INVISIBLE PUNISHMENT

The Collateral Consequences of Mass Imprisonment

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Invisible Punishment: An Instrument of Social Exclusion

Jeremy Travis[1]

I. BRINGING INVISIBLE PUNISHMENT INTO VIEW

Prisons have this virtue: They are visible embodiments of society's decision to punish criminals. As we punish more people, the number of prisons increases. We can count how many people are in prison, measure the length of the sentences they serve, determine what we spend to keep them there, and conduct empirically grounded analysis of the costs and benefits of incarceration. Because prisons make punishment visible, we can more easily quantify the policy debates over the wisdom of this application of the criminal sanction.

Not all criminal sanctions are as visible as prisons: We punish people in other, less tangible ways. Community corrections is one example. While the number of prisoners has quadrupled over the past two decades, the number of adults under criminal justice supervision through parole and probation agencies has more than tripled.[2] This form of punishment is not as obvious to the public: Probationers and parolees can easily become invisible. Yet, the quantum of punishment meted out through community-based sentences still has discernable bounds. We know the number of people under community supervision. We can measure the length of their sentences. Similarly, we can quantify, and thereby make "visible," the imposition of criminal fines, the collection of restitution, and the forfeiture of assets, three other criminal sanctions that have expanded over recent years.

This chapter focuses on a criminal sanction that is nearly invisible: namely, the punishment that is accomplished through the diminution of the rights and privileges of citizenship and legal residency in the United

States. Over the same period of time that prisons and criminal justice supervision have increased significantly, the laws and regulations that serve to diminish the rights and privileges of those convicted of crimes have also expanded. Yet we cannot adequately measure the reach of these expressions of the social inclination to punish. Consequently, we cannot evaluate their effectiveness, impact, or even "implementation" through the myriad private and public entities that are expected to enforce these new rules. Because these laws operate largely beyond public view, yet have very serious, adverse consequences for the individuals affected, I refer to them, collectively, as "invisible punishment."[3]

They are invisible in a second sense as well. Because these punishments typically take effect outside of the traditional sentencing framework—in other words, are imposed by operation of law rather than by decision of the sentencing judge—they are not considered part of the practice or jurisprudence of sentencing. Through judicial interpretation, legislative fiat, and legal classification, these forms of punishment have been defined as "civil" rather than criminal in nature, as "disabilities" rather than punishments, as the "collateral consequences" of criminal convictions rather than the direct results.[4] Because they have been defined as something other than criminal punishment, scholars, legislators, criminal justice officials, and legal analysts have failed to incorporate them into the debates over sentencing policy that have realigned our criminal justice system over the past quarter century.

Finally, there is a third dimension of invisibility. Although these criminal punishments look like typical legislative enactments, wending their way through the committee process, passage by majority vote, and approval by the executive,[5] their legislative life cycle often follows an unusual course. Unlike sentencing statutes, they are not typically considered by judiciary committees.[6] They are often added as riders to other, major pieces of legislation, and therefore are given scant attention in the public debate over the main event.[7] They are typically not codified with other criminal sanctions. Some exist in the netherworld of the host legislation to which they were attached. Some exist under a separate heading of civil disabilities. Some defy traditional notions of federalism by

importing federal penal policy into state sentencing statutes so that a conviction for a state law violation triggers federal consequences. Some apply the restrictions of one state on an offender convicted in another state who chooses to relocate. Little wonder, then, that defense lawyers cannot easily advise their clients of all of the penalties that will flow from a plea of guilty.[8] These punishments are invisible ingredients in the legislative menu of criminal sanctions.

This chapter argues that these punishments should be brought into open view. They should be made visible as critical elements of the sentencing statutes of the state and federal governments. They should be recognized as visible players in the sentencing drama played out in courtrooms every day, with judges informing defendants that these consequences flow from a finding of guilt or plea of guilty. Finally, they should be openly included in our debates over punishment policy, incorporated in our sentencing jurisprudence, and subjected to rigorous research and evaluation.

II. THE CONTEXT AND CONSEQUENCES OF INVISIBLE PUNISHMENT

The idea that convicted offenders should be denied certain rights and benefits of citizenship is certainly not new. In early Roman history, and among some Germanic tribes, the penalty of "outlawry" could be imposed on offenders. The outlaw's wife was deemed a widow, his children orphans; he lost his possessions and was deprived of all rights. In ancient Athens, the penalty of "infamy" could be imposed, meaning the offender was denied the right to attend public assemblies, hold office, make speeches, and serve in the army. Later in the Roman empire, offenders were barred from certain trades. In the medieval era, "civil death" was the consequence of a sentence of life imprisonment, meaning the offenders lost the right to inherit or bequeath property, enter into contracts, and vote.[9]

American legislatures continued this tradition,[10] denying convicted

offenders the right to enter into contracts, automatically dissolving their marriages, and barring them from a wide variety of jobs and benefits.[11] Indeed, the Fourteenth Amendment to the United States Constitution explicitly recognizes the power of the states to deny the right to vote to individuals guilty of "participation in rebellion or other crimes."

What is new at the beginning of the twenty-first century is the expansive reach of these forms of punishment. There are simply more of them: After a thirty-year period when these indirect forms of punishment were strongly criticized by legal reformers and restricted by state legislatures, they experienced a surge in popularity beginning in the mid-1980s. And, because of the significant increase in arrests and criminal convictions, they simply apply to more people. More than 47 million Americans (or a quarter of the adult population) have criminal records on file with federal or state criminal justice agencies.[12] An estimated 13 million Americans are either currently serving a sentence for a felony conviction or have been convicted of a felony in the past.[13] This translates into over 6 percent of the adult population having been convicted of a felony crime. The proportion of felony convictions among African-American adult males is even higher. Invisible punishments reach deep into American life.

The new wave of invisible punishments is qualitatively different as well. Taken together, the recent enactments, many of them passed by Congress, chip away at critical ingredients of the support systems of poor people in this country. Under these new laws, offenders[14] can be denied public housing, welfare benefits, the mobility necessary to access jobs that require driving, child support, parental rights, the ability to obtain an education, and, in the case of deportation, access to the opportunities that brought immigrants to this country. For many offenders, the social safety net has been severely damaged.

Why have our policy makers embraced this category of punishment in addition to building more prisons and expanding the reach of criminal justice supervision? We could imagine that the steady buildup of prisons might, by itself, constitute the full articulation of a new punitive attitude of our policy makers and the public they represent. Yet, when

we consider the expanded reach of the network of invisible punishment, we detect a social impulse distinct from the robust retributivism that has fueled harsher sentencing policies over the past twenty-five years. When sex offenders are subjected to lifetime parole supervision, drug offenders are denied student loans, families are removed from public housing, and legal immigrants with decades-old convictions are deported from this country, all without judicial review, even the harshest variants of just-deserts theories cannot accommodate these outcomes.

In this brave new world, punishment for the original offense is no longer enough; one's debt to society is never paid. Some commentators, seeing parallels with practices from another era when convicts were sent to faraway lands, refer to this form of punishment as "internal exile."[15] Others liken this extreme labeling to "the mark of Cain,"[16] and the effects of these sanctions as relegating the offender to the status of "non-citizen, almost a pariah."[17] The National Council on Crime and Delinquency summarized the effects this way: "Even when the sentence has been completely served, the fact that a man has been convicted of a felony pursues him like Nemesis."[18]

I prefer to focus on the impact of these kinds of punishments on the social fabric. To borrow a phrase now in use by the Labor government in the United Kingdom, these punishments have become instruments of "social exclusion"[19]; they create a permanent diminution in social status of convicted offenders, a distancing between "us" and "them." The principal new form of social exclusion has been to deny offenders the benefits of the welfare state. And the principal new player in this new drama has been the United States Congress. In an era of welfare reform, when Congress dismantled the six-decades-old entitlement to a safety net for the poor, the poor with criminal histories were thought less deserving than others. In an era when Congress has aggressively interjected itself into the criminal justice policy domains traditionally reserved to the states, there was little hesitation in using federal benefits to enhance punishments or federal funds to encourage new criminal sanctions by the states. In an era when the symbolic denunciation of criminals was politically rewarding, the opportunity to deny offenders the largess of the

welfare state was just too tempting. In this kind of environment, the people who come through our criminal justice system—mostly poor, urban, minority males, often denied the right to vote by virtue of their felony convictions—have few friends in high places.

The policy goal, then, is to find ways to constrain this form of punishment, to establish limiting principles, and to reverse the movement toward social exclusion. I offer some thoughts on how to accomplish those objectives at the conclusion of the chapter.

III. THE NEW STRAIN OF INVISIBLE PUNISHMENT

A brief review of the ebb and flow of support for collateral sanctions puts our current posture in sharp relief. The high-water mark of the movement to restrain these punishments occurred, not coincidentally, in the middle decades of the twentieth century. During that period, the country witnessed an extraordinary burst of criminal justice reforms. A landmark presidential commission called for a "revolution in the way America thinks about crime."[20] Congress passed the Bail Reform Act of 1968, which reduced pretrial detention for poor people. The Supreme Court issued a series of constitutional rulings granting new rights and protections to those accused of committing a crime. The Model Penal Code was adopted by the American Law Institute. Rehabilitation was understood to be the goal of corrections.

Not surprisingly, reformers in this era focused attention on the collateral consequences of criminal convictions.[21] In its 1955 Standard Probation and Parole Act, the National Council on Crime and Delinquency (NCCD) proposed that an offender's civil rights should be restored upon completion of his criminal sentence. A year later, the National Conference on Parole concluded that "the present law on deprivation of civil rights of offenders is in most jurisdictions an archaic holdover from early times and is in contradiction to the principles of modern correctional treatment."[22] The Act proposed by the NCCD included a provi-

sion to allow for the expungement of criminal records, meaning that an individual could be restored to his legal status prior to his conviction.[23]

In 1967, the President's Crime Commission noted that "[t]here has been little effort to evaluate the whole system of disabilities and disqualifications that has grown up. Little consideration has been given to the need for particular deprivations in particular cases."[24] In 1973, the National Advisory Commission on Corrections recommended fundamental changes in voter disqualification statutes, arguing that reintegration required no less: "Loss of citizenship rights . . . inhibits reformative efforts. If corrections is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system."[25]

In 1981, the American Bar Association (ABA) promulgated the Standards on Civil Disabilities, a document that seems quaint from a contemporary perspective. Asserting that the automatic imposition of civil disabilities on persons convicted of a crime were inconsistent with the goal of reintegration of offenders, the ABA recommended that no such disability be automatically imposed, except those related directly to the offense (for example, revoking the driver's license of a repeated drunk driver); that disabilities be imposed on a case-by-case basis, upon a determination that it was "necessary to advance an important governmental or public interest"; and that they be imposed only for a limited time, and then with adequate avenues for early termination upon appropriate review.[26]

The reform spirit touched state legislatures as well. In the 1960s and 1970s, the number of state laws imposing collateral sanctions declined. The same period witnessed an increase in the number of laws requiring the automatic restoration of an offender's civil rights, either upon completion of his sentence or passage of a certain amount of time. A comprehensive review of all state statutes, conducted in 1986, concluded that "states generally are becoming less restrictive of depriving civil rights of offenders."[27]

The movement to roll back collateral sanctions peaked in the 1980s. Just as sentencing policy generally became more punitive around this time, state legislatures rediscovered collateral sanctions. A new analysis of state statutes, conducted in 1996, documented the reversal.[28] Compared with 1986, there were increases in the number of states (a) permanently denying convicted felons the right to vote (from eleven to fourteen states); (b) allowing termination of parental rights (from sixteen to nineteen); (c) establishing a felony conviction as grounds for divorce (from twenty-eight to twenty-nine); (d) restricting the right to hold public office (from twenty-three to twenty-five); and (e) restricting rights of firearm ownership (from thirty-one to thirty-three).[29]

The largest increase came in the area of criminal registration. In 1986, only eight states required released offenders to register with the local police. Following some well-publicized crimes committed by parolees, a tidal wave of registration laws, spurred on by federal funding, swept across the country.[30] By 1998, every state had enacted legislation requiring that convicted sex offenders register with the police upon release from prison, an increase of forty-two states in twelve years. The duration of sex offender registration requirements range from ten years to life. Twelve states mandate lifetime registration. As of 1998, 280,000 sex offenders were listed in the state registries.[31]

The states also increased the number of occupational bars for people with various criminal convictions. For example, there has been an expansion of the prohibitions against hiring teachers, child care workers, and related professionals with prior criminal convictions. This expansion of legal barriers has been accompanied by an increase in the ease of checking criminal records due to new technologies, expanded access to criminal records, and an increase in the number of employers checking criminal records of prospective employees.[32] One's criminal past became both more public and more exclusionary, limiting the universe of available work.

Congress followed suit, but with a telling twist. As with the state legislatures, Congress ratcheted up the levels of punishment generally, and specifically enhanced the range of collateral consequences for those con-

victed of violating federal criminal laws. Yet Congress went further. As is illustrated below, Congress created a web of collateral sanctions that transformed a conviction for certain state crimes into ineligibility for federal benefits.[33] Furthermore, it used the power of the federal purse to encourage states to extend the reach of collateral sanctions. Taken together, the laws enacted during this resurgence of collateral sanctions construct substantial barriers to participation in American society. To borrow the phrase from the United Kingdom, the laws became instruments of the social exclusion of people with criminal convictions. Consider the following examples.

The most blatant form of social exclusion is the deportation of criminal aliens, akin to the ancient practice of exile. Foreigners with criminal convictions are generally excluded from admission into the United States, but beginning with the Immigration Reform and Control Act of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress significantly expanded the categories of crimes that would subject an alien to deportation. As a result, the number of deportations of aliens with criminal convictions rose from 7,338 in 1989 to 56,011 in 1998.[34] Congress even authorized deportation for past crimes. (This provision was declared unconstitutional by the Supreme Court in *INS v. St. Cyr* in 2001.[35])

Congress also enacted legislation to cut offenders off from the remnants of the welfare state. The welfare reform law of 1996 ended individual entitlement to welfare and replaced that scheme with block grants to the states known as Temporary Assistance to Needy Families (TANF). One provision of that law requires that states permanently bar individuals with drug-related felony convictions from receiving federally funded public assistance and food stamps during their lifetime.[36] (States can opt out of, or narrow, the lifetime ban, and over half have done so.) The welfare reform law also stipulates that individuals who violate their probation or parole conditions are "temporarily" ineligible for TANF, food stamps or Social Security Income (SSI) benefits, and public housing.[37]

Congress also authorized the exclusion of certain offenders from fed-

erally supported public housing. Statutes enacted in the late 1990s permit public housing agencies and providers of Section 8 housing to deny housing to individuals who have engaged in "any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises [by others]."[38] For those convicted of drug crimes, they can reapply for housing after a three-year waiting period, and must show they have been rehabilitated.[39] Anyone subject to lifetime registration under a state sex offender registration statute is ineligible for federally assisted housing.[40]

Congress cut offenders off from other benefits as well. The Higher Education Act of 1998 suspends the eligibility for a student loan or other assistance for someone convicted of a drug-related offense.[41] (Eligibility can be restored after meeting certain conditions, including two unannounced drug tests.) In the 2000–2001 academic year, about 9,000 students were found to be ineligible under this provision.[42] The Adoption and Safe Families Act of 1997 prohibits individuals with certain criminal convictions from being approved as foster or adoptive parents. It also accelerates the termination of parental rights for children who have been in foster care for fifteen of the most recent twenty-two months.[43]

Finally, Congress used the power of the purse to encourage states to pass laws restricting the rights of offenders. In 1992, Congress passed a law requiring states to revoke or suspend the drivers' licenses of people convicted of drug felonies, or suffer the loss of 10 percent of the state's federal highway funds.[44] Similarly, the 1994 Crime Act required each state to enact a sex offender registration law within three years or lose 10 percent of its federal funding for criminal justice programs.[45] A final example: The Public Housing Assessment System, established by the federal government, creates financial incentives for public housing agencies to adopt strict admission and eviction standards to screen out individuals who engage in criminal behavior.[46]

This recent wave of restrictions creates a formidable set of obstacles to former offenders who want to gain a foothold in modern society. Not only is it harder to find work, drive to work, and get an education, it is harder to exercise the individual autonomy that is taken for granted by

others in society—being a parent, living in public housing with one's family, relying on public benefits such as food stamps and welfare assistance, moving freely without notice to the police, and establishing a residence without suffering the rejection of one's neighbors. In his framework for tracing the evolution of the notion of citizenship, Marshall cites the expansion of "civil rights" in the eighteenth century, such as rights to free speech and religion, to own property and enter into contracts; "political rights" in the nineteenth century, such as the right to vote; and "social and welfare rights" in the twentieth century, such as entitlements to shelter, welfare, and food.[47] The strain of invisible punishments that emerged at the end of the twentieth century represented an intrusion into this third dimension to the definition of citizenship. In the modern welfare state, these restrictions of the universe of social and welfare rights amount to a variant on the tradition of "civil death" in which the offender is defined as unworthy of the benefits of society, and is excluded from the social compact.

IV. ASSESSING THE IMPLEMENTATION AND IMPACT OF INVISIBLE PUNISHMENT

Gauging the impact of these invisible punishments is difficult. For some consequences of felony convictions, the analysis is a relatively straightforward task. For example, we know that the laws of forty-eight states and the District of Columbia deny prisoners the right to vote while they are in prison. Therefore, we could survey prisoners, determine how many were registered to vote prior to imprisonment, calculate the likelihood that they would have voted had they not been imprisoned, and project the diminished voter participation attributable to these state laws.[48] In like fashion, one can estimate the impact of statutes denying voting rights to anyone convicted of a felony. One such calculation found that 4 million Americans are now disqualified from voting.[49]

Similarly, one can calculate the number of sex offenders registered with the state, or the number of legal aliens deported following criminal

convictions. But what about the impact of the statutes that disqualify criminals from education loans, public housing, welfare benefits, or parental rights? Counting the number of individuals punished through these laws approaches impossibility. The agencies that administer these sanctions are far-flung, have little or no connection with the criminal justice system, may or may not keep records of their decisions, and have no incentive to report on these low-priority exercises of discretion. It is difficult to assess their impact when we have such difficulty evaluating their implementation.

The lack of good data on the reach of invisible punishments raises a more fundamental issue, namely the lack of clarity regarding the purposes of these punishments. When these laws are viewed within the framework of the traditional purposes of punishment—deterrence, prevention, retribution, and incapacitation—they appear quite consistent with those purposes. (It is hard to discern rehabilitative goals in these punishments. In fact, they place barriers to successful rehabilitation and reintegration.) They are clearly intended to deter both the individual offender and others. Many (e.g., sex offender notifications, or narrowly tailored occupational disqualifications) are presumed to have crime prevention effects. They are clearly retributive and convey societal condemnation of antisocial behavior. They also operate as a form of selective incapacitation—for example, by keeping sex offenders away from certain locations and keeping drug offenders away from public housing.[50] Yet, creating a research agenda to measure their effectiveness at achieving these goals would quickly run into the obstacle posed by the paucity of relevant data.

A more fruitful analytical approach might be to evaluate the impact of these punishments at the community level, especially in poor, high-crime communities in this country.[51] This approach commends itself for those punishments designed to cut convicted felons from the network of supports and benefits. For example, if a particular housing authority were to enforce rigorously the three-year ban for individuals convicted of drug-related crimes, what would happen to the families in that housing complex? What would be the impact on the financial assets of poor

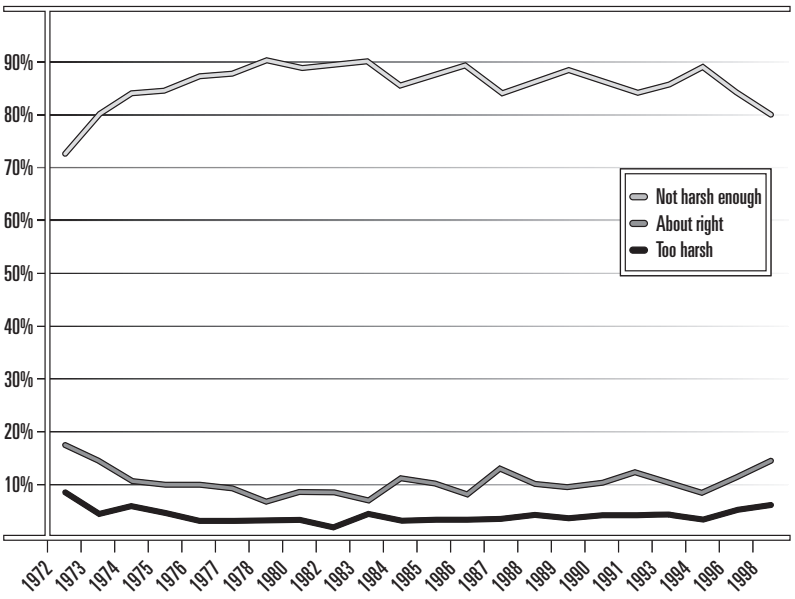
communities of those states that did not opt out of the lifetime prohibition against individuals with drug-related felony convictions receiving public assistance and food stamps? Arguably, the aggregate effect of this constellation of punishments on the social capital of poor communities could be quite extensive, and with long-lasting consequences for the vitality of families, labor markets, and civic life.[52]

V. THE PARADOX OF PUBLIC SUPPORT FOR PUNISHMENT

How can we explain the rise in this form of punishment? One hypothesis has superficial appeal: The American public has recently become much more punitive, and these legislative enactments, paralleling the increase in imprisonment and other "get tough" policies, simply reflect public opinion. Yet, a closer examination of research on public opinion reveals that the picture is a bit more complicated than that simplistic notion.

Since 1972, the General Social Survey has asked a sample of the American public whether they believed the courts in their communities dealt too harshly or not harshly enough with criminals. Between 1972 and 1980, the portion answering that the courts were too lenient rose from 72 to 90 percent (see Figure 1). Since 1980, however, the rate has been remarkably stable, even declining in 1998 to 80 percent. Over the same period of time, the percentage of Americans who answered that courts were too harsh never exceeded 10 percent. Two conclusions can be drawn from these opinion surveys. First, to the extent that the American public has become more punitive, the increases happened twenty years ago. Second, even after recognizing these fluctuations, one must conclude that Americans have been consistently punitive in their outlook for a long period of time.[53] Between 70 and 90 percent of Americans—a very high rate—think criminals are getting lenient treatment in the courts. Reflecting an even broader view, Zimring, Hawkins, and Kamin observe in *Punishment and Democracy* that "[p]ublic hostility toward criminals is a historical constant in stable democracies and is usually associated with support for punitive treatment of convicted offenders."[54]

Figure 1
Attitudes About the Severity of Courts in Dealing with Crime



Yet when asked by the Gallup organization which approach they favored for bringing crime rates down in this country—education and jobs to address "the social and economic problems that lead to crime," or "more prisons, police, and judges" to deter crime—we find a different picture of the American mood. In the periodic surveys taken between 1989 and 2000, between one-half and two-thirds of the respondents favored education and jobs, and between one-quarter and two-fifths favored more prisons, police, and judges. When given policy choices, the American public favors prevention over enforcement. As noted by DiIulio et al., "even in 'get tough' or 'do justice' periods there has been sub-

stantial public support for efforts to keep offenders from turning to crime and to keep ex-offenders from returning to it."[55]

A third source of data adds an important dimension to our understanding of the public mood. In 1965, at the beginning of the escalation of crime rates in America, only 4 percent of Americans polled by the Gallup organization felt that crime was the greatest issue facing the country. By 1994, that percentage had grown to about 50 percent, then declined again to 7 percent by 2001.[56]

So, the public expectations that the government do something about crime laid the groundwork for a change in the political dynamics about crime policy in America. Elected officials, and those aspiring to public office, were compelled to "do something" about crime in order to respond to the demands and expectations of a concerned citizenry. And one thing a legislator can do is pass laws increasing the quantum of punishment. They have shown little reluctance to pass laws increasing prison sentences, at enormous social and fiscal costs. Enacting legislation denying ex-offenders the rights and privileges of citizenship is in many ways much easier. There are no direct costs borne by the taxpayers—on the contrary, there may be savings in public benefits. There are no sentencing commissions to worry about asking tough questions about proportionality or adverse racial impacts. There are no judges who could interpose their own discretion and decide that a particular punishment might not be right for a particular offender. There are no political battles over the siting of prison facilities. So, the political appeal of this strategy is strong, particularly when public posturing over get tough strategies brought political dividends.

VI. THE SHIFTING CONTEXT OF PUNISHMENT POLICY

This shift in the political dynamics of crime policy coincided with—and contributed to—three major realignments in the American political context, two directly related to crime policy, and one indirectly.

First, over the past generation we have witnessed a more fundamental

transformation in the locus of our punishment policy from the judicial branch to the legislative branch of government.[57] For most of the twentieth century, American sentencing policy was remarkably constant and consistent, reflected in the framework of indeterminate sentencing. Under this approach, state statutes provided a broad range of possible sentences, leaving the determination of the ultimate sentence to the exercise of discretion by the sentencing judge and parole boards. Beginning in the mid-1970s, this approach came under attack from critics on the political left and right. Liberals thought it vested too much power with judges and parole boards, allowed for disparate treatment of similarly situated defendants, and facilitated racial bias. Conservatives thought it too lenient, open to political manipulation, and deceptive in that long sentences pronounced by courts were shortened by parole boards who granted "early" releases and corrections administrators who awarded good-time credits to hasten departures from prison. The well-known 1974 article finding that "nothing works" in prisoner rehabilitation contributed to the pessimistic mood.[58] With its intellectual and political foundations weakened, the philosophy of indeterminate sentencing lost its dominant position. We have witnessed what Michael Tonry calls the "fragmentation of American sentencing policy" as the legislatures (and, in the case of ballot initiatives, the voters) of the fifty states have created a crazy quilt of widely disparate, legislatively enacted penal policies.[59] The losers in this power shift were the judiciary, whose exercise of sentencing discretion fell into disfavor, and those with expertise in criminal justice policy, whose views were disregarded in favor of politically appealing policy initiatives.[60] The winners were the legislative branch of government, which developed ways to respond to the public's concerns about crime, including "three strikes and you're out" laws, truth-in-sentencing schemes, sentencing commissions designed to constrain judicial discretion, sex offender registration, mandatory minimums, and the abolition of parole boards.

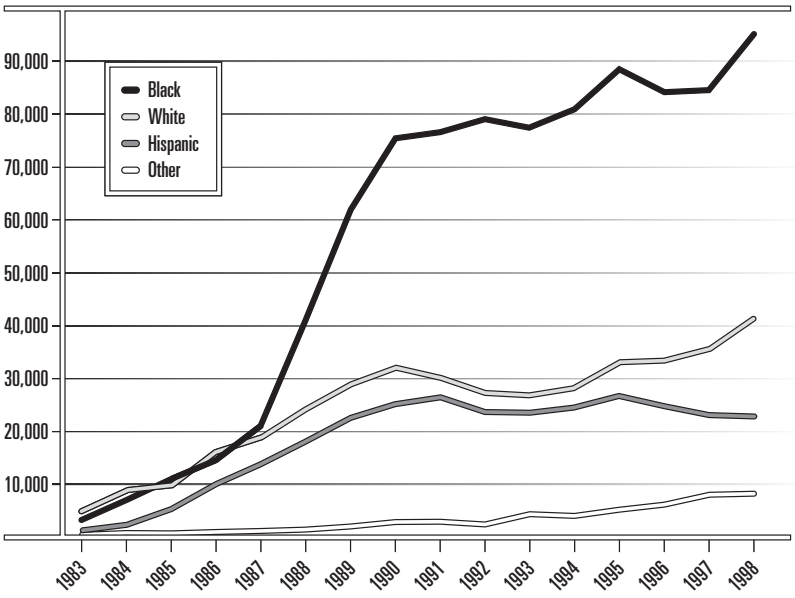
Following in the wake of these fundamental realignments of sentencing policy was the expansion of the universe of invisible punishment.

Unlike prison expansion, these sanctions required little or no expenditures of public funds. Unlike mandatory minimum sentencing statutes, or persistent felon statues like the "three strikes" legislation, these sanctions could not be opposed on the grounds that they would change the calculus of plea bargaining, because they operate outside the courtroom. Attaching them as riders to other pieces of legislation meant they could be enacted outside the traditional judiciary committee review process. Anyone speaking up in opposition could easily be branded as "pro-criminal." Symbolism could easily win the day, at no cost.

Second, we have witnessed the launch of a "war on drugs" with enormous consequences for the operations of the criminal justice system and profound impact on impoverished communities, particularly minority communities. This is not the place to review the effectiveness of those policies, yet one particular feature is noteworthy for this discussion. As seen in Figure 2, the rate of prison admissions for drug offenses of African-American defendants has escalated sharply over the past fifteen years. Recalling that many of the recently enacted invisible punishments target drug offenders with diminished rights, privileges, and benefits, the aggregate consequences of this diminution of citizenship status upon the African-American community reach staggering proportions. To take one example, there are now seven states where lifetime bans on voting for felons mean that one in four African-American men are permanently disenfranchised.[61]

Third, the decade of the 1990s witnessed the culmination of a long campaign to enact fundamental changes in the nation's welfare system. The welfare reform law of 1996 ended the nation's sixty-year commitment to its poor by eliminating the individual entitlement to welfare. This commitment was replaced with the notion of a time-limited eligibility—one could only be a recipient of federal benefits or TANF for a maximum of five years. The rhetoric accompanying this shift had implications for our punishment policy. In his campaign for the presidency, Governor Bill Clinton captured the essence of this shift by saying that those who played by the rules should be able to succeed. The implica-

Figure 2
Prison Drug Admissions by Race, 1983–1998[62]



tion is that those who do not play by the rules can be disfavored. A "social contract" concept of citizenship had been replaced with a "civic virtues" concept of citizenship in which the undeserving members of society were increasingly excluded from society's benefits.[63] Felons have clearly not played by the rules; they are hardly deserving; they became prime candidates for a position at the bottom rung of the new regime of federal support for the poor. How could we provide welfare for them, when mothers with small children were on their own after five years?

These three developments have heightened the vulnerability of poor people to the negative effects of invisible punishment. Poor people, minorities, young people, and felons are not well represented in the legislative branches of government that have historically reflected majoritarian

wishes. The war on drugs has geometrically extended the reach of the criminal law into poor, minority communities. And the movement from a federally guaranteed safety net to one reflecting assessments of an individual's willingness to abide by society's rules has left those convicted of crimes with little protection.

David Garland has developed a theoretical framework to understand these social forces, which he calls the "preconditions" of more punitive policies. He sets aside the more conventional focus on the politics of crime policy and the shifting ideological debates and posits, instead, that our more punitive policies must be understood by reference to "shifts in social practice and cultural sensibility." He writes that, in the United States and the United Kingdom,

> The field of crime control exhibits two new and distinct lines of governmental action: an *adaptive strategy* stressing prevention and partnership, and a *sovereign state strategy* stressing enhanced control and expressive punishment. These strategies—which are quite different from the penal-welfare policies that preceded them—were formed in response to a new predicament faced by governments in many late-modern societies. This predicament arose because at a certain historical point high rates of crime became a normal social fact, penal-welfare solutions fell into disrepute, and the modern, differentiated criminal justice state was perceived as failing to deliver adequate levels of security.[64]

In this new era, he concludes, "[p]unitive segregation—lengthy sentence terms in no-frills prisons and a marked, monitored existence for those who are eventually released—is increasingly the penal strategy of choice."[65] In our assessment of the universe of invisible punishment, we see the creation of a large population of felons, concentrated in poor, minority communities, who are "marked" and "monitored" and cut off from the supports of modern society. We are creating deeper and longer-lasting distinctions between "us" and "them."

VII. LIMITING THE REACH OF INVISIBLE PUNISHMENT: SOME MODEST SUGGESTIONS

I conclude by offering some thoughts about ways to constrain the impulse to punish those who violate our laws by diminishing their rights and privileges.[66]

Visibility. The first step is to make the punishment visible. This entails three strategies.

1. Truth in Advertising. The first precondition to the reform ideas set forth here is to change the language of the discussion. These are punishments, meaning that they are legislatively authorized sanctions imposed on individuals convicted of criminal offenses. They should be recognized as such.[67]

2. Truth in Legislating. The second step is to require state and federal legislatures to codify the collateral sentences that are scattered throughout their respective statutes. A defendant or his counsel should be able to find, in one place, all of the potential consequences of a criminal conviction. A parallel recommendation is that collateral sentences be reviewed by the legislative committees with jurisdiction over sentencing policies for the state.

3. Truth in Sentencing. The third step is to require that defendants acknowledge their awareness of the potential consequences of a plea of guilty at the arraignment or at the time of sentence following a determination of guilt.[68] One need not recite in open court *all* collateral sentences—that would be impossible. Yet, judges could be required to ask a defendant whether his counsel has explained to him that there *are* collateral consequences, and perhaps list some that might be pertinent to the defendant's situation.[69] It is ironic that the truth-in-sentencing movement, which promotes the notion of certainty of punishment, values open decision making about the terms of punishment, and denigrates the exercise of discretion in sentencing, has not yet discovered that the "secret sentences" that constitute the universe of invisible punishment violate those three principles.

Proportionality. A bedrock principle of our sentencing jurisprudence is the notion that the severity of the criminal sanction should be limited by the seriousness of the offense and relevant attributes of the offender. Sentencing grids, with charge severity on one axis and prior criminal record on the other and limited allowance for departures in mitigation or aggravation, are concrete expressions of this principle. Yet the collateral sanctions under discussion here do not reflect the principle of proportionality. A felon convicted of the lowest felony loses his right to vote, as does a serial murderer. A minor drug offender as well as the major drug dealer can be evicted from public housing. A teenager convicted of statutory rape for consensual intercourse with his underage girlfriend, as well as a repeated child molester, may be subject to lifetime registration. A zero-based review of collateral sanctions by a state's judiciary committee would begin by asking the questions posed in other sentencing contexts: How does this sanction further the purposes of sentencing, to whom should it be applied, and with what consequence? This complicated review might also be carried out by a state's sentencing commission. These quasi-independent entities have a track record of reviewing punishments in an effort to diminish disparities among similarly situated defendants. They could provide similar service to the legislature and the judiciary by developing guidance regarding the imposition of collateral sanctions.

Individualized Justice. Some collateral sanctions may appropriately be automatic. For example, barring convicted felons from jury eligibility automatically may well be reasonable to protect the integrity of criminal trials. But the vast majority of collateral sanctions cannot be justified this way. Within the established legislative ranges, these sanctions should be imposed in ways that tailor the punishment to the circumstances. Is a bar from a particular kind of employment appropriate for a given offender? Does it relate to the offense charged?

Avenues for Relief. Where does a convicted felon turn to challenge the imposition of a collateral sanction? Who tells him what his options are? When a drug offender is barred from living in public housing with

his mother, what is his redress? Granted, some of the statutes discussed in this chapter provide avenues for relief—for example, a drug offender denied a student loan may be restored to eligibility after passing two unannounced drug tests. And many states provide for individuals to petition a court for relief from these "civil disabilities." But these are cramped expressions of the notion of legal remedy. Could not a state enact legislation allowing convicted offenders to return to the sentencing court to argue that a collateral sanction should not apply to him? Could a statute allow the offender to bring officials of the housing agency to court to explain why they decided to exclude him from his apartment? Could not the corrections agencies be required to inform offenders of their rights to seek relief?

Embrace the Goal of Reintegration. Remembering Garland's insights about the growth of the punitive state, the most important recommendation—indeed, more a hope—is that the country reverse the current cultural sensibility about those who have violated our laws and adopt a goal of reintegration, not exclusion. We need to find concrete ways to reaccept and reembrace offenders who have paid their debt for their offense.

These reforms of the universe of invisible punishment may not comport with the punitive attitudes found in our political discourse. But they do offer a road map for legislative action. They are rooted in both traditional notions of sentencing philosophy and modern innovations such as truth in sentencing. Even proposing them to the legislature would have this advantage—they would make the universe of these punishments visible and would raise searching questions about why we have chosen these responses to the wrongdoing of our fellow citizens.