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(Re-)centering Law in the Criminology of Sentencing & Punishment

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In this essay, I argue for a more robust incorporation of law in the criminological study of sentencing and punishment. In doing so, we should also attend to processes as vigorously as we do to outcomes, to better understand how elements of the law are key, and variable, tools used by legal actors to produce legal punishment. Now this may sound obvious (and it may well be). It may also sound like I am arguing that we become doctrinal scholars (I am not).

Let me start with some history. Criminology and law were more closely coupled in the development of American criminology, both institutionally and substantively, than they are at present. And in many places outside of the U.S., they remain closely coupled. In the U.S. case, as the fledgling American Society of Criminology (then the Society for Advancing Criminology) was developing, a specialty law journal, *Journal of Criminal Law, Criminology & Police Science* (now just the *Journal of Criminal Law & Criminology*) out of Northwestern University's School of Law became the go-to outlet for publishing members' scholarship, and it served as the official journal for the Society from 1952 until 1963 (Morris, 1975).

The journal's table of contents in those years of affiliation reflected substantial overlap between legal scholarship, social science scholarship, and even some psychiatric scholarship, which fit with the ethos of the time. Criminologists publishing in the journal had academic homes in law schools, sociology departments, and nascent criminology and administration of justice departments. For example, law professor Frank Remington (1960) published a piece in the *Journal of Criminal Law, Criminology & Police Science* that encouraged legal scholars to

expand beyond doctrinal scholarship conduct research on how the formal laws passed by legislatures are actually administered. In his view, this would require taking into account "the intensive study of scientific crime detection, pathology, social work, psychiatry, [and] personnel management," among other concerns (Remington, 1960, 11).

The vision for research that Remington (1960) articulated was emblematic of the ideologically coherent understanding among scholars and practitioners regarding the law-crime-punishment relationship in the mid-20th century, when criminology was growing up as a field of study. Crime was defined in criminal law, and sanctions prescribed by law were ideally designed to reduce crime. This period was distinguished by an optimistic belief that legal institutions like courts, probation and parole, and correctional facilities could remediate the social problem of crime, most often by fixing the adjudicated person. Tweaks to the law—as to what was defined as criminal and especially as to sanctioning options—were generally tied to this optimistic commitment. Thus, criminological scholarship almost always marched to this beat during this era.

The ASC created its own standalone publication, first as a newsletter, in 1963, then as a journal for scholarship, *Criminologica*, in 1966 (subsequently changed in name to *Criminology*, in 1970; Morris, 1975). Cracks in the coherent and optimistic rehabilitative vision began to surface in the early issues of the new journal. In a 1967 essay, for instance, George Vold noted that the social upheavals of the time placed criminology at a crossroads. For Vold (1967), protests and demonstrations and civil disobedience **were** criminal acts (a point with which many might disagree), but they did not reflect behavior of sick or broken individuals, as criminology had focused on, but rather they suggested fractured social relations and group conflict, which

deserved attention by criminologists. In the next volume, ASC President Gerhard Mueller—the first law professor elected to that position—published his presidential address in *Criminologica* (Mueller, 1968). In it, he decried the increasing silo-ing of criminal law and social and behavioral science in the criminal law reforms that were beginning to be enacted around the country. He pointed to failures of lawmakers to consider data and research in reforming law, and advocated for more involvement by criminologists in legal efforts to ensure that legal changes were informed by social science insights and evidence.

This, though, did not happen. Criminal legal policy became even more divorced from social scientific insights as mass incarceration was born. Without rehashing the extremely well-covered decline of the rehabilitative ideal in criminal legal politics and policy (see, e.g., Allen, 1981; Beckett, 1999; Simon, 1993), it is worth noting that criminology, as a field of study, changed fairly dramatically in a different direction over that period of broader ideological change. A survey of *Criminology*'s table of contents in the from the mid-1970s into the 1980s indicates a slow but steady decline in research interest in law and even in criminal legal institutions, especially trial-level courts.

Moreover, a fracture in the close relationship between scholars who published in the journal and those involved in the system—staff and defendants alike—began to emerge. This shift was exemplified by two plea bargaining studies published in back-to-back issues in 1976. The first was conducted by a team of two probation practitioners and an academic, and involved interviews with people who had pleaded guilty in criminal court (Barbara et al., 1976). In the subsequent issue, a regression analysis of a large administrative dataset of sentencing outcomes,

examining the effect of guilty pleas and defendant race on sentence outcomes, offered a preview of the approach to come (Kelly, 1976).[1]

By the early 1980s, a distance from legal institutions, and from law as a substantive concern, had fully emerged in the research represented in the field's flagship journal, *Criminology*. Generally, much more was published on delinquency, violence, crime causation, and crime measurement, while research on the functioning of criminal legal institutions had substantially decreased. The work that remained had also primarily turned to quantitative analyses, typically regression models of administrative data sets, rather than data that involved direct contact with institutions and their inhabitants (for an exception, see Farr, 1984). This is when and where law seemed to become reduced to a series of control variables in models that examined whether any number of nonlegal variables, or "extralegal" variables in the language that emerged in the sentencing literature within criminology, influenced sentences (see Boris, 1979 for an early use of the "extralegal" concept in a multiple regression sentencing study).

In my read, this had at least three major negative effects on our understanding of how penal sanctions were being meted out during the rise and plateauing of mass incarceration, mass supervision, and other such punitive phenomena that materialized in earnest in the 1980s.

First, what is "law" or "legal" in these models was taken for granted as being appropriate, while those things in the extra-legal category were labeled as inappropriate. This became especially evident in the growing body of sentencing disparity research, examining how illegitimate "extralegal" factors such as race, ethnicity, gender, and class influenced punishment outcomes. By using legal variables such as offense severity, types of crimes, criminal record, and

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[1] In that study, Kelly (1976) used multiple regression, an emerging methodological approach in sentencing research at that time (Zatz, 1987), and controlled for a host of variables, including prior record, to assess the impact of both defendant race and plea type.

sentencing guideline factors as controls for what should predict sentence outcomes, criminal law's increasingly punitive force in this period largely escaped critique in the flagship journal. Consequently, scholarship published in the 1980s-1990s in *Criminolog*y seemed to completely miss the emergence of mass incarceration, save for perhaps Feeley and Simon's (1992) theoretical essay delineating the features of an emerging "New Penology."

Despite dramatic changes in formal law, and in legal practices, that reconfigured how criminal courts operated, this omission persisted over the next two decades. There were a few papers in the mid-1990s that empirically debated whether or not new determinate sentencing schemes increased incarceration. One analysis of multiple states concluded that with limited exceptions, they were not to blame for rising incarceration rates (Marvel & Moody, 1996), while another suggested this analysis missed how these laws increased jail incarceration in at least one jurisdiction (Stolzenberg & D'Alessio, 1996; see also Land & McCleary, 1996 suggesting neither finding was conclusive). Other than those few analyses, the proximate potential causes of emerging mass incarceration—changes in sentencing laws, and perhaps more importantly, changes in police, prosecutorial, and judicial behavior—were hardly a subject of study in scholarship published in *Criminology,* all while local courts around the country were producing vastly more prison-sentenced defendants than ever before.

An early 2000s paper did acknowledge and address rising incarceration rates across the country, using regression analysis to model what factors contributed to those rising rates at the state level (Greenberg & West, 2001). But the sole nod to legal changes affecting punishment was the inclusion of a determinate sentencing structure dummy variable as a control (it was not to blame for the rise, and indeed was associated with lower rates of incarceration, in the authors'

analysis). There was no empirical consideration of how legal practices, on the ground, had possibly changed in this period.

To be blunt, if one relied upon *Criminology*, the journal, to learn about sentencing and punishment practices and effects from the 1970s-2010s, that person would come with little awareness of the unprecedented explosion in incarceration and other criminal sanctions that we experienced in the US, much less about the way changes in formal legal structures and in on-the-ground criminal legal practices had produced that change.[2]

Second, because legal and extra-legal factors were bifurcated in such a manner, both conceptually and empirically in the modeling of regression analyses, the criminological sentencing research published in the journal rarely considered how legal and extra-legal factors interacted. So while prosecutors gained substantial power in steering harshly punitive outcomes due in part to changes in sentencing structures, the variance produced by factors such as the number and content of charges filed, criminal record, eligibility for sentencing enhancements, and even mode of adjudication was typically treated as unquestionably legitimate, acceptable variance—those were measures of the system working as it was designed.

Early on, there was some consternation and attention to these things. For instance, in the May 1984 issue of *Criminology*, both Zatz (1984) and Welch, Gruhl, and Spohn (1984) published analyses of sentencing outcomes that, among other findings, demonstrated how criminal history was differentially influential on sentence as a function of race. But this was not the norm that developed. Rather, criminal history came to be an essential, indeed required, "legal" control variable, but nothing more, in most sentencing studies. Thus, multiple analyses

[2] Notably, one theme that briefly emerged as legal changes started to have effects on court operations was on "efficiency" of the courts in processing cases, an understandable concern given rapidly rising criminal caseloads. See Meeker & Pontell, 1985 and Zatz & Lizotte, 1985.

published in *Criminology* from the 1980s onward addressed how to distinguish legal and extralegal influences on sentences (see, e.g., Vining, 1983, who also raises issues about whether the common distinctions used are always normatively appropriate). At the core of these analyses is an assumption that these categories need to be conceptually bifurcated to measure unwarranted disparities. In the November 2000 issue, for example, the journal published several articles that empirically debated how to best model and control for the "legally prescribed" influences of criminal history and offense severity on sentencing under determinate guideline sentencing models in order to properly assess the influence of "unwarranted disparities" (Engen & Gainey, 2000a; 2000b; Ulmer, 2000). But these papers did not interrogate how those legally prescribed factors were differentially manipulated by legal actors in ways that would contribute to inequalities in penal outcomes.

This approach rendered the increasingly punitive and racialized criminal legal system itself as "racially innocent" (Murakawa & Beckett, 2010, 697) within mainstream criminology, by implicitly or explicitly suggesting that it is only when the system malfunctions due to the influence of stereotypes or bias on the part of bad-apple actors are there "unwarranted" racial or other disparities in outcomes (Lynch, 2019). This approach, of course, misses how racial and other inequalities are produced *through* legal mechanisms and processes (see, e.g., Lynch & Omori, 2018; Provine, 2008; and Starr & Rehavi, 2013 for examples in the federal drug case context). In doing so, it also underestimates the degree of inequality that exists in prosecution, conviction, and sentencing by the very process of controlling for "legal" factors (not to mention the omission of considering the front-end processes that dramatically changed the demographics of who was even brought into the system as the penal expansion took off; see Lynch & Omori, 2018).

Third, the increasing distance that researchers had from legal actors and institutions seemed to have prevented much of the sentencing scholarship in the era of mass incarceration from even considering how legal tools are strategically used, for example, to enhance punishment via stacked charges and other forms of charging discretion, threats of enhancements, withholding of mitigation, and other such mechanisms (see Stuntz, 2013). In more recent times, such tools can and are also used to subvert reform efforts aimed at reducing reliance on incarceration (Beckett & Beach, 2021; Beckett, et al., 2018). Too many researchers had limited or no exposure to the actual day-to-day criminal legal processes (and the legal actors who inhabit the criminal legal system) that produced unequal outcomes, inhibiting how research questions were posed, regression analyses were designed, and findings were interpreted (Lynch, 2019; Ulmer, 2019).

It is really in the quantitative sentencing literature of the 1990s and onward, once the methodological rules and conceptual norms had become firmly established, that such studies repeated the omissions and elisions that I have pointed to here, and have solidified expectations about how quantitative analyses should be conducted and interpreted. The administrative data took on a life of their own with too little consideration of what socio-legal processes produced those data. Consequently, the theorizing about sentencing practices not only grew conceptually narrow, especially in reducing "extra-legal" disparities to a problem of individual legal actors' cognitions, it also became empirically untestable due to the nature of the administrative data being analyzed (Lynch, 2019). And as I know from experience, directly taking issue with the dominant theoretical and empirical norms that emerged, by using different specifications justified by a recognition that law (or the legal variables in the various datasets) is neither static in its

influence nor unquestionably legitimate, can result in being shut out of mainstream publication outlets like *Criminology* via gate-keeping practices.

Let me give just a brief example of how and why attention to law and legal processes are critically important to studying both the emergence of mass incarceration and its key feature of disproportionately impacting poor persons of color. I draw from the area I know best, federal sentencing.

As many likely know, criminal history is one of the two determinants, along with "offense severity" used to calculate the federal guideline sentence, as it is in many guideline and determinate sentencing structures. Criminal history has substantial influence on the guideline calculation, and it can trigger statutory sentence enhancements in certain kinds of cases. Criminal history is also perhaps the least controversial (except perhaps among the retribution purists) and most widely accepted "legal" factor at sentencing that exists. In other words, it is the best case for a "legitimate" legal factor among both practitioners and sentencing scholars.

Yet, its very constitution is shaped by racialized policing and potentially by biased processing in the system. This is especially the case for more discretionary forms of crime that rely upon proactive policing for detection—such as drug and gun crimes (Beckett et al., 2006; Gaston, 2019; Miller & Eisenstein, 2005). So out of the gate, to consider criminal history as an unproblematic "legal" variable that does not produce unwarranted racial inequality is itself problematic. And what cannot be determined by the administrative sentencing data but that becomes quickly apparent when one hangs around federal court and talks to legal actors working in that system, is how criminal history is key to so much more than as a prescribed determinant of sentencing.

First, it can, and often does, determine who gets charged in federal court—where the punishment is often much more severe than in the corresponding state court. My study of federal drug prosecutions revealed how individuals were often targeted for federal prosecution precisely due to their particular criminal histories, not necessarily because they were the most serious defendants (often the charged crimes involved small amounts of drugs), but because they could be subject to various enhanced punishments, such as the career offender guideline and/or the 851 statutory enhancement for drug defendants with prior drug convictions. In my study, this selection process was highly racialized, and recognized as so by legal actors in the system (Lynch, 2018b).

Second, once charged in federal court, defendants' exposure to such enhancements gave prosecutors added power in negotiating guilty pleas and/or in extracting "cooperation" to escape the worst of what could come in terms of sentencing. How this process unfolds is locally specific and its coercive elements are not captured in administrative data. This is especially true with the 851 statutory drug enhancement, which is not even coded in the data when it is applied, much less when it is used against eligible defendants as a threat in plea negotiations. At sentencing proceedings, even, criminal history takes on a life of its own, amplified by prosecutors in sometimes-racialized biographical narratives that argue for harsh punishment. These narratives were all-too-often more compelling to judges than were the defense counter-narratives (Lynch, 2016).

Finally, as work that I referenced earlier found for state-level sentencing in the 1970s (Welch et al., 1984; Zatz, 1984), criminal history has a differential impact on federal sentencing as a function of federal drug defendants' racial identity that is relatively consistent over time and across formal policy regimes in regard to how binding the guidelines are at sentencing,

especially disadvantaging Black defendants (Lynch, 2018a). Consequently, models that treat criminal history as a "legal" variable whose value is assumed to be uniform across racial groups will miss that important interaction.

Over the years, mainstream criminology ceded much of this law-in-action ground to Law & Society, another interdisciplinary field that I also call home. The good news is that through the Law and Society Association in particular, an extremely robust and growing group of scholars have connected under the "punishment and society" umbrella (it is a recognized collaborative research network in the Law & Society Association), and a good share of those scholars are also active in criminology networks, including both the Western Society of Criminology and the American Society of Criminology.

So while the production of racialized mass punishment by criminal courts and their constituent actors was not a hot topic in *Criminology*, the flagship American criminological journal, theoretically-rich qualitative and quantitative scholarship exploded on this topic in law and society journals, international criminological journals such as *Punishment & Society* and *Theoretical Criminology*, and even in generalist sociology journals. Within that literature has been a growing body of quantitative work that explicitly tackles the omissions and faulty assumptions about law's role in producing racial and other inequalities.

In recent years, some of this work is even making its way into *Criminology* and other prestige outlets in American criminology, especially some excellent work on the role of prosecutors' discretionary decisions in shaping punishment outcomes. Sentencing scholars have turned their attention to how inequality accumulates across the stages of legal processing, including how discretionary legal processes play a role in that (e.g., Kutateladze, et al., 2014), as well as how legal actors differentially wield their discretion to produce disparities (e.g., Johnson,

et al., 2008; Kim, et al., 2015). Decomposition analytic methods have been applied to quantitatively capture how "legal" factors play differential roles at all stages of legal processing as a function of defendants' race and ethnicity (e.g., Omori & Petersen, 2020). Scholarship is also grappling with how different internal structures of prosecutor offices, including commitments to "progressive" prosecution can impact incarceration use and racial inequalities in incarceration (Mitchell, et al., 2022). And *Criminology* has again begun to publish more high-quality qualitative research on criminal courts and their functioning, as well as on how criminal legal actors think about and do their jobs (e.g., Clair & Winter, 2016; Dunlea, 2022; Hester, 2017). But there is room for more.

So let me conclude with this call to my colleagues. Let's grapple with law as a dynamic force when we think about and study the production of punishment. Legal actors are both constrained and empowered by law in ways that take many forms, as a function of its formal dictates, as a function of the local legal culture and norms that develop over time in the places where they work, and in ways that seek stasis even in the face of formal policy change. At this moment of time, when we are grappling with the stubbornly high imprisonment rates in the wake of mass incarceration's rise, this last point is especially important. Reform efforts, even radical changes to law, can be circumvented to varying degrees by strategic legal actors who have a wealth of tools in their legal toolboxes to maintain punishment norms (Beckett & Beach, 2021). We therefore need to use our own diverse theoretical and empirical toolboxes to ensure we understand and interrogate how law itself contributes to inequalities and other injustices.

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