

Review Symposium: Rethinking the Pendulum Model of Criminal Justice History

Contention and the Pendulum Pivot: Weighting Equal Justice

Geoff K. Ward

GOODMAN, PHILIP, JOSHUA PAGE, and MICHELLE PHELPS. *Breaking the Pendulum: The Long Struggle Over Criminal Justice*. New York: Oxford University Press, 2017.

In *Breaking the Pendulum: The Long Struggle Over Criminal Justice* (2017), Philip Goodman, Joshua Page, and Michelle Phelps advocate replacing the pendular notion of penal change with an agonistic approach, where contention is central. This Essay reflects on a pendulum component that has escaped theoretical or empirical scrutiny in pendular accounts of penal change: the pivot determining how freely a pendulum weight swings, and its resting equilibrium. In this parting glance at the pendulum heuristic, I relate this pivot to the agonistic perspective on punishment and—focusing on racial politics of juvenile justice—imagine an antiracist calibration of struggle over penal change.

INTRODUCTION

Breaking the Pendulum (2017) takes aim at the notion that penal change swings like clockwork between extremes of retribution and rehabilitation. That old tale has paid little attention to actual struggles central to penal change, including how different status groups remain subject to disfavored penal regimes, and the array of agonists weighing in on ideas and practices of justice. *Breaking the Pendulum* builds a more accurate and constructive understanding of penal change, emphasizing the contestation basic to punishment and society. The authors urge researchers to center the agonists and movement agendas shaping penal fields, and challenge civic actors to engage in political struggles, policy debates, and programmatic efforts to advance legitimate systems of social control and equal justice. In this parting take on the heuristic, I consider a neglected but relevant part of the pendulum device—its pivot—in relation to racial politics of punishment, questions of equal justice, and the agonism of penal change.

THE FREEDOM OF PENDULUM WEIGHT

In standard penal applications, the pendulum metaphor describes a series of over-corrections to preceding reform efforts, typically characterized as polar swings between

Geoff K. Ward is Associate Professor of African and African American Studies at Washington University in St. Louis, One Brookings Drive, Box 1109, St. Louis, MO 63130, +1-314-935-9884, gward@wustl.edu.

rehabilitation and retribution. Each inevitably fails to deliver on its promise and the cycle is repeated. Reflections on background catalysts and foreground realities of these swings are rarely complicated by the study of race and ethnicity, including variable and dynamic power relations, and their imprints on penal strategies and impacts.

My first encounter with pendulum logic came while studying two centuries of racialized juvenile social control and the contested racial politics of American juvenile justice (Ward 2012). The pendulum narrative was of little use to this historiography, except as a foil. What Thomas Bernard (1992) described as homogenous, mechanical ruptures between rehabilitative and retributive ideals in *The Cycle of Juvenile Justice* bore little resemblance to the rise, fall, and lasting remnants of Jim Crow juvenile justice.

I am particularly interested in taking seriously the physics of a pendulum, and particularly the role of the pivot, which is key to the energy of the pendulum weight and the resting equilibrium position. In an actual pendulum, kinetic energy diminishes around its ideally frictionless pivot, until it eventually ceases to swing at the resting equilibrium point. This absence of friction allows the pendulum weight to swing according to the energy it generates in interaction with gravity alone.

The mechanical notion of the penal pendulum imagines similar physics, with each policy swing generating energy that proves unsustainable, inevitably leading to a corresponding swing in an opposite policy direction, as if driven by the sheer weight of these ideals (i.e., their appeal to a general public) and their interaction with gravity. A frictionless pivot thus allows the weight of a pendulum to swing freely, under the influence of its own energy, reacting to gravitational pull.

Yet, in a sociological sense, there is no *frictionless* pivot regulating this imagined pendulum of penal change. Penal developments have never swung under the weight of their logic alone: they are pushed and pulled by varyingly motivated and empowered actors. The pivot and corresponding resting equilibrium are themselves measures of the contested political order, and these power relations overdetermine the criteria, nature, and extent of penal policy change. As Goodman, Page, and Phelps (2017) stress, and illustrate in relation to various policy issues, apparent swings in penal policy are always established through struggle amid conditions of inequality. They also stress that this struggle is constant, and “consensus over penal orientations ... mostly illusory” (ibid., 128), suggesting the absence of a resting equilibrium in the sense of settled penal policy, universally understood to be just.

Intriguing to me about the neglected pivot in penal pendulum thinking is its relevance to the agonistic perspective, and how its resulting equilibrium (a hypothetical) might be conceived of in a relational or processual sense, rather than an end state. It is clear from various contexts that freedom is a constant struggle, and my sense that non-dominance of deliberative milieus is fundamental—indeed, pivotal—to the realization and maintenance of equal justice, in punishment and beyond.

In the case of juvenile justice, the movement context with which I am most familiar, white dominance of relevant deliberative milieus (e.g., policing, legislatures, schools, criminology) have overdetermined the “motor force” of penal change, establishing and sustaining a profoundly unequal resting equilibrium. White civil society hoarded this child and social welfare institution and its associated opportunities and resources (e.g., juvenile justice policy development, system employment, diminished culpability, vocational training, etc.), limiting others’ access to and influence upon

penal change. American juvenile justice has accordingly been stratified and distorted across time and place, sustaining demand for transformative change, which might establish a legitimate equilibrium of influence upon its ideas and practices of justice.

COLORBLINDNESS AND RACIST CALIBRATION

Many social histories of American juvenile justice simply ignore politics of race, notwithstanding its pivotal importance. A racial logic of colorblindness is indispensable to the mechanical tale of the penal pendulum, which privileges historiographies of white America, calibrated by selective interests in these penal subjects and agonists, while withholding an analysis of race. Many scholars have removed complicated cases of nonwhite actors, reading histories of juvenile justice as if they did not exist.

In *The Cycle of Juvenile Justice*, Bernard (1992, 50) renders black youth invisible during the nineteenth century rise of American juvenile justice by asserting that, “the slaveholder had ‘no idea of childhood’ when it came to slaves.” In *Thorns and Thistles*, historian Robert Mennel (1983, 75) holds that “plantation discipline took care of the disobedient Negro child,” and “few if any southerners dreamed of considering him as a juvenile delinquent in need of special care,” similarly disregarding experiences of free blacks and ideas of black agonists themselves, who certainly recognized black childhood and organized to secure associated child and social welfare interests (Ward 2012).

Cyclical pendular logic cannot easily accommodate black and other nonwhite legal subjects, or agonists, and asymmetries they raise. Erasure of these interests and agonists normalizes white domination and “opportunity hoarding” (Tilly 1998) within penal fields. Erasure avoids difficulties of reconciling, for example, “Progressive Era” enlightenment of juvenile justice with contemporaneous black youth lynching and execution in what Logan (1954) calls the “Black Nadir.” Capital punishment of young white offenders declined as the juvenile court movement unfolded in the early twentieth century, consistent with the “pendulum” of (white) youth justice swinging away from punishment. Yet, the number and share of black youth executions *grew*. Before 1900, half of the one hundred and twenty documented juvenile executions involved black youth. After 1900, when the juvenile court movement began, that share surpassed three-quarters; of the 118 youth executed between 1931 and 1959 alone, over eighty percent were black (Ward 2012, 117).

Youth lynching and execution are extreme cases, but the colorblind pendulum is no more accurate at the other end of the sanction severity scale. Consider complexities of black “status offenders,” whose transgressions like “sexual deviance” or “incurability” were not only punishable by virtue of age status, but intersecting constructs of race and gender difference, yielding a broad and contradictory array of penal implications. As white juvenile justice officials and constituents obsessed over the sexuality of white girls, policing their bodies and minds under the guise of protecting and rehabilitating their desirability as mothers for white families, these agonists oscillated between indifference and homicidal rage toward the sexuality of black girls and boys. Their sexual deviance was constructed as inevitable (an immutable “race trait”), and even useful as a foil, shielding white girls from sexual advances from white boys busy preying on black girls, hardly warranting the attention of courts (Ward 2012, 97). That is, except when black status

transgressions became horrific to them, and even punishable by death, such as 14-year-old Emmitt Till's flirtation with a white woman in Money, Mississippi.

When did retribution begin or end as a modal orientation toward black Americans labeled criminal or delinquent? If the pendulum metaphor describes formal policy extremes, it hardly accounts for practices that remain highly variable *within* policy contexts. The binary pendulum metaphor, oscillating between treatment or punishment, and its notion of homogeneous rupture (Goodman, Page, and Phelps 2017, 7–8), misrepresents this array of punishment agendas, policies, and practices, and the forces shaping them.

PIVOTAL FRICTION

While pendulum studies have been colorblind, the “motor force” (Goodman, Page, and Phelps 2017, xi) of juvenile justice policy change is often fueled by more or less explicit racial politics. In 1911, the Mississippi Juvenile Reformatory Association was candid about its selective investment in the rehabilitative ideal, in the service of white supremacy, and intention to deny related benefits to black constituents. “We have [an] Agricultural High School without Negroes; we have a State Normal School without Negroes; we have elections without them,” they proclaimed, “surely we can have a Juvenile Reformatory without them if it is deemed necessary” (Oshinsky 1997, 266). As the pendulum supposedly moved toward enlightened social control, white-dominated state authorities determined that nothing should change for black youth and communities.

Generally unchecked in their power imbalance, White Mississippi agonists maintained that policy of racialized exclusion for decades, leaving generations of black youth exposed to severe punishment (e.g., convict leasing, adult prisons, execution, etc.), routine neglect, and their collective harms, however the pendulum was swinging. Not until the 1940s would the state symbolically accommodate the growing pressure of demands for inclusion, funding a still separate and unequal public reformatory for black youths. This was the equilibrium of American apartheid.

Late-twentieth century agonists driving punitive penal change in formally integrated juvenile justice systems would similarly construct nonwhite youth and communities as “undeserving” of child and social welfare resources. In *The Juvenile Justice Century* (1998), University of Alabama criminologist John C. Watkins lobbied for a punitive agenda to “deal with” what he paints as predatory youth of color, a favorite folk devil in the period. Seeking to frame the central question for the next century of juvenile justice, he doubts “society [can] adapt a court whose original mission was to deal with the marginal delinquent and un-socialized children and their parents to the likes of predatory urban inner-city gang delinquents.” Advocating criminalization, he asserts that, “The juvenile court envisaged by the Illinois founders to deal largely with Caucasian, immigrant-driven, culture-conflict criminality is not the court that can realistically deal with the often amoral delinquents of the contemporary teenage ‘hood’” (ibid., xvii).

Watkins's provocation blends ahistorical renderings of race and juvenile justice, where nonwhites again disappear from the past, and white privilege is normalized, with

racist dehumanization of contemporary nonwhite delinquents. His romanticized past, where white officials had only to deal with European immigrants struggling with acculturation, erases their choice to deny services and resources to nonwhite families and children also migrating to Chicago and elsewhere (Agyepong 2018), and the opposition they faced. His racist “socio-legal commentary” on the future clearly illustrates the role of framing in the agonistic perspective on punishment, whereby academics and others influence “discourses, collective representations, practices and institutions ... [helping] generate friction and heat that braids (or ‘assembles’) penal practices and ... transformations” (Goodman, Page, and Phelps 2017, 140).

WEIGHTING EQUAL JUSTICE

I have so far argued that pendular thinking about penal change has tended to ignore complications of race, attributing this in part to colorblind racial ideology, which normalizes bias. To center racial contention related to penal change in juvenile justice, I have called attention to the pendular pivot, where the presence (or absence) of friction is essential to the mechanics of a pendulum weight’s (free) swing. I have also suggested that the pendulum heuristic may have more utility to considerations of equal justice—an idealized resting equilibrium—than the false binary of rehabilitation and punishment.

In this penultimate section I consider how we might conceive of a resting equilibrium in criminal punishment, centered by norms of equal justice, while also embracing the Goodman, Page, and Phelps (2017) observation that just punishment is a constant struggle (see also Davis 2016; Polletta 2002). To be sure, this resting equilibrium is neither a fixed nor literally frictionless pivot of finally resolved consensus over the substantive meaning and requirements of equal justice. Rather, those ideas and related social and institutional processes will remain dynamic and contested, but ideally under conditions where all constituencies can influentially assert legitimate claims to equal recognition and protection, and other expressed interests. In theory, this absence of social dominance establishes and actively sustains a more just equilibrium in penal and other fields, limiting the need for more transformative change (e.g., abolition versus reform).

Prospects of equal justice rooted in nondominance are admittedly dim. Substantial numbers of white Americans (among other dominant status groups) continue to view their social, economic, and political dominance as legitimate, indeed, as natural, meritocratic, and benevolent, rather than arbitrary or repressive, or at least rationalize dominance in these ways. As always, this white supremacist threat to life and liberty is moderated and subdued by agonists holding the line against even greater human and civil rights abuses, organizing protection, forcing concession, and seeking transformative change. These struggles do not disprove the potential for democratic social control (Ward and Hanink 2016), or a broadly participatory model of norm definition and enforcement. As Goodman, Page, and Phelps (2017) stress, continuous fights for penal change belie a lively, consequential, and ever contested deliberative milieu.

Generations of black agonists have struggled to institutionalize antiracism through active recognition and protection within this milieu, hoping to replace white-dominated social control with systems culturally and politically centered on equal protection. Inclusion would effectively reposition the pivot and its resting equilibrium,

with broader participation in shaping ideas and practices of youth justice countering white racial animus and opportunity hoarding, yielding more normative equal justice. The strategy has yet to be realized, or to produce transformative change, given the persistent imbalances of cultural, economic, and political capital shaping penal fields (Goodman, Page, and Phelps 2017, 11–12; Miller 2008) in the post–Civil Rights Movement period.

Yet a more equitably balanced pivot—a legitimate calibration of equal justice created and maintained by active, competing, and cooperative agonist effort—remains worthy of scrutiny and struggle. The ideal aligns with conceptions of equal justice for many political theorists and behavioral researchers. Its reorganization of power (and thus norms, processes, and outcomes) in penal and other contexts idealizes parity in what Tittle (1995) called “control balance,” the ratio of the degree of control one exercises relative to the control experienced. As Braithwaite (1997) notes, control-balance is basic to a republican conception of freedom as nondomination, and “societies with greater equality of control will be better off because of reduced predatory deviance and reduced withdrawal from social and political life” (ibid., 94). The equilibrium recalls the “overlapping consensus” key to a politically viable theory of justice (Rawls 1971), and the challenge of finessing the “redistribution-recognition” dilemma, where racial justice requires both elimination and reordering of difference (Fraser 1995). This more equitable pivot also recalls the apex of the “power-threat curve” (Blalock 1967), where the growing power of a repressed population necessitates compromise and accommodation on the part of a once more dominant group. Whereas unchallenged dominant groups can easily mobilize law and other resources of repression, as in the noted Mississippi case, a greater balance of power necessitates consensus.

Power equality counters both conscious and subconscious bias *through* struggle. Work on implicit bias in courts advocates equal participation in these deliberative milieus, to equalize odds of implicit in-group favoritism countering out-group derogation, balancing these impacts on decision making (Kang et al., 2011). Substantively inclusive organizations are not absent contention, but rather, characterized by more inclusive and productive tensions. Conflicts arise with collisions of experience, insight, and objectives, yielding regularly contentious but also more innovative, effective, and collectively gratifying results (Ely and Thomas 2001). While a greater balance of power might reduce friction around the pivot, in terms of demand for transformative change, it is itself a struggle to establish, assert, and maintain.

CONCLUSION

For me, the pendulum heuristic has seemed less useful for thinking about cycles of punishment than for thinking about cycles of racial contention, around criminal justice and beyond. Historical struggles against white dominance have transformed the racial structure (how race is organized societally at any given time), countering white supremacist threats to group standing, security, and opportunity. Advances have always been contested, and often subverted, through various strategies of retrenchment.

Consequently, I welcome the break from the pendulum heuristic but I also wonder if some of its failings are diminished by greater attention to the fractious pivot of penal

change and the resting (dis)equilibrium it defines. I have shown how histories of white racial dominance and opportunity hoarding have shaped priorities and impacts of penal change in the context of juvenile justice, including their racial violence, and mobilization of opposition. These efforts to institutionalize inclusion envision social policy decisions resting on a less fractious pivot, with control balance actively articulating and sustaining equal justice. This conception of equal justice has many component parts, including equal representation and protection—none of which are absent friction or tension in practice or application, but free of relations of dominance. Deeply representative systems of norm definition and enforcement would allow penal changes to unfold under the weight of their substantive value and legitimacy, as most inclusively determined.

An enduring obstacle to that equilibrium is dominant group resistance to the reorganization of power. The prevalent notion that dominant groups lose *freedom* as others gain legitimate opportunity and influence (Norton and Sommers 2011), continues to deny the realization of a resting equilibrium centered on equal justice. This zero-sum proposition idealizes and seeks to maintain a control imbalance that intensifies violence and conflict, sustaining calls for transformative social change, historically and today.

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