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## Mass Incarceration: The Silence of Judges



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## **Mass Incarceration: The Silence of the Judges**

**Jed S. Rakoff**

For too long, too many judges have been too quiet about an evil of which we are a part: the mass incarceration of people in the United States today. It is time that more of us spoke out.

The basic facts are not in dispute. More than 2.2 million people are currently incarcerated in U.S. jails and prisons, a 500 percent increase over the past 40 years. Although the United States accounts for about five percent of the world's population, it houses nearly 25 percent of the world's prison population. The per capita incarceration rate in the U.S. is one-and-a-half times that of second place Rwanda and third place Russia, and more than six times the rate of neighboring Canada. Another 4.4 million Americans are subject to the state supervision imposed by probation or parole.

Most of the increase in imprisonment has been for non-violent offenses, such as drug possession. And even though crime rates in the United States have declined for 24 consecutive years, the number of incarcerated persons has continued to increase over most of that period, both because more people are being sent to prison for offenses that once were treated with other measures and because the sentences are longer. For example, even though the number of violent crimes has steadily decreased over the past two decades, the number of prisoners serving life sentences has steadily increased, so that

one in nine persons in prison is now serving a life sentence.

And whom are we locking up? Mostly young men of color. Nearly 900,000, or 40 percent, of the 2.2 million U.S. prisoners are young African-American males. Put another way, about 10 percent of all black American men under the age of 30 are currently in prison, and, if current rates hold, one-third of all black men will be imprisoned at some point in their lifetimes. Another approximately 400,000, or nearly 20 percent, of the 2.2 million U.S. prisoners are young Hispanic males.

This mass incarceration – which also includes about 800,000 white and Asian males, as well as over 100,000 women (virtually all of whom committed non-violent offenses) – is the product of statutes that were enacted, beginning in the 1970s, with the twin purposes of lowering crime rates in general and deterring the drug trade in particular. These laws imposed mandatory minimum terms of imprisonment on many first offenders; propounded sentencing guidelines that initially mandated, and still recommend, substantial prison terms for many other offenders; and required life-time imprisonment for many recidivists. These laws substantially deprived judges of sentencing discretion and effectively guaranteed imprisonment for many offenders who would have previously received probation or deferred prosecution, or who would have been sent to drug treatment or mental health programs rather than prison.

The unavoidable question is whether these laws have succeeded in reducing crime. Certainly crime rates have come down substantially from the very high rates of the 1970s and 1980s that gave rise to these laws. Overall, crime rates have been cut nearly in half

since they reached their peak in 1991, and they are now at levels not seen in many decades. A simple but powerful argument can be made that, by locking up for extended periods the people who are most likely to commit crimes, we have both incapacitated those who would otherwise be recidivists and deterred still others from committing crimes in the first place.

But is this true? The honest answer is that we don't know. And it is this uncertainty that makes changing the status quo so difficult: for, the argument goes, why tamper with what seems to be working unless we know that it isn't working?

There are some who claim that they *do* know the answer to whether our increased incarceration is the primary cause of the our decline in crime. These are the sociologists, the economists, the statisticians, and others who assert that they have “scientifically” determined the answer. But their answers are all over the lot. Thus, for example, a 2002 study by sociologist Thomas Arvanites and economist Robert DeFina claimed that, while increased incarceration accounted for 21 percent of the large decline in property crime during the 1990s, it had no effect on the similarly large decline in violent crime. But two years later, in 2004, economist Steven Levitt – he of “Freakonomics” fame – claimed that incarceration accounted for no less than 58 percent of the violent crime decline in the 1990s and 41 percent of the property crime decline during that period.

Levitt's conclusions, in turn, were questioned in 2006, when sociologist Bruce Western re-examined the data and claimed that only about 10 percent of the 1990s crime drop could be attributed to increased incarceration. But two years after that, in 2008,

criminologist Eric Baumer took still another look at the same data and found that it could support claims that increased incarceration accounted for anywhere between 10 percent and 35 percent of the crime decrease in the 1990s.

As these examples illustrate, there is nothing near an academic consensus on the proportion of the crime decrease attributable to increased incarceration. Only last year, a distinguished committee of the National Academy of Science, after reviewing not only the studies referenced above but a great many more, was able to conclude only that, while most of the studies “support the conclusion that the growth in incarceration rates reduced crime ... the magnitude of the crime reduction remains highly uncertain.”

Most recently, in March 2015, the Brennan Center for Justice at NYU Law School published a study entitled “What Caused the Crime Decline?” that purports to show that increased incarceration has been responsible for only a negligible decrease in crime. One cannot help but be impressed by the sheer scope of the study. The authors identify the fourteen most popular theories for the decline in crime in the last few decades and attempt to test each of them against the available data. Five of the theories involve criminal justice policies: increased incarceration, increased police numbers, increased use of statistics in devising police strategies to combat crime, threat of the death penalty, and enactment of right-to-carry gun laws (which theoretically deter violent criminals from attacking victims who they now have to fear might be armed). Another four of the theories are economic in nature, involving changes in unemployment, income, inflation, and consumer confidence. The final five involve environmental and social factors: aging

population, decreased alcohol consumption, decreased crack use, legalized abortion, and decreased lead in gasoline (which theoretically reduces the supposed tendency of lead fumes to cause over-aggressive behavior).

The primary findings of the Brennan study are that increased incarceration “has had little effect on the drop in violent crime in the past 24 years” and has “accounted for less than one percent of the decline in property crime” in the last 13 years. To reach these striking results, the authors rely (as did most of the earlier studies cited above) on the social scientist’s favorite tool, a multi-variable regression analysis that, according to the Brennan Study, “controls for the effects of each variable on crime, and each variable on other variables.” But, as anyone familiar with regression analysis knows, it rarely speaks to causality, as opposed to correlation; and, even as to correlation, it involves a lot of educated guesswork. The authors admit as much, but seek to downplay the level of uncertainty, stating “There is always some uncertainty and statistical error involved in any empirical analysis.” But when you are dealing with matters so difficult to measure as how much of the decrease in crime can be attributed to everything from decreased alcohol consumption to increased consumer confidence, your so-called “estimates” may be little more than speculations.

In an attempt to adjust to this difficulty, the authors state the percentage of crime decrease attributable to each given factor as a range, *e.g.*, increased police numbers accounted, according to the study, for between 0 percent and 5 percent of the decline in crime between 1990 and 2013. But if you take the low end of each of the ranges, the

fourteen factors analyzed in the Brennan Study collectively accounted for as little as 10 percent of the decline in crime over that period; and even if you take the high end of each of the ranges, the various factors still accounted for only 40 percent of the decline in crime. Under any analysis, therefore, either the decline in crime in the last 20 years or so was chiefly the product of forces that none of the leading theorists has identified, or (as seems more likely) the regression analysis used by the authors of the Brennan Study is too imperfect a tool to be of much use in this kind of situation.

My point is not to criticize the Brennan Study per se. It is in many respects the most ambitious and comprehensive study of its kind undertaken to date. But as the National Academy of Science report points out in discussing the many similar studies that, as noted, led to a wide range of results, there are simply too many variables, uncertainties, estimates, and challenges built into the situation to permit a regression analysis that is little more than speculation dressed up as statistics. The result is that one cannot fairly claim to know with any degree of confidence or precision the relative role of increased incarceration in decreasing crime.

But put another way, the supposition on which our mass incarceration is premised – namely, that it materially reduces crime – is, at best, a hunch. Yet the price we pay for acting on this hunch is enormous. This is true in the literal sense: it costs more than \$80 billion a year to run our jails and prisons. It is also true in the social sense: by locking up so many young men, most of them men of color, we contribute to the erosion of family and community life in ways that harm generations of children, while creating a future

cadre of unemployable ex-cons who have learned in prison how better to commit future crimes. And it is even true in the symbolic sense: by locking up, sooner or later, one out of every three African-American males, we send a message that our society has no better cure for racial disparities than brute force.

So why do we have mass incarceration? As mentioned, it is the product of laws that were passed in response to the substantial rise in crime rates that began in the 1960s and continued through the 1980s. These laws varied widely in their specifics, but they had two common characteristics: they imposed higher penalties and they removed much of judicial discretion in sentencing.

The most pernicious of these laws were the statutes imposing mandatory minimum terms of imprisonment. Although there were a few such laws prior to 1970 – for example, criminal contempt of Congress carried a mandatory minimum sentence of six months in prison – beginning in the 1970s Congress passed laws dictating much harsher mandatory minimum terms of imprisonment for a very wide variety of criminal violations. Most notably these laws imposed mandatory minimums of five, ten, and twenty years for various drug offenses, and as much as 25 additional years for possession of guns during drug trafficking; but they also imposed mandatory minimum terms of imprisonment for such widely-varying offenses as possession of child pornography, aggravated identity theft, transportation of aliens into the United States for commercial advantage, hostage taking, unlawful possession of anti-aircraft missiles, assault on United States servicemen, stalking in violation of a restraining order, fraudulent use of food

stamp access devices – and much more besides. The dictate common to all these laws was that, no matter how minor the offender’s participation in the offense may have been, and no matter what mitigating circumstances might be present, the judge was required to send him to prison, often for a substantial number of years.

Throughout the 1970s and 1980s, many of the 50 states – with the full support of the federal government, which hugely increased its funding for state prisons during these years – passed similar mandatory minimum laws, and some went a step further and imposed mandatory minimum sentences of life imprisonment for recidivists (California’s “three strikes” law being a noteworthy case). Not to be outdone, Congress not only passed “career offender” laws similar to the “three strikes” statute, but also, in 1984, enacted, with bipartisan support, the Federal Sentencing Guidelines. These guidelines, although initially intended to minimize disparities in sentencing, quickly became a vehicle for greatly increased sentences for virtually every federal crime, chiefly because Congress repeatedly instructed the Sentencing Commission to raise their levels. Furthermore, these so-called “guidelines were, for their first 21 years, mandatory and binding. And while, in 2005, the Supreme Court declared that they were unconstitutional unless discretionary, federal judges were still required to treat them as the starting point for any sentence determination, with the result that they continued to be followed in most cases. More generally, judges both state and federal became accustomed to imposing prison terms as the “norm;” and with the passage of time, there were fewer and fewer judges on the bench who had even experienced a gentler approach.

But why, given the great decline in crime in the last quarter century, have most of the draconian laws that created these harsh norms not been repealed, or at least moderated? Some observers, like Michelle Alexander in her influential book *The New Jim Crow*, assert that it is a case of thinly-disguised racism. Others, mostly of an economic-determinist persuasion, claim that it is the result of the rise of a powerful private prison industry that has an economic stake in continuing mass incarceration. Still others blame everything from a continuing reaction to the “excesses” of the ‘60s to the never-ending nature of the “war on drugs.”

While there may be something to each of these theories, a simpler explanation is that most Americans, having noticed that the crime-ridden environment of the 1970s and 1980s was only replaced by the much safer environment of today after tough sentencing laws went into force, are reluctant to tamper with the laws they believe made them safer. They are not impressed with academic studies that question this belief, suspecting that the authors have their own axes to grind; and they are repelled by those who question their good faith, since they perceive nothing “racist” in wanting a crime-free environment. Ironically, the one thing that might convince them that mass incarceration is not the key to their safety would be if crime rates continued to decrease when incarceration rates were reduced. But although this has in fact happened in a few places (most notably, New York City), in most communities people are not willing to take the chance of such an “experiment.”

This, then, is a classic case of the public relying on what they believe is “common

sense” and being resentful of those who question their motives and dispute their intelligence. What is called for in such circumstances is leadership: the capacity of those whom the public does respect to point out why statutes prescribing mandatory minimums, draconian guidelines, and the like are not the key to controlling crime, and why, in any case, the long-term price of mass incarceration is too high to pay, not just in economic terms, but also in terms of societal values. Until quite recently, that leadership appeared to be missing in both the legislative and executive branches, since being labeled “soft on crime” was politically dangerous. Recently, however, there has been some small signs of progress. For example, in 2013, Attorney General Holder finally did away with the decades-old requirement that federal prosecutors must charge offenders with those offenses carrying the highest prison terms. And in the last Congress, a bill to eliminate mandatory minimum sentences for non-violent drug offenders was endorsed not only by the Department of Justice, but also by such prominent right-wing Republican Senators as Ted Cruz and Rand Paul. On the other hand, prosecutors still have discretion to charge offenders with the most serious offenses available, and they usually do. And the aforementioned bill to modify the applicability of mandatory minimum sentences never reached a vote.

So where in all this stands the judiciary? In some ways, this should be our issue, not just because sentencing has historically been the prerogative of judges, but also because it is we who are forced to impose these sentences that many of us feel are unjust and counter-productive. It is probably too much to ask state judges in the 37 states where

judges are elected to adopt a stance that can be characterized as “soft on crime.” But what about the federal judiciary, protected by life-time tenure from political retaliation and, according to most polls, generally well-regarded by the public as a whole?

On one issue – opposition to mandatory minimum laws – the federal judiciary has been consistent in its opposition and clear in its message. As stated in a September 2013 letter to Congress submitted by the Judicial Conference of the United States (the governing board of federal judges), “For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.” But nowhere in the nine single-spaced pages that follow is any reference made to the evils of mass incarceration; and, indeed, most federal judges continue to be supportive of the federal sentencing guidelines, even though Congress, while occasionally approving guidelines reductions recommended by the Sentencing Commission, has much more often required the Sentencing Commission to increase the prison time reflected in those guidelines, thereby further supporting mass incarceration.

Yet even within the judiciary there is some modest cause for hope. Several brave federal district judges – such as Lynn Adelman of Wisconsin, Mark Bennett of Iowa, Paul Friedman of the District of Columbia, and Michael Ponsor of Massachusetts, as well as former federal judges Paul Cassell and Nancy Gertner – have for some time openly denounced the policy of mass incarceration. More recently, a federal appellate judge, Gerard Lynch of New York, expressed his agreement (albeit in an academic article) that

“The United States has a vastly overinflated system of incarceration that is excessively punitive, disproportionate in its impact on the poor and minorities, exceedingly expensive, and largely irrelevant to reducing predatory crime.”

Perhaps the most encouraging judicial statement was made just a few weeks ago, on March 23, 2015, when Justice Anthony Kennedy – the acknowledged centrist of the Supreme Court – told a House subcommittee considering the Court’s annual budget that “This idea of total incarceration just isn’t working,” adding that in many instances it would be wiser to assign offenders to probation or other supervised release programs. To be sure, Justice Kennedy was quick to tie these views to cost reductions, avoidance of prison overcrowding, and reduced recidivism rates, all, as he said, “without reference to the human factor.” Nor did he say one word about the racially disparate impact of mass incarceration. Yet still, his willingness to confront publicly even some of the evils of mass incarceration should be an inspiration to all other judges so inclined.

In many respects, the people of the United States can be proud of the progress we have made over the past half-century in promoting racial equality. More haltingly, we have also made some progress in our treatment of the poor and disadvantaged. But the big, glaring exception to both these improvements is how we treat those guilty of crimes. Basically, we treat them like dirt. And while this treatment is mandated by the legislature, it is we judges who mete it out. Unless we judges make more effort to speak out against this inhumanity, how can we call ourselves instruments of justice?





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