

FOREWORD: ENDING MASS INCARCERATION

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Mass incarceration is a scourge. Our brutal penal system imposes great suffering on the incarcerated. It destroys families. It eviscerates communities. And there is good reason to doubt carceral solutions are in fact appreciably reducing crime.¹ Yet we persist with mass incarceration. America continues to have one of the highest incarceration rates in the world,² and among the states, Oklahoma has among the highest incarceration rates.³ On this backdrop, the *Oklahoma Law Review* organized this Symposium on “Ending Mass Incarceration: Philosophy, Practice, and Policy.” The Symposium brought together nine leading scholars to author and present pieces on how to recognize, address, and ultimately solve this dire problem with the American criminal justice system.

The Essays and presentations were organized into three panels:

The first panel, entitled *The Structures of Mass Incarceration*, featured Professors Stephanie Didwania, Thea Johnson, and Kathryn Miller, moderated by myself. The panel discussed the ways in which particular features of our criminal justice system contribute to mass incarceration and how to combat them. Professor Didwania’s Essay, *Redundant Leniency and Punishment in Prosecutorial Reforms*,⁴ proffers an empirical analysis of jurisdictions with so-called “progressive prosecutors” and how this movement has not resulted in significant decreases in incarceration rates. Professor Johnson’s Essay, *The Efficiency Mindset and Mass Incarceration*,⁵ explains how the “efficiency” mindset of prosecutors’ offices leads to a plea-

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1. See, e.g., David J. Harding, *Do Prisons Make Us Safer?*, SCI. AM. (June 21, 2019), <https://www.scientificamerican.com/article/do-prisons-make-us-safer/>; David J. Harding et al., *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, 3 NATURE HUM. BEHAV. 671, 671–77 (2019).

2. *United States Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> (last visited May 5, 2022).

3. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html#methodology>.

4. Stephanie Holmes Didwania, *Redundant Leniency and Redundant Punishment in Prosecutorial Reforms*, 75 OKLA. L. REV. 25 (2022).

5. Thea Johnson, *The Efficiency Mindset and Mass Incarceration*, 75 OKLA. L. REV. 115 (2022).

bargaining regime that results in higher sentences and contributes to mass incarceration. Professor Miller's Essay, *A Second Look for Children Sentenced to Die in Prison*,⁶ discusses the excessive sentencing of juveniles and how "second-chance" statutes can alleviate this over-punishment and, indeed, lower incarceration rates among juvenile offenders serving needlessly long sentences.

Each of these Essays makes a pragmatic contribution to our understanding of the actual, on-the-ground mechanisms leading to mass incarceration. My own view is that the problem of mass incarceration is multidimensional, and solving it will require fixing dozens of problems. These works have shown us a way forward in solving three discrete problems contributing to mass incarceration.

The second panel, entitled *The Nature of Criminality and Punishment*, featured Professors Jacob Bronsther, Raff Donelson, and Avlana Eisenberg, moderated by Professor Tracy Hresko Pearl. The panel discussed fundamental questions about the nature of punishment and punishment itself, and how this bears on what mass incarceration is. Professor Bronsther's Essay, *Nonfatal Death Sentences*,⁷ proffers an argument for why long-term incarceration constitutes a form of social death. With this in mind, Professor Bronsther contends that we can bridge the anti-capital punishment movement to eliminate long-term sentences. Professor Donelson, in his Essay *The Inherent Problem with Mass Incarceration*,⁸ inquires what the harm of mass incarceration actually is. After investigating various possibilities, he points to the perhaps obvious but unattended-to conclusion: the harm of mass incarceration is at bottom that it curtails freedom. He then richly develops this account and explores its downstream consequences. Professor Eisenberg, in her Essay *Getting to "Prisoner as Neighbor,"*⁹ explores the true reasons for our brutal punishment system. She concludes that it is a failure to attend to the humanity and dignity of our fellow humans, who are convicted of crimes, that has resulted in this deplorable system.

These Essays all address the most fundamental questions of mass incarceration—what harm punishment imposes on the individual and why we are willing to impose such grievous harms on our fellow people.

6. Kathryn E. Miller, *A Second Look for Children Sentenced to Die in Prison*, 75 OKLA. L. REV. 141 (2022).

7. Jacob Bronsther, *Nonfatal Death Sentences*, 75 OKLA. L. REV. 7 (2022).

8. Raff Donelson, *The Inherent Problem with Mass Incarceration*, 75 OKLA. L. REV. 51 (2022).

9. Avlana K. Eisenberg, *Getting to "Prisoner as Neighbor,"* 75 OKLA. L. REV. 69 (2022).

Answering these fundamental questions is key to solving mass incarceration, for we cannot hope to find a cure if we do not understand what we are trying to heal.

The third panel, entitled *Mass Incarceration as Oppression*, featured Professors Brandon Hasbrouck, Jamelia Morgan, and Maybell Romero, moderated by Professor Thomas Frampton. The panel addressed how mass incarceration constitutes oppression, along multiple dimensions. Professor Hasbrouck's Essay, *Movement Constitutionalism*,¹⁰ argues that mass incarceration constitutes oppression of Black, Brown, and poor communities and that the only solution is to commit to abolition democracy. Professor Hasbrouck then sets forth a blueprint for this ambitious but necessary project. Professor Morgan's Essay, *Disability, Policing, and Punishment: An Intersectional Approach*,¹¹ details the ways in which mass incarceration—and the criminal justice system generally—impose grave harms on disabled peoples. In her Symposium presentation, Prof. Romero discussed how mass incarceration impacts exurban, suburban, and rural communities and perpetuates oppression against Black, Brown, and poor peoples in thus far unexplored ways.

These Essays incisively and insightfully home in on the truths of how mass incarceration oppresses. Criminal law scholarship as a whole has often overlooked the political dimensions, effects, and repercussions of criminal justice. This scholarship focuses our attention on how our penal system is not simply a theoretical device to address and avoid criminal harms—it is a tool used to oppress Black, Brown, poor, and disabled peoples. Only by acknowledging that fact can we rectify that intolerable evil.

These brilliant pieces of scholarship by our Symposium participants, and their moving presentations, have the potential to make great change. They will be superlative substantive resources. But their presence and words will serve as a call to action, and as a source of great energy as we embark on this critical work.

In the same spirit, I want to add two further thoughts about how we perpetuate mass incarceration in our penal system: (1) through the imposition of the recidivist premium; and (2) through the coercive nature of plea bargaining. Below are mere sketches of these features of our criminal justice system. They are points I hope to explore further in my own research, but they are also invitations to others to take up the torch with me.

10. Brandon Hasbrouck, *Movement Constitutionalism*, 75 OKLA. L. REV. 89 (2022).

11. Jamelia Morgan, *Disability, Policing, and Punishment: An Intersectional Approach*, 75 OKLA. L. REV. 169 (2022).

First, there is the “recidivist premium.” The recidivist premium is the practice of punishing repeat offenders more harshly than if they were first-time offenders.¹² This is common in our system: for example, a convict who commits a second robbery gets more than the five years they got the first time; they get seven years (thus, a recidivist premium of two years). This is represented most starkly in habitual-offender laws, like “three strikes laws” which sentence a person to life imprisonment after three qualifying convictions.¹³ There are a great number of recidivists caught in the American penal system,¹⁴ and so the recidivist premium contributes greatly to mass incarceration. But if we attend carefully to the justifications for punishment, it becomes plain that the recidivist premium does no good. It does not provide more deterrence, more useful incapacitation, or more appropriate retributive desert.¹⁵ Indeed, because our system is brutalizing and criminogenic, it does no good in rehabilitating offenders—rather the recidivist premium likely leads to generating more crime.¹⁶ Consequently, I contend that we should abolish the recidivist premium. In the spirit of Professor Eisenberg’s Essay, I contend that this best recognizes the equal dignity and humanity of those who have been convicted of crimes.

Second, there is coercive plea bargaining. It is a brute fact that most prosecutions in our criminal justice system are resolved through plea.¹⁷ In the federal system, for example, approximately 90% of cases are resolved by plea.¹⁸ There are genuine questions about whether our criminal justice system

12. Melissa Hamilton, Back to the Future: *The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75, 79 (2015); Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 573–74 (2009).

13. Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001) (discussing habitual offender statutes).

14. See, e.g., Eva Herscovitz, *U.S. Recidivism Rates Stay Sky High*, CRIME REP. (July 30, 2021), <https://thecrimereport.org/2021/07/30/us-recidivism-rates-stay-sky-high/> (analyzing data provided by the Bureau of Justice Statistics).

15. Guha Krishnamurthi, *The Futility of the Recidivist Premium* (2022) (unpublished manuscript) (on file with author).

16. *Id.*

17. Stephanos Bibas, Essay, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1138 (2011) (“[T]oday, 95 percent of criminal convictions result from guilty pleas and only 5 percent result from trials. Plea bargaining is no longer a negligible exception to the norm of trials; it is the norm.” (footnote omitted)).

18. MARK MOTIVANS, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PUB. NO. NCJ 301158, FEDERAL JUSTICE STATISTICS, 2019, at 10 (2021) (showing that 90.4% of convictions in the federal system were obtained through plea agreement).

could even function if it were not the case—indeed, even if the percentage of cases resolved by plea decreased by a few percentage points. So, pleas are critical. Indeed, Professor Johnson’s contribution to this Symposium and her work generally detail this phenomenon. Now, plea bargaining can be largely modeled by looking at the prosecution and defendants as rational actors. Under such models, pleas cannot be simply understood as admissions of guilt by the defendant. Instead, pleas may be compromises arising from the risks of punishment the defendant faces, based on their (often incomplete) information and (often unacquainted) understanding of the criminal process. So, it is certainly possible that an innocent person would plead to a sentence of five years, when faced with a 20% chance of a long-term sentence. As Professor Bronsther observes, such long-term sentences are social death, so we are really asking whether an innocent person would plead when faced with the specter of (a type of) death. This raises the pressing questions: Can such pleas be voluntary? Are they not under duress and thus coercive? Thus far, the Supreme Court has turned a blind eye to these claims.¹⁹ It is evident that the Supreme Court is deeply worried about restricting plea bargaining in any way, for fear that it will damage or collapse our criminal justice system. But I suggest that this is not constitutionally valid, and it shirks the recognition that the government cannot coerce a waiver of constitutional rights. For this, I urge us to draw inspiration from the federalism context: The Court has been eager to recognize that the federal government cannot coerce the states into waiving their constitutional rights with offers that do not present a genuine choice.²⁰ Why should states receive such aegis and not criminal defendants? Thus, I contend that we should vigilantly ensure that pleas are not coercive. States can do this in many ways: by not overcharging, by reducing statutory maximum penalties, and by offering substantially more evidence supporting pleas.

By no means are these panacea to the plague of mass incarceration. Both of these have a part to play: reducing sentences by eliminating the recidivist premium lowers the total amount of incarceration, and imposing further obligations on pleas to ensure they are more truth adaptive helps the system not to impose undue punishment. As I suggested above, the problems of mass incarceration are numerous and varied. Solving a problem like mass incarceration will require continual listening and diagnosis and an untiring commitment to a multifarious, holistic approach. This Symposium embraced that philosophy. It is a continuation of the great work before us; we stand on

19. *See* *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

20. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580, 587–88 (2012).

the shoulders of giants. And it is a beginning, for further vigor, compassion, and progress.