

In Search of the Ethical in Criminal Justice Practice

David Polizzi, Indiana State University
Michelle Brown, University of Tennessee

M.B.: I wanted to start with your review for *Theoretical Criminology* of Arrigo et al.'s volume *The Ethics of Total Confinement: A Critique of Madness, citizenship, and Social Justice*, in particular the following line: "But how then do we treat those who have violated the established order and are sent away to the penitentiary? Are these same individuals part of the all that justice seeks to embrace?" In Arrigo's case, he invokes the complex circumstances of juveniles, the mentally ill, and the sex offender. You respond with the critique that the foundations of criminal justice and a more therapeutic or virtuous system of justice are inseparable from what it is to be human and live in society. As you put it in your Jan. 3 email, "how is it possible to create or evoke this very necessary condition of human flourishing in the criminal justice system when it is not present in the free society...?"

I'd like to use those questions and problems to frame a preliminary discussion of criminology and the ethical - what I see as generally absent and avoided theoretical exploration in criminology in need of address but also quite simply unacknowledged foundations of the field. In other words, these questions, although rarely addressed, are THE questions. Not to be too presumptuous, I'd like to playfully problematize what it means to do whatever it is we do.

For you, me, and others who take up a critical criminology, it seems there is a question of ethics at the heart of the project of criminology. Although ethics is something

that criminologists teach regularly and invoke often enough in research, it is a concept that is rarely theorized in relation to its foundational role in the formation of the social and its failures – which for me is the very site of criminology. Interestingly, criminologists have not been my primary influences in coming to this conclusion. Instead I've spent a good deal of time over the past two years with a political philosopher who has greatly informed my work: Emmanuel Levinas.

For Levinas, as you and I have briefly discussed, being human means that we stand accused fundamentally and this accusation/claim occurs prior to anything else. It derives from an encounter with the *face* of the other (before we even encounter the other) - read: absolute vulnerability, weakness, fragility, dependency, and need. It is a relationship that is original (primordial?) and unequal and demands an obligation, a responsibility we will never, can never fulfill. Levinas visualizes this relationship (although certainly the scope of the face exceeds identity) through the problem of misery, abandonment, and destitution - the weak, the poor, the orphan, the widow poised before the one who is richer, more powerful. Asymmetry then is fundamental. This is a situation made more complex by the fact that in any and every face-to-face encounter, multiple claims are present - multiple needs, multiple degrees of vulnerability, all relative, against an all-encompassing and singular vulnerability that is what it is to be human. So what is to be made of this claim and of that responsibility? What are the moments in which the encounter produces something genuinely extraordinary within the ordinary: Here, I'm thinking of the scene from Grossman's *Life and Fate* - the act of extraordinary generosity: the Russian woman who gives her last piece of bread to the German Nazi, now a prisoner of war and shoveling dead bodies out of a camp, whom she might just as soon kill, whom she must, on some level, despise - an act without explanation - the "epiphany of the face of the other."

If we are to take these responsibilities seriously as criminologists and human beings, then we are positioned well beyond the realm of law, crime, and criminal justice. We are

caught, as are ALL, squirming in the midst of irreconcilable relations and forced to deliberate, deny, do nothing, do something – and whatever we do, we will never fulfill this responsibility. Here, we run up against the dark side of empathy: It is fully possible to put one's self in the shoes of another and look away, avoid, deny, "not know" even as we know (as Stanley Cohen writes (2001), exploit, manipulate, and murder the targets of our empathy. Understanding another's suffering is no prohibition against suffering; in fact, this is most likely the empathy baseline. However, that is an open-ended moment, one in which myriad possibilities, knowable and unknowable, occur. It is this predicament – and this responsibility (whatever we make of it) that makes existence social and gives our lives a direction toward action and, sometimes, praxis. Responsibility is the "secret of sociality," as one of my favorite Levinasian commentators, philosopher Michael Morgan, claims (p. 177). The regularity and generality of laws and institutions, like criminal justice, preclude us from seeing that originary point for these rules, practices, policies, etc., are because we have been called upon to respond to another person in one way or another.

For Levinas, the law is the reminder of this framing of relations. Of course, for someone like Italian political philosopher Giorgio Agamben (another major influence), we will only see transformation when we move beyond the law.

This kind of position does not change the human condition, which is a dark one in too many ways, but it does have, minimally, the possibility of serendipitous acts of generosity – of a will to life and not death, that is far too little marked and remarked upon in criminology. Such reorderings also remind us that, as scholars and actors, we are not simply about crime and punishment but something much more fundamental.

DP: For me there simply is no disagreement or equivocation concerning your opening point: ethics is indeed at the heart of criminological and forensic psychotherapeutic practice, it is at the heart of what it means to be human and it is the call that seeks to shake us from our

lingering and sometimes immutable bad faith or totality. To recognize the flaws of the social order is to be willing and able to reconfigure the conversation concerning crime and criminological practice, which in turn, would evoke or perhaps even require that a different set of questions be asked. Within the safe confines of the classroom setting or the shared collegiality of academic publishing, these questions are rarely offered and when they are raised, their impact offers little resistance to what *they say* about the criminal or the ethical responsibility of the social order that is always implicit in criminal justice practice.

The notion of failure, I believe, is an important aspect of this narrative, but is one that all too often is hopelessly skewed toward the individual perpetrator who is required to take exclusive responsibility for the specific criminal act. Though it would be illogical and perhaps even irresponsible to conclude that the individual is not in some way implicated in the social harm evoked by their specific actions, it seems equally as irresponsible to contend that the social context from which these behaviors emerge is somehow insignificant or not in any way complicit in the production of the criminal act. Quinney (2000) in addressing this very concern makes the following observation.

What is important in the study of crime is everything that happens before the crime occurs. The question of what precedes crime is far more significant to our understanding than the act of crime itself. Crime is the reflection of something larger and deeper. (p. 21)

However, I am unconvinced that this observation alone resolves or actually even is capable of addressing the problem, which you raise. It could be argued that Quinney's observation, though ideologically at odds with those who maintain an unflinching and uncritical fidelity toward the belief that the act of criminality is the sole responsibility of the perpetrator, still seems to evoke a more causal or dialectical compatibility with these other seemingly incongruous theoretical perspectives. Whether ensconced within a totality of the

individual or within a deep structural analysis of cultural or social forces, crime production remains epiphenomenal to either the manifestation of individual irresponsibility and personal failure or as a product of failed economic and political structures within society, to which the individual falls victim. If we are truly to understand the act of criminality as Quinney instructs, our theories must reflect the ability to incorporate the co-constituted intervolvement of individual agency and social processes of construction and production.

Such a necessity, I think, is recognized by your observation that we must reach beyond the specific practices of academic criminology, criminal justice and its various practical applications, to embrace what it actually means to be human; this is a much more difficult project to embrace, but is an inescapable challenge that must be endured (Romano, 2009). To be accused is to face the implications of this threat, which calls us to recognize the other as a separate possibility for what it means to be human; a possibility that is not contingent upon any other totalizing process or image. Criminal justice practice is particularly vulnerable to this type of totalizing social production, which seeks to construct the image of the offender in very specific and potentially self-serving ways that tragically results in the proliferation of unjust practices in the name of justice (Arrigo, Bersot, Sellers, 2011).

The failure here is more directly situated within causal or dialectical explanations or descriptions of crime or criminal behavior, which refuse to transcend the more traditional linear presentation and conceptualization of this problem. Add to this distinction, the way in which human being itself comes to be constructed or defined as that which is worthy of ethical consideration that which is not (Deranty, 2008). The act of criminality not only becomes the totalizing "signifier" for that which is in some way less than human, but as such, is therefore deemed unworthy of any ethical consideration or empathetic reflection. The theoretical dualities of lawful/ criminal, human/inhuman, or normal/abnormal become aspects of a type of Totality within the ethical phenomenology of Levinas, which are never truly able to recognize the presence of this other except as that which my totalizing

presence is unable to own for itself. I think the following observation by Levinas (1961/1969) is appropriate:

To have the idea of Infinity it is necessary to exist as separated. This separation cannot be produced as only echoing the transcendence of Infinity, for then the separation would be maintained within a correlation that would restore totality and render transcendence itself, the overflowing of an adequate idea. If totality cannot be constituted it is because Infinity does not permit itself to be integrated. It is not the insufficiency of the I that prevents totalization, but the Infinity of the Other. (pp. 79-80)

Levinas (1961/1969) continues by stating

Reflection can, to be sure, become aware of this face to face, but the "unnatural" position of reflection is not an accident in the life of consciousness. It involves a calling into question of oneself, a critical attitude which is itself produced in the face of the other and under his authority. (p. 82)

The face of the criminal and victim is always absent. Not the face constructed by criminological theorizing or methodological reduction, but the truly all too human face of the individual that emerges in the space of our shared human failure. I think that our inability to call ourselves into question, to endure the ethical call that the other evokes is the very process that allows for the asymmetry that you identify. It also may help to lessen the need for the complete separation that Levinas requires insofar as the Infinity of the other also helps to reflect that which is Infinite in me: not an overflowing of an (in)adequate idea but the overcoming of its failure.

MB: Part of what I like about your response is the idea that we cannot get to a discussion of crime production as long as "failure" is perceived through the lens of the individual. More significantly, it seems we still do not have a recognizable vocabulary or legitimate discourse of the "social" against classical and neoliberal frames. Many criminologists conceive of this individualism as a problem of negative emotions, of a drive toward retribution as a vaguely disguised vengeance. However, I am increasingly more concerned with the problem of prosocial behavior – of a perceived benevolence – in relation to these issues. Scenes of vulnerability, the kind that lie at the heart of the criminological enterprise, are perhaps more likely to produce desires to withhold attachment – to be irritated by the scene of suffering in some way of both victims and perpetrators – in a manner that leads to an aversion of complex sources of pain. This may occur, even as, actors choose sides and celebrate themselves as having caught the feelings of suffering of others (including those who fall along the vectors of race, class, gender, age, and ability or dis-ability). Empathy that prides itself on its own authenticity and good will may invoke, as the law often does, what Lauren Berlant calls a "cruel optimism," "a relation of attachment to compromised conditions of possibility whose realization is discovered either to be impossible, sheer fantasy, or too possible, and toxic" (p. 94). Among the many positions that these critiques take, one includes the notion that "the directional quality of empathy offends because an empathizer feels with a subject who may or may not be empowered to speak for herself, to correct misconceptions about her feelings, and to refuse the pitying gaze. Finally, the threat that empathy justifies and precedes the imposition of 'improving' programs that may or may not benefit the recipient or respond to a real need also makes it suspect" (Keen, location 2733, Kindle Edition). These, of course, are the perennial problems of reformation in criminal justice.

Furthermore, add to this your claim that it is the very act of criminality that stands in, as totalizing signifier, for all that is in any way less than human. Here, criminology gains

a mandate that is virtually infinite in its calling. In late modernity, we have a proliferation of identities that are constructed as "less than human" or, relying upon political philosopher Giorgio Agamben, "bare life." If we follow Agamben's lead and imagine this as a figure outside the law (the actor stripped of fundamental rights to shelter, food, financial, and social support) and yet situated through ethical dependency upon the state, cast into a desperate struggle for survival with no responsibility upon the sovereign state to aid in that survival, then we run up against what an alternative mandate in criminology might mean: to address the question that haunts us all anyways: As Agamben puts it, "Are there human lives that have so lost the quality of legal good that their very existence no longer has any value, either for the person leading such a life or for society?" (Kindle Locations 1539-1542).

Interestingly and importantly, Agamben posits the boundaries of bare life as a moving threshold, one where we each risk the possibility of finding ourselves. In this widely cited passage, he makes dramatic connections between the life lived beyond the law and the manner in which every society marks this limit.

The new juridical category of "life devoid of value" (or "life unworthy of being lived") corresponds exactly-even if in an apparently different direction-to the bare life of homo sacer and can easily be extended beyond the limits imagined by Binding. It is as if every valorization and every "politicization" of life (which, after all, is implicit in the sovereignty of the individual over his own existence) necessarily implies a new decision concerning the threshold beyond which life ceases to be politically relevant, becomes only "sacred life," and can as such be eliminated without punishment. Every society sets this limit; every society-even the most modern-decides who its "sacred men" will be. It is even possible that this limit, on which the politicization and the exceptio of natural life in the juridical order of the state depends, has done nothing but extend itself in the history of the West and has now-in the new biopolitical

horizon of states with national sovereignty-moved inside every human life and every citizen. Bare life is no longer confined to a particular place or a definite category. It now dwells in the biological body of every living being. (Kindle Locations 1559-1566).

This threshold is a critical boundary I would argue for criminology. It is a line that predicated upon the boundaries of citizenship/state identity associations and those who have lost those markers: the stranger, the foreigner, the immigrant, the refugee, the undocumented, the asylum seeker, and the disappeared. It also marks the boundaries of the most basic materials of social support against those caught in zones of chronic crisis amid the cracks of social structure (the poor, the orphan, the mentally ill, the widowed, the homeless, the dislocated, the list goes on and on – all categories of social vulnerability). And then, finally, we have those posited beyond the pale (the criminal, the prisoner, the condemned) those posited beyond life, those where the biological and social converge along the line of life and death (the chronically or terminally ill, mentally ill, the disabled). Part of the story of criminology has to be how these categories have proliferated across modernity with greater visibility as we create more complex processes for defining and extending what and whom is inside and outside of the configuration of life. These are of course, to return to the idea of a moving threshold, categories into which, amid neoliberal trajectories, strategies of austerity, and the emptying of social infrastructure, individual actors may find themselves at various points in the life course – thus a potentiality we all carry within (amid social risk positions) ... to be dislocated, dispossessed, dis-eased, condemned, disappeared.

In the end, what is NOT the realm of the criminologist? And what does it mean to do criminology? We study vulnerability and what it is to be human and what it is to miss that humanity...as you put it, “the truly all too human face of the individual that emerges in the space of our shared human failure” that is too often the very moment of our turning away –

“our inability to call ourselves into question, to endure the ethical call that the other evokes.”

For these reasons, I also believe that at the heart of criminology is another kind of mandate: one that must guard against the reification of death through apocalyptic discourses of abandonment, one that gives attention to those complex local histories and sociologies that crisis and exclusion seek to obscure. In bare life conditions, humans consistently find ways to pick up the pieces, the fragments, and live at the site of devastation. And they do this through a complex maneuver that leaves them in interstitial zones to which we rarely give attention or agency (the kind of complex agency that is extremely constrained and yet palpable – so different from the individualism of dominant discourse). Bare life lays bare its perpetual dependency upon the generosity and support of others: charity, humanitarian groups, volunteer organizations, friends and acquaintances. It betrays the fact that ex-humans are generated through the social institutions – economy, education, families, religion - that ex-citizens were all once members of these formations until they were expelled or severed from them. It is, consequently, as any prisoner will tell you, the life of radical dependence AND the will to a life that is otherwise. Resistance comes, in these instances, most powerfully through the taking on of the very form of life that sovereign power seeks to impose, acts of lip sewing and hunger strikes, fecal bombardment and self-mutilation, where the stateless through their very acts assume the position of bare life and do so as a means of making an ethical demand upon the citizen. Here, in a zone of indeterminacy, a politics of contestation and challenge which works within, across, above, and beneath the power of the state serves as constant critical pressure upon the state, a pressure of emancipatory intent aiming at its infinite recognition, amelioration, democratizing failure. Perhaps, here, in the counter discourses and hidden transcripts, criminology can launch an alternative social justice that seeks neither state or

stateless societies, but the narration of the present as a struggle that is always immediate, urgent, now.

DP: Your reflection offers a number of very powerful observations to which I would like to respond. I like very much the way in which you explore the problem of "benevolence" and its relationship to the construction of "prosocial values." The scenes of vulnerability, to which you allude, often nullify the very possibility of empathy, which in turn, reconstructs and reifies these vectors of pain. It is impossible to transcend these conditions without the explicit recognition of their existence. The notion of benevolence is particularly implicated in this process and calls into question the very legitimacy of this stance. Berlant's (2010) notion of "cruel optimism" seems analogous to what I would call an arrogant benevolence which seeks to impose a certain "moral vision" upon the other that is incongruent to the lived reality of that experience. Empathy that refuses to acknowledge the other person in her own right and from the legitimacy of her perspective is not an example of empathy at all. An empathy that "...prides itself on its own authenticity and good will..." articulates an inflated attachment to self that must reduce the presence of the other to that of an epiphenomenal artifact solely in the service of self-aggrandizement. During such events, the legitimate voice of the other is never heard, for the simple reason that this process is not constructed to listen to the other; rather, its intent is more specifically focused upon validation of my good will.

Any legitimate possibility for empathy must require that I join this other from the perspective of their suffering and attempt to understand the depth of that experience from that perspective. Within this process, the very foundation of my own authenticity is called into question insofar as I am willing to endure the implications of this encounter. The stance of cruel optimism or arrogant benevolence rejects this possibility out of hand by its blind fidelity to this example of bad faith. I would agree that the "improvement of programming" which is centrally implicated in this process of arrogant benevolence has no

real interest in the “reformation” of the individual undergoing rehabilitative interventions, and is much more concerned with the validation of its clinical project. Ward & Maruna (2007) make an important observation on this point.

The rehabilitation client, after all, is not the real focus of the intervention, only his or her outward behavior. In fact, offender rehabilitation may be one of the only forms of treatment in existence that is explicitly intended for the benefit of others (the community) rather than for the person undergoing the counseling itself. (Ward & Maruna, 2007, p. 17)

If this statement is an accurate one, we must then be willing to re-examine the ethical foundations of this type of quasi-clinical practice, at least as it is most widely constructed by the discipline of forensic psychotherapy. Within this context, the process of rehabilitation evokes Foucault’s descriptions of governmentality and apparatus. Agamben (2009) describes Foucault’s concept of apparatus as “...a set of practices, bodies of knowledge, measures, and instructions that aim to manage, govern, control, and orient—in a way that purports to be useful—the behaviors, gestures, and thoughts of human beings” (p. 12). Traditional forensic psychotherapeutic practice, which intends to be useful, does so from a technical point of view that seeks to manage concern and control that which it purports to assist. Such a practice does not seek to rehabilitate but to re-fabricate those “broken” individuals under its control for the good of society. It must be remembered that the introduction of methadone as a type of “replacement therapy” for opiate addicted individuals, was also a practice that sought to control and manage the criminal behaviors related to heroin use without actually ceasing the addictive process. These individuals were not given methadone to cease their addiction—methadone is arguably more addictive than the heroin it was intended to replace—rather, its purpose was to prevent the possibility of

further street crime related to substance use: the streets of our community remain safer because the user's drug is now supplied by the government.

It is certainly understandable for someone reading this reflection to state with some frustration, "Well what is so wrong with having a safer community? After all, don't both parties in this interaction ultimately get what they want? The user gets his fix at a cheaper price and street crime goes down." Though on the surface this is certainly true, much like it is for certain rehabilitative practices, which appear to reduce recidivism to some degree, even while the very conditions from which this criminal behavior is forged, remain unchanged and seem to garner little concern from the larger society who simply want to go about their business without any further reminder of these forgotten others.

I believe the above observation reflects your discussion of Agamben's conceptualization of the bare life." The "proliferation of identities that are less than human..." becomes the result of a type of social production that re-fabricates these formerly discarded individuals into something more easily managed or controlled. If some manner of social breakdown occurs, these "defective social objects" are returned to an institution of total confinement for their re-fabrication or indefinite storage. As such, these lives become that which have "lost the quality of legal good that their very existence no longer has any value..." (Agamben, Kindle edition, pp. 1539-1542). They become the artifact of what Primo Levy (1989), Hannah Arendt (1992) and Martin Heidegger (2012) separately defined as the fabrication of corpses.

The concept "the fabrication of corpses" was initially used to describe the process of death which took place in the concentration camps during the Holocaust. Agamben (1999) observes that

In Auschwitz, people did not die; rather, corpses were produced. Corpses without death, non-humans whose decease is debased into a matter of serial production. And, according to a possible and widespread interpretation, precisely this degradation of death constitutes the specific offense of Auschwitz, the proper name of its horror. (p.72)

Heidegger in his Bremen lectures on technology given in the late 1940's makes a similar observation some forty years earlier: "Do they die? They debase. They are eliminated. They become pieces of the warehouse of the fabrication of corpses. They are imperceptibly liquidated in the extermination camps... (Agamben, 1999, p. 74). The concept of the fabrication of corpses is a powerful one that also may be applied to a variety of conceptual localities other than the horror of the camps.

In a much more banal sense, this fabrication of corpses may also be applied to the notion of warehousing that is quite familiar to the readers of criminology and in fact, represents a type of logical conclusion reflected in the rationale of the penitentiary system. Sykes (1958/2007), in his seminal text, *The Society of Captives*, describes the process each individual undergoes upon entering the world of the prison. "His age, name, crime and sentence, and other information are duly recorded; his civilian possessions are taken away and he puts on the prison uniform" (p. 4). He continues by observing. "In a very fundamental sense, a man perpetually locked by himself in a cage is no longer a man at all; rather, he is a semi-human object, an organism with a number" (Sykes, 2007, p. 6).

The semi-human object, this object with a number to which Sykes eludes, is similar to the pieces of the warehouse identified by Heidegger. The warehousing of human beings, these lives that "no longer have any value," become re-fabricated pieces of the assembly line of the penitentiary. Once deemed appropriate for release, they are returned to the community to be managed and shaped by rehabilitative practices. As such, they are no

longer empowered to speak in their own voice, transformed into a type of "rehabilitative corpses" that can only respond with "treatment speak," never allowed "to correct misconceptions about her feelings,..."

I would agree that the project of criminology is implicated in almost every aspect of life either indirect or direct. The assumed separation of these localities be they academic, professional or existential, become the process by which we help to reify these "discourses of abandonment," which allow us to turn away and return to our seemingly unaffected lives. In describing Heidegger's conceptualization of nihilism, Dodd (2009) states that the world remains ordered by the very same high values as before except that "It is just that the highest values are values that now "devalue themselves" (p. 92).

MB: There has always been a missing chapter in the story of punishment, one that would link the first wave of prison sociologies and ethnographies (Sykes, Clemmer, Goffman), as you do, to the fabrication of corpses at the fraught birth of human rights post-Nuremberg, a moment that many social-legal scholars now posit as one of the law's most complex forms of failure. The question: Can mass death and mass incarceration be so far removed? is unsettling enough to rightfully push many scholars away. I have had to remind myself across my own field work that the story of the prison, even as it remains among the most static and deadliest of human spaces, because it holds life must also carry the promise of a continuation of life, a passing of violence and unbearability as well as a sometimes space of growth, solidarity, even sociality. Even so, the tropes and logics of mortification, immobilization, paralysis, disintegration, and death extend forward from the birth of the penitentiary (Smith, 2009; Rodriguez, 2006) and, furthermore, the mass anonymity of mass killing and mass incarceration point to the claims at the heart of Hannah Arendt's work as well, I would argue, as Agamben's. (Heidegger is a bit trickier – his "fabrication," as critics have argued, sidesteps accountability, although here is not the place for a complex discussion of Nazi 'sympathy'".) These kinds of processes and experiences, totalitarian at

their core, change concepts of life and death and what it means to be human. What it means to exist in late modernity is to carry the possibility of being subject to mass death and mass confinement – and the conditions that drive such forces. The fabrication of corpses – the production of apparatus – depends upon the production of non-stories.

Counter-narratives in such a space are simply narratives – testimonies, witnesses to the life that exists in the space of unbearableness. But as you have consistently argued, there is such an utter resistance to the very kind of complex individuality and agency that would defy the anonymity of mass incarceration. I am reminded of Lorna Rhodes work in maximum security settings: Here, Rhodes theorizes individual choice and responsabilization strategies among inmates and staff in a manner which not only privileges the “full possession of free will,” an essential and necessary maneuver in the rise of the control prison, but one which offsets and distracts from fundamental questions about the manner in which selves are positioned in relation to one another – in relation to the social. Prisoners are responsible for their crimes, their infractions, their resistance – all of which is carefully, complexly constructed as “choice” while the role of prisons, institutions, and the social go unmarked. Rhodes asks: “What are the contexts in which certain ideas about self and self-responsibility become useful? What *work* is done, in the kind of practice that engages this man, by regarding himself in such full – not to say murderous – possession of individuality and autonomy?” (68).

DP: Doesn't mass incarceration become a type of death? Johnson and Tabriz (2011) in their article, *Sentencing Children to Death by Incarceration: A Deadly Denial of Social Responsibility* addresses this distinction in the following observation:

We cannot execute juveniles, thanks to the Supreme Court, but we we can lock them up and throw away the key, holding them captive until they die in prison after decades of empty and often debilitating

confinement. They are dead kids walking, until they grow up and die as old convicts. (p. 199).

Criminologists, legal scholars, politicians and political activists are often virulent in their opposition to the death penalty, but generally are much less so when confronting the rapidly increasing use of extremely harsh sentencing practices, which effectively remove the individual from the community for decades, if not for the rest of their life. We seem to be pleased with ourselves over such results without realizing that our compromise has actually achieved very little. Though it is true enough that we will have achieved the desired incapacitation of the offending individual, we have also clearly demonstrated that we have no legitimate belief in the process of rehabilitation. The rendering of such harsh sentences can completely invalidate any legitimate possibility for a successful return to society, if indeed potential re-entry to society is actually the honest goal of this process. Johnson and Tabriz (2011) add that:

Essentially, life without parole is like the death penalty in that it 'alters the offender's life by a forfeiture that is irrevocable' (*Graham v. Florida*, 2010, p. 18), and furthermore 'gives [the juvenile] no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope' (*Graham v. Florida*, 2010, p.28). The Court in *Graham v. Florida* (2010) appears to concede that life without parole amounts to a civil death penalty, the death of the offender's freedom, an assertion very close to the notion that this is in fact our other death penalty. (p.p. 199-200)

The above observation by Johnson and Tabriz seems to reflect the distinction you also offer between the death penalty and mass incarceration. These similar reflections concerning the degree of ethical separation between mass death and mass incarceration also seems to evoke certain aspects of Agamben's (1998, 1999; de la Durantaye, 2009, Norris, 2000, 2005) philosophical argument concerning his conceptualization of the camps as a type of current political paradigm. He describes the concept of paradigms as a

possibility that is neither a particular nor a universal, but both. In describing what he calls the historical object, Agamben states that:

I believe that history—or better, what Foucault called the archaeology of one's own culture—is the only way to reach the present. The historical object is never only in the past and never only in the present. It lies in a constellation formed by both. (de la Durantaye, 2009, 243)

Taken from this point of reference, the camps become the paradigm for mass incarceration and those who are forced to endure this type of existence.

It is important to clarify that such a comparison is not historically literal, nor is it intended to be. The historical and irrefutable horror and tragedy of the German extermination camps is not lessened or devalued when used as an example for the current practice of mass incarceration. Some have taken great exception with Agamben's conceptualization of the camps, which for them seems to detract from the unique reality of this unparalleled historic event, arguing that it does indeed lessen the unique historical significance of the camps and cheapen the catastrophic loss of life. (Fackenheim, 1982; Marion, 2006; However, even the most cursory reflection on the history of the last fifty years would seem to challenge the uniqueness of this type of human behavior. It seems ethically problematic and perhaps even shortsighted to enclose the meaning of the camps within a specific historical moment that becomes forever separated from those events that came before and those events that tragically followed.

The hardest aspect of this lesson lies in the idea that the same freedom—the same potentiality that is man's essence—that made such horrors possible is also the only one that can help us understand and combat those horrors. For this reason, in the catastrophe to which Agamben is directing his reader's

attention there is contained a fragile truth about the nature of being human that, in his view, could all too easily slip through history's hands.

(de la Durantaye, 2009, p. 285)

The observation provided by de la Durantaye allows us to return to your initial observation concerning the ethical significance of mass incarceration.

Though it is certainly true that one could immediately raise a variety of objections to the comparison being proposed here, such as: extermination camps are not the same as the incarceration of law breakers or that life imprisonment is not the same as a death sentence, for the simple reason that no life is specifically taken in this type of incarceration, no one is actually executed by the state. It could also be argued with perhaps more difficulty that unlike the extermination camps, no one is being incarcerated based on the fact of their ethnicity or religious orientation. It is also equally possible that we allow ourselves to be manipulated by the lack of literal continuity between these examples, thereby allowing history to once slip through our hands, and another type of social catastrophe to occur.

If as the Majority of the Supreme Court has opined in *Graham v. Florida* (2010) that life without parole becomes a type of civil death penalty than it does seem appropriate to explore the use of this type of sentencing with the experience of the camps, even if these two points of comparison are not literal representations. The sentence of life in prison without the possibility of parole becomes a type of death given that the inmate's life "...is no longer his own, and in that sense he is a living dead man" (Norris, 2000, p. 50). Though this individual will not have to undergo the actual ritual of state execution, the sentence of life without parole becomes a type of legal practice that provides for a bloodless killing that is much neater and much less prone to ethical objection. Justice Thomas (2010) argues as much in his strongly worded minority opinion offered in *Graham v. Florida* by stating:

The Court does not conclude that life without parole itself is cruel and unusual punishment. It instead rejects the judgment of those legislatures, judges and juries regarding what the Court describes as the "moral question of whether

this sentence [life without parole] can ever be “proportionate” when applied to the category of offenders at issue here [juvenile offenders].

(Graham v. Florida, Dissenting opinion, p. 1)

Thomas (2010) continues to argue that the national consensus concerning these types of sentences rejects the assumption that incarcerating a juvenile for life without possibility of parole is cruel and unusual punishment and is therefore both ethical and just; this shameful reality leads me to reflect on your observation concerning the penitentiary.

As you clearly state, the penitentiary also holds life and “...must also carry the promise of a continuation of life, a passing of violence and unbearability as well as a sometimes (potential) space of growth, solidarity, even sociality”. Your observation, which juxtaposes the experience of violence with the experience of growth and solidarity, exemplifies for me Agamben’s reformulation of Foucault’s notion of apparatus.

Agamben makes the following distinction concern his re-formulation of Foucault’s concept of apparatus.

I wish to propose to you nothing less than a general and massive portioning of beings into two large groups or classes: on the one, living beings (or substances), and on the other, apparatuses in which living beings are incessantly captured. (Agamben, 2009, p. 13)

However, Agamben continues with a third category which he identifies as subjects. “I call a subject that which results from the relation and, so to speak, from the relentless fight between living beings and apparatuses” (Agamben, 2009, p. 14).

From this context, the incarcerated individual attempts to find ways by which to overcome the violent environment of the penitentiary. The apparatus of the penitentiary literally captures living beings who are incessantly caught by this process. The semi-human object discussed by Sykes (1958/2007) in *The Society of Captives* or the dead men walking described by Johnson and Tabriz become examples or potentialities from which this subject may emerge. The incessant struggle between living being and apparatuses to which

Agamben elides becomes the ground from which escape becomes possible (Leder, 2004, Leigey, 2010).

Leder (2004) in his article, *Imprisoned Bodies: The Life-World of the Incarcerated* describes the ways in which this struggle is actually experienced. Leder, who worked for a few years as a volunteer teaching philosophy in a Maryland Maximum security penitentiary explored this incessant struggle with the individuals in his class. Though the specifics varied from person to person, all were clearly situated within this struggle of the subject that Agamben describes. Whether it was returning to the past or imagining a future or confronting head on the de-humanizing experience of incarcerated life, each individual was able to find a space where this subject is possible.

The descriptions that these individuals offered to Leder are similar to those that were told to me by those serving time in the Pennsylvania system. For these individuals, the constant struggle seemed to focus on the various ways one could be this subject, one could escape the incessant capture of the apparatuses of penitentiary life. Whether it was in the privacy of one's cell or in small groups or within the shared space of a classroom setting, escape became possible. Perhaps this incessant struggle is best captured in the following observation by Agamben where he discusses the subject and the remnant. '...the subject is a sort of remnant... It is something that is left over—it represents a difference. It is the impossibility for a subject to completely coincide with itself; there always remains a remnant' (de la Durantaye, 2009, p. 300).

MB: David, you write "Our inability to call ourselves into question, to endure the ethical call that the other evokes is the very process that allows the asymmetry that you identify to exist." I would argue this claim is the key to death discourse in relationship to criminology, a cultural blind spot that is carefully sustained by conditions of avoidance, aversion, and punitiveness that sustain structures of lethal violence. Agamben's inevitably problematic and yet, I agree, perhaps indispensable invocation of the camps emphatically brings home

the starkness of this relationship. In response to his critics, he has been careful to point less to the camps themselves in their unquestionable sociohistorical uniqueness and more to the political technologies at the heart of the enterprise of "concentration" and "death." When he writes, "The camp is a hybrid of law and fact in which the two terms have become indistinguishable" (p. 170), he points to what allows for a state of exception at the foundations of governance – and, with the camps, "the most absolute biopolitical space every to be realized" (p. 171). As he puts it, then there must be a turn away from the more superficial questions about the possibility of the holocaust toward the daily configuration of lethal and "legal" violence:

The correct question to pose concerning the horrors committed in the camps is, therefore, not the hypocritical one of how crimes of such atrocity could be committed against human beings. It would be more honest and, above all, more useful to investigate carefully the juridical procedures and deployments of power by which human beings could be so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime (p. 171).

What such a paradigm allows for is a manner in which to link the practices of mass incarceration, indefinite detention, forced migration, and refugee confinement as "the hidden matrix of the politics in which we are still living" (p. 175). In these spaces and, as you write, in the "relentless fight between living beings and apparatuses," we have built harsh maps of sociality – unnecessary and pain-filled. Remnants. The question from here I would argue becomes how to make remnants – and imprisonment - the opening to discourse, and not overlooked and naturalized sites of foreclosure.

As a means of address and in closing, I wanted to point briefly to the role of mourning as an alternative discourse. Contemporary feminists have made consistent claims for recognition of life through a politics of mourning. Judith Butler's most recent work, post-

9/11, has been dedicated to an elaboration by way of Arendt, Foucault, Levinas and Agamben as to what constitutes "grievable" life. In earlier work, she points to the unique place of Antigone in such debates – the liminal figure caught between family and state, between life and death – where to mourn is a crime. To grieve publicly and openly for the banished, for the criminal, is the most subversive and disruptive of individual acts in this mythology because it is a grief for all – for the banished, dead brother, for the arrogant father, for the brother left alive, for the unspeakable grief of women in her position. Butler, like Agamben, argues that we live increasingly in spaces and times where "populations without full citizenship exist within states; their ontological status as legal subjects . . . suspended. These are not lives that are being genocidally destroyed but neither are they being entered into the life of the legitimate community in which standards of recognition permit for an attainment of humanness" (p. 81). These categories proliferate – and they potentially include any one of us, should our material needs and legal identities suddenly shift from the realm of the living to social death, from citizen to non-citizen. She writes of this predicament through the figure of Antigone by asking how one can grieve from within the subject position of criminality – from within "the presumption that one's acts (*or one's existence*) are invariably and fatally criminal?" (p. 79 – italics mine), the realm of bare life where one may be killed without the commission of a crime. Butler's answer only leads us part-way toward any kind of response but her answer depends upon action. What does Antigone do: "She acts, she speaks, she becomes one for whom the speech act is a fatal crime, but this fatality exceeds her life and enters the discourse of intelligibility as its own promising fatality, the social form of its aberrant, unprecedented future" (p. 82). Fatalism aside for the moment, this figure of "the unspeakable" nevertheless makes itself heard through "borrowing and exploiting the very terms that are meant to enforce its silence" (78).

The figure of Antigone as witness provides a kind of foundational myth that explores the conditions under which conscience may find a voice. What is the nature of the zone that Antigone occupies? A limit – the point at which death is engaged with life – a vacillating zone from which the unspeakable truth about the criminal nature of the law might be spoken. In the realm of eternal forgetfulness and of unbearable truths too terrible to behold (the criminality of the social order itself?), this is the site where we must perennially find our voice and struggle to inhabit the world again and again. In this way, mourning is profound political work. To mourn, Derrida argues, is dangerous, inescapable, and impossible (2001) because, against futility, mourning highlights what is absent, silent, no longer seen. As Toni Morrison writes in "Unspeakable Things Unspoken," "We can agree, I think, that invisible things are not necessarily 'not-there'; that a void may be empty, but is not a vacuum. In additions, certain absences are so stressed, so ornate, so planned, they call attention to themselves; arrest us with intentionality and purpose, like neighborhoods that are defined by the population held away from them" (p. 11). Anthropologist Michael Taussig similarly argues that "the space of death is important in the creation of meaning and consciousness, nowhere more so than in societies where torture is endemic and where the culture of terror flourishes. We may think of the space of death as a threshold that allows for illumination as well as extinction" (1987: p. 4). The tiers of the US prison system and its death rows are sites with similar kinds of stakes in life and death.

I feel as if the way forward is tenuous. Criminology and criminologists – and especially those of us who center our work not simply in the study of prisons, control, and theory but in the interrogation and intervention of these spaces and frames – must continue to reach with depth and breadth into any way of thinking that pushes, challenges, and enlarges that pursuit, that illuminates the "incessant struggle" and inevitable remnants of "imprisoned life-worlds" – including considerations of bare life, concentration camps, the fabrication of corpses, and all other discourses of social suffering and social death.

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