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### No Reason to Blame Liberals (or, the Unbearable Lightness of Perversity Arguments)

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# No Reason To Blame Liberals (Or, The Unbearable Lightness of Perversity Arguments)

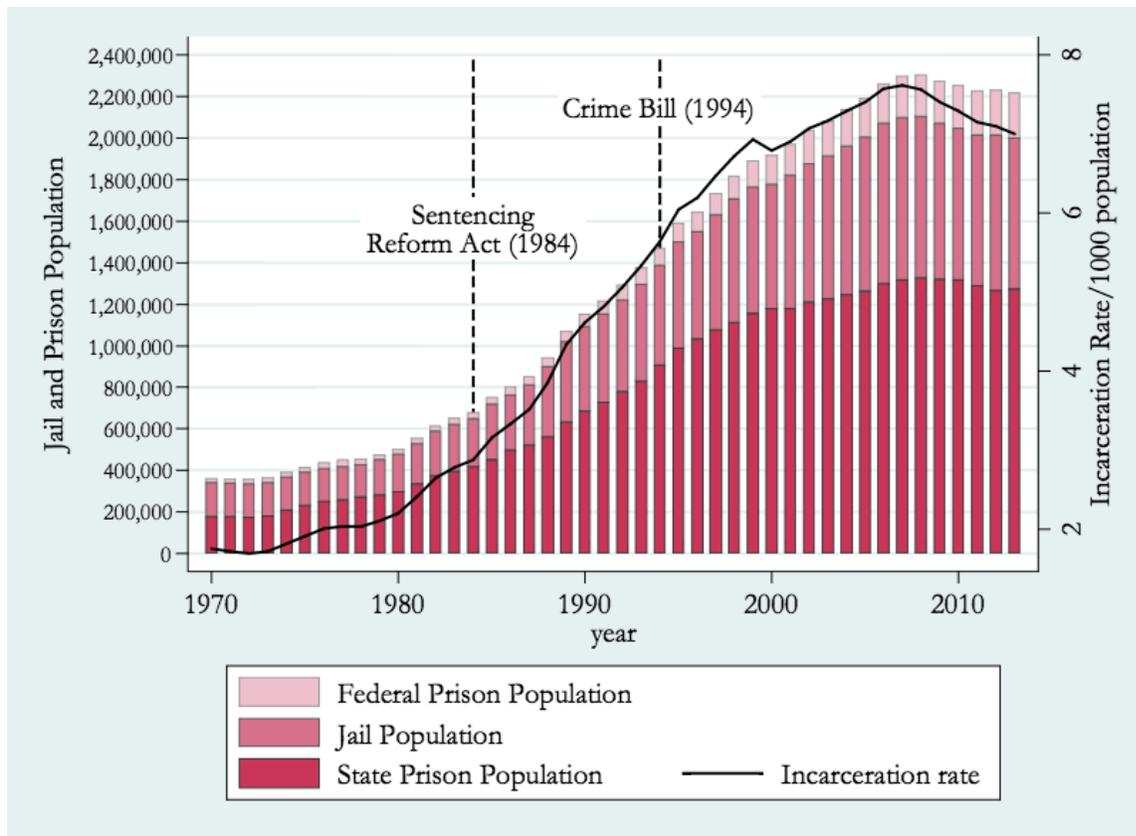
By MARGO SCHLANGER

Review of *The First Civil Right: How Liberals Built Prison America*, by Naomi Murakawa

Oxford University Press, 2014

Ours is an unprecedented era of mass incarceration. A familiar graph shows how prison and jail populations have increased over time:

## U.S. prison and jail population, 1970-2013



In addition to the current extraordinary number of people behind American bars, the other key feature of our current carceral state is the very high concentration of non-whites in that population. That concentration of non-whites has grown significantly since the 1960s, when whites constituted nearly two-thirds of American prison population; today, they are only a bit over one-third. Since 72% of Americans are white, the distinction in terms of incarceration rate is far more stark: among white men, the current imprisonment rate (counting only sentenced prisoners) is 4.7/1000; among Latino men it is two-and-a-half times that (11.3/1000); and among black men, it is *six* times as high as for white men (28/1000).

Naomi Murakawa, a political scientist and associate professor of African American Studies at Princeton, has written an interesting book that blames both features on American liberals—in particular Harry Truman, Ted Kennedy, and Bill Clinton (and Lyndon Johnson and Joe Biden)—and American liberalism. In *The First Civil Right: How Liberals Built Prison America*, Murakawa takes as her target a conventional wisdom that explains the rise of mass incarceration as a victory of Republican law-and-order over Democratic civil rights. Rather, she argues, starting right in her subtitle, “liberals built prison America.” It was liberals, she claims, who “established a law-and-order mandate: build a better carceral state, one strong enough to control racial violence in the streets and regimented enough to control racial bias in criminal justice administration.” (page 3)

Murakawa begins her story with what she calls “emergent democratic commitments to liberal law-and-order.” (page 39) She highlights President Truman’s civil rights agenda, and particularly Executive Order 9808, “Establishing the President’s Committee on Civil Rights.” Responding to the newly salient issue of lynchings, the 1946 Executive Order framed civil rights in opposition to racialized crime against black people: “the action of individuals who take the law into their own hands and inflict summary punishment and wreak personal vengeance is subversive of our democratic system of law enforcement and public criminal justice, and gravely threatens our form of government.” The resulting report, “To Secure These Rights” likewise highlighted the “right to safety and security” as an essential civil right.

Murakawa finds two problems in Truman and the committee’s approach. Quoting the committee’s attribution of black criminality to white aggression against blacks, she argues that the point conceded too much. The committee report purported to explain “occasional acts of violence” as well as “laziness, carelessness, unreliability, petty stealing and lying,” by African Americans. This marked, she suggests, a liberal ratification of the existence of black criminality, which morphed into “the black crime problem” used to justify punitive crime policies. In addition, she says, “the liberal right to safety translated race-based vulnerability to *excessive* arrest and punishment into a problem of ‘arbitrary arrest and punishment.’” (page 44) Thus the preferred liberal *solution* to the black crime problem would be “fortified criminal justice system,” albeit one that was procedurally “race neutral.” (page 71)

Murakawa argues that this proceduralist liberal solution was a key part of the Great Society, motivating the Omnibus Crime Control and Safe Streets Act of 1968, which responded to a significant crime wave and a corresponding surge of fear of both violent and property crime. Murakawa quotes liberal contemporaries who saw the Act as “a piece of demagoguery devised out of malevolence and enacted in hysteria”—a capitulation by President Johnson to conservative values. But those contemporaries were wrong, she says. In fact, the statute “was part of a long-term liberal agenda, one that reflected a belief that federally subsidized police recruitment and training could become racially fair.” (page 73)

Next, in an extended treatment of the 1984 Sentencing Reform Act, Murakawa appropriately declares it an important site of punitive, law-and-order politics. She summarizes the large incarcerative effect of the statute (in combination with mandatory minimum statutes, which she discusses less). Five years into implementation, the average time served in federal prison had doubled, and the percentage of convicts punished with probation rather than prison had halved. (page 91).

The conventional story is that the increasing harshness of federal sentencing marks liberals' acquiescence—or even futile resistance—to conservatives' punitive policy choices. Murakawa concedes that “it would be difficult to overstate the impact of shifts in partisan power” (page 105) that accompanied the punitive turn she documents. (Recall that the 1980 presidential election that brought Ronald Reagan to power also shifted control of the Senate to Republicans for the first time in a generation.) But her reading of the politics attaches far more agency to liberals. She argues that in the 1984 Act, and the Sentencing Guidelines that followed, “liberal ‘lion of the Senate’” Ted Kennedy in particular, and the Democrats more generally, “aided, abetted, and legitimated a punitive law-and-order regime.” (page 99).

There are two sub-arguments. First, the 1984 Act, while a major priority of the Reagan Administration, had its origins in sentencing reform legislation introduced in prior years by Kennedy. Murakawa demonstrates that in the years from 1977 through 1984, Kennedy's sentencing reform proposals moved substantially rightward, with respect to parole, “good time” credit towards sentences served, alternatives to incarceration, and prison capacity. Second, she critiques what Kennedy bought in exchange for those shifts. The resulting 1984 legislation, she says, possessed a “liberal core: fairness (racial and otherwise) administered through grids, without a vision of justice beyond predictability.” (page 105) The argument is not that the liberal core was an insufficient concession by the Republicans to justify Democratic support for the Act's high sentences; Murakawa argues that the liberal core was itself incarcerative, validating and entrenching an unduly punitive regime.

The next crucial episode in Murakawa's story is the Violent Crime Control and Law Enforcement Act of 1994, usually referred to as the 1994 Crime Bill. The punitive nature of the 1994 bill was no trade by the Democrats; the bill was President Clinton's baby, passed by a Democratic House and Senate. As Murakawa explains, President Clinton's “turn to ‘punishment, police, and protection’ was undoubtedly an electoral strategy.” (page 125) But, she says, it was a strategy with firm roots in the Democratic past. She quotes a memo from Domestic Policy Advisor Bruce Reed to the President:

You have a chance to seize one of the most powerful realignment issues (along with health care) that will come your way, at a time when public concern about crime is the highest it has been since Richard Nixon stole the issue from the Democrats in 1968. . . . Crime was [before that] a linchpin that helped hold a Democratic majority together across racial and class lines. . . . [Clinton should try to] unite the county on an issue that . . . divided our party and our nation for three decades. (page 126)

The '94 Crime Bill funded tens of thousands of local cops, and (oddly absent from Murakawa's account) offered financial incentives for states to establish truth-in-sentencing by requiring violent offenders to serve at least 85% of their sentences.

Finally, again looking at the 1994 Crime Bill—especially at its component Federal Death Penalty Act of 1994—Murakawa emphasizes the Democrats' abandonment of death penalty abolition (a plank of the 1972 party platform) in favor of an escalation of federal death-eligible crimes coupled with a “new, improved, routinized death penalty,” (page 131) whose procedural protections “‘enabled’ capital crime escalation.” She explains: “I offer the term ‘enabled’ in two

senses: new procedures enabled capital punishment to pass constitutional muster, and, more significantly, new procedures enabled a kind of liberal political cover.” (page 143)

Murakawa sums up:

In the end, the Big House may serve racial conservatism, but it was built on the rock of racial liberalism. Liberal law-and-order promised to deliver freedom from racial violence by way of the civil rights carceral state, with professionalized police and prison guards less likely to provoke Watts and Attica. Despite all their differences, Truman’s first essential right of 1947, Johnson’s police professionalization, Kennedy’s sentencing reform, and even Biden’s death penalty proposals landed on a shared metric: criminal justice was racially fair to the extent that it ushered each individual through an ordered, rights-laden machine. Routinized administration of race-neutral laws would mean that racial disparate outcomes would be seen, if at all, as individually particularized and therefore not racially motivated. . . In this sense, liberal law-and-order was especially powerful in entrenching notions of black criminality.” (page 151)

Count me unconvinced.

I’ll start with a caveat that Murakawa herself acknowledges, but that seems to me to be far more important than she allows. *The First Civil Right* is about federal politics. But the criminal justice system is nearly entirely local. True, the federal government’s share has increased enormously. In 1970, federal prisons held just 5.6% of the nation’s incarcerated population, whereas today, of 2.2 million jail and prison inmates, over 210,000—nearly 9.7%—are confined by the federal government. But that number itself demonstrates that the states, counties, and cities are the more important sites of American crime policy. Of course, this is not news to Murakawa. She concedes that she is “examin[ing] the politics of carceral expansion in one relatively small, unusual site: the federal government.” But she argues that “federal lawmakers have generated a national conversation on law-and-order”—that “federal crime policy carries light institutional but hefty symbolic weight.” (page 21) I can’t disagree with that last point: federal crime policy is important. But Murakawa is making a very strong claim—that liberals and liberalism have been foundational to our current overly incarcerative approach to criminal justice. For reasons that follow, I don’t think she establishes this even with respect to federal criminal justice policy, but in any event, her evidence base simply is not up to the task of analysis of *non*-federal criminal justice policy—and that’s where the action is.

Moving then to what Murakawa demonstrates about federal law-and-order politics, I think it is useful to reslice her arguments a bit crosswise. Murakawa is most successful, but least novel, when she argues that *liberals*, or, at least, Democrats, have contributed importantly to mass incarceration. President Clinton’s 1994 Crime Bill was undoubtedly a highly punitive intervention in federal crime policy. And it must have had effects (though they are hard to quantify) on state incarceration levels too: All those thousands of cops must have arrested people. And federal truth-in-sentencing incentives had at least a marginal effect of increasing incarceration in a number of states. (Although abundant recent work undermines the claim that increased sentences, rather than changes in other aspects of the criminal justice process, have been the main drivers of increased incarceration in recent decades.) The 1984 Sentencing Reform Act was, likewise, a consequentially punitive change in federal policy, and likewise passed with Democratic support. But we didn’t need a new book to make those well-recognized points. The

contribution of *The First Civil Right* is not to argue that President Clinton's 1994 Crime Bill was punitive and problematic, that Clinton was a triangulator, or more generally that sometimes Democrats aren't very liberal. Nor is Murakawa's novel contribution the argument that liberals in 1984 got rolled, when compromise after compromise led Ted Kennedy and his fellow Democrats to acquiesce to a punitive federal sentencing regime change.

Rather, Murakawa's contribution—the attention-grabbing claim at the core of her book—is her argument that *liberalism* has built modern American mass incarceration. Her major point along these lines is that the liberal preoccupation with using fair, non-racist procedures has contributed importantly to the growth of the carceral state, taming reform urges, entrenching the punitive regime. This argument sounds in perversity—on Murakawa's account, liberalism's attempt to improve racial justice using procedural tools not only fails, it is counter-productive, entrenching and worsening the system's inequities.

Albert Hirschman, in *The Rhetoric of Reaction: Perversity, Futility, Jeopardy*, analyzed the appeal of the perversity argument as a reactionary trope: "What better way to show him up as half foolish and half criminal than to prove that he is achieving the exact opposite of what he is proclaiming as his objective?" Hirschman argues that conservatives are particularly drawn to perversity arguments, because they are a way to deride purportedly public-spirited reform. This nicely supplements the conservative commitment to self-interest that (via the Invisible Hand doctrine of Adam Smith) serves the public good.

But as Hirschman says, perversity arguments are not "the exclusive property of 'reactionaries.'" And actually, perversity arguments are just as much a hallmark of left/radical attacks on liberalism/reformism, such as Murakawa's. A classic radical argument, founded in Marxist dialectical thought, is to promote drastic but salutary change (that is, revolution) by making the current state of affairs more intolerable. The idea, often tagged with the imperative "heighten the contradictions," is that if things get worse for the proletariat, that will spur much-needed radical solutions. The converse claim is that moderate reform, by dulling "contradictions," perversely makes things worse for its purported beneficiaries. The same structure underlies arguments from the left often grouped under the rubric "critique of rights." A major contribution of the critical legal studies movement, the radical critique of rights accuses "reformist" rights of taming the aspirations of oppressed groups, legitimating and therefore entrenching the oppressive system without achieving much by way of amelioration. Murakawa's argument about liberalism is a variant on the critique of rights. Although she levels her attack not against *all* rights, but merely against procedure, her arguments against liberal reformism are the same. And as with the critique of rights, the claim is one of perversity.

Indeed, perversity arguments are appealing not only to reactionaries and the left-of-liberal left but to academics, irregardless of ideology. As Hirschman says, a perversity argument "is, at first blush, a daring intellectual maneuver. The structure of the argument is admirably simple, whereas the claim being made is rather extreme." Perversity arguments are counter-intuitive, attention-grabbing. These are attractive characteristics for someone trying to stand out in a crowd of monographs. And sure enough, the attack on liberalism as perversely harming the disempowered has become quite fashionable in criminal justice in particular. Bill Stuntz is its most well-known (and least radical) author, but structurally similar claims have sprouted up all over, usually from the far left. These are arguments that prison conditions litigation causes an increase in incarceration, *Miranda* rights cause increased arrests, and so on. The claims are

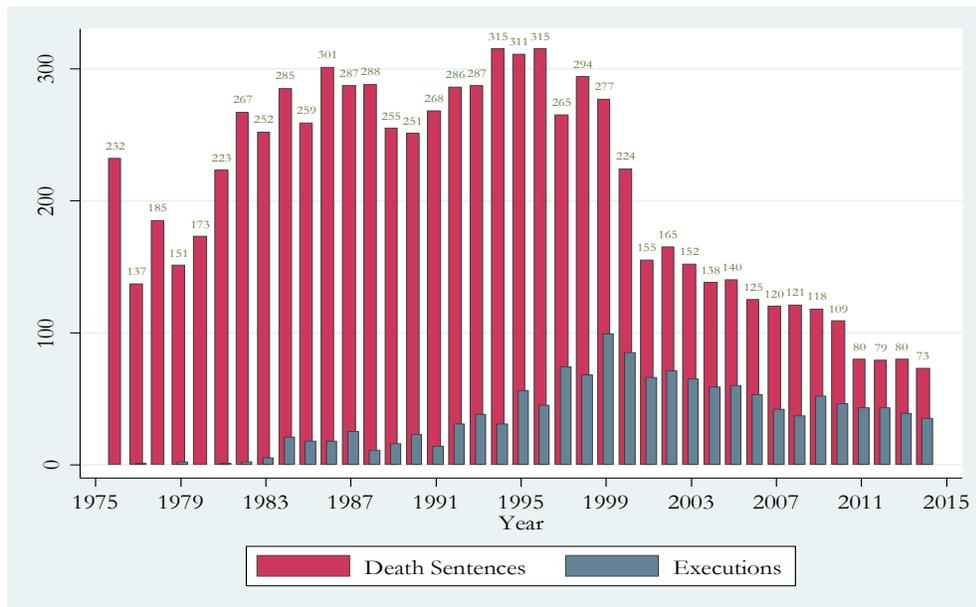
empirical—A caused B—but the arguments are usually a combination of ideological and hypothetical.

Hirschman and others warn us, however, that notwithstanding the aesthetic appeal of perversity arguments, we should be on our guard against them: “The perverse effect is widely appealed to . . . [but] unlikely to exist ‘out there’ to anything like the extent that is claimed.” I think this warning applies in full force to *The First Civil Right*. The chart I started this review with demonstrates conclusively that the liberal, procedural reforms Murakawa attacks did not fend off mass incarceration. Indeed, they could not reasonably have been expected to do so. But it’s worth noting that neither the 1984 or 1994 federal statutory interventions produced any visible spike in prison population growth, in the figure. And Murakawa offers no evidence that reformist procedures “built” our modern carceral state.

In fact, Murakawa rests some of her argument on the death penalty, and there, at least, it seems to me demonstrably false. Murakawa laments the “road not taken—death penalty abolition.” (page 131) She writes that “[b]y opposing the death penalty on administrative grounds, liberals propelled, however unintentionally, the pursuit of administrative improvements for the death penalty.” (p. 114). As proof, she points to the “bidding war” between Democrats and Republicans that led to a sharp increase in the number of capital crimes in the U.S. Code. (p. 145) QED: Liberal proceduralism entrenched the death penalty.

The problem is that in the decades that followed the bidding war in question, the death penalty, far from being entrenched, has been decaying. Death penalty abolitionism has not succeeded, of course, but death sentences and executions are a fraction of their former numbers. The graph below sets out the trends.

### Death Sentences and Executions in the U.S., 1975-2014



As the figure shows, what seemed in the mid-1990s like an inexorable increase was decidedly not: national death sentences peaked in 1994, the very year Murakawa says the Crime Bill

entrenched capital punishment in America. The decline in the years since has been sharp and longstanding. Moreover, however many types of murder the Congress has made death eligible, *federal* death sentences are few and far between: there have been fewer than 80 federal death sentences since reinstatement of the federal death penalty, and just [three actual](#) executions by the Federal government since 1963. Death penalty proceduralism may or may not have slowed the rate of death sentences. (I suspect that federal processes act like a tax on capital sentences, decreasing them marginally, but maybe they don't.) And even if death penalty proceduralism *has* been a source of friction, it may or may not have been more effective than abolitionism would have. Perhaps abolitionism would have succeeded, or perhaps it would have failed and had no effect at all. But one thing we know that death penalty proceduralism in the mid-1990s has *not* done is entrench capital punishment.

Move back, then, to the main claim of *The First Civil Right*—that proceduralism is not merely insufficient to achieve racial justice and an appropriately limited criminal justice system, but is actually, perversely, foundational to our current overincarceration. On this front, all we have is the aesthetic appeal of the argument. Murakawa adduces only post-hoc/propter-hoc kind of evidence: the liberal proceduralism she highlights has accompanied the ballooning of the incarcerated population. That is far from enough to convict generations of liberals—many though not all of whom decried overincarceration, as well as unfair procedures—of the charge that they “built prison America.”

One final criticism: Although it is not logically central to her argument, Murakawa’s historical claim that President Truman laid the foundation for the modern carceral state seems to me both historically inapt and a little bit silly. First, it would be fairer to acknowledge that *To Secure These Rights*, the report she criticizes as laying a foundation for racist understandings of black criminality actually conceptualizes civil rights with remarkable broadness and muscularity. Safety and security went alongside the rights to “citizenship and its privileges,” “freedom of conscience and expression,” and “equality of opportunity.” And the report deals makes many non-proceduralist points, about rights to employment, education, housing, health services, and the like.

More important, Murakawa suggests that the report’s focus on private violence as a civil rights affront was a 1940s innovation—one no longer part of our collective consciousness. I agree that the modern state action doctrine has banished the right to safety from our current conception of civil rights. But the anti-lynching movement long predated the 1940s, and a civil right to safety has roots far older than Truman’s civil rights committee. As the great civil rights and constitutional theorist Jacobus tenBroek established in his influential 1951 book, *The Antislavery Origins of the Fourteenth Amendment*, the freed slaves’ right to state protection against racialized violence was a core motivation of the Fourteenth Amendment’s framers, and in fact underlay the phrase “equal *protection* of the laws.” Indeed, the idea that government is instituted to secure to its citizens rights to life and liberty—that crime prevention is a core duty of the government—is at least as old as the American republic. (Consider the maxim, in Cicero, “*Salus populi suprema lex est*”: the safety of the people is the supreme law.)

But I want to end with an appreciation: The best thing in the book is its description of the complex interplay among different conceptions of racialized crime over time and across ideology. Murakawa demonstrates that racialized understandings of black criminality were

nourished by liberal arguments that crime by whites against blacks—lynchings being the most dramatic but far from the only examples—was triggering a disorderly criminal response:

Characterized as “volcanic threat” or “socio-racial dynamite,” black lawlessness was, for liberals, an expression of rage, frustration, or aggression. . . . [T]he double edge of liberal advocacy becomes clear: perhaps the explosive volatility of black rage necessitated civil rights legislation, but the imagery militated against recognition of black humanity. That uncontrollable fire of black rage conjured ‘the black criminal,’ the figure used to justify lynching, chain gangs, exploitative labor, segregation, and the overall maintenance of white supremacy. . . . [I]t becomes clear that there was no post-civil rights exit from racial criminalization. There were ‘competing’ constructions of black criminality, one callous, another with a tenor of sympathy and cowering paternalism.” (pages 9-10)

By offering numerous examples to support the passage just quoted, Murakawa is surfacing a much less well known criminal justice counterpart to Daniel Moynihan’s famous 1965 report (“The Negro Family: The Case For National Action”), which attributed black disorder to racism more generally. On this topic, *The First Civil Right* makes a useful contribution both in terms of the excavation and the analysis of the evidence.

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