

FROM THE PODIUM

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Prisoners of Populism: Understanding the Politics of Mass Incarceration

On October 25, 2016, Rachel E. Barkow, the Segal Family Professor of Regulatory Law and Policy at New York University School of Law, delivered Marquette Law School's George and Margaret Barrock Lecture on Criminal Law. This is an edited and condensed text of her remarks.



As I wrote my lecture, I couldn't help but feel a little guilty that it's almost guaranteed to make you more dejected after you hear it than when you arrived. That's because I'm going to argue that all the talk you may have heard about how there is a bipartisan movement to address mass incarceration and reform criminal justice in the United States is way overblown. In fact, the politics of criminal law in America remain as irrational and counterproductive as ever, and the reforms that have passed through the political process have been modest at best.

That is not to say that the reforms that have passed are not worth applauding—they are. But if we really want to tackle our sky-high, record incarceration rates and address the deepest problems

of criminal justice administration in America, going through our existing political process and institutions to enact new substantive policies one by one is not the way to do it.

There is an enormous institutional problem in how we approach criminal justice, and nothing fundamental will change until we change those institutions and how they operate. So my goal today is to get you as cynical as I am about criminal justice reforms and to convince you that we need a more significant institutional realignment for real progress.

To do that, I'll break my talk into three parts. First, I am going to give you a brief overview of how sweeping criminal law is in the United States and explain the ways in which it produces laws that are often irrational and undermine public safety. Second, I will explain how these crazy policies come to pass, highlighting the political and institutional dynamics that all but guarantee that these pathological policies will continue with only marginal changes. Finally, I will briefly sketch a different path forward that I believe points the way to real reform—with the caveat that I think we have a long way until we get to that institutional reform moment.

I. The Problem of Mass Incarceration

Let's start with what people are talking about when they say that there is mass incarceration in the United States. It doesn't mean people are rounded up in large groups in one proceeding and thrown in prison. What people mean by *mass incarceration* is that we have the highest incarceration rate by far in our history, and we have the second-highest incarceration rate in the world.

You might have thought that we were first, but Seychelles is ahead of us because it has 735 prisoners—*altogether*, but that makes its rate pretty high because it has a total population of around 92,000 people. But other than Seychelles, we're at the top—by far. We have more than 2.2 million people who are incarcerated. To look at in another way: We have 5 percent of the world's population, but 25 percent of its prisoners.

Critically, the jarring statistics are not spread evenly among the population. African Americans make up nearly half of the people incarcerated, even though they are only 13.2 percent of the U.S. population. At our current pace, nationwide, almost one out of three black men in the country can expect to be incarcerated during his lifetime, while only 6 percent of white men face the same expectation. And if we look beyond incarceration to criminal justice supervision, the racial disparity numbers are even more shocking. In some cities, more than 40 to 50 percent of black men are under criminal justice supervision.

Most people agree that these statistics show that something has gone very wrong in our country. For some people, that means addressing the root causes of crime. And I'm all in favor of that. This is an issue that merits close scrutiny because poverty, housing segregation, poor education systems, and lack of employment disproportionately affect communities of color and do feed into higher rates of criminality. But I think that you need to talk about more than root causes to address all the problems we have with criminal justice in the United States.

Whatever we do to adjust the underlying rates of crime by tackling root causes, the fact remains that our *response* to crime is itself problematic, and we need to address that response as well as root causes. All too often, our criminal justice policies are not proportionate to the crime we actually have in the United States, do not promote public safety, and have a disparate impact on racial minorities that cannot be explained by the underlying rates of offending.

Let me give you a few examples of these irrational policies. Just keep in mind that the illustrations I'm giving today are part of a much larger pattern.

Lumpy Laws

We'll start with the fact that our criminal laws often lump together people of vastly different levels of culpability but treat them all as if they were the worst of the worst. I will give you some examples,

starting with sex offender laws. When the average person hears the term *sex offender*, he or she is likely thinking of rapists and child molesters. And that is certainly to whom politicians refer when they pass laws addressing sex offenders. You know these laws—they are often named after a victim (often a child) who was killed after horrific sexual abuse.

But the *actual* laws defining sex offenders go far beyond the child molestations and brutal rapes and killings that prompt their enactment. A Human Rights Watch report found that at least 5 states required people to go on sex-offender registries for visiting prostitutes, and 13 required sex-offender registration for urinating in public. Twenty-nine states required registration for teenagers who have consensual sex with another teenager.

Sentences and collateral consequences for sex offenders are not set with these kinds of cases in mind. They are not set based on children playing pranks, individuals hiring prostitutes, or teens sexting. They're set with the worst of the worst in mind. But all offenders get lumped together as if they were equivalent because the political process does not take the time to sort them out. They all get the same mandatory minimum sentences and are put on a sex offender registry, often for life, not to mention facing bans on where they can live.

Recidivist laws (often called three-strikes or career-offender laws) are another example of lumpy laws because they typically fail to distinguish among the types of crimes that individuals are committing.

The problems of lumping people with different culpability together are exacerbated by the fact that the laws often trigger mandatory minimum sentences and mandatory collateral consequences for everyone in the group without making distinctions.

Other Irrational Policies

These aren't the only examples of irrational and disproportionate policies and laws. Our prison policies suffer from many similar problems. We don't invest in prison programming that has been shown to reduce recidivism and yields more benefits than it costs. For example, about 85 percent of those incarcerated have a substance abuse problem, but only 11 percent of the people in prison and jail are receiving substance abuse treatment.

We see the same thing with respect to mental health treatment, cognitive behavior treatment, vocational ▶▶

training, and educational programming. These interventions work to reduce reoffending, but we're just not offering them.

The lack of support for this kind of programming is not based on a rational assessment of the costs and benefits. If that were occurring, we would make the investment in these programs now to get the benefits of lower recidivism—and therefore lower incarceration costs—later.

We also see irrationalities when we talk about the collateral consequences of convictions. Despite the fact that housing is a crucial need for those released from prison—with one-third of those released from prison being homeless within six months—Congress has passed strict bans on access to public housing for those with convictions. It has targeted its harshest bans for those engaged in drug activity, even when the person wasn't selling or using drugs in public housing.

It is not just housing restrictions. When Congress “ended welfare as we know it” in 1996, it required states to impose lifetime bans on individuals with drug-related felony convictions from receiving federal welfare aid or food stamps. States can take affirmative action to opt out of the lifetime ban, and some have done so, but people with a felony drug conviction are still fully or partially excluded from food stamp benefits in 30 states and from welfare assistance in 36 states.

II. The Politics and the Power of Stories

So now that you have a sense of just some of the many ways in which our laws are irrational, I want to turn to how we end up with policies like these that undermine public safety, cost a fortune, and disproportionately affect people of color. Here it is critical to understand that these policies are not the result of rational reflection. Our political process is driven by high-profile stories, not by data or weighing costs and benefits.

Let me give you an example of how this works. In the 1980s, Massachusetts and many other states used furlough programs that allowed inmates weekend or other short-term passes to work, visit family, or do community service. These programs aimed to ease people's reentry into society, to assist in the management of prisons by keeping morale higher, and to help the governor make clemency decisions

by seeing what kind of track record people had while on furlough.

Then there was the story of Willie Horton. He had murdered a teenage gas station attendant and was serving a life sentence. He was released on a weekend furlough as part of the Massachusetts program, and he did not return. Instead, while out, he committed horrible crimes against a Maryland couple, Cliff and Angela Barnes. He raped Angela Barnes and pistol-whipped Cliff Barnes.

This story became national news when George H. W. Bush used it in his 1988 presidential campaign against Michael Dukakis, the governor when Horton was furloughed, to paint Dukakis as soft on crime. Many credit the Horton ads as pivotal to Bush's winning the election. Indeed, just about all politicians since that time have been well aware of what it would mean to their political career were they to have their own Willie Horton story.

Because of the fear of these attacks, we've seen furlough programs dismantled and declines in pardons, parole, and any other program that could possibly be pinned to a politician, should someone released on that program go on to commit a violent act. We have also seen programs that could be used to rehabilitate people and reduce recidivism get destroyed or never get off the ground because of a fear that to support these programs was to risk getting labeled as someone who coddles violent criminals.

As for the furlough program in Horton's case, one could agree or disagree that it was a good idea. But when the ads came out, the program was never analyzed beyond the Horton story. It actually had a success rate of 99.5 percent in terms of how many individuals went on furlough and returned to the prison facility with no trouble.

Our political system does not analyze whether a program prevents more crimes than it risks or how it can be modified to maximize public safety. It doesn't consider whether longer sentences make sense or whether they lead to more crime later because the person who is released—and 95 percent of all people in prison are released, 600,000 each year—will struggle to reenter because of the longer sentence. It doesn't factor in whether a collateral consequence will lead to more crime.

I teach administrative law as well as criminal law, and I am always struck by the contrast. We don't approach other areas of government regulation the way we approach the regulation of criminal behavior. We don't ban a vaccine once there's a story of a death or a serious reaction to it. We don't get rid of air bags because one kind happens to be defective.

Instead, we carefully study things to see whether on balance they will do more good than harm. Environmental policy, occupational health and safety, consumer products, pharmaceuticals—we look at the risks presented by something and ask whether it's worth doing because the good outweighs the bad.

Criminal law, where the state power is at its most intrusive, should be as rational in its approach as these other regulatory areas. But it is not. And part of the reason is that it's just not seen as a regulatory area where expertise is needed.

The Demise of Checks and Balances

The Framers knew that the political process would be prone to excess in criminal law. Alexander Hamilton—now of Broadway fame—wrote in the Federalist Papers that “[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.” (I was hoping that this would make it into the musical, but no luck.)

So the Framers put in place a multitude of constitutional checks, including the president's pardon power, the jury trial guarantee, and the

Eighth Amendment prohibition on cruel and unusual punishment.

Beyond these and other constitutional protections, for most of the country's history, there were additional checks. Judges had the power to individualize punishment in criminal cases, and then parole officers could similarly provide a check. These constitutional and institutional checks started to break down when the tough-on-crime era began in the 1960s.

And when they did, prosecutors began to assume tons of unchecked powers. Criminal codes expanded, giving prosecutors a greater menu of charges from which to choose. In the 1970s, legislators increased statutory maximum sentences, established mandatory minimum sentences, and put in place binding guidelines in many jurisdictions. Many jurisdictions also abolished parole.

These shifts considerably weakened the role played by judges and parole officials and expanded prosecutorial power. With the option of charging offenses with mandatory minimums, prosecutors could effectively sentence defendants—or threaten to do so. This gave them huge leverage in plea negotiations.

The Supreme Court, for its part, allowed the balance of power to shift to prosecutors. Whereas plea bargaining took place in the shadows for most of U.S. history, in 1971 the Supreme Court acknowledged plea bargaining as an acceptable practice, even though there is little to distinguish it from unconstitutional-conditions jurisprudence. After all, prosecutors are putting a big price on the exercise of a defendant's jury trial right. ▶▶

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Moreover, the Court has put essentially no limits on what prosecutors can threaten if a defendant turns down a plea deal, so long as there is evidence to support the threatened charges. For example, the Court upheld (in a 5–4 decision) a conviction where the prosecutor offered to recommend a five-year deal if the defendant were to plead but threatened to bring different charges carrying a mandatory life sentence if the defendant went to trial. If that is not coercive, it is hard to imagine what is.

The Court also has taken a hands-off approach to the Eighth Amendment, effectively leaving non-capital sentences unregulated. It has upheld a life sentence for a defendant who committed three low-level theft offenses with a total loss amount of \$230. It upheld mandatory life without parole for a first-time offender charged with possessing 672 grams of cocaine.

This one-two punch—legislators arming prosecutors with a choice of charges and severe mandatory sentences and the judiciary giving them unlimited license to use harsh sentences as leverage to extract pleas—virtually knocked out jury trials from the system.

Instead, the new normal in criminal law administration is a system dominated by prosecutors. We now have an endless cycle in which legislators continue to have incentives to pass excessive laws and prosecutors have an incentive to ask for them. Prosecutors lobby for harsher sentences to enhance their position during plea negotiations and to gain cooperation.

In addition to touting those sentences to get cooperation and pleas, some prosecutors have openly admitted that they use long sentences for drug charges to get people they believe are violent, even when they lack proof that the person committed more-dangerous crimes.

It is no wonder that prosecutors fight sentencing reforms—they will fight any inroads on their discretion and the power it gives them to adjudicate cases without judicial oversight.

You will often see prosecutors openly advocating that, even with our current numbers of mass incarceration, we should build even more prisons, despite any evidence that it would reduce crime. Steven Cook, president of the National Association of Assistant United States Attorneys, said, “Do I think it would be a good investment to build more [prisons]? Yeah, no question about it!”

Of course it is easy to see why prosecutors take these views. They do not need to pay for prisons and long sentences out of their budgets, but they get the benefits of having those long sentences on the books because of the bargaining leverage it gives them and because they can appear tough to their constituents.

And yet prosecutors are the only firewall against the excessive legislative judgments that the political system is bound to produce—the “necessary severity” of the criminal code that Hamilton identified. But that is to ask the fox to guard the henhouse: Oftentimes prosecutors are the ones asking for those broad laws and long sentences because of the leverage it gives them.

Prosecutors are thus the real power centers in American criminal law, effectively running a vast administrative system. But unlike other areas of administrative law, where an executive agency faces lots of checks on its discretion, prosecutors face almost no oversight.

Moreover, in the civil regulatory field, agencies recognize that they are making law through their decisions and thus think about broader policy questions. Prosecutors tend not to see their role as big-picture policy makers but instead see themselves as making case-by-case determinations.

Aside from that cultural difference, there are big legal differences.

Civil regulatory agencies must abide by various separation requirements within their agencies and provide various procedural protections. Prosecutors’ offices are under no obligation to provide any kind of

process to individuals during plea bargaining, even though that is effectively a final adjudication for most people. The same individual who investigates a case can make the final charging decision and decide what plea to accept.

The role of reviewing courts is also vastly different. Courts review civil regulatory agencies to make sure their policies are not arbitrary and capricious. Judicial review of prosecutors is almost non-existent.

Prosecutors also escape oversight from other actors. For example, they do not need to perform cost-benefit analyses for their decisions to an overseer in the executive branch. And whereas legislators often keep close tabs on civil regulatory agencies because powerful interests lobby them to do so, the relative weakness of criminal defendants means that legislators often do very little to rein in prosecutors who go too far.

The result of this institutional arrangement is that the political forces I have described face almost no pushback. It should come as no surprise that this institutional arrangement produces policies that defy rationality.

This dynamic is critical to understanding why the current talk about criminal law reform is overstated. When you hear talk about criminal law reform, you have to keep in mind how narrow it actually is.

As Marie Gottschalk at the University of Pennsylvania points out, the efforts so far have focused on what she calls the “non, non, nons—the nonserious, nonviolent, non-sex-related offenders.” These offenders make up only 32.4 percent of the prison population. So even if we legalized all drugs, for example (and we are nowhere near doing that), we’d still have the highest incarceration rate in the world—after Seychelles.

Meanwhile, keep in mind that the reforms for the non, non, nons have hardly been sweeping. In fact, they’ve been quite modest, targeting the lowest-hanging fruit—those charged with drug possession, for example—for sentencing reductions. In addition, it has hardly been the case that new criminal laws have all been in the direction of less severity. Many new laws have passed increasing punishments.

So while reforms might tinker around the edges to deal with the least culpable categories of nonviolent, low-level offenses, they will not do more than that

because this institutional structure is destined to mass-produce incarceration and criminalization.

III. A Road Forward?

Let me outline a more fruitful approach for reformers to follow. To get better outcomes, we need a better institutional structure that avoids some of these pathological political pressures, as the late Professor Bill Stuntz so aptly labeled them. I want to highlight three key institutional changes that I think are critical places to start.

First, we need to focus on prosecutors because they run this system, and they need to be checked more than they are now. Some changes here could be relatively small things—like changing the internal structure within prosecutors’ offices so that more-experienced prosecutors screen cases because they have a better perspective of what is serious or putting different people in charge of charging decisions from those who investigated cases.

Other needed changes are bigger—such as focusing on metrics that hold prosecutors accountable for how their decisions affect recidivism and reentry. We should force them to think about more than short-term elections and instead look to longer-term facts such as crime rates and recidivism. Because most head prosecutors are elected, reformers can also turn their attention to those elections. A highly organized and interested group could really make a difference.

We’ve already seen this, with Black Lives Matter activists helping to turn out the vote against prosecutors who failed to bring cases against police officers who shot and killed unarmed civilians. If that same energy were also channeled to focusing on how prosecutors exercise their discretion in other areas—when they threaten long sentences, show racial disparities in their charging patterns, and charge juveniles as adults, for example—we might see changes in how that discretion is exercised, at least as long as prosecutors believed it could cost them an election.

The second institutional change that I would focus on would require jurisdictions to see criminal law administration more like the administration of other regulatory areas. One of the biggest institutional flaws in our current approach to criminal justice is that no one actor seems to have an eye on the big



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picture of using criminal justice interventions to study what works to reduce crime rates and recidivism and to implement those reforms. This task is allocated among prosecutors, prison officials, probation departments, parole officials (where they still exist), and executive officers responsible for clemency—the result being that no one agency is accountable for outcomes. Budgets for these different departments exacerbate the problems, because money saved in one area (e.g., prisons) does not automatically get reallocated to another (e.g., probation or treatment programs), where it might be better spent.

We need a coordinated approach to these issues under one roof that is based on the best data available instead of the intuitions of various actors. Jurisdictions should turn to an agency model—whether a sentencing commission or a reentry commission—that is responsible for setting sentencing guidelines, incarceration policies (where individuals are housed and what programming should be available during their terms of confinement), and collateral consequences. We do this in other regulatory areas, and there is no reason not to do it here. This agency should be required to study policies and keep only those where the costs are justified by the benefits.

Third and finally, the courts need to step up and check the system’s excesses. The Supreme Court has largely failed to accommodate constitutional protections to the world of plea bargaining in which we now live, but it is not too late to change course.

Similarly, while the Court has taken a hands-off approach to the Eighth Amendment outside the death penalty context, there are signs that this, too, could shift. There are various openings for shifting the doctrine so that critical constitutional protections provide their intended check against excessive punishments and preserve an individual’s right to a jury trial.

We also need changes to the composition of the judiciary, which is dominated by former prosecutors, with almost no former defense lawyers or individuals experienced in criminal justice reform. The result is a decided tilt toward the government that must be remedied.

Criminal justice reformers should pay more attention to federal judicial appointees to make sure that there is diversity when it comes to criminal justice experience. Those interested in criminal justice need to be just as attentive to the courts as other interest groups are. They should also focus on judicial elections. Just as we are starting to see a shift in elections involving prosecutors, we may also be able to focus some of the criminal law reform’s efforts on judges.

Not one of these steps will be easy. It will be a very long road, but the key is to make sure we are on the right one. And I don’t think we will be headed in the right direction until we recognize that the problems are far deeper than just changing laws through the existing political institutions. We need significant institutional changes, and only then can we expect to change our current system. ■