Mass Incarceration and Poverty:
The Morality of the American Criminal Justice System

In his book Moral Man and Immoral Society, Reinhold Niebuhr writes, "biased judgments of the court are all the more dangerous for having the prestige of impartiality."[1] The American criminal justice system is a manifestation of privilege veiled under the cloak of egalitarianism. At any given time, there are about 2 million individuals incarcerated in the U.S. Though the country only accounts for approximately 5% of the world's population it houses about 25% of the world's prisoners.[2] Ours is a retributive system of justice that seeks to exact punishment while failing to recognize the many factors that lead people to be caught up in the system. Hundreds of thousands of individuals have their lives destroyed for minor non-violent offenses. These individuals exit the system stripped of rights and without the resources to rectify their lives, remaining trapped in a societally designed cycle of poverty that extends across generations and systematically subjugates sections of American society. This system, which so closely ties mass incarceration to race and poverty, and vice versa, is wrought with inequalities. Taking inspiration from prominent ethicists and philosophers I will show that the American criminal justice system is built upon a foundation of injustice and every bit the reinforcement of privilege and inequality that Niebuhr feared.

Niebuhr highlights the tendency for the privileged to consider theirs an earned status, the implication being that the underprivileged are morally inferior and occupy that position through the fault of their own actions. In passing off the culpability onto the poor and minorities, the

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1 Niebuhr, Reinhold. "The Ethical Attitudes of the Privileged Classes." In *Moral Man and Immoral Society: A Study in Ethics and Politics.*, 141. New York, New York: Scribner, 1960.

2 "Mass Incarceration in the USA." Amnesty International USA. Accessed December 10, 2015. http://www.amnestyusa.org/our-work/issues/military-police-and-arms/police-and-human-rights/mass-incarceration-in-the-usa.

privileged are not forced to confront the ways in which they benefit from society's institutions and the injustices built into them. They can ignore the societal failures, such as an underfunded education system, lack of job opportunities and racist policing practices that funnel huge portions of poor and minority communities into jails and prisons. They turn a blind eye to the missing correlation between drug use and rates of arrest, or incarceration rates and crime levels. By any measure the American criminal justice system is unequal and the myth of impartiality should be torn down. This is the essential first step in allowing for a thorough exploration of the morality of inequalities contained within this system of punishment.

An individual born into poverty has a much higher likelihood of serving time than one of their more affluent counterparts. In his book, The Working Poor, David Shipler highlights the vulnerability that is a fundamental symptom of poverty. [3]The criminal justice system's practices have the effect of aggravating this instability by criminalizing poverty. For instance, if an individual gets a traffic ticket or similar fine and fails to pay, this can quickly escalate into a cycle of ever-increasing fines, ending in incarceration.[4] Or take another example, of a former prisoner who owes several thousand dollars to the state in court fees. Despite making every effort to clean up their life, they are unable to pay off the mountain of debt, ultimately landing them back in prison for a period of time.[5] Many municipalities have also begun to make homelessness a crime by passing laws that prohibit begging, loitering, and sleeping in public or in a car, to name a few.[6] Failing to provide meaningful solutions to homelessness, these cities instead choose to funnel these individuals into jails.

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[3] Shipler, David K. *The Working Poor: Invisible in America*. New York, New York: Knopf, 2004. 13-38.
[4] Knafo, Saki. "The U.S. Is Locking People Up For Being Poor." The Huffington Post. February 12, 2014. http://www.huffingtonpost.com/2014/02/12/debtors-prisons-report_n_4768320.html.

[5] Ibid.
[6] "No Safe Place: The Criminalization of Homelessness in U.S. Cities." Nlchp.org. Accessed December 11, 2015. http://www.nlchp.org/documents/No_Safe_Place.

African Americans are disproportionately affected by poverty, with the highest poverty rate of any racial or ethnic population in the United States. As a result, they are the hardest hit by these policies and practices that criminalize the poor. In addition, the criminal justice system is wrought with systemic racial biases that increase the number of Black Americans behind bars. Black Americans make up twelve percent[7] of the total U.S. population but account for about thirty-eight percent of the U.S. prison population[8]. Though white and Black Americans use drugs at similar rates, the latter group is about six times more likely to be arrested on drug-related charges.[9] Similarly, drivers of all races are stopped at comparable rates but Black drivers are three times as likely to be searched during a stop than their white counterparts.[10] In this system, arrest rates are almost entirely independent of crime rates; in many cases, your race matters more than your culpability in determining whether you will be arrested.

Inequities do not end with arrest rates, but extend into the court system and are reflected in differing conviction rates. Although the justice system is upheld as the shining example of fairness in American society, the reality reveals a much different picture. Every American is guaranteed the right to an attorney regardless of their ability to pay. However, the under-staffed, underpaid, and overburdened public defender system makes quality legal representation for the poor all but impossible. As a result, 88% of defendants with a public attorney were convicted as compared to 77% of those who were able to hire a private attorney. [11] The disparities in sentencing are further amplified when one examines variation based on race. For example, mandatory minimum sentencing laws allow for sentences below the minimum when the

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[7] "Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System." August 2013. The Sentencing Project. 3.
[8] Federal Bureau of Prisons
[9] Ibid. Sentencing Project 4
[10] Ibid. 5.
[11] "Poverty and the Criminal Justice System." Publiceye.org. May 1, 2005.

defendants cooperate with the prosecution; an exception from which white defendants benefit at much higher rate than their minority counterparts.[12] In this stage of the criminal justice process, as well, socioeconomic and racial background has a tremendous influence on outcomes.

Even after a prisoner's release, the effects of incarceration follow them throughout the rest of their lives. Those pulled into the system often struggle to permanently escape. A National Institute of Justice survey found that 76.6% of those released from prison would be rearrested within 5 years.[13] When one examines the barriers to success for former prisoners, it is unsurprising that so many slide back behind bars. In many ways it seems as if the system were designed to encourage failure erecting barriers at every step of the process, from finding housing to securing employment. Rather than provide these individuals with the help they need to restart their lives, this system pushes them to the outskirts of society and into poverty. As such, it should come as little surprise that so many of these men and women fall back into old patterns of crime or addiction and ultimately reoffend.

The punitive effects of this criminal justice system extend beyond the incarcerated individuals to their family members. The loss of a primary earner's income is almost always detrimental, but when one takes into account that incarceration disproportionately affects low-income communities, a family member's incarceration has the potential to pitch that family into crisis. A report entitled "Who Pays: The True Cost of Incarceration on Families" found that the consequences of this original blow are then multiplied when one takes into account the conviction-related costs, such as attorney fees, which they found to average $13,067.[14] Many of the families surveyed struggled to meet their basic needs, such as food or rent, as a result of these

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[12] Ibid. Sentencing Project. 10.
[13] Durose, Matthew R., Alexia D. Cooper, and Howard N. Snyder, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010,* Bureau of Justice Statistics Special Report, April 2014.
[14] Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi. *Who Pays? The True Cost of Incarceration on Families.* Oakland, CA: Ella Baker Center, Forward Together, Research Action Design, 2015. 13.

fees and fines.[15] Moreover, family members must pay continuously along the way, for their loved one's commissary, phone calls, and transportation costs for in-person visits.[16] Having committed no crime, families share in the punitive effects of their loved one's incarceration. In a system that fails to provide sufficient resources for ex-offenders, families become their primary support networks when they are released. In degrading this social unit, the criminal justice system increases recidivism rates, in addition to harming innocent individuals and wreaking havoc in entire communities.

In order to make the case that these inequalities are unjust, one must necessarily argue affirmatively for the principle of equality. The scourge of mass incarceration and the institutions that contribute to it, as integral parts of American society, should clearly be beholden to the principles on which this country was built. The Declaration of Independence famously reads, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[17] Two hundred years later John Rawls drew upon the nation's founding principles to more fully define equality. He argues that, " each person engaged in an institution or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all."[18] The principle of equality is clearly written into the fabric of American society, even if in practice it has clearly suffered egregious violations. Nonetheless, this fundamental commitment to equality may be called upon to condemn present day injustice, as has occurred so many times throughout this nation's history.

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[15] Ibid. 14
[16] Ibid. 29
[17] Thomas Jefferson, "The Declaration of Independence," *Historic American Documents*, Lit2Go Edition, (1776), accessed December 20, 2015,http://etc.usf.edu/lit2go/133/historic-american-documents/4957/the-declaration-of-independence/.
[18] Rawls, John, and Samuel Richard Freeman. "Distributive Justice." In *Collected Papers*. Cambridge, Mass.: Harvard University Press, 1999. 133.

In his paper Distributive Justice, John Rawls uses his broad definition of equality and individual sovereignty to lay the framework for his ideal society, that of the social contract. Rawls writes that a society is a collective of rational individuals who are simultaneously self-interested and cooperative. Justice is the set of principles that allows individuals in the society to pursue both interests without infringing upon the inviolable rights of their fellow citizens. Rawls envisions a system of pure procedural justice through the creation of perfectly fair and equal institutions that necessarily serve the interests of all within the society. In order to create this just compact all citizens must reach a consensus on the meaning of justice in the context of their society. Anticipating the influence of bias, Rawls suggests that all involved assume a veil of ignorance, forgetting their place in society. From this position of ignorance, they envision the social structures they would establish were they to be unaware of where in the society they would fall. The resulting social contract could vary based on the values inherent in their society, but as the product of free and equal individuals, free of bias, it is inherently just.

Rawls proposes one possible outcome of this social experiment, the principles of justice as fairness. First, he argues that, "each person engaged in an institution or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all."[19] As outlined above, certain individuals within American society do not benefit from equal treatment at the hands of the criminal justice system. This is reflected in higher arrest rates, conviction rates, longer sentences, and lower likelihood of success post-incarceration. In routinely infringing upon individuals' equal right to liberty, the American criminal justice system stands in violation of Rawls' first principle of justice.

[19] Ibid. Rawls,133

Rawls' first principle may also be interpreted as a guideline for just punishment. Said another way this principle could read: every person has rights up to the point where they begin to violate the rights of their fellow citizens. In this way, crime can be understood as an overextension of one's own rights to the point where they infringe on another's. Given this interpretation of criminal behavior, punishment should be inherently linked to the amount of harm caused to an individual or society. In the current criminal justice system many convictions, especially for drug-related crimes, are vastly out of proportion with the harm these crimes inflict on society. In the early 1980s Congress began enacting mandatory minimum sentences for certain crimes, mostly drug crimes. These laws oblige judges to assign minimum length sentences for specific crimes no matter their understanding of the case's specifics or special circumstances. Moreover, these laws targeted drugs more commonly used amongst minority populations, such as crack cocaine, while adopting weaker measures for drugs traditionally used in white communities, like powder cocaine. The denial of a criminal's liberties should roughly approximate the "liberty" that he or she denied a fellow citizen. The grossly over-inflated punishments associated with certain crimes reflect a violation of this first principle and the limits of equality in the American criminal justice.

The second principle states that, "inequalities as defined by the institutional structure or fostered by it are arbitrary unless it is reasonable to expect that they will work out to everyone's advantage and provided that the positions and offices to which they attach or from which they may be gained are open to all."[20] Rawls clearly has access to positions of privilege in mind in his fair opportunity rule; however, it has clear relevance to the criminal justice system as well. If every individual has an equal opportunity to attain positions of privilege, every individual, upon

[20] Ibid. Rawls, 133

birth, should have an equal likelihood of spending time in prison. In other words, just as there should be an equal opportunity for success there should also be an equal chance of failure. A Prison Policy Initiative study found that the average income of an incarcerated individual was 41% less than the national average[21] and black men are much more likely to spend time in prison than their white counterparts. It's clear that certain groups and classes in our society are much more likely to fail as a result of institutional partiality. The American criminal justice system is wrought with both implicit and explicit flaws that produce drastic inequalities in outcomes based on economic status and racial background.

Far from being perfectly fair, American institutions produce drastically different outcomes based on socioeconomic and racial backgrounds. The difference in rates of arrest is indicative of systemic inequalities in whose behavior we criminalize and which populations we target. Disparities in conviction rates and sentencing length reflect the underfunding of public resources for the poor. Meanwhile, this society fails to take actions to address these entrenched inequalities. Although educational achievement contributes to a lower risk of incarceration, states have continuously slashed education budgets while increasing the amount that they spend on corrections over the last 30 years.[22] In Rawls' ideal society the government's role is to correct inequalities, enforcing a social minimum level of income and protecting equal opportunity for all. However, in reality the government has enacted policies that led to an epidemic of mass incarceration that is harming the United States' most vulnerable communities; far from being a

[21] Rabuy, Bernadette, and Daniel Kopf. "Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned." Prison Policy Initiative. July 9, 2015 ://www.prisonpolicy.org/reports/income.html.
[22] Klein, Rebecca. "States Are Prioritizing Prisons Over Education, Budgets Show." The Huffington Post. October 30, 2014. http://www.huffingtonpost.com/2014/10/30/state-spending-prison-and-education_n_6072318.html.

system of pure procedural justice, the American criminal justice system's outcomes are decidedly unjust.

John Rawls' theory of "Justice as Fairness" is not without blind spots, especially when put into practical use. Ada María Isasi-Díaz levels a poignant critique of Rawls' veil of ignorance, which she argues does not eliminate prejudice and has the potential to encode bias in societal institutions. Isasi-Díaz writes that true objectivity is impossible and what passes for impartiality is in reality the privileged's point of view. Echoing Reinhold Niebuhr, Isasi-Díaz argues that to pretend otherwise perpetuates systems of oppression by giving institutions the legitimacy of impartiality. The criminal justice system is biased because its creators imbued it with their prejudices. What's more, it perpetuates this imbalance of perspective by revoking felons' right to vote, thereby eliminating their ability to officially participate in their political system. The solution lies not in continued efforts at unprejudiced decision-making as John Rawls suggests, but instead in an embrace of the unique perspectives and experiences of the oppressed. "This claim of the centrality of subjectivity seeks to unveil the prejudices in favor of dominant groups that validate the present political and economic arrangement while ignoring the reality of well over one-third of the U.S. population and 80 percent of the world population."[23] Those who experience oppression are the only people that understand the extent to which American institutions perpetrate injustice, and as such are uniquely qualified to correct these inequalities. Their experience is their power, which can be used to achieve a truly just society.

The social contract, however, is not the only lens through which one may understand the injustices of the American criminal justice system. Rawls' framework for justice is necessarily

[23] Torre, Miguel A., and Ada Maria Isasi-Diaz. "John Rawls on Justice." In *Beyond the Pale: Reading Ethics from the Margins*. Louisville, Ky.: Westminster John Knox Press, 2011. 150.

situated within American society and he acknowledges that the contents of the social contract could vary based on context. Others advocate for a universal, all-encompassing declaration of fundamental human rights enjoyed by all citizens of Earth, no matter their country of birth. This point of view has produced documents like the United Nations Declaration of Human Rights, which lays out explicit human rights to be respected by governments throughout the world. Having ratified this declaration and as a member of the United Nations, the United States is morally bound to uphold the principles expressed therein. The document provides an important moral authority to which individuals may appeal in an effort to expose injustices within their society.

The Universal Declaration of Human Rights adopted a broad definition of what constitutes a human right in recognition of the fact that human flourishing is dependent on diverse factors. Allowing all of the world's citizens to succeed is not a matter of applying pressure in one area but instead, of addressing the fundamental flaws that perpetuate poverty, discrimination, and disenfranchisement. Mass incarceration does not stem simply from imperfections within the American criminal justice system, but also the abandonment of resources for entire swaths of the American population. As an example, the term "school-to-prison pipeline," has been coined to describe the way in which unequal funding for education and other opportunities funnels racial minorities and the poor into the prison system.[24] The United States is clearly failing to provide education "directed at the full development of the human personality."[25] Furthermore, drastic disparities in employment rates according to racial background and the arbitrary exclusion of ex-offenders from many professions reveal that the U.S. government does not respect every citizen's right to work, and provide sufficient protection

[24] Education reading from class
[25] Ibid. UDHR Article 26

from unemployment.[26] The UDHR helps to highlight that injustice is not concentrated in one place but rather permeates the fabric of American society and requires multi-pronged solutions.

The UDHR also speaks directly to elements of criminal justice and incarceration. Article 29 states that, "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[27] The UDHR affirms that criminals maintain their fundamental human rights and that proportionality in punishment for crimes is a human right. As such, this document demands freedom from discrimination[28], equal protection under the law, prohibits arbitrary arrest[29]and the use of cruel and unusual punishment[30], and guarantees the right to adequate defense[31]. A preliminary examination of the American criminal justice system reveals that violations of all of these rights occur routinely and that by these standards the system is clearly unjust.

Amartya Sen's work, focused on the idea of human capability, is highly complementary to the principles espoused by the United Nations. Sen writes that, "there is a strong case for judging individual advantage in terms of the capabilities that a person has, that is, the substantive freedoms he or she enjoys to lead the kind of life he or she has reason to value."[32] Though Sen writes after the genesis of the UDHR, its articles appear to be the practical manifestation of his line of thinking. In contrast, Sen is deliberate in not explicitly stating those conditions that must be met in order to allow for human flourishing, as he believes they necessarily vary based on

[26] Ibid. UDHR Article 23
[27] Ibid. UDHR, Article 29
[28] Ibid. UDHR, Article 6
[29] Ibid. UDHR, Article 9
[30] Ibid. UDHR, Article 5
[31] Ibid. UDHR, Article 11
[32] Sen, Amartya. "Poverty as Capability Deprivation." In *Development as Freedom*. New York: Knopf, 1999. 87.

context. In this way he avoids one of the UDHR's most common critiques, that far from embodying universal ideals it imposes Western values on the rest of the world. In not enumerating the essential requirements for human flourishing Sen opens his work up to vigorous debate. But his decision also lends his work even greater strength, for it renders it more malleable and ultimately universal. Furthermore, his demand that every human being be allowed not just to survive, but to lead a life worth living, is a powerful one.

Sen's body of work provides a potent lens through which to understand mass incarceration and its direct relationship with entrenched American poverty. Sen defines poverty more broadly than limited income, arguing instead that poverty is a deprivation of capabilities and, as such, a violation of human equality. Given this framework, one can understand government's role in a society as one of capability maximization. The injustice of incarceration in the U.S. is twofold; first, in directly contributing to the monetary impoverishment of the individuals and their family members; and second, in denying ex-offenders rights and opportunities after they have served their time. This argument demands a revolution in the criminal justice system so that rather than crippling individuals' abilities to achieve, it offers them the resources they need to succeed. This would mean, for example, reforms so that drug addicts receive treatment rather than languishing behind bars, and so that prisons offer quality education and job training to prepare prisoners for life on the outside. This restorative justice model shifts the focus from punishment to rehabilitation; addressing prisoners' problems at the root giving them the tools to succeed upon release.

Though these perspectives vary in their approaches and priorities, they convene in a number of important ways. Beginning with their affirmation of the principle of universal equality and extending into their diverse moral frameworks, each one clearly indicates that the

inequalities built into the criminal justice system, and the resulting plague of mass incarceration, are fundamentally unjust. The evidence and arguments laid out in this essay render it impossible to continue one's belief in the myth of impartiality, which as Niebuhr highlights, contributes to the entrenchment of inequality and injustice. The recognition of this injustice obliges all within the society to action. Just as these philosophers and ethicists helped to form the case for mass incarceration's moral indictment, so too might they offer guidance in how to create effective solutions to guide us towards a more just society.