Prisoners of Myth

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INTRODUCTION

One of the most forceful lines of reform analysis and criticism in contemporary criminal law and procedure begins with the rather striking gap between executive action in criminal law and in almost every other part of our sprawling modern administrative state and proceeds to imagine closing that gap. Normally when executive actors wish to enact new rules or apply them to people in new ways, they have to go through various procedures of rulemaking designed to allow public notice and comment and to give impacted citizens an opportunity to a hearing before being subjected to any deprivations based on those rules. With the police and prosecutors who pull many of the levers that engage people in the criminal process, things are very different to say the least. Police can stop, search, or arrest a person, even using deadly force to do so, without any prior hearing (not even the summary ex parte hearing involved in a judge issuing a warrant). The police's actions will be reviewed, if at all, only at an arraignment some days later. In the rare situation police actions are held to be violations of a person's constitutional rights, the judge-made doctrine of qualified immunity protects officers from personal liability unless the violated right had been clearly established (generally by a past similar judicial ruling). Moreover, police departments can establish enforcement strategies at will and change them generally without public notice or comment.[1]

Prosecutors, generally the most influential actors in punishing, can select which of a potentially wide variety of crimes to apply to a citizen's conduct, and under many sentencing systems they virtually select a sentence

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1 *See, e.g.*, Boston Police Department, *Rules and Procedures*, BPD NEWS, https://perma.cc/9PWL-2EME (last visited Mar. 9, 2022) (noting for example in Rule 100 that changes were made to the rule but not listing when the rule was updated or in what ways).

that can range from probation to years or even decades of imprisonment with essentially no hearing or review and absolute immunity even from unconstitutional decisions. Prosecutors stand for election, and the public may be able to learn something about how many cases they have lost to jury acquittals or "hung juries," but their policies for case selection or use of enhanced sentencing provisions are generally unavailable to the public. Their discretion and its insulation from accountability has been enshrined as central to our entire system of criminal justice.[2]

No one has been a more compelling advocate for the administrative reform of criminal law and law enforcement than Rachel Barkow, the Vice Dean and Charles Seligson Professor of Law at NYU Law School. In her recent book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*,[3] Barkow offers a host of practical and politically achievable administrative reforms at the prosecutorial and sentencing stages of the criminal process, steps that promise to move the country significantly away from its forty-year long infatuation with unleashing police and affirming prosecutorial discretion.

Professor Barkow understands well that mass incarceration is about more than institutions, especially given our deep history of racism in the administration of justice, but she makes a compelling case that institutions represent levers for change. Having observed recent efforts to reform federal sentencing law from the unique vantage point of a Commissioner on the U.S. Sentencing Guidelines Commission from 2013 to 2019, Barkow knows as much as anyone in academia can about how powerful the populist politics of "getting tough on crime" are, and how well they have served in aligning the representative institutions of government, like Congress and state legislatures, with the accumulation of power by law enforcement executives.

Part II of *Prisoners of Politics* is grounded in astute observation of the complexity and variability of the political environment for administrative reform. More than any other recent book on criminal justice reform, Barkow's analysis is disciplined throughout by a keen sense of the limits and opportunities for institutional reform built into the highly politicized space for criminal justice policy. For example, Barkow highlights the potential for reform-minded electorates in large urban areas to elect "progressive prosecutors" capable of wielding discretion to diminish incarceration even while proposing significant administrative constraints on prosecutorial

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[2] *See* Gerard E. Lynch, *Prosecution: Prosecutorial Discretion*, JRANK, https://perma.cc/6CGL-37H3 (last visited Mar. 9, 2022).

[3] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

discretion in other respects. These are not necessarily contradictory. Progressive prosecutors like Los Angeles District Attorney George Gascon have in fact implemented some of the kinds of proposals that Barkow supports.

The forward looking proposals in Part III are presciently crafted with an acute sensitivity to the kind of political backlash that we have already seen with the "defund the police" slogan.[4] They also reflect deft redeployment of the canon of purposes of punishment embraced by the federal and most state criminal legal systems, including the consequentialist goals of crime prevention through deterrence, incapacitation, rehabilitation–which Barkow identifies with–and retribution, which she is less keen on.[5]

I'm going to use this brief essay to add another layer to Professor Barkow's analysis of the political and institutional obstacles to reform, one that incorporates history into the present through attention to the culture generally,[6] and specifically the domain of myth. To tame the dragon of American punitiveness (or at least return it to something closer to its pre-1980s shape) administrative reforms of criminal justice have to be aligned with a social movement that makes the punitive state itself a direct threat to public safety and well-being.

At once both a kind of civil religion and a publicly-available-but-privately-consumed fantasy of control, punishment in the United States has long been invested with mythic meanings that are rarely, if ever, subject to close examination or testing. This helps explain why, as Rachel Barkow puts it, "very few powerful groups stand in the way of the push for broader and more severe criminal laws."[7] It is not simply because as the powerful they benefit from severe criminal laws–they may not always–but because hundreds of years of investing the power of punishment and punishers mythic beliefs in their social benefits have endowed them with a very real halo effect.

Making use of the tools of modern administrative law to make criminal justice institutions more accountable to empirical testing of the rationalist explanations given for punishment is an important step. It is in the nature of myths to avoid regular testing. But once we include the often archaic and

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[4] *See* Jessica M. Eiglin, *To 'Defund' the Police*, 73 STAN. L. REV. ONLINE 120, 120 (2021), https://perma.cc/P2LP-97E8.

[5] *See* Ewing v. California, 538 U.S. 11, 21–22 (2003) (discussing how a higher sentence under a recidivism statute does not violate the Eighth Amendment).

[6] *See generally* PHILIP SMITH, PUNISHMENT AND CULTURE (2008) (exploring the cultural influences behind our ideas of punishment).

[7] BARKOW, *supra* note 3, at 115.

theological meanings invested in punishment by the tradition of what was once called "western legality" in general, and its distinctive genealogy in the enterprise of colonizing North America in particular, the differences between punishment and the other organs of the modern welfare state come into focus. Older than almost any other part of the modern state, criminal courts have been repeatedly invested with mythical properties while tied to a progressively larger and more aggressive criminal justice machinery.

FOUR MYTHS OF THE AMERICAN PUNITIVE STATE

Law students learn about the four major "purposes of punishment" in the beginning of their 1L criminal law class.[8] While retribution, deterrence, reform, and incapacitation may also justly be called myths, they are not drivers of popular punitiveness like the myths I have in mind, although they are connected to them in many ways. Four evils in particular form the central pillars around which punishment has been invested with mythic powers of redemption and salvation. These "folk devils"[9] come from specific periods of our history, but they continue to haunt us in modern guise through the enabling discourses of clergy, criminology, journalism, and policy innovation: the penal debtor; the idle person or "vagrant"; the "dangerous degenerate" whose criminal traits are incorrigible; and the "disorderly" whose deviant norms can overwhelm the pro-social norms whose informal enforcement is the key to keeping neighborhoods safe. Individually and collectively, these myths make it difficult to cabin criminal law enforcement within rational administrative frameworks; indeed, they often invade such frameworks, overwhelming the boundary setting function.

Unless we heed these myths and demons, administrative reform of the criminal law may go the way of what was, in many respects, the most significant effort in American legal history to administratively reform a particularly problematic piece of the criminal legal system—i.e., the death penalty. All the things (e.g., racism, arbitrariness, inhumanity) that have convinced many over the years, including Supreme Court justices, that abolishing the death penalty is the only way to square with modern legal values, apply to the criminal justice system as a whole.[10] The Supreme

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[8] *See, e.g.*, CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 6, 11–12 (4th ed. 2019).

[9] STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1–2 (Routledge Classics 2011) (invoking another important strand of cultural criminology).

[10] *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 1–2 (2017).

Court's infamous *McCleskey v. Kemp*[11] decision, narrowly upholding the Georgia death penalty against Equal Protection and Eighth Amendment arbitrariness claims based on the statistical analysis of race effects in Georgia capital punishment (both race of the victim and race of the defendant), is a striking testimony to the Court's recognition of an inexorably mythic quality to punishment decisions and the sacredness of prosecutorial discretion.

Over the course of three centuries of political development, the American penal state[12] has experienced four phases of rapid institutional expansion of its punitive sector. The first one, which came along with colonization, was the criminal court and was the key legal technology through which the colonization project was undertaken.[13] The project of settlement and enslavement seems to have encouraged and enhanced development of the public prosecutorial function, which even pre-Revolution developed more rapidly here than in the metropolitan center.[14] The second phase, which began at the very end of the eighteenth century and the first decades of the nineteenth, saw the emergence in North America of penitentiary style prisons and, toward mid-century as the profits of slavery generated enormous growth through immigration in the large cites of the coast, public policing. The third, in the interwar years of the early twentieth century, often and misleadingly called the "Progressive era", expanded court powers to include juvenile and family court interventions, probation, and parole supervision following imprisonment. The fourth is associated with a scaling up and coordination in favor of incarceration of the existing parts of the punitive state.

Each of these expansions was met by considerable resistance.[15] Whether police or the juvenile court, many citizens viewed these new governmental institutions with alarm as to their intrusive power and their cost. The battle

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[11] 481 U.S. 279, 305–06 (1987).

[12] As with most aspects of political and governmental authority in the United States, it is difficult to speak singularly of the "state" since power is exercised through so many levels, and the local government can far exceed the reach of the federal government. Nonetheless, I will refer to the "penal" or "punitive" state to describe all legal authorities and institutions connected to crime and punishment.

[13] *See generally* CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865 (Cambridge Univ. Press 2010).

[14] S*ee generally* JOHN BEATTIE, POLICING AND PUNISHMENT IN LONDON, 1660–1750: URBAN CRIME AND THE LIMITS OF TERROR (2001) (explaining formally public prosecution in the Imperial center waited until the early 20th century and discussing the system of private prosecution in England).

[15] S*ee generally* ANTHONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES (2019) (discussing that resistance).

for them was ultimately won through the promotion of powerful myths about the threat posed by crime to the social order and the consequent benefits of punishment.

I'm not the first to call punishment a myth,[16] and many more than four myths could be named by most students of the field. While there are indeed many, these four stand out in the history of American punitive state development as the most generative myths, root myths that have given rise to numerous subsidiary myths. Each one objectifies crimes and those who commit them as a distinctive kind of threat to law and sovereignty itself.[17]

I. The Penal Debtor and the Myth That Punishment Strengthens Sovereignty

By penal debtor I mean not so much the recently rediscovered significance of fines and fees in dragging out the hold of criminal punishment on many American families, but something that helps explain why that kind of penal debt is so commonly imposed, including on people with already precarious existences. The oldest myth in our punitive religion (one that long predates settlement in North America) is that a crime itself creates a kind of debt to the law. Strikingly, this debt is not to the actual victim, if there is one, but to be collected by the sovereign in the form of the penal state. Whatever injury may have been done to the victim, it is this metaphorical injuring of the law's power that the one convicted is condemned for.[18] It is common to say of individuals who have served significant prison sentences that they have "paid their debt to society" (the latter being a popularization of sovereignty appropriate to democratic societies).

While paying debt sounds benevolent, since it implies that the criminal debtor will recover previous good standing by enduring the penalty

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[16] *E.g.*, BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); Richard Lowell Nygaard, *The Myth of Punishment: Is American Penology Ready for the 21st Century?*, 5 REGENT U. L. REV. 1, 4 (1995); Philip Smith, *Narrating the Guillotine: Punishment Technology as Myth and Symbol*, 20 THEORY, CULTURE & SOC'Y, no. 5, 2003, at 27, 27–51 (2003).

[17] Elsewhere one might simply say "the state", but America's civil religion combines a deep belief in sovereignty, and the collective use of violence against perceived domestic enemies, with a skepticism about the state. The obvious contradictions in this is one of the reasons criminal law is so important to the civil religion. If punishment is an okay expression of sovereignty that does not set off alarms about state expansion, but welfare is not, then they are not equal ways of reducing crime.

[18] *See* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 76–77 (2011) (discussing the philosopher Friedrich Nietzsche's speculation about the origin of penal law in commercial law).

honorably, the myth has a double edge for both the punished and the society that punishes. Toward those "condemned" to penalty, the debt metaphor, with its demand for an accounting, contains a scarcely veiled presumption against under-payment and fear that some part of that debt will be evaded or forgiven. As the millions of Americans who experienced incarceration over the past decades of mass imprisonment can attest, the prison gate hardly marked an end to penalty for them, but rather perpetuated a path of continued correctional supervision, often tied to fees and fines, and spells of re-incarceration triggered by technical violations or new arrests.

For the punitive society, the debt metaphor invests punishment itself with a redemptive value. If the sovereignty of the law is impugned by criminal violations, punishment is uniquely able to restore it. This feature lies in the original theological roots of this metaphor, the parallel between divine law and judgment and that of earthly law and sovereign justice.[19] In both cases, an ontological divide prevents repayment in any other form since the sinful human and criminal citizen do not inhabit an equal state with the offended sovereigns (divine and territorial). This leaves the sovereign with the real power to enforce the law, or in some cases to recognize an exception in the form of pardon or clemency, but also creates a powerful negative association between mercy and weakness. Crime, like debts, must normally be paid. A sovereign that routinely ignores the flouting of its most important laws, the penal code, does not seem to be one at all. Around this metaphoric structure, the myth of sovereignty holds for punishment a unique power to sustain the larger beneficent framework of law and the guarantee of authority behind. From the Fourteenth Century to contemporary politicians like Donald Trump and Jair Bolsonaro, the association between punitive responses to crime and the overall strength of political leadership has remained a potent source of legitimacy. The slogan "law and order" does not even need to mention punishment. It is built in the linkage, the way law produces order, by the very meaning of the "and."

Debt, and the myth of sovereignty it promotes, helps make sense of one of the great problems of contemporary American criminal justice that Professor Barkow identifies and hopes to reform—i.e., the combination of very long prison sentences with intense institutional resistance to allowing those sentences to be revisited, revised, or relieved.[20] As the modern legitimacy crisis of the post-World War II welfare states pushed

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[19] HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 71–73 (1983).

[20] Ironically, if prison sentences were analogized more directly to debt, there might be more pressure on states to discount the outsized numbers.

governments across the wealthy industrialized democracies to rely more on punishment to demonstrate sovereign strength,[21] use of the kind of revisions that Professor Barkow urges through several institutional mechanisms (clemency, parole, compassionate release) has withered, demonstrating the punitive edge of the myth. Many states have abolished or restricted parole as a mechanism for early release (although California is leading a possible countertrend). Traditional executive clemency, once relatively common, has shrunk to a tiny fragment of its past. Even compassionate release, a policy in the federal system and many state correctional systems that allows imprisoned people with less than six months to live to petition for administrative release, is almost never given. Most recently, President Biden has insisted that people imprisoned in federal prisons sent home to protect them from the COVID-19 virus return to prison to complete their sentences despite any serious risk of future crimes.

In *Prisoners of Politics*, Professor Barkow points to a different kind of "cultural" source of meaning that impinges on the rationality of sustaining law prison sentences, one anchored in a well-established cognitive bias (presumably acquired through cultural learning over generations) known as the "endowment effect," in which people "react far worse when those lose something they once had than they do if they do not receive something in the first place."[22] Barkow calls for reinvigorating the institutional mechanisms that once worked around this endowment effect, including parole and clemency,[23] and to grant even more power for experts to guide criminal justice policy more like they do in the regular administrative state, with empirical research and accountability for optimizing public safety perhaps enforced by reinvigorated courts.

I would argue that the mythic linkage of crime and debt and punishment and redemption is deeper than the endowment effect, and may be a necessary correlation for its application to something like a prison sentence that does not readily fit conventional understanding of an object that one has a possessory interest in. In the typical experiment demonstrating this effect, the subject is given a real object, like a coffee mug, tee-shirt, or pen as

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[21] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 29–30 (2001).

[22] BARKOW, *supra* note 3, at 75.

[23] Some evidence suggests that governors often felt politically pressured to grant clemency from friends and family of the person imprisoned. Parole was embraced in some states at the end of the 19th century to relieve some of this pressure on the elected executive and moving it to a less visible and appointed administrative commission. *See* Sheldon L. Messinger et al., *The Foundations of Parole in California,* 19 LAW & SOC'Y REV. 69, 69, 100, 102 (1985).

something the person possesses and is then asked to give up for compensation. These subjects do not need mythic associations to endow that possession with a sense of personal possession or attachment. Turning punishment in the form of a prison sentence into a possession that citizens (perhaps collectively) hold, while quite real now, required centuries to forge through metaphor and myth the belief that state punishment belongs to all of us and endows us and our laws with strength.

II. The Vagrant or Idle Poor Person and the Myth That Punishment Can Provide Discipline

The core idea that infused the great 19th century expansion of the punitive state in the post-Revolutionary United States to include prisons and eventually professional policing was the inevitable danger to property and even public peace posed by the idleness of the poor, especially those perceived as constitutionally inferior of character, like enslaved persons and eventually immigrants from colonized spaces like Ireland. Even today, the term idleness has an enduring resonance with moralistic judgment. Only in very recent years has there been grudging acknowledgment that time off work is necessary for mental and physical health, counterbalancing a historic belief that, to quote frequent religious formulation, "the devil will make work for idle hands."

Perhaps the most iconic version of this myth, born appropriately at the dawn of the commercial age in London, is William Hogarth's series of engravings, first published in 1747 entitled *Industry and Idleness* and depicting, over twelve images, the fates of two apprentices in an early industrial loom; one whose hard work and moral virtues ultimately make him Lord Mayor of London, and the other whose idleness and proclivity toward vice leads him to execution at Tyburn, London's infamous site of public hanging (now rebranded as Marble Arch Mound).[24] Hogarth, who specialized in luxury images for the rich, had these printed up inexpensively so that they could be put up on the walls of local commercial establishments to educate young apprentices as to the fates awaiting them.

Most historians agree that the modern prison, and later police, were introduced largely on the belief that they would discipline individuals (and the working class population more generally) with forced labor (or direct religious exhortation), close oversight, regulation of working class life, and punitive correction.[25]

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[24] Sean Shesgreen, *Hogarth's* Industry and Idleness: *A Reading*, 9 EIGHTEENTH-CENTURY STUD. 569, 569–70 (1976).

[25] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 25, 115 (Alan

While modern criminology no longer views the "idle poor" with the explicit tone of condemnation common among moral entrepreneurs of the 18th and 19th century, the myth that idleness among the urban poor leads to increasing criminality remains deeply embedded in our punitive institutions and assumptions. The specter of forced labor, and the supposed discipline it brings, hangs over prisons, even as it is interwoven with enforced idleness.

In an era of mass unemployment for many, and precarious work for many others, this mythic equation and the demonization of idleness at its heart drives a tendency toward mass incarceration and mass supervision. This is especially cruel when the long sentences and collateral exclusions facing formerly imprisoned people, which Professor Barkow rightly calls out about our current system, means sustainable employment is extremely unlikely for a great many former prisoners. As Professor Barkow points out, some 10 to 15 percent of people released from prison end up homeless.[26] One could also suspect a much higher percentage of people released from prison are older former prisoners and those living with chronic illness. And yet our entire system of correctional supervision and related fees and fines exerts a relentless punitive pressure on those convicted of crimes to engage in labor or live in a punitive simulation of labor made up of highly arbitrary and burdensome (for those with virtually no property) goals to achieve.

Unfortunately, the demonization of idleness and the myth of discipline continues to infect many reform minded ideas that propose returning to a more ambitious agenda of rehabilitation with our punishments. The belief that we can nip serious crime in the bud by disciplining the wayward tendencies of the idle poor to do bad things like use drugs, gamble, sex work, or other forms of survival transactions returns in full force as soon as we imagine reducing incarceration through improving our rehabilitative competence.

Yet this is exactly the ground that many reform agendas, including Professor Barkow's, would have to dig into. For example, adopting administrative measures that would hold prisons responsible for their outcomes sounds good: "prisons should be assessed on the basis of things like recidivism rates, post-release employment rates, and substance abuse desistance."[27] But actually, each of these is an extension of the vagrancy folk

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Sheridan trans., Vintage Books 2d ed. 1995) (1975); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 93 (Routledge rev. ed. 2017).

[26] BARKOW, *supra* note 3, at 89.

[27] BARKOW, *supra* note 3, at 72. The degeneracy myth also expresses itself in another pathology Barkow nails: the tendency of contemporary reform measures, like post marijuana legalization expungement laws, to leave an exemption for "public safety," again giving

devil, the criminalization of "idleness," and the myth that punishment can discipline people in a way that will enable the kind of calculating self-governance that is the ideal of all liberal societies. Post-release unemployment, substance abuse (the usual companion of idleness in the myth of discipline), and recidivism itself are factors towards reincarceration since parole and probation officers are more likely to seek reincarceration for technical violations when supervisees are unemployed.

None of this is to imply that chronic unemployment or self-medication with unregulated drugs for a variety of illnesses and disabilities is good for anyone, nor that discouraging both is an inappropriate problem for government intervention. It is to question the mythic status that links these conditions to crime and public disorder. This linkage is forged out of the history of an extreme demand for labor extraction in the era of capitalist accumulation and fueled in the United States by the enslavement of much of the labor force. In this context, idleness was defined as virtually anything not exploitable by the owners, including self-care, solidarity building recreation with others, and labor in the service of one's self or family. The enslaved person fishing or gathering, or cottage farming, was deemed idle, and any enslaved person on the public roads without a pass was subject to immediate corporal punishment by the "slave patrol."[28] Those on probation or parole today often find themselves subject to similar demands that they perform labor or its bureaucratic equivalent even if they would benefit from spending their time on family or self-care.[29]

III. The "Dangerous Degenerate" and the Myth That Policing Could Eliminate Most Crime

The elements of the modern criminal justice system that we still have in the United States were set in place during the interwar years when a combination of criminal court reforms at the state and local levels, and Prohibition at the federal level, expanded the disciplinary punitive state in a number of ways.[30] The traditional core of the criminal law, the courts, received new powers over juveniles (juvenile justice) as well as a new kind

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prosecutors vast punitive power on the myth of their expertise.

[28] *See* WALTER JOHNSON, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 168, 222–23, 226, 228 (2017).

[29] *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 87–89 (2020).

[30] LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 7, 12 (2015); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 50 (Routledge 2017).

of sanction, probation, which allowed courts to sentence people convicted of (or pleading guilty to) misdemeanors and even felonies to a period of "supervision" by a court officer in place of a sentence to jail or imprisonment. The prison systems in many states were enhanced with new powers to permit early release (parole) followed by supervision in the community by a state agent. At the federal level, efforts to repress the burgeoning criminal market in alcohol distribution and sales led to an expansion of the whole federal criminal system, including new prisons and new enforcement agencies as well as growing federal oversight of the whole emerging system of criminal administration.

Now largely forgotten is how much this whole expansion was leveraged to the demonization of "degeneracy" and the widely accepted idea that most social problems, like criminality and mental illness, were the result of inherited traits that the largely Anglo-Saxon and upper class educated elites, who promoted eugenics as a governmental program, associated with non-White races as well as immigration from European races perceived as less advanced than "Nordics." The great myth of eugenics, widely accepted by political and scientific leaders in the interwar years (and for a good deal longer perhaps), held that crime and other social problems would largely be eliminated by removing the sources of degeneracy (through prohibition, immigration restriction, segregation, and anti-miscegenation laws) and using the new individualizing tools of criminal justice to remove the degenerates themselves.

After World War II the concept of "degeneracy" and the larger eugenic program fell into disrepute, a consequence of their overt racism, their association with Nazi era violations of human rights, and considerable advancement in biology that shattered the alleged scientific basis of race. Yet, importantly, there is a strong association between the demonization of degeneracy and the myth of eugenics forged by the high levels of crime in American cities and large-scale immigration or migration (such as the Great Migration).

Criminologists and sociologists soon replaced degeneracy as a biological notion, with related concerns about "deviance" rooted in culture, upbringing, or environment but always internalizing the criminal threat or dangerousness to the individual. With the restriction of immigration in the 1920s, African Americans, the new arrivals in large American cities, came to be the primary focus of crime prevention and increasingly the target of control-oriented policing and selection for harsher punishment in the courts and prisons. Most importantly, the sense embedded in punitive institutions that the core of the American crime problem involved a largely irredeemable criminal class, associated with young Black people in urban areas, remained

firmly in place.[31]

Few today would comfortably traffic in rhetoric like degeneracy or the very idea of a born criminal. But modern concepts like "career criminal" have taken its place, and a great deal of the edifice of mass incarceration has unleashed even greater punitive power throughout the system targeted at the dangerous, persistent, serious offender. This myth helps explain one of the pathologies that has been largely ignored by critics of mass incarceration until Rachel Barkow—the tendency of modern legislatures and Congress to define substantive criminal offenses very broadly to capture the maximum number of possible people breaking the law while setting the punishments around the most alarming and dangerous of them. It was the eugenic era and the myth of the dangerous degenerate that helped sell America on the necessity of individualized justice and gave to prosecutors a primary role in deciding which of the many people who meet the offense terms require the heavy incapacitative force of these sentences.

Barkow sensibly seeks to limit this prosecutorial discretion through a variety of institutional mechanisms ranging from resources to charging limitations to increasing judicial discretion. Unfortunately, efforts to reform administratively by imposing more transparency about the crime prevention rationality of punitive sanctions is likely to push the system to double down even further on the most modern version of the degeneracy demon: the antiseptic notion of risk and especially the much-discussed use of actuarial prediction, powered by algorithms, to identify the "high risk".[32]

IV. The Disorderly and the Myth of "Broken Windows" Enforcement

The era of mass incarceration, the exit from which is Professor Barkow's primary objective, represents the largest expansion of the punitive state in American (and world) history. While relatively few new institutions were formally added (and a few came back, like solitary confinement), all of the existing punitive institutions—courts, police, prisons, parole, and probation—were expanded and, until recently, programmed to be more networked in applying their punitive power. This overall effort can be called the "war on crime," to reflect the name given to it by advocates of punishment and to recognize its enduring military model.[33]

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[31] *See* Jonathan Simon, *"The Criminal Is to Go Free": The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 790 (2020).

[32] BARKOW, *supra* note 3, at 59 (endorsing risk assessment tools to replace bail for pre-trial detention decision making and possibly other sentencing related decisions).

[33] *See generally* MICHAEL S. SHERRY, THE PUNITIVE TURN IN AMERICAN LIFE: HOW THE UNITED STATES LEARNED TO FIGHT CRIME LIKE A WAR (2020).

The rise of mass incarceration represents a reactivation of all the previous folk devils and myths of American crime control. As Barkow sharply outlines, the slogan "law and order" and criticism of overly lenient courts and parole systems highlighted the myth that leniency is weakness and led to new laws establishing harsh mandatory minimum prison sentences for many offenses and the elimination formally or informally of parole release from prison. The war on drugs of the 1980s and its demonization of young Black residents of high poverty, inner city neighborhoods endlessly emphasized their idleness and the lack of working role models (blamed at the time by many on "welfare dependency"). Young Black people were also the primary target of a revitalization of the degeneracy demon and its eugenic myth that the dangerous minority exists and can be effectively confronted by a more scientific law enforcement approach.

At the same time, the full expansion of punitiveness in this war on crime is inadequately captured by mass incarceration because it also involved an incredible increase in punitive policing and privatized exclusion (like gated communities and business improvement districts weaponized with private security) that did not center on prison or jail necessarily. The era of mass incarceration created its own folk devil, the disorderly (i.e., those with supposedly anti-social norms and habits), and its own myth that punitive responses were required to prevent minor disorder from becoming chaotic lawlessness, or "broken windows" policing in the name of its most famous theory.

Disorder, of course, is a long-term theme in our civil religion of punishment. Disorder in the post-Revolutionary period was part of the larger crisis of social order that brought about a systemic failure of punitive sentences to collect the debt of unpunished crime.[34] Disorder in the sense of lack of regulation was blamed along with squalor for some of the danger associated with the idleness of the poor in the early 19th century.[35] Disorder also went along with degeneracy, confirming in life habits the internal traits that eugenicists attributed criminality to.

What made the new demonization of disorder in the 1980s distinctive was its central role in producing crime or resisting it. Now it was not necessary to blame serious and violent crime on the bad people occupying high crime neighborhoods, or on their bad (idle) habits, but rather crime

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[34] *See generally* MICHAEL MERZANE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835 (1996).

[35] *See* PATRICK COLQUHOUN, A TREATISE ON THE POLICE OF THE METROPOLIS 13–14 (Good Press 2019) (1796).

could be blamed on disorder itself; the failure of formal and informal authorities to enforce pro-social norms, and to correct antisocial behavior, could itself lead to more serious and violent crime. In the influential article *Broken Windows: The Police and Neighborhood Safety*, published in the Atlantic Magazine in 1982 just as mass incarceration was becoming visible, two academic policing experts made the case that fighting violent and serious crime directly was too late.[36]

The way to save neighborhoods from the irreversible tipping point of becoming a dreaded "high crime neighborhood" was to encourage the norms and habits of law-abiding citizens and discourage the norms and habits of people who break the law or associate with them. Police could help favor the former by using their stop and arrest powers to enforce local pro-social norms against people, e.g., lying down in doorways or aggressively "panhandling." Some well-known examples of policing over the next decade seemed to enact this strategy—for example, the ticketing of so-called "squeegee men," mostly older Black men (many of them probably formerly imprisoned by the 1990s) who would wipe down windshields on busy Manhattan thoroughfares when the cars were stopped at traffic lights in the hopes of attaining a donation. Much of what was called "broken windows" policing was in fact just an intensification of aggressive policing in neighborhoods already considered high crime that had been going on since the 1960s.[37] In many middle-class communities this myth has become part of the rationale for placing police officers in schools and drug testing high school athletes. More broadly, at the mythic level, the "broken windows" theory encouraged a practice of leaning into prisons and police as a strategy to win a war not against crime itself but against norms of disorder and discord.

Today, the demonization of disorder and the myth of "broken windows" work directly against some of the reform policies for prosecutors touted by Professor Barkow and practically everybody else: policies that encourage prosecutors to simply not charge many minor crimes and to avoid using sentencing enhancements to lengthen prison sentences. Efforts to support these policies based on the kind of cost-benefit analysis that is central to an administrative model of reform run into the problem that the myth of "broken windows" has endowed both the enforcement of laws

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[36] James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety,* THE ATLANTIC MONTHLY, March 1982, at 29, 29–38.

[37] Policing is heavily local in the United States. For one study of an important city, Chicago, *see generally* SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER (2019).

against minor crimes and the imposition of long prison terms.

CONCLUSION: MYTH BUSTING AND THE ADMINISTRATIVE REFORM OF AMERICAN CRIMINAL JUSTICE

It is no secret that criminal law and criminal justice are lands of myth. That is surely why they make such repetitive grist for popular entertainment as well as politics. Twenty years ago, when I was studying the rise of what seemed like a new political rationality in democracies around the government's role in fighting violent crime,[38] I missed the significance of the deeper history of criminal justice in America and the myths that have made it a kind of civil religion. What I took for a short-term political logic had deeper roots and greater capacity for renewal and reinvention. In *Prisoners of Politics*, Professor Rachel Barkow has made a compelling case for thinking about criminal law in the post-mass incarceration era as largely a problem of administrative reform—that is, careful attention to decision making institutions and procedures to create the right incentives for decision makers inside those institutions, especially prosecutors, to exercise their discretion in ways that achieve public goals behind punishment. Yet, while Rachel Barkow's *Prisoners of Politics* is among the best books written on how to escape the political logic of mass incarceration, I now think that's not enough. In short, I'm saying "jump higher."

The elusive historical quest for rational criminal justice policies in the American experience is testament to a structural problem facing even the best recalibration of incentives. Judgments about the social benefits of punishment are highly inflated by the accumulation of powerful myths about punishment in political and legal culture. In distinction from the lived experience of punishment, which is nearly impossible to deny, the legislative vision of punishment is almost always a fantasy in which all of the complicated details of implementation are wished away. Bolstered by strong pre-empirical notions on the desirability of punishment, especially for the social groups that the American carceral state has historically concentrated on (Black people, queer people, unemployed people, young people), proposals to sustain or even extend the current scale of punishment have a huge advantage over proposals to shrink it.

Efforts to block mythic powers out with institutional solutions will never be entirely successful. Yet, the administrative reform vision for criminal justice is a promising start to contesting these myths. Making criminal justice

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[38] *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 273 (2007).

institutions more accountable for what they do can create a context in which the racialized folk devils and idealized results that animate so much of America's history of campaigns to expand the criminal justice system can be exposed. But history teaches us that exposure alone is not enough. The power of punitive myths is that—like discipline, eugenics, and broken windows—they often represent themselves as innovative ways to accomplish the frequently frustrated goals of law enforcement (think about the popularity the "broken windows" myth still enjoys among many politicians and policy experts).

This means following up administrative reforms with substantial efforts to identify the way that specific historical constructions are programmed into the punitive aggravators in our system, including these myths of defaulting debtors, the vagrants or idlers, the "degenerates," and the disorderly. Revitalized by the latest journalism or criminology, these folk devils reappear along with renewed hopes that more focused efforts at discipline or risk selection will allow the system to escape its flawed strategies.[39] For example, serious efforts to audit the racial justice impact of new, algorithm-based pretrial release mechanisms should be considered an essential component of "bail" reform.[40]

Going forward, reformers need to identify these folk devils as powerful biases in even rational crime control policies and push for reforms that do not reproduce or rely on them. To take one concrete example, mandates to work in the absence of real jobs can often mean an extended punitive mandate to meet arbitrary performance goals set by a probation or parole officer on pain of being reincarcerated. Instead, we can imagine a reentry system that recognizes both the social and crime control value of having a formerly incarcerated person spend their time helping family and performing routine care activities in the household (if they are fortunate enough to have one) or neighborhood. But it would have to root out the deeply inscribed, and in this country often racialized, myth that links the poor to crime unless they are under the control of wage labor or worse.

All of Professor Barkow's recommendations are worth adopting, but sustained reductions in the scale of the carceral state will require strong bottom-up demand in the form of social movements directly opposed to the

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[39] *See generally* MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 176 (2009). An outstanding example and a really useful book for reformers by my late friend.

[40] Their absence was notable in California's Proposition 25 in 2020. *See* Nigel Duara, *What the Failure of Prop. 25 Means for Racial Justice in California*, CAL. MATTERS (Nov. 5, 2020), https://perma.cc/SS3S-VRBT.

current shape of punishment in America. In this we would all benefit from more engagement *between* institutionalists like Rachel Barkow and the largely activist (but sometimes also academic) community of abolitionists, some associated with the social movements who have rallied both in the streets and on social media under the Black Lives Matter (BLM) title or hashtag.[41] It is not necessary that the often abolitionist ethic of the BLM movement be compatible with the institutionalist logic of administrative reform. They respond to different contexts of strategic engagement and different historical timelines. What may be important is that institutional reforms that demand more rationality from criminal justice actors are enabled by a bottom-up struggle to diminish the popular hold that these myths historically have had.

Most importantly, these myths have to be directly contested by social movements grounded in clear experiences of how these myths are used to dispossess and injure Black people, queer people, and people of color more generally but always in location specific ways. The myths of the punitive state are formally color blind, but the anti-crime campaign against penal debtors, idleness, degeneracy, and disorder has come to focus on Black communities with increasing intensity since the beginning of the 20th century. No community has been more othered by these myths,[42] and while Black communities are not immune to them, the BLM movement is the first social movement in generations to make the anti-Black myths of the criminal justice system a central issue of civil rights. By rejecting the core premises behind each folk devil and punitive myth through the lived experience of Black communities, we can attack the presumption of good intentions that shields criminal justice institutions from any reckoning over harms done and avoided.

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[41] CHRISTOPHER J. LEBRON, THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA 97–127 (2017).

[42] The experience of Asians, Latino, and Indigenous Americans rivals the Black experience of being othered and excluded in regions where these communities have been sufficiently numerous to be perceived as a threat.