorse he deems necessary. Once, for

³ That this may be the discourse commonly communicated by conservative media and widely shared by political elites, state officials, prison administrators and large segments of the public, is not to say that judicial attitudes and practices are necessarily deferential to external pressures.

example, the label of generic and invariable dangerousness is successfully detached from prisoners, and once it is firmly established that a great many offenders suffer cruel, inhuman and degrading treatment in prisons for crimes that could have been dealt with less painfully, less expensively and more effectively through community-based schemes, then support for mass incarceration can turn into an object of shame.

But if, as I have argued above, it is important that the judiciary not be exempt from such shaming, then judges may be an uncertain source for the new common sense that shaming, theirs or others', requires. Penological scholarship can step in and provide essential input to the production of the humanitarian discourse Simon envisages. True, penology has not been entirely immune to responsibility for the 'old common sense' that encouraged undue fear of criminal victimisation, invented classes of criminally-prone people and called for their punitive incapacitation. On the other hand, by virtue of its empirical and normative expertise, together with its strong critical caucus, penology is well placed for the task at hand. Indeed, *Mass Incarceration on Trial* abundantly attests to this.

As well as offering a clear and comprehensive evidence-based picture of the brutal nature of US prisons, the book explains in meticulous detail why its findings should be cause for grave moral concern, over and above issues of unconstitutionality. That the reader is exposed both to the grim realities of American imprisonment and to powerful arguments as to the various ways in which the realities in question are morally reprehensible, is of essential importance from the point of view of promoting change. Considered alone, cruel conditions of imprisonment cannot generate emotional disquiet and soul-searching, let alone support for substantive reform, amongst people who remain unchallenged in their belief that such conditions are justifiable. Conversely, unless grounded in thorough accounts of life inside prisons, moral critiques of imprisonment are bound to be denied as irrelevant and sensationalist, especially amongst prison enthusiasts. But *Mass Incarceration on Trial* does not stop there. It rather adds further impetus to the case for grassroots penal reform and decarceration in particular by paying recognition and responding with convincing empirical evidence to 'realist' criminological concerns about how to deal with the realities of crime, including recidivism; issues that critical criminologists are not always comfortable to acknowledge and debate.

Although it is a cliché to say about books one deems important for human welfare that they should be read by everyone, *Mass Incarceration on Trial* fully deserves this accolade. It is perhaps most imperative, however, that the book be read by American judges, so as to encourage urgent change amongst this strategically positioned body of professionals. If anything –and this is another significant contribution of *Mass Incarceration on Trial*–, Simon's focus on *Brown v. Plata* and other recent landmark court decisions about prison conditions in the US illustrates that a different, progressive course is truly possible in judicial practice. At the same time, the book's readership should ideally extend beyond the US borders, not least because the American example of excessive punitiveness has inspired or otherwise contributed to similar developments in many other parts of the world.

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