

THE FUTILITY AND NECESSITY OF HUMAN RIGHTS IN AN ERA OF CARCERAL HYPERINFLATION *

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Over the past dozen years, I have had the opportunity and privilege to share my research on the nexus of incarceration and urban marginality with a broad range of non academics. I have spoken to and debated with the leadership and staff of the prison services of France, the Netherlands, Brazil and Argentina; I have engaged officials and professionals concerned with criminal justice trends and policies at the United Nations, the OECD, the Italian parliament, and a smattering of regional and city governments (ranging from the district of Seine-Saint-Denis, northeast of Paris, and the Generalitat de Catalunya to cities as far flung as Rotterdam, Rome, and Rio de Janeiro). I welcome this opportunity for dialogue and mutual learning with the Gendarmeria de Chile on this day in Santiago.¹

THE PRISON IN PROFESSIONAL PRACTICE AND SOCIAL THEORY

First, let me make clear that I am not here to inculcate or disculpate the Gendarmeria by my words or deeds, not because I am timid or squeamish, but simply because *sociologists are not moralists*. We are not in the business of passing judgement on institutions, deciding who is “guilty” and who is “innocent,” and assigning blame for undesirable social conditions and unwanted human outcomes. We are in the business of analyzing the ordinary operations, built-in contradictions and ramifying effects of institutions, the social functions they fulfill and the collective fictions they sustain.² I want to stress this at the outset to dissipate a mistaken view of what sociologists are about, prevalent among the educated citizenry as well as among many of my colleagues (who think that putting the adjective “critical” before sociology does more than waste a bit of ink and paper).

Second, I am not here to give lessons to the Gendarmeria de Chile: academics should always be careful when addressing professionals because they reside for the most part in an abstract world of texts, suspended above and sheltered from the urgency of practical tasks. By contrast, professionals have their hands dirty from getting things done in whatever domain they operate. I have no experience running a prison but I have enough of a sense of the complexities it entails to know that I am badly placed to instruct anyone who does on how to administer their establishment. I would not count my morning-long visit of La Penitenciaría, however instructive

¹ This is a revised version of notes prepared for a keynote address to the Gendarmeria de Chile, Division of Human Rights, 16 October 2013, at the Gran Palace Hotel, Santiago de Chile. I thank the Gendarmeria de Chile for this invitation. I am grateful to Alejandro Arevalo, head of the Unit for Protection and Promotion of Human Rights, for involving me in this debate; to Guillermo Sanhueza for his tireless work behind the scenes; and to Megan Comfort for her astute observations during and after our visit of the prison of La Penitenciaría.

² Max Weber (1948) put it best in his essays on *The Methodology of the Social Sciences*: our task is to “analytically order empirical reality,” which is different from assessing its aesthetic value, moral worth or political tenor.

it has been, as basis for leveraging advice. Prison tours are interesting to get a feel for what the warden wishes to showcase to outsiders; they tell us more about the view that officials want to project than about the daily realities of life in under lock.

But here is the advantage of being retired from a given institution: you can study it, dissect it, break it down into its constituent elements, and learn from comparison across units, epochs and geographical boundaries. The contribution the sociologist can make to the discussion about human rights behind bars is to provide a broader outside view; bring the lessons of historical and international experience to bear on contemporary debates in a given country; supply an *analytic frame that makes it possible to step back* from the urgency of practice and the fire of political debate, reformulate questions, and point to some of the unforeseen consequences and hidden contradictions of penal confinement as well as link the prison to other pertinent institutions beyond its walls.

Different theoretical traditions in the social sciences articulate different connections of punishment to non-judicial institutions. Roughly put, we can distinguish five theoretical strands and organizational linkages:

1.-*Class and the economy*: the neo-Marxist tradition portrays criminal justice as a material instrument of control whose primary target is the poor and whose trends mirror those of the sphere of production, particularly the state of labor. Its typical topic is the macro-level correlation between incarceration and unemployment. Rusche and Kirschheimer's ([1939] 1995) *Punishment and Social Structure* is generally cited as the canonical text of this tradition -- mistakenly, in my view, since it puts forth a multifactorial model taking into account extra-economic variables such as fiscal capacity, religion, and sexuality, that puts it closer to Weber than to Marx.

2.-*Community and morality*: the tradition descended from Émile Durkheim and the French school of sociology construes punishment as a language, a means of symbolic communication that captures collective emotions to spotlight and elevate shared norms. The target here is not the criminal but the law-abiding citizen, and a favorite topic is crime scares and judicial ceremonials that embody the passionate tenor of punishment and serve to draw boundaries between insiders and outsiders. A paradigmatic study is Kai Erikson's (1966) dissection of the Salem witch trials in the 17th century Puritan colony of Massachusetts in *Wayward Puritans*.

3.-*Professionals of rationality, elite mentalities and cultural sensibilities*: a third line of works takes after the classic analysis of law, bureaucracy and rationalization by Max Weber and his epigone Norbert Elias. It stresses the emergence of official specialists in the management of crime, the changing attitudes of elites toward the body, pain, and deviance, and how these shape the gradual "civilizing" of punishment. The Dutch historian Pieter Spierenburg (1984) offers a classic statement of this position in his book *The Spectacle of Suffering* which charts the disappearance of the public infliction of physical punishment from the 16th to the 19th century in Europe. I put Foucault within this broad neo-Weberian tradition, given his concern for the uniqueness of the West and the de facto rationalization of domination through the societal diffusion of "disciplines" designed to make bodies "docile and useful" in *Discipline and Punish* ([1975] 1977).

4.-*Forging criminal deviance, penal identity and the self*: Foucault also offers a link to a distinctively microsociological tradition, rooted in the North American school of symbolic interactionism, concerned with the social mechanisms that produce deviance, shape identity and mould the self of the criminal and the inmate. Erving Goffman's (1961) *Asylums* and John Irwin's (1970) *The Felon* are exemplary statements of this approach which gives us an understanding of punishment from the standpoint of the punished and their coping strategies.

5.-*The state as symbolic power and bureaucratic field*: the last and most recent theoretical strand draws on the work of my mentor and friend, the late French sociologist Pierre Bourdieu. Bourdieu ([1993] 1990) gives us two concepts to rethink punishment: the notion of "symbolic power" points to the monopolization of the capacity to impose classifications on society and to inflict dishonor on its members in the form of penal sanction; the notion of "bureaucratic field" suggests that there is a *struggle going on inside the state* between rival agencies that purport to resolve social problems by applying supportive social treatment (the feminine Left hand) or disciplinary sanctions (the masculine Right hand). In my book *Punishing the Poor* (Wacquant 2009), I adapt these two notions to show that the resurgence of the prison over the past thirty years partakes of the building of the neoliberal state and its policy of penalization of poverty.

This brief overview is intended to point out that, far from being an isolated institution, the prison is simultaneously linked to a multiplicity of social institutions and forces, themselves interlinked: the economy, civic emotions, elite sensibilities and bureaucratic forms, the identities elaborated by the punisher and the punished, and patterned struggles inside the state on how to define and distribute public goods, including the negative good of criminal punishment.

Here I want to spotlight this last variable: the notion of human rights is typically invoked by educated elites with a stake in expanding the role of the Left hand of the state in opposition to their counterparts of the Right hand who invoke economic rationality and budget necessities to undermine the extension and enforcement of costly rights. The ministry of justice, where it oversees the prison system, is itself traversed by the same tension between a Left pole wedded to rights and rehabilitation and a Right pole infatuated with retribution and the rigid implementation of law and order as a matter of state authority. I suspect that in this very room there are members of the Gendarmeria de Chile who are committed to upholding and expanding human rights behind bars and others who see the same human rights as a useless luxury and a feckless distraction from their mission, if not a Trojan horse for leftist sedition. The fact that I am invited to give this address today and the look of stern military attentiveness of my audience indicate that the struggle between these two poles is uncertain if asymmetric.³

The Bourdieusian approach invites us to make three moves that are useful to situate the debate over human rights in prison (see Wacquant 2011 for an elaboration). The first is to *decouple crime from punishment* and to acknowledge that, from the time of its historical invention in the late 16th century, the penal prison has always served as an implement to manage urban marginality and to assert the prerogatives of the ruler through the theater of penal sanction. The second move is to treat social welfare policy and penal policy as *two sides of the same coin*

³ I would hypothesize further that supporters of human rights within the polarized social space of the Gendarmeria are likely to be younger, more feminine, endowed with university credentials and with career paths starting outside of law enforcement whereas their detractors sport the opposite properties. For backdrop, see the astute and thorough study of the recent transformation of penal institutions and policies in Chile by Paul Carlos Hathazy (2013), *Democratizing Leviathan*.

of poverty policy and to acknowledge that these two policy streams must be understood together, insofar as they treat the same population and deploy the same discursive tropes and administrative techniques. The third move is to *hold together the material and the symbolic moments of punishment* and to realize that its functions of control and communication, associated with the Marxist and the Durkheimian schools respectively, are not antinomic but complementary and even mutually sustaining. When you arrest a suspect and incarcerate a convict, you are simultaneously exerting physical force and symbolic force: you are curtailing the material entitlements of that person as well as broadcasting a moral message by amputating his membership in the civic compact and soiling his dignity.

CONNECTING HUMAN RIGHTS INSIDE AND SOCIAL RIGHTS OUTSIDE

The question of human rights is primarily a juridical and moral question, not a sociological one, so I feel ill-positioned to tackle it. I am aware that there is a broad and dynamic domain of research at the intersection of law, political sociology, and peace studies that deploys this notion (Somers and Roberts 2008, Clapham 2016). But my summary view is that, in the current context of carceral hyperinflation and bolstering of the penal state across Latin America (Müller 2012, Hathazy and Müller 2016), human rights form what Kenneth Burke (1957) calls a *terministic screen*, a discourse that veils the reality of the utterly catastrophic conditions of mass detention, reminiscent of captives in medieval dungeons (Geltner 2008), in a set of formal categories obfuscating the interests of those who invoke them.⁴

So I would turn the question around and ask: when are *human rights* invoked behind bars? Answer: when fundamental *social and economic rights* are routinely violated beyond bars, as is the case throughout Latin America due to the combination of extreme social inequality, rampant poverty, and the political reality of the (un)rule of law (Hoffman and Centeno 2003, Mendez et al. 1999). At the risk of seeming to court paradox for its own sake, I will argue that talk of human rights in the prisons of societies that ongoingly violate basic standards of human dignity at the bottom of their class structure is at once futile and indispensable.

To speak of human rights behind bars is an *exercise in futility* for two basic reasons. The first is that the prison itself is fundamentally an *outlaw institution*: it functions *exlex*, outside of the law. Under the press of necessity, correctional authorities everywhere violate the legal rules they are supposed to uphold. Proof is the suffusive brutality and shocking material penalty that afflicts inmates throughout Latin America. Even in advanced countries, penitentiary legal codes are underdeveloped, weak, and solipsistic, incapable of effectively allocating inmates a core set of rights. This is because the confined are by design *zombie citizens*, existing in the shadow of the law but not in its light. The second reason is that the prison is a deeply *damaging institution*: it is a place of concentrated violence and vice; it assaults the personality, distorts the sociality, and erodes the physical and mental well-being of those placed in it. Moreover, it seems absurd to grant and enforce human rights behind bars when these same rights are denied beyond them due to the weakness of the social and economic rights of citizenship that are their minimal condition of actualization.

⁴ On this point, I recommend reading Nicolas Guilhot's (2005) *The Democracy Makers*, which shows how the transnational movement for democracy and human rights has been highjacked by experts and turned into an instrument of neoliberal reform. For dissenting views documenting a more positive role for human rights, see van Zyl and Snacken (2009) for Europe, and Sikkink (2007) and Cardenas (2011) for Latin America.

And yet there is definitely a *utility to human rights*: legal discourse can serve a guide and goad to improve correctional funding and functioning, as a weapon to curb penal illegality and to minimize human damage within carceral facilities. For this reason, we must invoke them, insert them among correctional standards, and seek to enforce them so long as we do not know how to do better and until such time as we engage in a more fundamental political reflection on the purposes of incarceration, or lack thereof.⁵ But we must do with no illusions about their limits and by constantly connecting human rights inside and social rights outside.

So how are we to deploy human rights to minimize the interlinked illegality and social destructiveness of the prison? I propose that we follow three principles. First, *minimize the footprint of the carceral institution* by maximizing alternative ways of managing marginality and crime, including social, medical and economic treatments of problematic conditions and conducts, all of which focus on preclusion and prophylaxis rather than punitive reaction.⁶ Second, *relink inside and outside*, for the prison is not a closed and hermetic space. Contrary to the official vision, its walls are doubly porous, by which I mean that external forces seep in and affect its operations and output (concretely, think of the flow of service providers and visitors who come into its perimeter daily and of the streaming contraband of drugs, cell phones, and indispensable goods like food, medicine, and toiletries) and that, going the other way, the prison deeply affects the neighborhoods of relegation that are its primary feeders. This is true everywhere but nowhere truer than in Latin America where, due to lack of sufficient funding, prisons rely on this constant tide *trans muros* for their basic operations and routine order maintenance. Third, take into account the deleterious long term impact of incarceration both *within and across generations*: confinement warps the life trajectories not just of the inmates but of entire lineages, from their wives and parents to their children and grandchildren and many of their kin and friends in between.⁷ The prison is a poverty-perpetuating and crime inducing-institution, both within and beyond its walls.

Some of you may complain that these principles are overly broad and generic and that they fail to provide a guide for concrete and immediate action, beyond the indispensable goals of reducing staff mistreatment, inmate violence, and improving visiting and access to programs (Sanhueza et al. 2017). So let me end by making a few practical if politically unlikely recommendations to the Gendarmeria de Chile and, beyond it, to the prison services of the various Latin American countries that can find inspiration in Chilean reforms that would make this country a *continental trend-setter for decarceration* after being leader in incarceration for so long.

1. Reduce grotesque overcrowding: human rights are a joke so long as inmates are packed like dead sardines. According to official data, the national occupancy level of Chile's custodial establishments is 118% and reaches 130% in La Penitenciaría. But this is a total charade: these figures are meaningless because they are obtained by cramming six men in tiny cells that should house at most two people. So the actual overcrowding rate is closer to 330%. Reducing overcrowding can be obtained by reducing sentence length across the board for good

⁵ David Garland (2003) shows that we do not really know why we incarcerate any more due to “the crisis of penal modernism.”

⁶ I discuss these alternatives in Wacquant (2009: 281-286), “How to Escape the Law-and-Order Snare.”

⁷ See the work of Comfort (2008) on the girlfriends and wives of convicts, Black (2010) on brothers, and Wakefield and Wideman (2013) on the multisided impact on their children.

behavior (day for day), increasing early releases and expanding diversion programs (to minimize entries on short-term sentences).

2. Set a low prison population target and institute a cap: launch an active policy of decarceration with an ambitious goal. Chile should aim to return to a rate of about 100 inmates per 100,000, similar to the rate it sported in 1981 and close to the average for Western Europe. Starting from today's rate of 300, this can be achieved by shaving about 12 points every year for 15 years, which represents a subtraction of about 1,700 inmates annually. This rate of 100 can then be treated as an absolute cap motivating the courts to find creative and effective alternatives to incarceration whenever it comes within reach.

3. Move the prison from the justice ministry to the Ministry of Social Development (where it belongs) and provide effective programs in health (including mental health), marital and family counseling, job training and employment under what I will call the *two for one rule*: two units of any service will be provided in the dispossessed districts symbiotically linked to the prison for every one unit delivered within the prison. For instance, offer construction jobs both inside and outside according to this ratio. Boosting social and economic rights on both sides of the prison walls simultaneously will deflect the politics of resentment (which falsely portrays the provision of correctional services as a zero-sum game that takes resources away from law-abiding citizens) and help create popular support for those programs.

4. Reduce the shocking squalor of the physical plant of penitentiaries as part of a large scale public housing program. Close down older facilities unfit for human housing and replace them with new ones built as part of a dual construction policy: for every peso invested in building a new prison, invest two pesos in improving the housing stock, and infrastructure in the neighborhoods of relegation that are the primary feeders of houses of confinement. Effectively, treat prisons for what they are everywhere: a central component of low-income or social housing.

5. Integrate public services behind bars such as education, health care and social work with regular public services outside: create a mandatory "national service" for teachers, nurses, doctors and psychiatrists, and family counselors to serve two years inside prisons on government payroll, one year right after they obtain their degree and one year a decade later. Such service will both dramatically improve conditions for inmates and lift the concern of professionals outside for what happens to convicts. Provide tuition credit for university students who come to teach high school courses inside prisons. Make universal literacy mandatory for all inmates: no one should come out of prison without knowing how to read and write.

6. Elevate the status and quality of prison staff: increase the baseline qualifications, periodic training, and pay of the staff to make the position of correctional officer a valorized and attractive one. Teach them applied rudiments in sociology, psychology and social work instead of tutoring them only in order-maintenance techniques. This will valorize their work as well as make them attuned to rights behind bars. In particular, drill into them that the full respect of the law and fair treatment of each inmate in every circumstance is the foundation of their job (we know that procedural justice, not fear, is why people obey the law, as shown by Tyler, 2006).

7. Triple the correctional budget in fifteen years and make prison gradually more expensive so that budget-minded politicians actively seek alternative solutions to incarceration. Propositions 3 to 6 above will require significant increases in public funding. Together with propositions 1 and 2 they will raise the per capita cost of incarcerating offenders, which will create a built-in incentive for not overtaking the carceral cap.

8. Run a public information campaign on the failure of current penal policies making it clear to the citizenry that the prison is a *bankrupt institution*, a blunt and brutal implement that

does not resolve the crime problem but merely hides and displaces it; that incarceration does not reduce recidivism and expand the ability of convicts to lead a lawful and productive life once they return to society (which nearly all of them do); and that confinement is enormously more costly than alternative responses and is becoming more expensive as human rights standards are implemented in custodial facilities.

This platform for action will not by itself deliver human rights in custody but it will facilitate their insertion and defense. More importantly, it will directly curtail the built-in illegality and reduce the human corrosiveness of the prison. Ultimately, we must question the dichotomous offering of human rights behind bars and citizenship rights beyond bars. For inmates are citizens and, as such, they should be entitled to a modicum of social capacities and dignity both inside and outside the gates of the penitentiary.

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* Forthcoming in Chris Garces, Sacha Darke, Luis Duno-Gottberg and Andrés Antillano (eds.), *Carceral Communities in Latin America: Ethnographies of Prison Insecurity, Informal Dynamics and Survival*, Durham, Duke University Press, 2018.

[version 8/27/17 4,465 words]