

**PS 1281: SEMINAR IN AMERICAN POLITICS RACE AND THE CRIMINAL
JUSTICE SYSTEM (INSIDE-OUT Fall 2017)**

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Essay Question: Reflect on the below quote by Lori Pompa. What does it mean to you? What do you think it means to others?

“In the United States, we’re not tough on crime; we’re tough on criminals.”

“Over the past thirty years the adult prison population in the United States has skyrocketed from around 300,000 to 2.3 million – it is now the largest prison population in the world.”¹ The United States not only has the highest incarceration rate in the world, but the lengthy nature of our criminal justice system’s sentencing structure also makes it one of the harshest.²

Lawmakers, law-enforcement agencies, politicians, and prosecutors all tout lengthy prison sentences as a way of showing they are tough on crime. But are lengthy sentences tough on crime? A lengthy sentence certainly inflicts hardships on the individual lawbreakers, but does it attack the root causes of crime? In California, a Federal District Court found that “[t]ough-on-crime politics have increased the population of California’s prisons dramatically while making necessary reforms impossible.”³

An oncologist, while treating cancer, does not treat the *symptoms* caused by the illness in order to defeat the illness. A person becoming a criminal and crime in general are symptoms of a greater systemic flaw. Lengthy sentences and harsh treatment of convicted criminals as a method of combating crime is akin to a physician giving a cancer patient a Percocet in the hopes of killing a tumor.

Every criminal sentence is intended to have some type of legitimate penological purpose. The theory behind a sentence is for it to meet the goals of deterrence, rehabilitation,

¹ *United States v. Skull*, 793 F.Supp. 2d 1048, 1052 (E.D. S.D. Ohio, June 29, 2011).

² *John Pfaffe, Locked In*, pgs. 51-54.); See *United States v. Gonzalez-Ramirez*, 561 F.3d 22, 31 (1st Cir. 2009) (“The Judicial Conference of the United States for almost 20 years, and the Sentencing Commission for almost 10 years, have pleaded with the judiciary committees of Congress to do something about the serious injustices that these long, mandatory minimum sentences impose – to no avail.”)

³ *Coleman v. Schwarzenegger*, 922 F.Supp.2d 882, 887 (E.D. Cal. August 4, 2009).

incapacitation, and punishment.⁴ If the sentence does not accomplish a legitimate penological purpose, it is said to inflict needless pain and suffering in violation of the Eighth Amendment of the United States Constitution, Article 5 of the Universal Declaration of Human Rights, as well as Article 1, § 13 of the Pennsylvania Constitution.⁵ As lengthy sentencing seems to be lawmakers' go-to tool to combat crime, let's parse through these purposes of sentencing.

Incapacitation:

At first glance, it could appear that incapacitation would, at the very least, prevent a particular individual from committing further crime. But is it not also true that crime continues to occur even behind bars?⁶ Does incarceration stop someone from raping, murdering, or assaulting others while imprisoned? What about drug dealing, which has historically run rampant in the prison system? Or, how about the person who operates a criminal organization *while in* the penitentiary? It is not unusual for prisoners to remain active in their drug operations while incarcerated.⁷

Incapacitation doesn't necessary *stop* crime. Incapacitation is more akin to *relocating* crime. As Judge Merritt commented "[a]s soon as one [criminal] is incarcerated for his offense, another steps into his shoes. Long periods of incarceration have done little except drive up the costs of our correctional system and perhaps appeal to our retributive instinct to be 'tough on crime' [.]".⁸ In fact, the prison environment may exacerbate some individuals' criminal tendencies. All in all, incapacitation does very little in the greater objective of curtailing crime.

Deterrence:

Deterrence is a dreadful word in the context of sentencing. Black's Law Dictionary defines deterrent punishment as "a punishment intended to deter the offender and others from

⁴ **Criminal Trial Techniques**, Vol. 1B, Chapter 40A § 40A.04[2].

⁵ The United States Supreme Court in *Coker v. Georgia*, 433 US 584 (US 1972), held that "a punishment is 'excessive' and unconstitutional if it ... makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."

⁶ Pennsylvania's crime code has multiple statutes authorizing criminal charges for offenses committing while imprisoned. See, **18 Pa.C.S.A. § 2703** (Assault by prisoner); **18 Pa.C.S.A. § 2703.1** (Aggravated harassment by prisoner); **18 Pa.C.S.A. § 2704** (Assault by life prisoner); and **18 Pa.C.S.A. § 5123** (Contraband).

⁷ *United States v. Savage* 2013 U.S. Dist. LEXIS 47862 (E.D. Pa. 2013; Also See, *Matsey v. Westmoreland Cnty*, 185 F.App'x 126, 128 (3rd Cir. 2006) (discussing prison inmate running a drug trafficking operation out his prison cell.)

⁸ *United States v. Graham*, 622 F.3d 445, 469 (6th Cir. 2010)

committing crimes and to make an example of the offender so that like-minded people are warned of the consequences of crime.”⁹ Deterrence is analogous to a scarecrow. A scarecrow is limited to a specific effect – it may scare off a couple of crows, but if you are counting on it to keep the fox out of the hen house you may want to think again.

To curtail crime, deterrence must cast a wide net. The problem is that deterrent sentences have never shown themselves to operate at any level of efficiency. Law Professor John Pfaffe drove home this point in his book, *Locked In*, where he remarked that harsh sentencing is of minimum value in the realm of deterring crime, because a characteristic of criminal behavior is impulsivity, i.e. prior to committing crime, many (or most) people are not thinking about the consequences. In cases of violence, it is illogical to believe that the fear of a stiff sentence would halt the actions of a person in an extreme mental and emotional state. Via the theory of deterrence, one would have to hesitate in following through with a particular course of conduct simply because he or she is in fear of the severity of the consequences *if caught*. In the prototypical course of criminal conduct this is rarely the case. Most criminals do not think about the consequences, and if they do, they take the appropriate steps to avoid detection.

However, harsh deterrent sentences could be an effective method of deterring crimes committed by police officers, doctors, and judges. Police officers, doctors, and judges are more prone to think about the long term consequences of their actions than your typical criminal, because they have more to lose. Thus, if they knew a particularly course of conduct carried a stiff and possibly mandatory sentence, they would do exactly what deterrence demands – stop to think about the ramifications. On the other hand, take the poverty stricken youth who chooses to sell drugs, it is reasonable to believe that he or she would be less likely to contemplate the long term consequences of his or her actions in comparison to the short term rewards of the conduct. The youth is already in a dire situation, and the short term rewards from the risky behavior could potentially have a huge impact on meeting a pressing need. In addition, the consequences of the conduct if detected would leave him in no worse situation than the one he is already in. Ironically, Pennsylvania’s mandatory minimum sentencing scheme targets the impoverished youth more than the lawbreaking cop, judge, and doctor.

Rehabilitation:

Do lengthy prison sentences help to rehabilitate criminals, and thus prevent future crime? Our prison system currently does very little to rehabilitate someone. For example, a person is

⁹ **Blacks Law Dictionary**, 9th Edition, at page 1354.

convicted of aggravated assault and receives a five to ten year sentence. While in prison his prescribed "treatment plan" mandates that he participate in a six month "violence prevention" program, which consists of meeting once a week in a group of about twenty-five inmates for an hour and discussing violent behavior. It is well known among prisoners and the prison administration alike that programs such as this are nothing but a farce. In fact, to pass the class all the participant need do is keep his seat warm. No further treatment is required for the remaining term of his sentence.

Violent offenders are typically given the harshest of sentences.¹⁰ This is significant because over half of all state inmates in the United States are in prison for violent crimes.¹¹ "There are almost as many people in prison today *just* for murder and manslaughter as the *total* state prison population in 1974."¹² Thus, half of the system's crime fighting efforts are invested in ineffective programs such as "violence prevention" as its main and many times only rehabilitative tool.¹³ In essence, a person convicted of a violent offense will be exiled from society and warehoused for decades (at the cost of tax payers) only to one day be thrust back into civilization. Upon release the ex-con will face a litany of new obstacles. Recidivism is common.¹⁴

This rehabilitative failure is a common theme throughout all classifications of crime. Drug offenders are rehabilitated via a four month drug treatment program (T.C. - Therapeutic Community), which has a laughable success rate. Sexual offenders are rehabilitated through a few months of classes involving a couple hour long group therapy sessions each week. The majority of these offenders will spend most of their time playing cards, lifting weights, or playing handball out in the yard.

If lengthy sentencing is being tough on crime, is this what the American people envisioned? If so, we need a new vision and some new visionaries while we're at it. There is nothing wrong with being tough on crime. In fact, everyone should be a supporter of the effort

¹⁰ Professor Pfaffe has commented that the term "violent offender" is a misleading term. "For almost all people who commit violent crimes, however, violence is not a defining trait but a transitory state that they age out of". See, **Pfaffe**, *supra*, at pg. 101.

¹¹ **Pfaffe**, *supra*, at p. 66.

¹² **Pfaffe**, *supra*, at 185.

¹³ I was wrongfully convicted of second degree murder and sentenced to mandatory term of life imprisonment without the possibility of parole. My prescribed rehabilitative treatment plan consisted of a few months of violence prevention classes, which I promptly refused.

¹⁴ **Pfaffe**, *supra*, at 66-68.

to combat crime. However, as I stated above, our system is only treating the *symptoms* of crime and in the process adding to the illness. We must attack the root causes of the sickness. Imprisoning a robber may stop that particular person from robbing for a period of time, but it does nothing to curtail the conditions that pressed the person to partake in crime in the first place.

Politicians have routinely pandered to the public's pulse. Therefore, political rhetoric on cracking down on crime should give us a good idea of how others would evaluate Pompa's quote. The Republican Party has unequivocally characterized their Party as "tough on crime". But let's look at what the Democrats also had to say. In Michelle Alexander's book, *The New Jim Crow*, she recounted how during Bill Clinton's 1992 presidential campaign he pledged to the American people that no Republican would be tougher on crime than him. In doing so he asserted that, "I can be nicked a lot, but no one can say I'm soft on crime." He made good on that promise with the enactment of the Anti-Terrorism Effective Death Penalty Act (AEDPA), which severely limited a federal court's ability to grant habeas relief to a state inmate and mainstreamed the appeal process in death penalty cases. Likewise, during Barack Obama's presidential campaign he too asserted a tough on crime mentality. After originally repudiating capital punishment, he transformed his position into supporting the death penalty for child rapist – even if the victim was not killed.

Why, when it comes to crime and criminals, do all politicians sing from the same hymnal? It is because that's what the people want.

What Lori Pompa's quote means to me is that our primary means of attacking crime is directed toward punishing the individual perpetrator with a lengthy sentence. However, there is no method to this madness. It only deals with crime from a surface level perspective. Lengthy sentences do not treat the root causes of crime and thus are *not* tough on crime. I believe others, initially, would agree, but their zeal for revenge ultimately blinds them. It's been said that our country is a nation of second chances, but the evidence shows otherwise. The fact of the matter is, America is less a forgiving nation than it is a retributive one.