

## Forum

### Beyond Blame

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#### Opening the Debate

*Barbara H. Fried:* The philosophy of personal responsibility has ruined criminal justice and economic policy. It's time to move past blame.

#### Responding

<i>Christine M. Korsgaard</i>	<i>Paul Bloom</i>
<i>Erin Kelly</i>	<i>Gideon Rosen</i>
<i>Adriaan Lanni</i>	<i>Brian Leiter</i>
<i>Mike Konczal</i>	<i>George Sher</i>
	<i>T. M. Scanlon</i>

***Reply: Barbara H. Fried***

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Wednesday, July 10, 2013

I want to focus on the practical implications of Barbara Fried's challenge to the culture of blame. Can critiques of individual responsibility support efforts to scale back mass incarceration? In my view the most promising approach is not to concentrate, as Fried does, on the morals of our criminals but on the morality of our punishments.

For the first time in decades, there is a realistic chance of reversing the trend toward harsh criminal penalties. The fiscal crisis has tightened state and local government budgets; there is widespread distrust of large, expensive government programs; crime and fear of crime are down in many



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urban centers; and appearing tough on crime seems to be less central to political campaigns than it once was.

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But whether purely economic and utilitarian arguments against mass incarceration, strong as they are, will bring about reform remains unclear. History suggests that we need a moral argument against mass incarceration: every major penological shift, from the rise of the penitentiary, to the Progressive-era focus on rehabilitation, to the late 20th century surge in determinate sentencing, has been accompanied by strong moral claims.

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## **We don't need to change attitudes about blame in order to scale back mass incarceration.**

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California's recent ballot measures seeking to curtail the severity of criminal penalties are instructive here. Last fall California voters reformed the state's three strikes law but voted to uphold the death penalty. In both cases, voters considered moral and economic issues. The three strikes law was criticized for wasting public funds and for meting out disproportionate life sentences for petty crimes such as shoplifting and drug possession. Voters also learned that the death penalty cost the state \$184 million a year, and opponents made moral arguments against the legitimacy of state execution. A *Los Angeles Times* poll found that support for reforming the three strikes law and for maintaining the death penalty changed only slightly or not at all when the prompt included information about the measures' potential cost savings. This suggests that voters made their decisions primarily on the basis of moral concerns.

Fried is right that the case against mass incarceration will rise or fall on moral grounds. But while I am sympathetic to many of her arguments questioning the idea of individual responsibility, I am not optimistic that they will gain widespread appeal anytime soon. Fortunately, we don't need to convince the public that individual criminals are not to blame for the harm they cause in order to make a persuasive moral case for scaling back our system of mass incarceration.

A different moral argument may be more likely to succeed. As Fried briefly notes, our current sentencing regime regularly metes out penalties that are much harsher than the public believes is deserved. Social science research suggests that the trend toward harsher sentencing policies stemmed from an oversimplified understanding of public attitudes toward punishment. In opinion polls carried out in the 1980s and '90s, majorities regularly stated that penalties were too lenient, leading politicians to enact harsher sentencing laws. Prosecutors responded by bringing more charges and seeking more severe sentences, all in an attempt to appear tough on crime. But studies from the same era show that, when given detailed descriptions of specific cases, respondents favored sentences more lenient than the mandatory minimums in their jurisdictions.

These trends hold up among real jurors. In 2010 three federal district judges published a small

study that revealed a marked disparity between Federal Sentencing Guidelines and jurors' recommended sentences. Following convictions in twenty jury trials, the judges gave each juror a sheet listing the defendants' past criminal convictions and asked the jurors to recommend a sentence. The low-end punishment proposed in the Guidelines was in each case almost five times higher than the median jurors' recommendation. Ninety-two percent of jurors recommended a sentence below the Guidelines' minimum.

This discrepancy between a general preference for harsher sentences and more lenient reactions to specific cases appears to result from the tendency to assume that the typical offense is more serious than it actually is. This may be due to the greater media attention that naturally follows grisly crimes or crimes that involve sympathetic victims. Reporting on sensational crimes leads the average citizen to believe that crimes are, broadly, sensational.

As the reform of California's three strikes law suggests, educating citizens about the severity and arbitrariness of real punishments can inspire political action. This approach may be more likely to bring about change than could fiscal and pragmatic arguments alone, or indeed attempts to take the blame out of criminal punishment.