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Critical Perspectives in Criminal Justice

Marijuana Legalization and the Philosophies of Policymaking

Miles Grossman

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ESSAYS

Marijuana Legalization and the Philosophies of Policymaking

Miles Grossman

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A majority of Americans, including most Republicans and Republican-leaning individuals, support the legalization of marijuana, motivated by prohibition's racialized enforcement and the economic, social, and medical benefits of legalization. However, American political institutions have vehemently opposed proposed relaxations of marijuana restrictions. This move is greatly influenced by the power of utilitarianism in conventional decision-making calculus. However, utilitarianism unjustly imposes personal beliefs of success and happiness over the entire population, is inadequate to take moral and ethical considerations into account, and, writ large, fuels bad policy decisions. Using marijuana legalization as a case study to examine the failures of utilitarianism highlights its inadequacies more broadly and suggests new paths toward ethical policymaking.

Introduction

Despite the overwhelming majority of Americans supporting the federal legalization of marijuana, with 67 percent supporting legalization as of 2019 (Daniller) and all but 5 states decreasing restrictions on marijuana, almost nothing has been done on the federal level in decades. While the MORE Act, officially named the Marijuana Opportunity Reinvestment and Expungement Act of 2019, seeks to remove marijuana from the federal controlled substances list — effectively decriminalizing the drug — and expunge the records of those with past marijuana-related offenses, the bill is unlikely to pass the Republican-controlled Senate, with Skopos Labs estimating it has a four percent chance of being signed into law (Gehlen; GovTrack). This is clearly

incongruous with the polling presented earlier. More, although marijuana legalization is split along party lines in terms of legislative efforts in the federal government, with Democrat legislators favoring relaxing restrictions and Republicans legislators starkly opposed, the majority of Republican and Republican-leaning voters (55 percent) are in support of legalization (Daniller).

Thus, it is critical to understand what is driving such a large faction of our government away from supporting the legalization of a substance which will, by most accounts, be extremely beneficial in an array of manners. While one could dismiss this as the result of aggressive lobbying by the tobacco industry and others, though indeed a factor, it is more powerful to name the fundamental differences underpinning this divide. Upon doing so, it becomes evident that the divide on marijuana policy highlights the utilitarian thinking that underpins U.S. policymaking. Specifically, policymakers justify prohibition by accounting for the purported negative effects of marijuana use. While in name utilitarianism seeks to maximize happiness, not a bad idea at face-value, the issue with the framework becomes apparent when considering how it fails to grapple with problems with morality. Specifically, from a moral outlook, marijuana should be legalized because of its medical benefits, the harmful and racialized impact of policing its use, and a Lockean understanding of free will. Thus, the failures of utilitarianism in policymaking, made apparent by its contradiction of popular opinion and morality, demonstrate not only the need to reevaluate marijuana policy but to evaluate the role and necessity of utilitarianism in policymaking as a whole.

Marijuana Use and Legalization

To begin, there are a number of reasons why, from a purely practical perspective, marijuana should be legalized. First, marijuana prohibition has unquestionably failed in its stated goals. Prohibition was intended to decrease use, and thus decrease the perceived consequences of marijuana use. However, prohibition has failed on both counts. “Marijuana use has increased drastically during its prohibition. Today, 22,000,000 Americans use cannabis each month, and even more consume it on a less frequent basis,” say Prof. David Nathan, Dr. H. Westley Clark, and Prof. Joycelyn Elders, an expert medical team of a former surgeon general and experts on substance abuse and cannabis. Worse, prohibition has increased the potential negative effects of

marijuana use since marijuana's high spot on the federal drug schedule prevents regulation of cannabis products, increasing the risk of consuming products that are lethally contaminated or impure (Nathan, et al.). Additionally, legalization would provide a massive economic stimulus. According to a study done by the right-libertarian Cato Institute, policy to decriminalize marijuana would save the government $17.4 billion a year, with one half coming from reduced spending on enforcement and the other from the newfound ability to tax revenue on legal cannabis products (Miron & Waldock). Along with providing an economic boost, marijuana has proven and unproven medical benefits. It is widely accepted in the medical community and by the government that marijuana products have caused largely positive results across many trials for a wide range of treatments (Grinspoon; NCCIH; CDC). Some of a long list of examples include significant pain reductions in cancer patients, reducing nausea in cancer patients, and alleviating neuropathic pain (Farrell, et al.).

Nevertheless, legalization raises both moral and ethical questions as well. One issue is the aforementioned contradiction between popular support and legislative gridlock for legalization. Governments have an ethical obligation to justify legislation that goes against the will of the vast majority of its constituents, as is the case with marijuana legalization. Second, while possession of marijuana can be punished by up to one year in jail (Working to Reform Marijuana Laws), punishments are not doled out uniformly; instead, marginalized communities are disproportionately affected by such punitive policies. "Black and white Americans use marijuana at similar rates, but black people were 3.7 times more likely to be arrested than white Americans for marijuana possession in 2010" (Lopez (b)). While the scope of racism in the criminal justice system is much larger than just marijuana, allowing one facet of racism (marijuana criminalization) to persist is unjustifiable. The ethical position would be to prevent arrests from a victimless crime and expunge the records of those who have been affected by morally bankrupt policies of criminalization.

Finally, should a wide swath of practical and moral benefits for legalization still not be enough, we can turn to a philosophical evaluation of marijuana criminalization. John Locke — a philosopher whose work laid the foundations for the American Revolution and founding documents — should guide our understanding of marijuana legalization. Writing on the extent of legislative power over property, Locke stated that

> *"The supreme power cannot take from any man any part of his property without his own consent: for the preservation of property being the end of government,*

> *and that for which men enter into society, it necessarily supposes and requires, that the people should have property … they have such a right to the goods, which by the law of the community are their's [sic], that no body [sic] hath a right to take their substance or any part of it from them, without their own consent: without this they have no property at all; for I have truly no property in that, which another can by right take from me, when he pleases, against my consent."*

In Locke's earlier musings on the state of nature, he argued that

> *"All men may be restrained from invading other's rights, and from doing hurt to one another, and the law of nature be observed."*

In these two quotes, Locke creates a goldilocks zone for laws restricting individual freedoms: namely, that legislation should not restrict property under the condition that it does not impede upon the rights of others. For this reason, the government, at least to some extent, has the burden to provide substantial evidence that marijuana possession, which it does not, impedes upon the rights of others — especially since such Lockean principles were the foundation of the Constitution in the first place.

So, given that marijuana legalization is popular as well as practically and morally defensible, why does it remain illegal at the national level? There are two conceivable explanations. The first is that those in government are unduly influenced by parties that, for selfish reasons, do not wish to see marijuana legalized. This is certainly possible, as industries like tobacco could see a decline in sales from marijuana legalization measures. However, while the industry has and indirect vested interest in the outcome of marijuana policy, the scope is rather limited, and, so, the research is mixed on where they stand on legalization (Barry). Instead, the more pressing issue is that politicians are informing their decision from an ethical perspective that does not present in favor of legalization. Most prominent among these is the theory of utilitarianism.

Utilitarianism in U.S. Policy

> *"The utilitarian doctrine is that happiness is desirable, and the only thing desirable, as an end."*

Here, John Stuart Mill, one of the most influential philosophers in the development of utilitarianism, is communicating that, in the doctrine of utilitarianism, the ultimate desirable goal in life is to be happy. Importantly, Mill describes happiness as an end rather than a means. Describing happiness as a means would be more in line with a hedonistic philosophy, which argues that whatever brings the most immediate pleasure should be done. Indeed, a hedonistic framework would support marijuana legalization. However, hedonism is an equally, if not more, faulty outlook, as "scientists have found that the more we experience any pleasure, the more we become numb to its effects and take its pleasures for granted" (Dalai Lama and Tutu). In the case of utilitarianism, happiness as an end informs policymaking by arguing against measures that could threaten our future well-being. Thus, utilitarian policymakers inform their decisions by maximizing the perceived net positive effect on well-being, generally of their constituents. This typically means mitigating consequences such as death, adverse health outcomes, etc. Also, policymakers may use their personal beliefs to inform their understanding of this end goal of happiness. For example, politicians who adhere to classical liberalism, a majority of the American government, might believe that accelerating the growth of individual wealth and production would net positive utility and this would inform their utilitarian decision.

So, what are these concerns in the case of marijuana and how valid are they? Regarding health, the primary concerns lie in the fact that evidence is still lacking on the long-term effect of marijuana use. However, if this were the primary concern, the government would authorize studies on the effects of marijuana; yet, this remains illegal due to marijuana's placement on the drug schedule. Especially given that the studies that have been authorized have favored marijuana legalization, this argument is massively disingenuous. Moreover, marijuana laws have become almost impossible to enforce except in overpoliced urban communities and there is substantial risks of impure products in illicit markets (Kleiman). A second is the "gateway drug" argument, claiming that increased use of marijuana results in increased use of more dangerous drugs which have proven negative health effects. This argument has been repeatedly proven to be fallacious: the use of marijuana correlates with hard drug use but does not cause it. Rather, "people who are more vulnerable to drug-taking are simply more likely to start with readily available substances such as marijuana, tobacco, or alcohol" (National Institute on Drug Abuse). In this regard, there exists as much logic behind criminalizing alcohol as continuing to criminalize marijuana. The final common argument against legalization falls under the category of personal belief. Many argue

that marijuana use results in a decrease in individual productivity and success. Informed by their beliefs, conventional policymakers assert that being wealthy and productive is key to happiness. Whether this assertion is correct or not, it is clearly out of step with the teachings of Locke on freedom and liberty. Basing governmental policy on unfounded personal beliefs is illegitimate since those whom the policy affects may not share the same beliefs. While politicians may believe financial success is key to happiness, their constituents may seek happiness in other forms. In conclusion, examining utilitarian policymaking renders it increasingly clear that making decisions based purely on some manufactured, incomplete picture of long-term effects is an incorrect approach for creating moral, equitable marijuana policy. The status quo framework on prohibition creates a host of negative outcomes, preventing the economic, medical, and philosophical benefits of legalization and cementing the issues of racialization within current policy.

However, the failures of utilitarianism go far further than marijuana policy. When policymakers employ utilitarianism in calculating outcomes, "Knowing aggregates and averages, [they] proceed to calculate the utility payoffs from adopting each [policy]" (Goodin). But as Professor Robert E. Goodin, one of the top international figures in political science, explains, one of utilitarianism's great failures is that the predictions made are flat-out wrong. "They cannot be sure what the payoff will be to any given individual or on any particular occasion. [Available information] is just not sufficiently fine-grained for that." In the case of marijuana, for example, while initial data presented in favor of the gateway drug theory, subsequent analysis proved it wrong, but people still latch onto the line of reasoning to justify harmful policies. The potential impacts of being incorrect in other spheres of policymaking, such as foreign policy and economic policy, can be far more disastrous. A second critique is that utilitarianism fails to be morally equitable. "Utilitarianism with its "greatest happiness principle" completely neglects the spiritual dimension of human life" (Cleveland). Professor Cleveland explains this in the context of property ownership, noting that even if it was net better to redistribute wealth, for example with restorative policies for emancipated slaves after the Civil War, utilitarianism focuses on the rights of the property owner. An immoral framework has allowed for numerous atrocities committed by the U.S. government. One such example is the use of enhanced interrogation. While the CIA believed that the potential lives saved by uncovering intelligence outweighed the suffering of interrogated individuals, it ignored the moral implications of excusing torture if they viewed it as justified. Combining this with the

explicit warnings of Locke, not only marijuana criminalization but a large portion of our political system gets called into question.

Conclusion

It now becomes our responsibility to find a better framework for evaluating policy, one that is morally justifiable and empirically desirable. We do this by evaluating our actions by a set of moral guidelines and principles. We should seek an ethical rulebook in direct contrast to the effects-based, consequentialist style of utilitarianism. While these alternative theories are a large topic of debate in and of itself, one theory in particular offers initial promise: deontology. Deontology posits that we should judge an action based on whether it is "right" or "wrong" rather than its effects or consequences. Largely influenced by the work of Immanuel Kant, "deontological theories all possess the strong advantage of being able to account for strong, widely shared moral intuitions about our duties better than can consequentialism" (Alexander & Moore). While each actor is free to adopt their own deontological viewpoints, restructuring the framework by which we evaluate policy can engage the ethical debates necessary for responsible policymaking.

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Predictive Prosecution: Part 2

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Note: This is Part 2 of a two-part series on predictive prosecution. This essay explores the impacts and future of predictive prosecution. Part 1 has more information on the history and details of predictive prosecution and was published in our last issue, here.

Predictive prosecution — data-driven policies that shape prosecution strategies — exists in an experimental phase. This Essay seeks to raise preliminary questions about an obviously nascent experiment. But, the questions are real, and will need to be answered soon. The hope of this brief Essay is to set forth the possible impacts, raise questions, and plan for the future of predictive prosecution.

Preliminary Questions about Predictive Prosecution

This section examines one big question surrounding predictive prosecution. How does predictive prosecution impact prosecutorial decision-making? Due to the constraints of the format, the ideas discussed are initial impressions, not full explorations of complex and important topics.

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Predictive prosecution offers potential benefits in terms of prioritization, efficiency, and more informed judgments. Prosecutors must make difficult decisions every day, and more information might provide for better choices. In today's legal system, prosecutors possess almost unlimited discretion (Podgor). Prosecutors decide whom to prosecute (*Wayte v. United States*). Prosecutors decide how to charge and how to structure plea bargains (Covey; Litman; Podgor). And prosecutors decide recommendations for sentences (Griffin). Adding information from sources such as the predictive policing "Heat List" (see Part I) or organically developed intelligence does not present any direct ethical or constitutional concerns.

If used to identify and proactively target actual crime drivers in a community, a predictive prosecution system could well provide an overall benefit to society. If resources could be redirected toward incapacitating more serious offenders (through bail, charging, and sentencing decisions), while concomitantly incapacitating fewer, less serious offenders, such a process could mean fewer overall people in jail. Such a system might also be more efficient, redirecting scarce prosecution resources. Of course, the current system of mass incarceration that has developed over the last several decades has not lacked for efficiencies in prosecuting and convicting defendants (Alexander; Chettiar). Mandatory minimums, harsh drug sentences, plea bargains, and other processing efficiencies have created an overly efficient process for incarcerating millions of people (Traum). But, the web of people caught up in this system has been overbroad, lacking a commitment to prioritize those most dangerous to society (Pfaff). Millions of nonviolent offenders, millions of misdemeanants, and millions of low-level figures in the drug world are serving significant time in jail (Natapoff). Individually, those persons might not be the chosen targets of our criminal justice resources, but systemically prosecutors have had few mechanisms to evaluate or rank relative danger or risk to society (Neyfakh).

Predictive prosecution offers a potential smart-on-crime counterweight to the tough-on-crime practices of over-incarceration. In fact, taken one step further, if prosecutors only sought to target those predicted to be of high risk of committing crime, then a huge majority of people would see reduced bail, better pleas, and more lenient sentencing. Such prioritization might significantly reduce pretrial detention costs, long term sentencing costs, and overall criminal justice costs.

The danger, of course, is that predictive prosecution might not reduce prosecution levels, but might, in fact, bring more people into the criminal justice system. Two

obvious concerns arise within the Enforcer Model (see Part I). First, in the Enforcer Model, individuals are being linked to criminal activity by proxies for criminal activity. A gang member who has a friend who was shot may be added to the system because, statistically, the associates of dead gang members are more likely to themselves be involved in gun violence. The "two degrees of separation" analysis may both be accurate and yet overbroad when it comes to prosecutorial decisions (Papachristos & Kirk). The particular individual might not have done anything but be a victim of violence, or might remain a small time criminal actor. Further, that particular individual might be summoned to a call-in by a prosecutor and threatened that he may face harsher detention, charging, and sentencing decisions should he get in trouble in the future. So, that individual is in the first instance added to a prosecution list without criminal activity of his own, and in the second instance faced with the potential for a harsher criminal justice outcome because of that designation.

Similarly, in the "Investigative Model," individuals are being targeted because they have been identified as the primary targets for removal (Papachristos & Kirk). The key, of course, is the process by which people are targeted. If limited to only those individuals with multiple convictions for violence, this incapacitation approach can be defended. Using minor crimes to incapacitate major criminal actors is aggressive, but defensible. However, if other factors such as a lack of cooperation with police, suspected but unproven violence, or low-level, non-violent crimes become the justification for being a target, then justification for aggressive incapacitation weakens. Using minor crimes to incapacitate minor criminal actors undercuts the value of targeting only the serious offenders.

Put another way, because the targeting mechanism of identifying the primary targets rests with the prosecution (in collaboration with police), and because there is no system to challenge or correct a targeting error, a risk arises about the data populating this system. Prosecutorial decision-making runs a real risk of being infected by bad data in these systems (*Herring v. United States)*. Personal bias could influence who becomes a target. Political or economic pressure could shape the types of crimes addressed.

Even more generally, any data-driven system runs into concerns with data quality. Data can be inaccurate (M.D.M. Fan; Navid; Steinbock; Whalley). Data can be biased (Taslitz (a)). Data can reify the existing socio-economic inequalities in the criminal justice system (Llenas). Data can also be overwhelming, with little practical or technological checks on quality or accuracy (Mitnick). Yet, every day police and

prosecutors collect more data on individuals, and systems are being designed to become more reliant on this data collection (Mitnick). In prior articles, I have laid out the concern of data error in the criminal justice system (Ferguson (a); Logan & Ferguson). From big data to small data — all data systems generate error. Human error, collection error, processing error, analytical error, application error, or sharing error all exist and cannot be minimized when this same data is used to determine human liberty. If prosecutors' discretionary power involving bail, charging, and sentencing is informed by erroneous or merely poorly correlated data, then real injustice could occur.

The issue is not that prosecutors cannot rely on this data within their existing professional and ethical mandate, but whether they should. The subsequent part of this Essay will address how prosecutors should minimize the real risk of using bad or biased data.

Principles for Predictive Prosecution

Predictive technologies are not new to the criminal justice system (Harcourt (a)). Since the 1920s the lure of predictive insights has led the criminal justice system to try to forecast the future. Predictors for recidivism (Hamilton (a); Sidhu), pretrial detention (Baradarna & McIntyre; Williams), sex offenders (Hamilton (b); Janus & Prentky), juveniles (Fagan & Guggenheim; Roberts & Bender), and a host of actuarial solutions have been proposed (Ferguson (b)). Predictive policing, and now predictive prosecution, fit that pattern.

For almost as long as their creation, the critiques of these predictive technologies have identified the same concerns over and over again. Predictive correlations become mistaken for causation (Underwood), validation studies fail to validate (Grove & Meehl; Harcourt (b)), analytical mistakes infect the legitimacy of the conclusions, and error — small and systemic — pervades all data-driven systems. The concept of predictive prosecution provides the same promise and potential critique. Yet, because of the prosecutor's special role in the criminal justice system, there may be some cause for optimism. If designed carefully, a predictive prosecution system might provide an accountability mechanism to police data error and moderate blind reliance on data-driven predictions.

While a full descriptive framework is beyond the scope of this Essay, any predictive prosecution system must be built on four related principles: ownership, accuracy, transparency, and fairness. These principles are explained below, with recognition that significant additional discussion and debate is needed before the adoption of any predictive prosecution program.

First, prosecutors must accept ownership of the data underlying predictive prosecution systems. If bail determinations, charging decisions, or sentencing is impacted at all by data correlations, then that underlying data must be trustworthy enough to withstand scrutiny of judges inquiring about the bases of the lists or reasons for the decisions. Whether from a predictive policing system or organically developed by prosecutors, once used in court, prosecutors must take responsibility for the data. Integrating police and prosecutorial systems, even informally, means that prosecutors must take on a data management duty that they previously did not have to accept.

Second, and relatedly, prosecutors must ensure the accuracy of the data. In adopting theories of intelligence collection to augment traditional prosecution roles, prosecutors should also examine how intelligence agencies test and assess the data collected. In the national security context, thousands of intelligence analysts work for the United States government because of a healthy distrust of the raw intelligence coming in from sources (FBI). Intricate internal systems exist to evaluate the reliability of data, recognizing that actionable data for targeting cannot be relied upon without critical analysis. So, too, with intelligence-driven prosecution, prosecutors must establish systems to assess the value of the data coming in through community sources, detectives, social media, and other sources.

In addition, this push for accuracy means developing systems to audit existing data-collection systems, including mechanisms for removal and alteration of bad or outdated data. The danger of a high-volume data collection enterprise is that it is much easier to simply collect everything, accurate or not (Lapp). Going back to correct errors involves time, money, and technological sophistication (Westland). But, without such checks, the data becomes unworthy of use in criminal courts. Direct connection to criminality, not mere correlation, should be required when an individual's liberty is being decided. Processes must be created to ensure that personal bias or corruption does not distort the targeting. Further, the data collection and analysis must be scrutinized for implicit or explicit bias (Taslitz (b); Gove). Disproportionate minority contacts, high incarceration rates, and harsh sentencing have been clearly demonstrated throughout the

criminal justice system (Sterling). Any data-driven system built on top of that inequality will likely reify the inequality unless explicit steps are taken to address the issue.

Third, any data system must be transparent (Zarsky). This involves a two-fold transparency, both to the prosecutor using the data and the community legitimizing the use of the data. Prosecutors are lawyers trained in law, not technology. In large offices the data will be compiled by colleagues and assistants. In systems of "extreme collaboration," data will also be compiled by police. So, mechanisms must be created so that prosecutors can understand the source of the data. Prosecutors need to be able to not only trust, but understand and defend the data. Arguments cannot be along the lines of "judge, I am asking for a no bond bail determination because the pre-printed form told me to ask for it," but because of particularized, verifiable facts that can be obtained through a data-driven system. Arguments cannot be "judge, the defendant is on the SSL, so we ask that he be held," but based on the actual underlying facts that might have led some individual to be on that list. Prosecutorial transparency requires understanding why individuals have been chosen to be marked by predictive technologies. This understanding may also require knowledge of the provenance of the data, the currency of the data, and the reliability of the data.

The other aspect of transparency focuses on community acceptance of predictive prosecution outcomes. The Orwellian nature of government lists of predicted targets rightly causes suspicion. Any predictive prosecution system needs to be able to explain, in a relatively open and clear way, how people are placed on predictive lists, and why the criteria is legitimate. This presents a challenge in that most prosecution or police methods also need to be relatively opaque in order to avoid undermining ongoing investigations. This balance between transparency and operational secrecy presents real tensions. But, as the creation of custom notification letters demonstrate, prosecutors can develop a process to show and explain why someone is targeted. Custom notification letters are "customized" and include the target's specific criminal history and risk factors. The reasons for the targeting are thus particularized and individualized and open for inspection. Similarly, in call-ins, prosecutors can explain in specific detail why the particular targets have been contacted. This process provides transparency and legitimacy to the process (albeit after the fact).

This type of customization also needs to be applied systemically. Prosecutors need to be able to explain why certain communities have been targeted, and how they have attempted to avoid class- or race- based impacts. Using crime mapping, visual

displays of historic criminal activity, and other accessible media, the argument can be made for why certain areas were chosen and not others. Discriminatory impacts need to be monitored and studied. Communities may accept a higher prevalence of prosecutorial interest in an area, but it must be explained and defended in a transparent manner.

Finally, predictive prosecution systems must build in mechanisms to ensure fair process. An emphasis on fairness must address concerns that citizens might hold in being targeted by predictive techniques. A process will need to be developed to challenge a target designation on a police list (Hu). A method to account for possible racial or class discrimination will need to be created (Ajunwa et al.). Clear procedures to use and validate the predictive target list need to be developed. And, a general emphasis on procedural justice must continue. Due to the influence of some of the academics who provided the early inspiration for the Chicago projects, procedural justice has been a key organizing principle behind the intervention strategy, but such an emphasis must continue to be prioritized (Meares).

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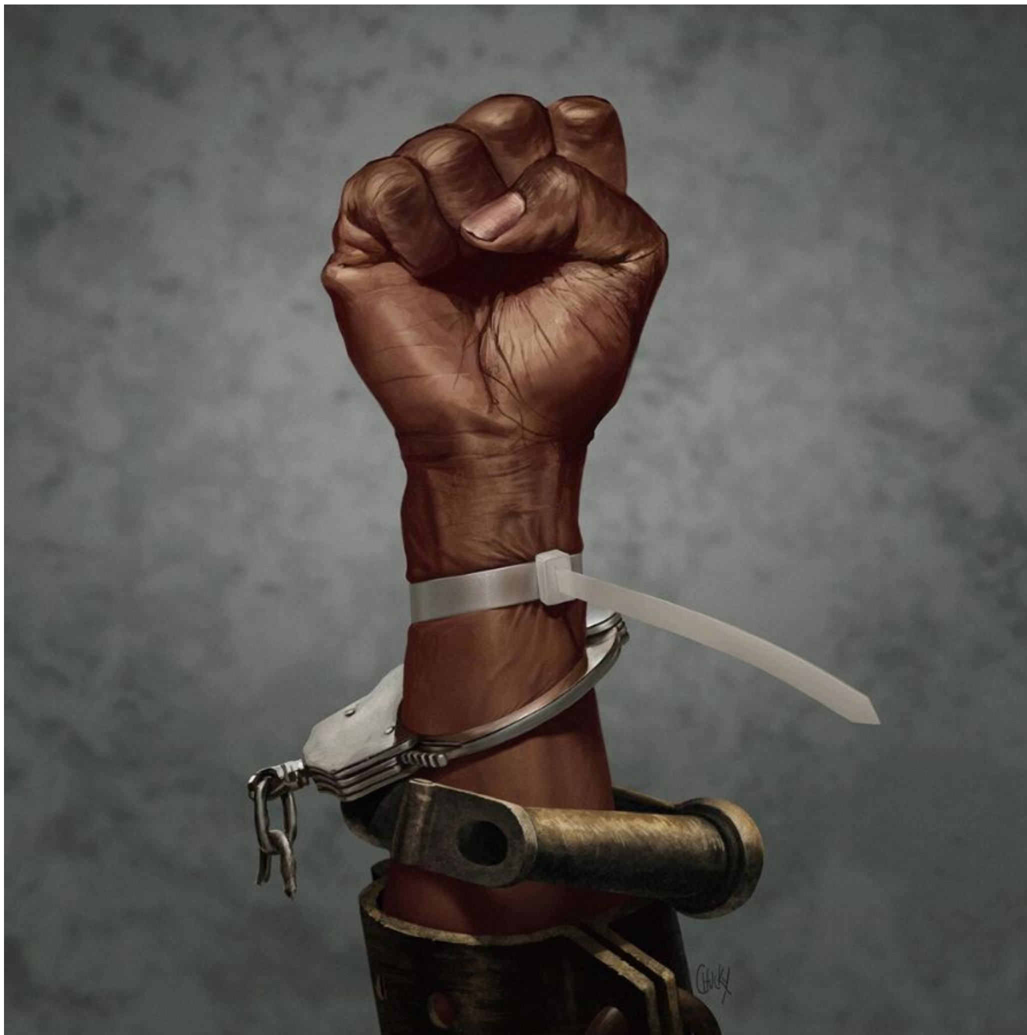
COMMENTARY

Whoever Says 'Prison' Says Black: The Genealogy of the Criminal Justice System

Maanas Sharma

Maanas Sharma is the founder and Editor-in-Chief of JIPP. He is also the captain and research lead of the policy debate team at the School of Science and Engineering in Dallas and a nationally competitive mathematician. At his core, Maanas is passionate about transdisciplinary policy and bringing historical and social-scientific understandings to quantitative policy solutions.

Image: "Generational Oppression" by Ricardo Chucky



"Whoever says 'prison' says Black."

~Professor Jared Sexton, University of California-Irvine

Professor Sexton's words highlight a particularly troubling reality in today's carceral state. However, this begs the question of why: Why is the prison system today in the United States that targets and breaks apart Black families? While we can isolate any number of bad policies that have contributed to mass incarceration and over-policing of Black communities, we cannot disentangle this contemporary issue from history. Rather, history sheds light on the truth of the matter: the prison is simply the newest instantiation in a long history of state control of Black people in America.

The arrival of the first African slaves in America 401 years ago in 1619 inextricably shaped the course of the United States. Though slavery was "abolished" in 1865, new systems have been born to take its place. Namely, slavery shifted to sharecropping after the end of the Civil War. Later on, as Black sharecroppers began to prosper and move off plantations, the state shifted to new methods of control. The government began to physically place Black people under government control through segregation, and soon after, redlining. Moreover, the government fueled a psychological and physical war against Black people. More than 6,500 Black Americans were lynched by white Americans to "intimidate, coerce, and control Black communities with the impunity of local, state, and federal officials…" Moreover, state-sponsored race massacres, like Tulsa's "Black Wall Street" Massacre decimated Black communities at the first sign of independence and prosperity, effectively nullifying the (minimal) expansion of civil rights. As negative public perception of these actions increased after decades of intense Black struggle, a careful transition into our current criminal "justice" system was orchestrated. The criminal justice system maintains the (in)visible hand of the state over Black people through criminalizing the very economic and social situations they were forced into, continuing to inflict violence, and extracting Black labor: just as slavery did 200 years ago. Indeed, we can still see the vestiges of slavery in our carceral state:

- Formerly incarcerated people are called "free men."
- Solitary confinement is directly informed by tactics used in the slave hold.

- ❖ Breonna Taylor's killers have not yet been charged with murder, not as some exception to the rule, but because police contracts ensure they can not.
- ❖ 1 in 3 Black men, and rising, will be incarcerated by the state in their lifetime.
- ❖ In a carefully crafted exception to the 13th amendment, chain gangs of Black men line up, chained together, working the South's plantations, sold as "prison labor" for no pay.

The goal of criminal "justice" is so clear that the Supreme Court of the United States says "apparent [racial] disparities in sentencing are an inevitable part of our criminal justice system." Though the Supreme Court's words here are shocking to many, they accurately describe the American body politic. The current instantiation of the criminal justice system is inextricably linked to the logics of racial control created by chattel slavery. Indeed, the crafters of the system have long recognized its racialized motivation; for us to avoid doing so is a great disservice to movements for justice. However, recognizing the racialized foundations of our current system does not mean we cannot fight for reforms. Instead, renowned abolitionist Rachel Herzing suggests we make incremental steps that "steal" some of the Prison Industrial Complex's power so that it cannot "continually increase its power and hold on our lives." She characterizes abolitionism as a constitutive action that uses reform, where we say "this is the world I want to live in, therefore, I need to take these steps to create the conditions that make that world possible."

Using this framework, it is clear that, for example, ending qualified immunity and the war on drugs are "good" things. The former makes it possible to hold police officers accountable and the latter is a decrease of the state's crackdown on people of color for petty reasons. These will certainly aid movements to decrease the power of the carefully crafted carceral system over Black bodies. Nevertheless, we must never lose sight of the fact that our true goal is something specific — true liberation. The United States has a pattern of simply dressing up oppressive policies in makeup and calling it a day. When the government finally gives in, we must proactively hold it accountable to ensure that this pattern does not repeat itself this time around. It is our job as people dedicated to a more just future to demand more.

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Rehabilitative Justice: What the US can learn from the Norwegian Model

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The US imprisons more people per capita than any other country in the world, at a rate of 700 per 100,000. Consider the just 66 per 100,000 in Norway, whose prison model is rehabilitative in nature, and the difference is stark. Indeed, the differences in incarcerated populations can be tied back to the rehabilitation efforts (and lack thereof) of the two carceral systems. For example, in California, when an inmate from prison is released, they receive a measly "gateway sum" of a maximum of $200, which is completely insufficient for living necessities, let alone the technology or professional attire one needs to get a decent job. However, in Norway, released inmates get significant assistance with reintegration; active labor market programs help with job searching and formerly incarcerated individuals get access to a variety of social support services including housing, social assistance, and disability insurance. California's system will inevitably cause higher recidivism rates because formerly incarcerated people have no choice but to resort to larceny to survive, relapse into drug use because of deteriorating mental health, or any number of other suboptimal paths. As expected, more than half of America's release inmates are reincarcerated within three years of their release.

Why, then, do so many Americans support the status quo carceral institution? The most common argument is that rehabilitative prisons cost too much. However, empirical evidence shows that rehabilitative prisons are far more cost-effective than punitive ones. In one of the UK's deferred prosecution schemes 'Operation Checkpoint', the estimated benefit to society from reduced re-offending was 2 million pounds against a cost of only half a million for running the program. Similar patterns hold true in Norway. While the Norwegian prison system spends two to four times more than the

US per person, there is less recidivism and crime which results in an overall reduction in criminal justice expenditure and reduction in victimization costs. Moreover, helping formerly incarcerated people find jobs results in a higher income through taxes for the government and lower transfer payments. Finally, reforming prison sentencing in the US to model those in Norway would help solve prison overcrowding by decreasing prison populations and the length of sentencing. Prison overcrowding has been deemed to cause "an unconscionable degree of suffering" by the US Supreme Court and will also easily free up funds to invest in prison reform. Obviously, then, this argument falls flat.

Secondly, people push back on the comparison made between Norway and the United States, saying they have extremely different social values and institutions. Nevertheless, Norway and the US have fairly similar prisoner demographics and types of crimes committed. Also, while Norway's society is certainly more egalitarian and homogenous than the United States', Norway's prison system hasn't always been this way. Norway in the 1980s had a harsh punitive system with an emphasis on punitiveness and security. The recidivism rate was around 60-70%, like in the US. After reforming its prison system to one based on rehabilitation and support, though, the efficacy of its prisons in reducing crime skyrocketed. More, the United States has regressed rather than progressed: before the "Tough on Crime" movement of the 1970s and 1980s, the US had more rehabilitative prison processes in place. These processes were successful in combating recidivism, promoting humanity, and being economical. But, we have since moved away from these policies. Thus, all metrics indicate that rehabilitative practices today would be just as beneficial in the US as in other countries.

At the end of the day, Norway's humane prison system has received international praise and commendation: it has provided copious amounts of evidence that rehabilitative justice is better for society, mental health, crime rates, and the economy. Even outside of Norway, statistical and empirical studies have confirmed the efficacy of such measures. If the US chooses to ignore this excess of evidence, it will never be able to reduce crime without resorting to heavy-handedness and hyper-punitiveness. Systems that produce rather than reduce crime must clearly be changed. More, when crafting prison systems, the humane treatment of every person should not be subject to debate. All in all, modeled after Norway's rehabilitative system (and even some past American policies themselves), there is no justification to not reform the US criminal justice system.

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Life in Prison for Hedge Clippers: A Racialized Justice System

JIPP Student Editorial Board

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In 1997, Fair Wayne Bryant stole a pair of hedge clippers. Bryant — a Black man — had been convicted of 3 "petty theft" crimes and one count of armed robbery almost 20 years before the incident in question. However, under criminal statutes known as "habitual offender" laws, the prosecutor of the case pushed for life in prison. Without parole. In the most recent of a series of appeals, the Louisiana Supreme Court voted to uphold Bryan'ts original sentence — but at what cost?

Retired New Orleans judge Calvin Johnson speaks to the gross inhumanity of the punishment. Bryant is forced to live out the rest of his old age at the Angola State Penitentiary in Louisiana — the largest maximum-security prison in America — performing backbreaking labor, all for a pair of hedge clippers. Moreover, his incarceration has cost Louisiana taxpayers more than half a million dollars to date. Given that such an excessively harsh sentence has no increased penal benefit and is exorbitantly expensive, why was it ever requested? More importantly, why does our justice system vigorously defend life in prison and other excessive punishments for crimes where they have no conceivable criminological benefit?

First of all, numerous data points can explain why such a sentence was initially sought. To begin, 95% of elected prosecutors and 71% of district court judges are white. Adding on that juries are selected from voter rolls (which are in turn susceptible to the massive disenfranchisement of Black people and "purges" of Black voters) and that Black jurors are almost twice as likely to be rejected from the panel, it is no surprise that old, white citizens are vastly overrepresented in juries in Louisiana. Due to all of this, Black defendants often find themselves facing a room of all white people when fighting

for their freedom. Therefore, according to the United States Sentencing Commission itself, Black men are sentenced for almost 20% longer than white men for the same crime on average.

Regardless, the more pressing question is how the United States continues to justify such punishment within its legal systems. Chief Justice Bernette Johnson — the lone dissenter to the Supreme Court's decision as well as the only woman and Black person on the Court — offers a historical explanation.

Johnson notes that each of Bryant's crimes was for theft, i.e. dependent on financial situation, and that his life sentence was made possible through habitual offender laws. These laws were created by southern states during the Reconstruction era to "excessively criminalize petty theft associated with [the] poverty" of newly emancipated slaves. Since freed slaves had not been taught English and had no capital of their own, they either had to sharecrop for their previous enslavers or turn to petty theft to provide for themselves. Habitual offender laws for theft allowed states to convert those instances of petty theft into long sentences of forced labor on plantations. Essentially, America constructed a legal system that provided the backbone for a modern, and legal, form of slavery and labor extraction.

This history is particularly strong in Angola — the prison where Bryant is incarcerated. Angola is on the site of a former slave plantation named after the African country where the majority of the slaves were taken from. To this day, thousands of prisoners work the fields as free labor for the government. Not surprisingly, 80% of the prisoners at Angola under habitual offender laws are Black — further implicating the current use of these already racialized laws.

We can no longer avoid these uncomfortable conversations about race in our society. In the words of Chief Justice Johnson, "we can only accomplish [change] by honestly and objectively examining our past in order to understand our present, and then critically examining our present in order to create a better future." Only then can we truly understand the ugly truth of how the laws on the books today were created during the Reconstruction and Jim Crow eras and are therefore thoroughly informed by race. It is a disservice to the millions of Americans of color for us to continue to ignore these facts and fight against reform to the justice system.

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ART + POETRY

Living Punishable By Death

Iyana Trotman

Iyana Trotman is a freshman at Wake Forest University. She was a champion policy debater for North Star Academy in Newark, NJ, where she focused on critical theory and antiblackness, and currently debates for Wake Forest.

Content Warning: This poem includes descriptions of violence and racial slurs.

today i asked myself,
"have i been saying their names loud enough?"
like maybe if i shouted louder
my air loss would grant life to their bodies.
like maybe if i was just loud
i could voice their thoughts.
feel their pain.

if any.

today i asked myself,
"would their bodies float to the rim of the water?
would they name their tormentors?
would they ask for justice?"
could they hear me shouting?

inhale;
exhale;
breathe.

or do i try my hardest to stop breathing?

darkness is more than
chocolate skin pressed against a bland background, but,
you couldn’t tell because
whiteness captures it like quicksand.

black is a color, a code, a transcript;
la negra, el negro, nigger;
skin, nose, mouth, lips.
was it ever captured, did it ever belong to us?
year 401 and still shouting,
i think we’re mute.

but,
the chanting grew faint, the rallies still,
and we believed in our hearts that ‘i can’t breathe’ wasn’t a slogan
because our breathing slowed,
and this time, there were too many names to say.
we put our hands up and never said don’t shoot but
closed our eyes.

because death was here already.

the truth is,
all our lives we’ve been
running like Ahmaud,
going to the store like Trayvon,

sleeping like Aiyonna,
getting married like Breonna.
saying their names.
screaming them.
crying, watching, because that too was us
on that run, at that traffic stop, at the papi store, in the house just—

not yet.

so yeah.
today i asked myself,
“have i been saying their names loud enough?”
and i haven’t.
because in every action i take there's a spirit
of a black body reminding me
that being black means being punished and
being black and alive is punishable by death.

i didn’t forget, it’s impossible to.
being louder won’t bring them back, but i still remember
dana martin’s laughter,
eric garner’s family,
philando castile's advocacy,
bailey reeves’ fun aura,
and their names echo there too,
because death wasn’t all it was with niggas.

The Silenced Voices

Shahzaad Raja

Shahzaad Raja is a Chicago-based Pakistani-American collage artist. Inspired by artisans in 2018, he creates his collages entirely from hand-cut magazines and newspapers and spends hours tediously finding the right source material to convey his complex messages. Raja's work holds a mirror to society as a whole: the good and the ugly, the mainstream and the hidden, the social and the political.

What pushed you to be so political and use art as your voice?

There wasn't just one specific instance; it was the amount of injustice and corruption that was going on in the world that pushed me. Mainstream news will cover stories that follow their narrative, so a lot of important things that are going on in the world get left in the dark — and this is especially true in situations where Muslims are the victims.

Each one of my pieces highlights some social or political issue that we are faced with. I want to bring awareness around certain things, which is always the first step towards change. I think art does have the power to spark social change — I want people to really think about the issues that are presented to them and hopefully turn that thinking into doing, and taking action toward a certain cause.

What is the context of your work?

For years, the ones in power were the ones telling us the story.

All of the injustice, mistreatment, and systemic racism of black people has come up to the surface and it is staring us right in the face. The police are a reflection of our society, where the oppression of black people is woven into the system at every level.

African Americans have been crying out for centuries and it seems like we are just now hearing them. But are you listening?

How should people support these voices?

This isn't a situation where you can be neutral — either you can accept all of this injustice going on or you can fight against it. Normal was never working, so now it's time for us to disrupt the norm.

No major social change was caused by people staying quiet — all of them were caused by people rallying together and fighting for their cause. If protesting isn't your thing, there are other ways to get involved: donating, lobbying, or joining an activist organization that is already working toward a specific cause.

Certain things will always be out of our control, but that doesn't mean that we shouldn't stand up for what we believe in — stand up for the silenced voices of the world.