

## Roundtable on the Future of Justice Policy

Examining Justice Reform and the Social Contract in the United States: Implications for Justice Policy and Practice

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### Criminal Justice and the Social Contract

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American criminal justice deploys penal controls more extensively and more intensively than anywhere else on the planet. And instead of imparting “justice” in individual cases, its primary function is to impose stigmatizing forms of segregation and supervision on masses of people, above all on poor people of color.

American criminal justice has abandoned the principles of parsimony and proportionality; it has given up on considering whether offenders’ background circumstances entitle them to mitigation or mercy; and it no longer aims to promote rehabilitation and reform. Instead it foregrounds incapacitation and penal control, relying on a vast archipelago of harsh, poorly-run jails and prisons, and on an army of probation and parole supervisors who have exchanged their traditional social work role and now operate as control agents. And as this penal apparatus metastasizes, states and localities increasingly seek to shift its costs onto offenders and their families, burdening them with debt and trapping them in cycles of recidivism. By contrast, all the other western nations use penal controls much less often, and when they do, their punishments are generally much less harsh and much more humane.

In this paper, I ask why this stark contrast exists; what it tells us about American society; and how we can use international comparisons in the struggle for criminal justice reform.

My argument will be that other affluent nations are less reliant on imprisonment and penal control because the social and economic milieu of poor people in these societies is much less disadvantaged – not to say desperate and dangerous – than it generally is in the US. There are fewer social problems and pathologies: much less lethal violence, better functioning families and communities, more economic and social protections, and more social services. Because these nations have more extensive welfare states and more inclusive forms of citizenship, they experience less violent crime and fewer social problems – and their typical response to crime and social dislocation is much less penal and much more social.

The lesson I take from this is simple. It is not enough for reformers to demand that American criminal justice scale back incarceration and become less punitive. Real reform will also have to improve the prevention of crime and the social and economic support of poor people and communities. Hard-fought efforts to scale back penal control and decarcerate masses of offenders will become a Pyrrhic victory if the effect is to make crime rates rise again. To prevent this, we will need to build systems of social protection and social support for families and communities as well as for released ex-offenders. Ending mass incarceration, if it is to be sustainable, will have to be allied to extending social citizenship and improving social justice.

## The Distinctiveness of American Penalty

Comparative studies generally use *per capita* rates of incarceration as their dependent variable but if we look in more detail, we discover that American punishment is an outlier on multiple dimensions. American authorities do not just impose more punishment: they also punish in a distinctive way,<sup>1</sup> without showing signs of relinquishing even in the face of a global pandemic.

(i) Twenty-nine American states and the federal government still permit capital punishment and a dozen states still carry out executions. By contrast, no European nation – and very few developed ones – retains the death penalty. All 50 US states and the federal government imprison offenders for terms of Life Without Possibility of Parole (LWOP) – another extreme sentence banned elsewhere.

(ii) The *per capita* rate of incarceration for America as a whole is currently seven times higher than the Western European average and six times as high as that of Canada. And though there is great internal variation, the mildest US states have higher rates than the harshest of the Western European nations.

(iii) America's extraordinary incarceration rates are generated by sentencing practices that are also highly distinctive: sentence lengths (and time served in prison) being much longer in the US than elsewhere, as are sentence enhancements for prior convictions. Pre-trial detention rates and the likelihood of a custodial sentence following arrest are higher and suspended sentences are rarer.

(iv) American prisons are harsher, on average, than those of comparable nations, with more austere conditions and more solitary confinement. Rehabilitation, education, home leaves, and re-entry assistance are much less available.

(v) America's *per capita* rate of correctional supervision is five times greater than the European average. It is also more control-oriented with multiple restrictions placed on the supervisee's behavior and routine re-incarceration following licence violations. Probation and parole officers in the US are routinely armed and, unlike their European counterparts, bear little resemblance to social workers. Moreover, several US states permit 'lifetime probation' – a sentence that is unknown in Europe.

(vi) The imposition of collateral consequences such as disfranchisement, ineligibility for welfare benefits, disqualifications, banishment, deportation, and public criminal records is a routine concomitant of criminal conviction in the US. Such restrictions are more extensive, more onerous, and more enduring in the US than elsewhere.

(vii) Fines, monetary penalties, and reparation orders are used as stand-alone criminal sanctions much less frequently in the US than in other western jurisdictions. Fines are deployed against corporations and traffic violators but rarely against individuals with non-trivial criminal convictions. Even misdemeanors are more often dealt with by jail, probation, or prosecutorial control measures than by fines. On the other hand, fines *are* frequently used by America's criminal courts as 'add-on' sanctions, tagged on to a jail sentence or probation. The same applies to the administrative fees and charges that criminal justice authorities impose on offenders and their families in order to recoup the costs of processing, supervision, and confinement. These are *additional* charges that

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<sup>1</sup> For sources and references supporting the empirical claims in this paper, see David Garland, "Penal Controls and Social Controls" <https://journals.sagepub.com/doi/full/10.1177/1462474519881992>

are not at all equivalent to the widespread European practice of imposing fines (often with time to pay and adjusted to the offender's income) as the exclusive sanction for a majority of offences.

(viii) America's penal system is also characterized by gross racial disparities – producing an incarcerated population that is predominantly people of color. Admittedly, other nations such as Canada, Australia, and the UK also exhibit racially disparate patterns of sentencing but America's larger minority population, the legacies of slavery, and the continuing operation of race discrimination today, mean that American criminal justice is more racially defined than elsewhere. Racial disparities in American punishment are a consequence both of racial discrimination and of differential crime involvement. Racial discrimination flows chiefly through unwarranted attributions of dangerousness and refusals of mercy in a system where control is the chief imperative. Racial differences in rates of criminal involvement are, in the last instance, effects of America's political economy – as I argue below.

### **American Penalty as Penal Control**

American penalty is often referred to today as 'mass incarceration' as if there were a singular project or characteristic to which penal policy might be reduced. But America's local, state, and federal penal systems are complex assemblages of laws, policies, and practices that have emerged and evolved over time. Far from being the realization of some national plan, what we call 'mass incarceration' is the cumulative result of multiple contributing causes, operating at distinct governmental levels, prompted by different events and considerations, involving diverse political actors and coalitions, and enacted in thousands of laws, policies, and enforcement practices.

Despite this multiplicity and variation, it is a remarkable fact that for 35 consecutive years between 1975 and 2010, all 50 states and the federal government moved continuously in the same expansionist direction, increasing their penal populations and rates of incarceration. Even more remarkably, there is a recurring theme that characterizes this whole process of growth, despite the diverse historical events, political contexts, and penal laws that gave rise to it – a fundamental principle that features in virtually all of these different reforms and constitutes the operational logic that now underpins America's penal apparatus. This common principle is not something vague and generic such as 'law and order', 'harsh justice', or 'tough on crime.' It is the consistent priority given to the specific mode of penal action that I described above as 'penal control.'

Penal control is the fundamental principle and basic imperative that runs throughout this whole historical period and across this vast American penal landscape. It is not the only principle, nor the sole meaning – punishments are intrinsically polysemic and rarely reducible to a single function. But it is the essential, indispensable one. When penal measures exhibit secondary or tertiary aims, these are rarely allowed to dilute the measure's control functions.

Among the distinctive features of American penalty set out above, no fewer than six – extreme penalties; frequency and length of prison confinement; harsh sentencing; frequency and length of correctional supervision; extent and duration of collateral consequences; repressive character of American prison regimes – describe a criminal justice system that maximizes penal control. The seventh feature – a comparative reluctance to use monetary penalties as a stand-alone punishment – is explicable by reference to the same considerations. Whatever their other advantages and however much they are utilized elsewhere, fines impose little in the way of penal control. Given the American electorate's concern to minimize public spending, and the importance of the cash

nexus in American society, one would expect America's deployment of monetary sanctions to be at the top end of any international distribution. That the opposite is the case seems significant.

The leading characteristic of the American penal landscape today is neither harshness, vengefulness, nor cost-cutting: though these are present in abundance. Its leading characteristic is *the imposition of penal control* – a fundamental imperative embodied in sentencing law, in the culture of enforcement, and in the legal provisions that mandate judges to impose long-lasting penal controls on criminal offenders. This stress on control – and not just the quantity of punishment – sets America apart from other nations, particularly Western Europe, where monetary penalties and penal assistance (rehabilitation, social work with offenders, etc.) are much more important and penal controls much less extensive. I might add that American *policing* – with its 'warrior' style, its 'stop and frisk' and 'zero tolerance' policies, its extraordinarily high rates of civilian killings, and America's world leader status in the employment of private '*guard labor*' – reinforce this criminal justice strategy of aggressive control, as does American *prosecution policy* during the period between 1980 and 2010.

### **Contrasts in Tolerance: European Penal Practices**

Every other nation incarcerates at a lower rate than the US, with Canada and the Western European nations averaging around 100 per 100,000 – compared to an American rate that is 7 times as high – and most of these nations treat offenders with considerably more dignity, humanity, and positive purpose. By way of contrast, and to highlight alternative ways of approaching criminal justice, let me focus on some nations with particularly low rates of imprisonment such as Norway (63 per 100,000), Denmark (63 per 100,000), Sweden (59 per 100,000), Germany (75 per 100,000) and the Netherlands (61 per 100,000).

In each of these countries, offenders are condemned, violence is feared, and a mixture of deterrence, public safety, and retributive sentiments shape criminal justice – just as they do in the United States. But instead of viewing convicted offenders, *en masse*, as incorrigibly dangerous individuals from whom the public must be protected and who, even after release, must be subjected to a web of penal controls, the practice of these nations is to treat offenders as wrongdoers who should be punished for their crimes – and who may deserve a term of imprisonment – but who fundamentally remain fellow citizens. As such, convicted offenders are to be treated with dignity and respect, and adequately prepared for their return to the community, at which point they will have paid their debt to society.

This more liberal sensibility is expressed in a variety of ways. Its most fundamental expression is the fact that so many fewer people are sent to custody, sentence lengths are so much shorter, and most convicted offenders are sanctioned by fines, suspended sentences, or community-based penalties. But the manner of running prisons and treating inmates is also revealingly different. Open (minimum security) prisons are common; home leaves and private family visits are routinely granted; and education, training, and rehabilitative programs are generally much better developed. (The European Court of Human Rights has stated that member states have a positive obligation to ensure rehabilitation, and in Germany, access to rehabilitative programs is a constitutional right.) Prisons in these nations are generally much smaller than in the US; are located closer to cities where inmates' families live; are more comfortably furnished; and are run by relatively well-paid prison officers whose extensive training emphasizes social work with inmates rather than security concerns. To avoid overcrowding, these nations often have prison "wait lists", enabling sentenced offenders to remain at home until a prison place

becomes available. And the presumption is that inmates will be held at the lowest level of security compatible with their characteristics.

Prison administration in Germany and in Norway is governed by the “principle of normality” and in the Netherlands by the “principle of association”; the implication of which is that the lives of prisoners should resemble normal life to the extent this is possible – for example by allowing inmates to wear their own clothes, cook their own meals, be in regular contact with their families, and have access to all of the social services (such as healthcare, education, or counselling) provided by the local municipality. Courtesies that are unheard of in American prisons – such as knocking on a cell door before entering or addressing a prisoner as “Mr. Smith” – are an aspect of this “normalization” ethos.

Provision for re-entry and resettlement are also strikingly different than in the US. Since 2005, Norway has instituted a “reintegrative guarantee” that provides released prisoners with an offer of employment, education, suitable housing, medical services, addiction treatment, and debt counselling – an official acknowledgement that prisoners retain their citizenship rights and welfare state entitlements. The underlying idea – again quite alien to the US approach – is that prisoners are still members of the outside community, and that they remain citizens who enjoy the fundamental rights of citizens, even while they serve a custodial sentence.<sup>2</sup>

Compared to the US, each of these nations exhibits not just lower rates of incarceration – they also have much more egalitarian economies and more universal, generous welfare states. Nor is this a surprise, since, as sociologists have repeatedly pointed out, penal institutions and welfare institutions are tightly coupled and mutually reinforcing. The simplest way to understand this fact is by reference to the idea of the Welfare State as a *social contract* – a form of political association in which members of a society come to feel a sense of solidarity and mutual obligation; and in which the government is responsible for ensuring that every citizen is able to live a secure, decent life, with equal access to the public resources (education, housing, income support, social and cultural services, etc.) needed to participate in the social and civic life of the society. In other words, these more progressive, more humane forms of punishment exist not because Europeans are more civilized or have no tendency towards racism and punitiveness. They exist because European nations have established economic arrangements, welfare states, and forms of political association that are more egalitarian and inclusive – and which thereby reduce the need for penal control.

## Violence and Social Problems in the US

What do these international comparisons tell us about the roots of American penal exceptionalism? How do they help make sense of America’s obsession with penal control?

One basic finding of comparative research is that Americans are exposed to very much higher levels of criminal violence than are the citizens of other affluent nations. Over the course of the twentieth century, America’s homicide rate was three times as high as Canada’s and between 5 and 10 times as high as those of western and northern Europe. Homicide rates are especially high among African Americans and Latinos, but white Americans are also killed at a higher rate than the populations of Western Europe. The widespread availability of guns undoubtedly elevates American lethal violence, but non-firearm homicides are also higher in the US than in

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<sup>2</sup> T. Horn and T. Ugelvic, “Best in Class: Norwegian Incarceration” in T. Daems and R. Luc (eds) *Europe in Prisons* (2017).

other western nations. Despite the downward trend of the last two decades, America's homicide rate remains four times as high as comparable nations, while its rates of armed robbery and police-civilian killings are also markedly higher.

But violence is not America's only problem. Compared to other affluent nations, the US is at the high end of virtually every social problem. Like lethal violence, high social problem rates are a long-term feature of American society that grew worse from the 1960s onwards and that have recently become somewhat less severe. Compared to other developed nations, the US exhibits strikingly high levels of *child poverty* (American child poverty rates are higher than in any other OECD country and four times as high as children in northern Europe); *relative poverty* (compared to ten other rich nations, America has the highest levels of relative poverty and the second highest levels of absolute poverty); *poverty while in work* (American single parents work more hours than do the resident parents of other nations while also receiving less in transfer benefits); *infant mortality* (the US has one of the highest infant mortality rates of any rich nation); *single parent households* (America has the highest percent of single parent households of any western nation other than Hungary); *teenage birth rates* (the highest in the developed world); *mental illness* (US rates are higher than in other rich societies); *high school non-completion* (US high-school graduation rates are near the bottom of the OECD countries); *drug addiction* (higher than those of comparable nations); and *drug-related deaths* (5 to 10 times higher than western Europe). In an 'index of health and social problems' comparing twenty-three rich nations on multiple indicators, the US had by far the worst overall score.

### **Social Problems, Poverty and Race**

Violent crime and social problems are, in any society, concentrated in the poorest areas and social groups. Because American inequality is among the highest in the developed world, because of its history of racial subordination, and because it continues to exhibit high levels of racial and spatial segregation, these social problems are highly concentrated in minority communities. Violent crime rates for African American neighborhoods are five times as high as for white neighborhoods; African Americans have a homicide victimization rate that is 6.6 times higher than Whites; a serious crime victimization rate that is 1.4 times higher; and are injured by gunshot wounds 19 times as often. Homicide is *the* leading cause of death for black males aged 15 to 34. Data on single-parent households, teenage pregnancies, infant mortality, and long-term unemployment show similarly marked racial disparities.

Why, in the most affluent nation in the world, is violence and disorder so much worse than in other developed nations? And why are violence and disorder so concentrated in poor, segregated, minority communities?

The most persuasive explanation points to patterned effects generated by the structure of America's economic and political institutions. Comparative data strongly suggests that rates of violence and rates of punishment tend to correlate with levels of inequality and welfare state provision. Unequal nations with weak welfare states exhibit high rates of violent crime and incarceration. More equal nations with strong welfare states exhibit lower rates of violence and of punishment. America is exceptional in penalty and in violence because it is exceptionally unequal and because its welfare state is exceptionally weak, at least in its provision for the poor. (This correlation between welfare and penal policy can be observed across the American states as well.)

America's distinctive political economy exposes communities, families and individuals to greater market-generated risks (unemployment, poverty, inequality, inadequate housing, food insecurity, and so on) while providing them with fewer social protections (social insurance, income support, public provision, social rights,

healthcare, etc.) than are provided in comparable nations. This risk-exposure is greatly magnified in segregated urban communities where African-Americans live in conditions of concentrated disadvantage. The result is that families, schools, and employers in these stressed, at-risk communities are less able to carry out the vital work of socializing, controlling and integrating individuals and maintaining social order in their neighborhoods. This, in turn, gives rise to unsafe public spaces, social disorder, and extraordinarily high rates of violence.

## Political Economy and Violence

Viewed comparatively, America's political economy is characterized by an exceptionally "liberal market economy"; a minimalist welfare state for the poor with few economic and social protections; very high levels of social and racial inequality and high levels of extreme poverty among the non-aged. "Liberal market economies" are characterized by low levels of employment protection, weak trade unions, lightly-regulated labor markets, competition between firms, high proportions of workers in low-wage, insecure jobs, and by welfare state regimes with minimal protections for workers and for the poor. On all of these measures, the US falls at the extreme end of the range.

In 2007, the US ranked second-to-last of 34 countries in terms of union membership and it has the highest proportion of workers in poorly paid jobs. America has the lowest level of labor regulation, and US employers have the highest level of firing flexibility. US public social expenditure as a percent of GDP ranked 19<sup>th</sup> of 20 OECD countries and, according to the Luxembourg Income Survey data, America's anti-poverty effort is the least of the 30 nations included in the survey. Except for Mexico and Russia, America is by some distance the most unequal of the OECD nations in terms of income distribution. The US also provides relatively less support to families in the form of subsidized child-care; paid parental leave; housing support; and pre-school education.

America's *laissez-faire*, small-state arrangements were modified between 1935 and 1965 by the New Deal and the Great Society. But the economic and social protections that these programs provided were less developed than those of comparable nations and more racially skewed, with black workers largely excluded from benefits for much of that period. Moreover, this 30-year stretch of US history proved to be an exceptional one, after which governments once again emphasized reduced taxation, the deregulation of business, and the minimizing of social protections. From the mid-1970s onwards, the New Deal coalition collapsed and America's brief flirtation with social democracy gave way to a renewed free-market fundamentalism. The result was labor union decline, wage stagnation, increased inequality, and deepened poverty for those at the bottom of the class and race hierarchy. Increasingly, Democratic Party politics de-emphasized the struggle for economic justice so that even as diversity improved and explicit racism diminished, the situation of the urban poor deteriorated. Inner cities suffered a large-scale disinvestment by industry and business as well as the declining support of federal and state government, giving rise to what Pat Sharkey calls a "policy of abandonment." The welfare reforms of the 1990s – enacted in parallel with federal legislation accelerating mass incarceration – exacerbated these effects by concentrating benefits on the working poor and minimizing support for out-of-work men and single mothers.

My argument so far has been that America's penal state and welfare state differ from those of other affluent western nations – and that these two facts are causally connected. We might say that the American *social contract* – the reciprocal rights and duties that bind each of us to each other, the norms that shape the conduct of citizens and the responsibilities of government – is distinctive, and, for those who believe in equality, inclusiveness, and social justice, deeply problematic. In the American social contract, poor people – and above all poor people of color – count for very little. Our willingness to tolerate a welfare state and penal system that treat people so very

harshly and with so little dignity confirms this. The American polity simply does not value the lives of those populations.

Why is this? There can be little doubt that America's political development – with its legacies of slavery and segregation, its states' rights federalism, and its anti-government, pro-market ideology – is largely responsible. But whatever the historical explanation, America's political economy continues to be arranged in ways that systematically disadvantage lower classes and minority groups, while allowing elites to amass vast fortunes. These economic burdens, overlaid with practices of segregation and discrimination, generate serious social problems – poverty, infant mortality, addiction, mental illness, housing insecurity, family breakdown – chief among which is violent crime.

In any community, social order primarily depends upon informal social controls exerted by families, neighbors, and community organizations. It depends upon the quotidian work of child-rearing and parenting, teaching and mentoring, guiding and advising, supervising and scolding, restraining and rewarding, bonding and binding – backed up by the disciplines of school, workplace, and labor market. These vital tasks require energy, resources, and a stable, secure setting. When families are stressed, money scarce, employment and housing inadequate, and have family members addicted, absent, imprisoned, or never home because they are working multiple jobs – and when governments fail to counter these problems – neighborhoods become disorderly, disorganized, and prone to vice and violence. Where social order is well-established, law and courts stay in the background and reinforce informal processes. Where social order is fragile, the state's control agencies – police, prison, probation, parole – play a much more prominent role.

The effectiveness of neighborhood institutions and informal controls is conditioned by larger socio-economic structures that determine the resources – jobs, decent schools, affordable housing, public transport, social services, responsive policing, information networks, and so on – made available to residents. Political economy conditions how effectively families, schools, local labor markets, and community organizations are able to function, and in turn, how much deviance and disorder is liable to emerge. Routine social control is enabled or inhibited by socio-economic structures and the supply of public resources. Where social control is weak, crime and disorder result.

Admittedly, social control processes have their own dynamics and are never entirely determined from above: even in the poorest neighborhoods, some families overcome disadvantage and raise well-socialized children; just as some poor neighborhoods establish vital and solidaristic communities. But the important point for my purpose is that, generally speaking, political and economic structures have consequences for criminal violence; and that America's political economy is, for reasons we now understand, much more criminogenic than those of other developed nations.

When making common-sense judgements about blameworthiness and criminal responsibility, we forget that adult individuals have biographies that are always embedded in social and economic contexts that are outside their control, and for which they bear no responsibility. Adult offenders, like everyone else, start out as infants and children and their brains and bodies – like their personalities and characters – develop over time within family and social relationships. Most offenders are shaped by a life-time of poverty, which often involves “addiction, mental illness, violence, residential instability, poor health, and unsafe neighborhoods”, traumatic experiences with violence, and ongoing, conflictual relationships with police and authorities.<sup>3</sup> And once we factor that social fact

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<sup>3</sup> M. Desmond and B. Western “Poverty in America: New Debates and Directions” *Annual Review of Sociology* (2018) and B. Western, *Homeward* (2018)



into our thinking, it changes our ethical assessment of the individual offender as well as our political assessment of what needs to be done to prevent crime and improve public safety.

The welfare states of most rich nations provide extensive social protections, economic transfers, social services, and social controls. They help families and communities function more effectively; protect against the economic and social risks; and provide resources for managing deviance without resorting to punishment. In America, by contrast, risks are more fully borne by individuals, families, and communities. Market winners are allowed to prosper so that, compared to their counterparts elsewhere, well-to-do Americans earn higher incomes, pay lower taxes, enjoy more corporate welfare, and accrue more wealth. Market losers, on the other hand, do much worse than equivalent groups elsewhere: experiencing more insecurity, deeper poverty, and greater disadvantage. The result is the presence, in many American cities, of dangerously disorganized neighborhoods characterized by chronic social problems, unsafe streets, and endemic violence – neighborhoods that can appear alien and frightening to the more affluent groups who control local governments and shape policy choices.

American society generates high rates of violence and social problems and deals with them using the penal controls of police and prison. Other affluent nations experience fewer problems in the first place – thanks to the preventative, prophylactic effect of their social protections. And when faced by violent crime and social problems, they have a greater capacity to deal with them by social services, social controls, and soft power. As a result, fewer people are caught up in the net of penal control and imprisonment.

### **Political Economy and State Capacity**

There is widespread skepticism among Americans about the efficacy of government programs: a skepticism that is reinforced by the poor performance of under-funded government agencies operating in a hostile political climate. Criticism is especially directed at social programs that aid ‘undeserving’ minority communities and the supposed failures of the War on Poverty in the 1960s are often cited as dispositive evidence that such initiatives cannot work. There is also a widespread assumption that when it comes to crime-control, punishment *works*. Unlike social policy interventions, the imposition of harsh penal controls appears immediate, targeted, relatively inexpensive, and morally appropriate – giving offenders the punishments they deserve.

There are structural as well as attitudinal reasons that make social policy programs less likely than penal responses here in the US. Social policy interventions are generally more long-term and more expensive – even if they would work out cheaper in the end – and their impact upon crime is less targeted and less direct. Given powerful resistance to taxation; Republican opposition to social spending; the short-termism of election cycles; popular hostility towards ex-prisoners and people on welfare; and a division of political power that allows numerous opportunities to veto controversial legislation; American governments are generally predisposed to reject preventative social investments and rely instead upon *post facto* responses. Given this settled disposition, efforts to mount social interventions often require novel forms of expertise, personnel, and agencies – and a willingness to engage in long-term investment and institution-building on the part of government. In contrast, there is a ready-made resort to police, prosecution and imprisonment that makes penal control the path of least resistance. Political barriers are lower too, since proposals to increase punishments rarely meet with organized opposition.

Compared to other nations, the US (at the national, state, and local levels) has a more limited capacity for remedial social action. Welfare states are not just systems for tax-and-spend redistribution; they also involve

large-scale expansions of state capacity and infrastructures of positive state power by means of which governments affect the fates of families and firms, and the conduct of individuals. In the welfare states of most rich democracies, there are governmental agencies, employees, and funding streams whose task it is to ensure that households, schools, and communities are supported; social exclusion combatted; affordable housing made available; job-training and placement provided; and employment made secure. Highly developed welfare states provide diffuse, extensive, front-end forms of social prevention that enhance social control and reduce social dislocation. And when deviance or disorder do occur, there are already-existing social services, public health agencies, community agencies, and professional caseworkers to deal in a non-penal manner with problems such as homelessness, mental illness, drug addiction, prisoner re-entry, and the needs of crime victims.

The social infrastructure of American government is, by comparison, less extensive and less well-resourced. City governments in particular lack the power to undertake elaborate or costly social initiatives, so urban problems are rarely effectively addressed in the absence of state or federal assistance. America's meagre welfare state is less well equipped with the kinds of soft power – the social services, personnel, infrastructure, and capacity for positive, co-ordinated action – that other nations use to deal with crime and disorders. As a consequence, it lacks social reach and effectiveness. When American politicians, policy-makers, and judicial actors are faced with urgent demands to stem the tide of criminal violence, they have fewer options at their disposal and those they have are mostly repressive.

As a result, American criminal justice is charged with tasks that other nations allocate to social service agencies. Jails are America's biggest mental health facilities – a task for which they are singularly ill-suited. (According to the National Research Council, 64% of jail inmates have mental illness and 68% have drug or alcohol dependence, while in state prisons, the prevalence is 56% and 53%. Furthermore, 80% of inmates are without private or public health insurance upon reentry, and many states make former inmates ineligible for Medicaid.) Similarly, America's police – relatively ill-trained as they are – are expected to manage the social and health problems of poor communities in addition to the work of law enforcement.

### **Implications for Reform**

Mass incarceration and repressive criminal justice are deeply embedded in America's social and economic structures. We can reform that system at the margins – and each progressive reform reduces the human cost of injustice. But to “end mass incarceration” we will have to enact fundamental reforms in sentencing while simultaneously addressing the institutional arrangements that promote violence and dysfunction in poor communities and improving the social services we provide to formerly-incarcerated people.

The men and women who populate our prison and jails are often seriously damaged by the environments in which they have been raised. Mental illness, physical disability, drug and alcohol addictions, traumatic exposure to violence, and sexual abuse are highly prevalent in these populations, which also tend to be under-educated, lacking in job skills, and employment experience. If we move large numbers of offenders into the community without providing them with housing, employment, social services, healthcare, and income support, this decarcerated population will inevitably re-offend, driving up crime rates and undermining public support for the reform effort. (We saw this in the 1960s with the deinstitutionalization of the mentally-ill, and we may see it again soon with New York's attempt to end cash bail.)

To make criminal justice reform sustainable, we need to adopt non-penal methods of reducing crime and violence (such as situational crime prevention, social crime prevention, and community action, etc.); we need to provide re-entry support to enable released offenders to build law-abiding lives; and we need to build a welfare state infrastructure of social and economic supports that lifts up our poorest families and builds strong communities that are less prone to social problems and violent crime.

The requisite reforms go beyond criminal justice to include a radical rethinking of crime control strategy, urban policy, and welfare state provision. And this, in turn, means that real criminal justice reform will only happen as part of a larger progressive movement to make America's political economy more egalitarian, more inclusive, and more just.

Can we control crime while reducing incarceration? Perhaps. Mass incarceration and extensive, intrusive policing have clearly played a role in bringing crime rates down, but New York State has shown that it's possible to reduce jail and prison populations while simultaneously reducing crime. We need to stress that "punishment" is *not* an efficient form of crime control. Granted, we need *some* level of punishment to deter would-be offenders, to impose deserved retribution on wrong-doers, to contain dangerous individuals, and to uphold the law. But criminal punishment, if it occurs at all (most offences never result in a conviction) is after-the-fact, and tends to reinforce the likelihood of criminality rather than reform individuals. We should think of punishment in terms of a necessary minimum, and focus on the fact that its overuse produces unnecessary pain and suffering, and sometimes, as with mass incarceration, generates extensive, long-lasting damage to whole communities and social groups.

In reality, most crime control results from the routine operation of *mainstream* social processes – from the socialization, social integration, and social controls exerted by families, teachers, employers, neighbors, churches and communities – not from police and prisons. Which is why other nations, where families and communities are better supported by social services and welfare states, have fewer social problems, lower rates of violence, and healthier, happier populations.

These nations have built welfare states that expanded the meaning of citizenship, creating an equality of social esteem and entitlement that acted as a counter to the class structure of capitalism. They forged social contracts that emphasized solidarity, security, equality of esteem, and an inclusive "people's home" or "welfare state." Nothing of the sort occurred in the US. The New Deal brought us social security and later Medicare and Medicaid, and these big programs became embedded and hugely popular. But America never developed a true "welfare state" in this more powerful, normative sense, and for much of its history, the New Deal institutions excluded people of color, amounting to "affirmative action for whites." Nor did it provide citizens with social and economic rights – other than the right to a K-12 public education. Instead, it encouraged private sector provision (occupational pensions, employer-based healthcare) for workers, and minimal, means-tested provision for the poor.

In the last 40 years this already-meagre welfare state has been made meaner, more conditional, and more disciplinary, above all for single mothers, for the very poor, and for those out of work. And as labor unions decline, wages stagnate, and employment becomes more precarious, poverty-in-work has become a defining feature of millions of American households. It was in this political and economic context that mass incarceration flourished, establishing imprisonment as a repressive back-up to a precarious labor market: a means of governing the poor by branding them as felons and subjecting them to a lifetime of stigma, supervision, and exclusion. What comparative work suggests, is that the antidote to mass incarceration is not simply decarceration – it is a citizen's welfare state.