

Making us angry and active: The personal, the policy and the political

How interesting it is that when people talk about transformations in their thinking, they often refer to a different sort of learning than the one they are accustomed to. Those of us who have been in school and good at it, read and then read some more. We are comfortable with the world of ideas. Many of us can recite a litany of the world's sins. We carry around that sense of tragedy and suffering but somewhat abstractly. We become inured after a while. Like fast forwarding through a movie or channel surfing, we can easily move from ads about cereal to the emerging refugee crisis in Syria to the *New York Times* series on climate change deniers. We may understand systemic oppression and the basis upon which inequality works. But our true comprehension of how individually lived experience plays out in these systems may not be activated until we hear the voices and the shared stories of those who live the lives we read about.

Similarly, people whose first-hand experience is on the streets, lived experiences that are tiny slices of the world. They may also become accustomed to these inequities—micro, mid-range and macro aggressions from lots of parties—similarly situated others competing for scarce resources, institutional forces, those who prey on the poor. Often, these individuals don't work up a good anger until they are educated, till they understand the systemic nature of these problems—their history, their dimensions. They come to understand not only the personal individualized experiences of poverty or inequality; they come to see systemic oppression. It's not just my neighborhood and my friends; it's bigger than that.

A friend of mine who retired from working in the state prison on the custody side (as a warden) *and* on the rehabilitation side as Associate Director of Rehabilitation has been teaching a course to workers in an anti-violence program. Many of her students come from the streets; several have

been in prison and are working their way back to society. After spending a semester in her class, one of the students remarked that she was beginning to sound like an angry black man.

Questioning him further, she commented on his life experiences, coming up on the streets. He appeared to her to be a calm and well-assured young black man. She wondered why he wasn't angrier himself. He replied that he didn't get angry until he went to school and started learning about the structure of racism and the organization of prejudice.

I call these big bang theories of learning—profound breakthroughs—that are created when we cross the barriers that are usually erected around us. Bringing together personal experience and the larger picture is a productive place to start important dialogues about how our social policies—well-intentioned or not---affect the lives and livelihood of individuals in communities that may be different from our own. The Freedom Project, produced and created by Everett: Company, Stage & School, does this beautifully in its presentation of mass incarceration. (Links to videos of the Freedom Project and the Freedom Cafes are shown at the end of this essay.) The narratives presented in dance, music and theater, developed out of personal testimonies and story telling, offer tales of oppression and resistance, marginalization and resilience. We can't simply consider Freedom Project another night at the theater; we should be agitated, fueled by questions of how mass incarceration happened and how it can be dismantled. The stories in the Freedom Project are personal accounts—both tragic and triumphant—of how the lives of men and women, their families and their communities have become victims and survivors of the wars on crime and drugs.

Extraordinary and deliberate actions must be in place to incarcerate millions of men and women. It takes a convincing narrative to go from a nation that imprisoned fewer than 500,000 inmates in 1975 to one that locked 2.3 million behind bars in 2013. I write this essay as a scholar in the area

of criminal justice and as an individual who has worked in the Rhode Island correctional system on two occasions. I will rely on those twin perspectives to tell the story of how and why mass incarceration happened. I will make the argument that it has taken a village to incarcerate millions of citizens and that it will take a village to work our way out of this madness. The good news here is that significant reform which seemed like a faint hope and distant dream just a few years ago is moving ahead with initiatives at the federal, state and municipal level. In mid-July 2015, President Obama delivered a speech calling for fixing a broken system. He argued for early childhood education, improving conditions of confinement, creating pathways to productive lives for ex-offenders, for the end of mandatory minimum sentences and stronger focus on the due process rights of those swept up in the system. After decades where politicians felt they couldn't be harsh enough on crimes, it is startling to hear a president call for lighter sentences and admit that racial bias is cooked into the system. Works like the Freedom Project go a long way toward making a conversation about reform real and possible. The Freedom Project is built not out of a playwright's imagination or observations; it is constructed artfully and creatively out of lived experiences, shared and transformed into pieces of art, music, film and dance.

In her important book, *The New Jim Crow*, Michelle Alexander traces the mechanics of mass incarceration. As a legal scholar, she reports that in writing her book, she used every logical argument that she could employ *against* an argument that suggested that mass incarceration had a racial element. After extensive research, she finally names the phenomenon and concludes that mass incarceration is yet another manifestation of racialized control. Under the banner of fighting a war on drugs and crime, we traded safer streets for middle class whites by making other streets unsafe for black men. The nature of other larger demographic shifts into

increasingly racially segregated communities meant that much of our population was shielded from the impacts of mass incarceration. Figures comparing the lifetime likelihood of incarceration are shocking for whites and people of color and also for men and women. The likelihood a male will be incarcerated over the course of his lifetime is out of nine. Black men have a one in three chance of incarceration; Hispanic men one in six. Women have a one in 56 chance of incarceration. That figure is 1 in 111 for white women, 1 in 18 for black women and 1 in 45 for Latina women. While mass incarceration was emptying out these communities, actually making them more dangerous, middle-class communities could scarcely feel the burden of mass incarceration until the system became so expensive and dysfunctional that even conservative lawmakers cried uncle. The isolation of the middle class from mass incarceration is the opposite of the Butterfly effect, where small differences can have significant impact. In the case of mass incarceration, momentous changes in social policy that had such a negative effect on certain communities were scarcely felt in others. Broken windows policies have meant casting a wider net over behaviors, criminalizing them and tightening up the ways in which men and women may escape this net after they have paid their price for their offending. In an earlier essay called *Broken Windows: Slamming Doors*, I examine how these policies have affected not only incarceration but instead the entire criminal justice and its collateral systems of control. And, as any scholar of the criminal justice can attest to, incarceration itself would be a significant penalty all by itself. Prisons on their best days in well-managed systems are still places of isolation and degradation. Removal from family and friends, loss of status, dealing with the range of characters, temperaments of the officers and other inmates are all punishments. And, at the other end---the quality of some of our prisons are sources of national shame. Rikers Island in a liberal state, surrounded by high-powered lawyers and an active press, has been a place of

awful management. Other prisons--Angola in Louisiana. Pelican Bay in California—are similarly famous not for their successes in rehabilitation but for their litany of abuses and degradations.

Rhode Island is not immune to managing dangerous prisons. In 1975, Rhode Island's prison system fell under federal court order with, from the vantage point of four decades, what seems like a very small prison population of under 600 inmates. Forty years later, the population has risen to 3,214. Rhode Island has one of the lowest per capita imprisonment rates; this is generally true for the northeast. We lock up in our prisons fewer than 200 men and women per 100,000 residents. This compares to a national average per capita incarceration rate of 211. Louisiana's rate is the highest in the nation at 867 with Mississippi and Oklahoma not far behind. Our incarceration rate is the 47th lowest in the nation. Still, we lock up in our prisons and jails one of 265 white men above the age of seventeen, as well as one of every 83 Hispanic males and one of every 29 black men. Our rate of community supervision—probation and parole—is among the highest in the nation. Rhode Island has the 3th highest rate of supervision in the U.S. One of every 24 white men, every 14 Hispanic males and every 6 black men is under correctional supervision. Rhode Island's rank here is high, fueled by very long terms of probation and parole and wide application of this punishment to offenders who neither require supervision nor benefit by it. The terms and conditions of community supervision are important to understand because, although few members of the public know this, probationers and parolees can be technically violated and returned to prison, not because they have violated the law but they have failed to abide by conditions of supervision. In some states, up to forty percent of all returns to prisons are due to technical violations—failing a drug test, failing to show up for an appointment, visiting with another felon and the like. In Rhode Island, of the men and women sentenced to Rhode

Island Department of Corrections in 2014, 34% were for technical violations and the rest due to criminal activity. We have lots of people on long-term probation.

But, in addition to the pains of imprisonment are the life-long disabilities of incarceration—prohibitions against voting, denial of public housing, denial of educational loans, lack of access to some occupations, long-terms for probation and parole meaning more supervision and greater surveillance and greater likelihood for inadvertently messing up. As Alexander notes, these life-long punishments are as damaging as Jim Crow was, only now under the regime of mass incarceration, we don't use racial superiority to justify the system, we point to the criminal behavior of minorities to keep this system in place. Given the life-long consequences of imprisonment, the workers who are trying to divert young men and women from life on the streets, are challenged. As a street worker who does this work says, to “ease their transition” away from crime and toward opportunity is especially difficult when justice-involved people endure so many limitations and prohibitions.

It has taken us a disconcertingly long time to wake up to mass incarceration. We should understand mass incarceration not just to mean that lots of people are in prison. Mass incarceration can be better understood as the whole machinery of the process--the working model of the village that incarcerates. From media representations to law-making that ties the hands of judges to aggressive policing to criminal processing and the denial of bail to prosecutorial powers and inadequate defense, to faulty forensic science, to compelling confessions and other miscarriages of justice, to incarceration for failure to pay fines, to lengthy prison terms and damaging collateral consequences of arrests and convictions, we have built up a system that may incarcerate men and women for a defined period of time but in some cases, it incapacitates them and their communities for lifetimes. What is important to recognize in the

American system of justice is what we can call the fifty-state experiment. Although much of the debate in criminal justice occurs at the federal level, most of the action happens at the state-level. Of the 2.3 million men and women behind bars, approximately ten percent are serving time in federal prisons. Most are either in state prisons, for more serious offenders, or in local jails awaiting trial or serving short terms. Because most of the action in criminal justice happens at the state-level, we have the advantage of seeing the costs and benefits of widely divergent criminal justice policies. As we have seen in recent news reporting, the nature of policing varies widely with some communities making wide use of stop-and-frisk and others employing community policing. Some states have programs that divert offenders from criminal justice while others have constructed a system where there are virtually no “Get out of jail cards.” In some states, full-time public defenders are responsible for indigent defense; in other states, the private bar takes up this responsibility with state or local supervision by the courts. Some states lock up twice as many offenders per capita than other states. Some states allow babies to remain with their inmate mothers; others place these infants in foster care or with relatives. Some states impose long terms of community supervision. There is wide variation in recidivism, the rate at which offenders return to prison, and within this measure, varying practices on whether to re-incarcerate technical violators of probation and parole. In some states, if an inmate is wrongly incarcerated, he can be compensated for each year in prison; in other states, he must sue the state and prove the error was intentional. And, finally, some states impose a lifetime ban on voting for released inmates while other jurisdictions allow inmates to vote when they are confined. It would seem with so much variation that we would learn from the mistakes and missteps of other states but what really happens in some cases, is that whether these practices work or not to reduce

crime, punish offenders and restore citizens to their communities is less important than the politics of crime and justice.

Many members of the public don't understand that the criminal justice system represents a series of decisions, each turning upon discretion. Testimonies from the Freedom Project depict this point in shared stories. Why me? How did I get caught up in a system that has no escape? "How easy it is to get caught up in the system," one actor observes. Was there no other future that was possible for me? Or does a history of bad schools, struggling parents, and criminal opportunity lay out my future, as I if had gone to a career counselor and she suggested this would be my path? As another storyteller in Freedom Project says, "Good kids are like bad kids. Bad kids get lost in their heads and can't find a way to the good."

Discretion points the way in criminal justice processing and often, as we have seen in incident after incident of police-black male encounters in the media, these decisions are not solely based on suspected criminal behavior of individuals. It is far more complicated than that. A chain of perceptions (and misperceptions) guide behavior. Do the police approach a citizen? What is the nature of the encounter? Do we arrest? Do we book at the station? Do we prosecute? For what charge? Do we push for a plea deal? What sort of counsel is afforded? What evidence is there? And so on. Some of the most important of these points—all making up the machinery of mass incarceration can be seen below. At each point, there are policies that are amenable to change. At each point, there are examples of changes that are already under way. What I will do here is summarize some of these examples.

Operative Ideas

Key to this are operative ideas. First, I would argue, is the false premise that a myriad of social problems should be the province not of social services, mental health, and drug treatment but of

criminal justice. The issue of criminalization is an important one and has fueled our response to urban crime and drugs. Ta-Nehisi Coates writes that we have opted to use the tools of incarceration and criminalization when other approaches would be less expensive, more effective and more productive for our social fabric. We can see in the Freedom Project the folly of treating drug addiction as a crime instead of a public health problem. We see the effect of these policies not just on individual offenders, but on families and children, in this generation and beyond. In the wake of the killings of black men by police officers, attention was placed on police reform. The body camera fix seemed particularly appealing to politicians.

Body cameras are helpful in police work but they are also helpful in avoiding a deeper conversation about what it means to keep whole swaths of America under the power of the justice system, as opposed to the authority of other branches of civil society. Police officers fight crime. Police officers are neither caseworkers, nor teachers; neither mental-health professionals, nor drug counselors. One of the greatest hallmarks of the past forty years of American domestic policy is a broad disinterest in the difference.

This is an important point. Not only has our safety net unraveled by many counts, our net for capturing, confining and punishing social problems, has expanded and grown more punitive. The second belief: “Why fix it if it is broken?” reflects a belief that even if our policies aren’t working, there are no good alternatives. Mass incarceration has been somewhat fueled by the war on drugs. As Naim wrote, Americans are of two minds about the war on drugs. The first is that the War failed on nearly any measure AND we can’t do anything about it. The first point is without dispute. There are plenty of drugs available; their potency is better than ever. Our partners in waging anti-drug campaigns in Latin America are changing their policies, legalizing drugs and moving away from the interdiction and crop eradication policies.

While few wish to talk publicly about broader legalization of drugs, policies that embrace harm reduction, that see drugs as a public health not just a criminal justice problem have proven

effective. The founder of Silk Road, an online black market site for drugs, was recently convicted to the life sentence for his drug distribution empire. The government suggested that this online marketplace was more dangerous than street-level trafficking. Ulbricht's attorneys argued that in fact Silk Road provided a safe and reliable delivery system for drugs serving more than 100,000 customers and generating more than \$200 million dollars over a period of more than two years. Although the defense strategy didn't work for Ross Ulbricht, the argument provided an interesting picture of drug supply and demand.

The second point is also important. Until recently, we had no alternatives. If locking up so many people for such long terms didn't work, if we couldn't push people out of a profitable underground economy, if our policies were expensive and ineffective, what should we do?

The third important lesson is that no one individual or office presides over the criminal justice system; fewer actors in the system have any idea of what happens in the other sectors. In a recent symposium on mass incarceration at Roger Williams University, a presenter asked this gathering of judges how many of them had visited the state's correctional system. A few hands went up; most of the judges who had sent prisoners to the prison had no first-hand exposure to the conditions of confinement and to the programs in the institution. The same is the case for lawmakers. Representative James Sensenbrenner, who has sat on the House Judiciary committee for decades writing punitive legislation, reducing judicial discretion and putting into place mandatory minimum sentences, is heading up criminal justice reform. His position on criminal justice has, as they say in these circles, evolved. He explained, "We really aren't exposed to the practical aspect of the criminal-justice system, or what happens or doesn't happen in the prisons." This leads us to our next point of decision making: Lawmaking

Lawmaking

The criminal justice system is, of course, a system of laws. These define categories of offending and assign punishments commensurate with the seriousness of the offense. Many laws are made by what we can call ‘lawmaking by outrage’—a high visibility crime occurs and lawmakers write laws that are designed to address the most egregious of offenses. Experience with three strikes, mandatory minimum sentences and some sex offender laws shows us that unintended consequences typically flow from this sort of lawmaking. Congressional acts have narrowed the ability of judges to exercise discretion over sentencing in their courts. Some have called this an assault on judicial power and decision-making. The result of this has been longer and more punitive sentences and a lessening of judicial power.

Law making also occurs, of course, in the appellate courts. A string of decisions by the U.S. Supreme Court have given more power to the police, have strengthened the powers of local officials to confiscate property through asset forfeiture and have left those harmed by prosecutor malfeasance without relief.

Law enforcement

Americans typically get most of their knowledge about the criminal justice system from the media and from encounters with law enforcement. As noted above, police are the gatekeepers of the criminal justice system. Lots of crimes don’t get reported; police don’t arrest every offense they see. But at the start of the so-called criminal justice funnel are encounters between police and the public. Police officers are empowered to arrest individuals who are committing or have committed a crime. However, plenty of research has suggested that racial profiling plays a role on a conscious or an unconscious level. As Alexander notes, the war on drugs has been fought in African American communities and has, in many people’s mind, created the image of the criminal as a young black male.

Recently mainstream America has had up close and personal looks at the relationships between black Americans and some police officers in some departments. We can rattle off these names and summon up pictures of overly aggressive policing. Michael Brown. Freddie Gray. Eric Garner. Dante Parker. And many many others. Research has documented the impact of policing that includes stop-and-frisk policies and that relies upon the broken windows theory of policing. Reforming police practices is challenging. Calls for less aggressive policing has resulted, in some communities, in work stoppages and drastic declines in arrests.

In some instances, these aggressive strategies have led to a general decline in community trust of the police. Lack of cooperation with investigations of serious crime by community residents has led to a sharp decline in clearance rates. An offense is cleared when an arrest can be made. In some communities, such as those profiled by Jill Leovy in *Ghettoside*, few homicides are solved. Her careful and compelling study set in Los Angeles reveals that the clearance rate for homicides revealed that fewer than one of three homicides of black victims in Los Angeles has been solved. There are similar data in other communities. In Providence, RI, of over 110 homicides committed in the period 2000 to 2013, 43% are unsolved. This reflects a national trend. In 1961, 91% of all homicides cases were cleared; forty years later, the clearance rate had plummeted to 62%. This compares to earlier period and reflects a genuine decline in confidence that the criminal justice system will afford justice to the community. The impact of this is the community-level work that is done with gang intervention seeks to do what police can't do, in many cases. It is to provide a way to tamp down gun violence by explaining to young men that their affiliations and loyalty are based on the accident of birth and residence. As a street worker I spoke with suggests to the young men on the street, what if you were born in another neighborhood, in the neighborhood of your sworn enemy and you were one of them, "who are

you mad at?” Here, of course, he means, mad enough to lose a life or take a life, and are these other young men the people with whom they are truly angry?

Courts

Under the constitution, the courts are designed to afford a place where the accused are given a fair hearing. The role of due process is important here, of course, so that the vast power of the state is balanced against the rights that the individual has to defend himself against the charges he faces. The courts are deluged with cases, many with long delays, requiring months for cases to make it through the system. Early in detention, the courts determine bail conditions. In some cases, the setting of bail is clearly more than the defendant can afford meaning that someone with more resources can spend pretrial time on the street and someone with fewer resources remains behind bars. The longer someone is confined pretrial, the greater the chance that he will be sentenced to prison. Money bail may do little to distinguish those who are dangerous to the community from those who pose no risk and between those who will appear for a court date and those likely to flee. Research has shown that setting bail can be challenging for judges but there is an emerging science for this. Using algorithms that have been tested in the field, alternates to cash bail have developed that have released more individuals to the community in lieu of jail with no increase in crime rates or failure to appear for dates.

Although defendants have the right to a jury trial where he can face a panel of his peers, few defendants choose that path. There is plenty of pressure on the prosecution and the defense to avoid a trial. There is the time and expense of a trial. The system could not work if every defendant demanded his day in court. But, besides the costs, there is also the important variable of the unknown outcome. For the prosecution, if the trial results in an acquittal, the defendant goes free; for the defense, if found guilty, there will be punishment, most likely incarceration.

So, for the most part, both sides bargain for the best deal they can get. In fact, 95% of felony cases are plea-bargained. If these are fair and just bargains, we can consider that justice was done. However, there are important caveats to consider.

Prosecution

Prosecutors have enormous power to manage cases through the system. It is their decision what charges to bring and what deals to offer defendants. Prosecutors can use the resources of the state to assemble evidence against defendants. They don't enjoy unlimited budgets but they are able to use state and local resources to prosecute cases as they wish. Some provisions, like the 851 statute, allow federal prosecutors to double mandatory minimum sentences for offenders with prior drug convictions. The statute was passed to give prosecutors extra power to deal with the most serious offenders. However, 851 has been used to extort guilty pleas from much less serious offenders. Even defendants with relatively minor involvement in these crimes waive their rights to avoid extraordinarily long sentences. According to research, 851s are used disproportionately against black defendants. While 851 is a federal tool, it is emblematic of the concentrated and often unchecked power of prosecutors.

Equally troubling is the lack of effective oversight and disciplining of the prosecutors, even when offices of district attorneys have been shown to systematically deprive defendants of exculpatory evidence that would exonerate them. Few jurisdictions have disciplined over-zealous prosecutors and fewer have systems in place to limit prosecution misconduct. The United States Supreme Court decision *Connick v. Thompson* severely limited the ability of defendants to get relief for prosecutor malfeasance.

Defense

Although criminal defendants are guaranteed access to an attorney in criminal proceedings, there is no doubt that defense counsel are outgunned at every turn. The quality and availability of defense counsel varies widely and makes a difference in outcome. In some states, a full-time office of the public defender provides legal assistance with funding from the state. In other jurisdictions, private attorneys are hired on a case-by-case basis to afford counsel. Some offices are supported with funds from the general treasury; others are funded from the imposition and collection of fees and fines paid by defendants. Few scholars would argue that indigent defendants receive adequate defense counsel.

Forensics

Surrounded by what had been a nearly invincible shield of respectability and “science,” forensic science has taken quite a hit recently. Perhaps, it is the popularity of the CSI franchise that has convinced most Americans that the evidence offered by prosecutors and police is clear, precise and free of contamination. But this is not always the case. Recent stories in the popular and professional presses have questioned the science behind arson investigation, shaken baby syndrome, autopsy reports, DNA collection, and fingerprint reading, as well as the veracity of jailhouse confessions, eyewitness accounts and expert testimony. The American Bar Association and other professional groups have taken up these issues, finding serious shortcomings in forensics and other evidence used to convict defendants. Many of those who had been released from prison have had their cases overturned because of false confessions, faulty witness identifications, mishandled evidence and other errors. These are an important and not random source of error in the criminal justice system.

Corrections

There is no doubt that too many individuals are behind bars. There is nearly universal agreement about this point. The sheer number of those in confinement is the first major problem of confinement. Secondary problems include over-crowded conditions of confinement, the overuse of solitary confinement, the declining use of parole, the absence of effective rehabilitation programs inside prisons, and others. Only recently have the dangers and damages wrought by overuse of solitary confinement been examined. One young woman profiled in a video from the Freedom Project, explains that she spent months in segregation, twenty-three hours a day in a cell. Imagine the impact of that sort of “treatment” on an individual’s ability to cope with and survive incarceration. Imagine the impact of this on life post-incarceration.

Collateral consequences

In enacting tough penalties for drug and other crimes, law-makers piled on a series of other punishments. These result in the lifelong disability of incarceration. Court costs, fees and fines are assessed on criminal defendants and increasingly these funds are used to support the running of the criminal justice system. Failure to pay these fines and fees can result in incarceration which some argue is tantamount to debtors’ prison for poor defendants. As noted above, disenfranchisement prevents ex-offenders from voting. Some categories of offenders are barred from public housing and from receiving food stamps. Others face bans for entering certain occupations. The existence of an arrest and conviction record hampers employment. State child welfare authorities may initiate termination of parental rights for offenders who are incarcerated for lengthy periods of time. The absence of so many parents in prison makes for difficult childhoods and painful adult lives. As Alexander notes, the collateral consequences of mass incarceration creates systems of racialized control as effective and as powerful as Jim Crow in creating a permanent sub-class of individuals unable to fully participate in society.

Changing the terms of the conversation

As cited above, lots of our strictest and more punitive laws have been written in response to high visibility crimes. Perhaps, it is time to name criminal justice reforms for those whose lives were taken in the broken criminal justice system. Perhaps, new policies that reform cash bail, limit the discharge of weapons by police in response to low-level offending, set disciplinary regimes for prosecutorial misconduct, limit the power of street sweeps for minor offenses, assign adequate counsel and other improvements could be named after Trayvon Martin, Eric Garner, Michael Brown, John Thompson, Sandra Bland, and others. Given the recent activity at all levels of the criminal justice system, in northern and southern states, to take a new turn in dismantling the troubling part of the system that has fueled mass incarceration, we know that we can do better. And, we can't just have a conversation about race and leave it at that, as important as this is. We need to rebuild communities and move against the trends that keep us apart and insulated from each other's lives and futures.

Everett's production of Freedom Project is a singular tool for reform and reflection. It works on multiple levels; it hits us where we should hurt. Dance, music, moving images, spoken word—captured on the Freedom Project stage—brings lessons to us. It creates that village that rebuilds. Our task now is to figure out where we all belong and which part of this system we can most readily and effectively take apart. As one of the actors says,

We know human in its angelic form and as a demon form. We choose to be everything you expect us not to be. We choose to be love.

We should all make that choice as we seek to rally a campaign against mass incarceration and its component parts.

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