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### De-Democratizing Criminal Law

Benjamin Levin

*University of Colorado Law School*

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## De-Democratizing Criminal Law

Benjamin Levin\*

Writing twenty years ago, the late Harvard Law professor William Stuntz diagnosed a set of “pathological politics” at the heart of U.S. criminal law.<sup>1</sup> Stuntz sought to explain why carceral policies in the United States appeared to operate as a one-way ratchet, constantly expanding the scope of criminal law and the severity of its punishments. Stuntz’s article on *The Pathological Politics of Criminal Law* – one of the most heavily cited in contemporary criminal law scholarship – ultimately offered an argument grounded in political economy. The story of overcriminalization and mass incarceration was a story of electoral politics, of whiter and wealthier suburban voters favoring harsh responses to social problems and using criminal law to police poorer people of color in U.S. cities, and of the incentives created for judges, legislators, and prosecutors to punish more.<sup>2</sup>

Over the past two decades, some version of the pathological politics thesis has become a common refrain in criminal law scholarship. Certainly, scholars continue to debate the doctrinal nuances of substantive criminal law and constitutional criminal procedure. But, a growing body of literature produced by U.S. legal academics focuses instead on the politics, structures, and institutions that define the administration of criminal law.<sup>3</sup> At the same time, the carceral state and the institutions of mass incarceration have come under increasing fire. With the publication of *The New Jim Crow*,<sup>4</sup> the rise of the Movement for Black Lives, and increasing bipartisan attention to the long hangover of decades of tough-on-crime policies, the moment of “criminal justice reform” has arrived.<sup>5</sup>

Where only a short time ago Democrats and Republicans sparred for the mantle of toughest on crime, politicians increasingly adopt the language of mass incarceration, decrying racial disparities and endorsing non-carceral alternatives.<sup>6</sup> Indeed, the last few years have even seen a groundswell in support for District Attorney candidates with defense backgrounds who have run on platforms

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\* Associate Professor, University of Colorado Law School. For helpful comments and conversations, thanks to Jenny Braun, Thomas Frampton, Aya Gruber, Carissa Byrne Hessick, Joan Segal, and Ahmed White.

<sup>1</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

<sup>2</sup> See generally *id.*

<sup>3</sup> And, it is worth noting that comparative accounts of criminal policy frequently focus on the role of elections and electoral politics as a driver of the exceptional brutality and scope of the U.S. carceral state. See, e.g., DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2015); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

<sup>4</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>5</sup> See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

<sup>6</sup> See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (collecting sources).

devoted to dismantling or at least dialing back the carceral state.<sup>7</sup> In short, the politics of criminal law appear to have reached a breaking point.<sup>8</sup>

In many ways, Rachel Barkow's *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* stands as the culmination of the pathological politics thesis.<sup>9</sup> Released into a moment of potential and uncertainty in criminal justice policy, Barkow's important book shows just how much criminal justice thinking and structural criminal law scholarship has grown since the turn of the twenty-first century. But, unlike Stuntz, and unlike a growing chorus of academics and advocates, Barkow argues that the solution to the problem does not come via popular democracy; rather, the way to address the carceral state's pathological politics is to move away from (electoral) politics. To Barkow, the best path forward is to embrace the bureaucratic aspects of the criminal system.

Through a series of compelling anecdotes backed with statistical and historical context, Barkow explains how U.S. "penal populism" has fueled the carceral state. In response to these structural issues, Barkow departs from Stuntz and a growing chorus of academics and advocates to argue not for more or better democracy, but for a technocratic turn. In Barkow's telling, the criminal system has failed in large part because it has been constructed by non-experts who have not pursued rational or evidence-driven solutions to problems of public safety.<sup>10</sup> As advocates and academics celebrate the rise of so-called progressive prosecutors, the increase in activism targeting punitive policies, and legislative efforts to dial back criminal law, Barkow calls for a new politics rooted in expertise and evidence-based decisionmaking.

This Review proceeds in two Parts. In Part I, I describe Barkow's argument, situating it against the backdrop of a growing schism between criminal justice "bureaucratizers" and "democratizers." In Part II, I argue that Barkow's call for expertise raises important questions about the nature of criminal justice policymaking, the purpose of the criminal system, and the limitations of expertise and rationality as responses to deep structural critiques. Ultimately, I see Barkow's account as an important reminder of the punitive impulses at the heart of U.S. political culture and, as such, a timely and cautionary tale for those enthusiastic about a democratic turn. But, I also remain skeptical about a prioritization of "rationality" and a prioritization of experts dedicated to optimizing "public safety."

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<sup>7</sup> See, e.g., David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017); Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748 (2018); Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC, May 18, 2016, <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/>; Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019).

<sup>8</sup> Of course it is worth noting that the politics of criminal law aren't and never have been monolithic. See generally PHILIP GOODMAN, JOSHUA PHILIPS, AND MICHELLE PHELPS, *BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE* (2017). Indeed, scholars increasingly have argued that the "criminal justice system" is hardly a single system and is better understood as conglomeration of local institutions embedded in local politics. See, e.g., Bernard E. Harcourt, *The Influence of Systems Analysis on Criminal Law and Procedure: A Critique of a Style of Judicial Decision-Making* (Columbia Public Law Research Paper No. 14-562, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3062900](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062900); Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice"*, 15 OHIO ST. J. CRIM. L. 619 (2018); Sara Mayeux, *The Idea of "The Criminal Justice System"*, 45 AM. J. CRIM. L. 55, 55 (2018); John F. Pfaff, *Waylaid by A Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 558 (2015) ("[T]he 'system' is not a system at all. Instead, it is a loose affiliation among independent law enforcement agencies, individual counties, local jails, and state prisons.").

<sup>9</sup> RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019).

<sup>10</sup> See, e.g., *id.* at 10.

## I. *The Limits of Democracy*

As critics of mass incarceration have internalized the pathological politics of the carceral state, they generally have endorsed one of two broad approaches: an embrace of more (or better) democracy and public participation, or a rejection of public participation in favor of expert decision-making.<sup>11</sup>

While both approaches are well represented in the literature, the democratizers generally appear to have gained the upper hand in the debate.<sup>12</sup> A democratic turn can take many forms and have many different political valences: to Stuntz, the answer to the problem of pathological politics was a (re)turn to the local.<sup>13</sup> To law professor-turned judge Stephanos Bibas, the criminal system has become unmoored from its roots as an institution of public morality because of its over-reliance on lawyers and other bureaucratized elites.<sup>14</sup> And, to a growing chorus of left, radical critics, the criminal system operates as vehicle of social control; if power could be turned over to the people, the community, or movement actors, the argument goes, the carceral state would wither and die to be replaced by non-punitive institutions.<sup>15</sup>

It's not that democratizers ignore or disregard the relationship between representative democracy and mass incarceration. Indeed, scholars who don't adopt a bureaucratic- or expert-driven model generally argue that there *is* close relationship between U.S. electoral politics (from the election of judges and prosecutors to public perceptions of crime) and the growth of the carceral state.<sup>16</sup> But, many commentators and advocates seek to subvert that historical relationship: the problem isn't democracy or public participation as such; rather, criminal law suffers from many of the same ailments as other corners of U.S. democracy.

As political scientist Lisa Miller and legal scholar James Forman, Jr. have argued in different contexts, voters aren't necessarily punitive in a vacuum. Rather, when presented with a limited set of political responses to violent crime, they will choose punitive measures, not because of an abiding punitiveness, but because they want the state to do *something*, and in a neoliberal political economy, criminal law is usually the only *something* available.<sup>17</sup> In statistically challenging the "myth of mob rule,"

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<sup>11</sup> See, e.g., Lauren M. Ouziel, *Democracy, Bureaucracy and Criminal Justice Reform*, B. C. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3391800&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391800&download=yes); John Rappaport, *Some Doubts About 'Democratizing' Criminal Justice*, 87 U. CHI. L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3418059](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418059)

<sup>12</sup> See generally John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3418059](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418059) (describing this tension and the ascendancy of democratic solutions); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U.L. REV. 1693 (2017).

<sup>13</sup> See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>14</sup> See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

<sup>15</sup> See, e.g., Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Introduction, 132 HARV. L. REV. 1568 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Platform, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/>; Dorothy E. Roberts, *Democratizing Criminal Law As an Abolitionist Project*, 111 NW. U. L. REV. 15977 (2017); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

<sup>16</sup> See, e.g., MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2014); LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* (2016); AYA GRUBER, *THE FEMINIST WAR ON CRIME* (forthcoming 2020) (describing radical feminist support for carceral policies); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

<sup>17</sup> See LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* 204 (2016); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017). Cf. BERNARD E.

Miller has argued that when presented with a full menu of policy options, voters might opt for social services or, at the very least, less-punitive criminal responses, but that full menu is rarely available, particularly for voters and communities lacking in political clout.<sup>18</sup> Similarly, in looking at Black support for punitive policies that disproportionately affected Black defendants, Forman has argued that the support was the result of compromise: many Black activists in the 1960s and 1970s called for a “Marshall Plan for the cities.”<sup>19</sup> These activists *were* concerned about crime, but they were asking for social services, not just more police and more prosecutions. As in so many areas, the state’s response was to strengthen the carceral apparatus.<sup>20</sup>

Viewed through this frame, mass incarceration isn’t necessarily or exclusively a creation of problematic political inputs (*i.e.*, public preferences); rather, the problem is one of political outputs (*i.e.*, how policymakers and political elites translate those preferences into law).<sup>21</sup> So, this frame allows for continued enthusiasm for democracy and public participation, as long as we can design movements, policies, and institutions to be *truly democratic* and to center voices and impulses often excluded from the halls of political power.

*Prisoners of Politics* stands as a powerful response to that democratic impulse. While starting from a similar premise as the democratizers (*i.e.*, that the politics of criminal law are corrosive), Barkow tacks in a very different direction. Barkow decries the “over-politicization of criminal law – and the corresponding lack of rational deliberation it brings.”<sup>22</sup> As she describes it, democratic reforms can only do so much to escape from the vicious cycles of pathological politics: “Strong political and psychological forces remain decidedly in favor of long sentences and an expansive criminal state – even when doing so is best characterized as pathological. If reform is sought directly through the political process, it will achieve only so much before running up against these political forces.”<sup>23</sup> The narrative that she weaves is one in which popular punitive impulses have led to the constant metastization of the carceral state, as legislators vie to respond to voters’ fear of crime. And, the touchstone in Barkow’s account is “public safety.”<sup>24</sup> Barkow argues that decades of pathological politics haven’t made the United States a safer country, but well-designed expert agencies could succeed where voters and politicians have failed.<sup>25</sup>

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HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 40–44 (2011). (“Neoliberal penalty facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics.”); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 17(2014).

<sup>18</sup> See generally LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* (2016).

<sup>19</sup> FORMAN, *supra* note 16, at 12-13.

<sup>20</sup> See *id.* See also JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); Elizabeth Hinton, Jullily Kohler-Hausmann, & Vesla M. Weaver, Opinion, *Did Blacks Really Endorse the 1994 Crime Bill?*, N.Y. TIMES, Apr. 13, 2016, at A25 (“Policy makers pointed to black support for greater punishment and surveillance, without recognizing accompanying demands to redirect power and economic resources to low-income minority communities.”).

<sup>21</sup> Or, as Barkow observes, “often other societal safeguards are absent or fail, thus leaving it to criminal justice institutions to address the problems.” BARKOW, *supra* note 9, at 184.

<sup>22</sup> BARKOW, *supra* note 9, at 140.

<sup>23</sup> *Id.* at 124.

<sup>24</sup> See, e.g., *id.* at 167, 184.

<sup>25</sup> See, e.g., *id.* at 10-16.

In building this argument, Barkow structures the book in three parts. The first part examines “some of the most important criminal justice approaches that fail to promote public safety and lead to unnecessary confinement, the misallocation of resources, and . . . a disproportionate impact on poor and minority communities.”<sup>26</sup> Elsewhere, Barkow has argued that “in criminal law, stories, not data, drive the policy analysis.”<sup>27</sup> And, while *Prisoners of Politics* relies largely on a meticulous deployment of crime data and academic research, Barkow does make effective use of stories that highlight the irrationality and tragic absurdity of the criminal system – from James Bower, the terminally ill drug defendant with six months to live who was denied compassionate release because “officials believed he could still engage in criminal activity despite suffering from prostate cancer,<sup>28</sup> to ten-year-old Cindy “who cannot have a birthday party at her house because her father is a registered sex offender.”<sup>29</sup> In a sort of argumentative jujitsu, then, Barkow makes her case for data instead of emotionally resonant stories by deploying those same stories.

In this part, Barkow decries substantive criminal law as outrageously broad. Statutes reach conduct that may be harmless or may have little in common with the misfeasance that legislators had in mind (a common refrain in the literature on overcriminalization). And, by allowing for such broad applications, criminal law does a terrible job categorizing. “Sex offense” or “felony” might conjure up certain images in the public imaginations, but these classifications sweep in many people and much conduct that hardly fits the vernacular definition, leading to harsh sentences and social stigma that appear a poor fit for the actual offense.<sup>30</sup> Further, this categorical sloppiness exacerbates the problem of collateral consequences, as institutional actors are unable to make exceptions, instead applying sweeping restrictions to wide swaths of people with criminal records.<sup>31</sup>

Additionally, Barkow brings together a wealth of criminological research to argue against “senseless sentencing” practices that do more harm than good.<sup>32</sup> She embraces a utilitarian approach to punishment arguing that many long sentences can’t survive cost-benefit analysis and that the actual conditions in prison do little to rehabilitate and are, instead, criminogenic themselves.<sup>33</sup> Barkow argues that a shift away from the rehabilitative ideal hasn’t benefited society: “[t]he tragic irony of our current approach to warehousing individuals without programming is that it fails miserably as a matter of public safety.”<sup>34</sup> Further, “the skepticism about rehabilitation” that took hold in the 1960s has “had another negative consequence for public safety aside from the lack of programming in prisons: we stopped reevaluating people and policies over time.”<sup>35</sup> Or, put differently, in Barkow’s account, the

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<sup>26</sup> *Id.* at 17.

<sup>27</sup> Rachel E. Barkow, *Criminal Law As Regulation*, 8 NYU J.L. & LIBERTY 316, 322 (2014).

<sup>28</sup> BARKOW, *supra* note 9, at 87.

<sup>29</sup> *Id.* at 95.

<sup>30</sup> See generally BARKOW, *supra* note 9, at 19-37. Cf. Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563 (2018) (critiquing the continued reliance on the felony categorization).

<sup>31</sup> See generally BARKOW, *supra* note 9, at 88-102.

<sup>32</sup> See *id.* at 39-55.

<sup>33</sup> See *id.* at 39-72.

<sup>34</sup> *Id.* at 67.

<sup>35</sup> *Id.* at 73. For a critical take on the reemergence of rehabilitation, though, see generally Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013).

institutions of criminal punishment haven't been subject to necessary, meaningful oversight or reexamination; they – and their attendant carceral logics<sup>36</sup> – have been treated as natural and inevitable.

The second part pivots to the politics and institutions that have driven these failed policies. Barkow briefly provides an account that will be familiar to scholars of criminal law: how a crime spike in the 1960s helped fuel a carceral turn that was exacerbated by a marked imbalance in interest group politics (*i.e.*, advocates for prosecutorial policies are ubiquitous, well-funded, and well-organized, while criminal defendants – particularly poor defendants, defendants of color, and others from marginalized communities – are not a lobbyist's dream).<sup>37</sup> Importantly, Barkow highlights “the limits of progress under populism.”<sup>38</sup> Even much-celebrated contemporary reform efforts often adopt narrow frames or targets: “Almost all the reforms have been to reduce imprisonment for what political scientist Marie Gottschalk calls the ‘non, non, nons – that is, the nonserious, nonviolent, non-sex related offenders.’”<sup>39</sup> And, as Barkow stresses, this problem is bipartisan. For example, despite making public statements (and writing a much-heralded law review article)<sup>40</sup> about the importance of criminal justice reform, President Barack Obama adopted a “cautious” approach to reform.<sup>41</sup>

The problem, though, isn't just this populist push from Goldwater onward, Barkow argues. Rather, it's that popular punitivism has met no meaningful institutional check and that, as an historical matter, any such checks have diminished over time.<sup>42</sup> Here, Barkow takes an originalist turn, looking to the late eighteenth century and the system of checks and balances that were designed and envisioned to present the sort of unrestrained state power that has dominated modern criminal law.<sup>43</sup> Clemency has not done the work that it might have (Barkow is and has been one of the leading voices for improving the clemency process),<sup>44</sup> and prosecutors and legislators have served as inter-branch allies in the war on crime, acting in tandem to enhance the breadth and severity of criminal law.<sup>45</sup> The judiciary is not spared Barkow's critical eye, as she catalogues the ways in which judges – often disempowered by legislators' decisions in a prosecutor-dominated regime – have failed to exercise even the limited tools at their disposal.<sup>46</sup>

Finally, in the book's third part, Barkow pivots to the prescriptive. Building on her past scholarship, Barkow traces a way forward with a focus on “institutional checks to inject rationality

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<sup>36</sup> See, e.g., Lori Gruen on Prisons in MYISHA CHERRY, UNMUTED: CONVERSATIONS ON PREJUDICE, OPPRESSION, AND SOCIAL JUSTICE 24, 29 (2019); Sarah Lamblee, *Transforming Carceral Logics: 10 Reasons to Dismantle the Prison Industrial Complex Through Queer/Trans Analysis*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 235 (Eric A. Stanley & Nat Smith eds., 2011); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 18 (2019).

<sup>37</sup> See generally BARKOW, *supra* note 9, at 105-19.

<sup>38</sup> See *id.* at 119.

<sup>39</sup> *Id.* at 120.

<sup>40</sup> Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

<sup>41</sup> *Id.* at 122.

<sup>42</sup> See generally *id.* at 125-38.

<sup>43</sup> See generally *id.* at 125-29.

<sup>44</sup> See, e.g., Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 425-41 (2017); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1345-51 (2008); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and A Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

<sup>45</sup> See generally BARKOW, *supra* note 9, at 126-32.

<sup>46</sup> See *id.* at 132-35.

into the process.”<sup>47</sup> Her goal here is to “describe[ ] a better institutional model for criminal justice decision-making that insulates the worst self-destructive impulses of populism and injects rationality in the system so that public safety is maximized at the lowest cost and on the best available evidence.”<sup>48</sup> In doing so, Barkow rejects solutions to the problems of punitive populism that she sees as politically impractical (*e.g.*, moving away from elected judges and prosecutors) and instead offers a turn to expertise.

As she has elsewhere,<sup>49</sup> Barkow proposes an administrative model for prosecutorial oversight. Recognizing that prosecutors are the dominant actors in the criminal system, Barkow argues that constructing a workable system of oversight for prosecutors’ offices should be an essential component of any reform agenda.<sup>50</sup> While Barkow expresses cautious optimism about the new crop of DAs running on reformist platforms, she raises concerns about actually assessing DA performance and also the vicissitudes of political will. Not only might campaign promises give way to prosecution as usual, but the current excitement about reformist DAs might be replaced by a tough-on-crime backlash: “the whims of the electorate are no replacements for. . . structural changes.”<sup>51</sup>

And, like prosecutors, Barkow argues, judges could make many improvements with the powers and doctrines they already have at their disposal.<sup>52</sup> In order to break the hold of punitive populism, Barkow contends, reformers must focus more on judicial selection and the politics and prosecutorial backgrounds of those taking the bench.<sup>53</sup>

That said, the heart of the book’s third part (and, in a sense, the heart of *Prisoners of Politics*) really is Barkow’s call for a move to overarching expert policymaking. No matter how much work is done to improve prosecutors and judges, Barkow contends, the United States “need[s] another institutional actor or actors with the relevant expertise and access to data and empirical information to coordinate and oversee criminal justice policies. . . .”<sup>54</sup> Barkow acknowledges that there are “two crucial premises behind this idea”: (1) “criminal justice has to be more coordinated than it is now” because “coordination is necessary to get better outcomes”; and (2) “empirically valuable information on criminal law can lead to better decisions.”<sup>55</sup> Where too many discussions of criminal policy and criminal justice reform assume that we all agree on what “better” means, Barkow is careful to specify her utilitarian priors: “better decisions” are “decisions that improve public safety and human lives at a lower cost.”<sup>56</sup>

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<sup>47</sup> *Id.* at 140.

<sup>48</sup> *Id.*

<sup>49</sup> See, *e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

<sup>50</sup> See generally BARKOW, *supra* note 9, at 143-54.

<sup>51</sup> *Id.* at 164.

<sup>52</sup> See generally *id.* at 186-98. Cf. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016) (making an analogous claim about the untapped potential of judges to improve the administration of criminal law).

<sup>53</sup> See generally BARKOW, *supra* note 9, at 198-201. Cf. also Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1987 (2016) (tracking the relationship between Fourth Amendment jurisprudence and judges’ prosecutorial backgrounds).

<sup>54</sup> BARKOW, *supra* note 9, at 166.

<sup>55</sup> *Id.* at 166-67.

<sup>56</sup> *Id.* at 167. Certainly, as in any cost-benefit analysis, each term could be parsed endlessly, and the question of what facts or factors to endogenize into the concepts of “public safety,” improved “human lives,” and “cost” remains a massive one.



Looking to her experiences as a commissioner on the U.S. Sentencing Commission, Barkow offers a set of best practices for structuring a criminal oversight agency or agency. Despite many shortcomings in form and function, sentencing commissions in Barkow's account have had some important successes.<sup>57</sup> She particularly praises the ways in which sentencing commissions have been able to bring together different voices and interests to address a common problem.<sup>58</sup> While she concedes that the federal commission and its state analogs are not without their problems, Barkow argues that many critiques actually rest on the ways in which the expert-led bodies have been insufficiently insulated from politics as usual; as she puts it, the "Commission has rarely been left alone to make policy and Congress has directed just about everything it has done over the years."<sup>59</sup> So, looking to lessons from administrative law, Barkow walks through a range of different institutional approaches to providing further independence.<sup>60</sup> Further, Barkow argues that coordinated institutions devoted to systemic oversight will be able to take a broader view and see the ways in which policies interact and the ways in which the criminal system relates to other legal and social institutions.<sup>61</sup>

## II. *The Limits of Bureaucracy*

The prescriptive turn to agency oversight is much of what makes *Prisoners of Politics* such a fascinating read and a novel contribution to the literature. But, that turn also raises questions about the nature of both expertise and the carceral state. I am hardly the first person to express some concern about a technocratic or bureaucratic approach to criminal policy making, but I see Barkow's account and a case for expert decisionmaking as raising three major questions: (1) Is criminal policymaking suited to expert-based solutions? (2) What is criminal justice expertise? And (3) Can we really divorce technocratic approaches from politics? In this Part, I address those questions in turn.<sup>62</sup>

### *A) Is Criminal Policymaking Suited to Expert-Based Solutions?*

One of the peculiarities of the debate over bureaucratization of criminal law is the departure from politics as usual. That is, in debates about criminal law and its administration, many of the same commentators who usually embrace agency discretion and deference to experts suddenly balk. Or, more pointedly, many commentators who usually embrace the administrative state and fall on the political left when it comes to matters of regulation adopt a decidedly libertarian rhetoric when it comes time to address state action in the criminal context.

This tension is evident in the debates around non-delegation and the Sex Offender Registry Notification Act as well as in well-established criticism of courts' approach to prison law and regulation. For example, much commentary on civil prison litigation and the Prison Litigation Reform

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Nevertheless, in an academic and policy space often full of bromides and light on details, where it's easy to accept the illusion of consensus because of lack of specifics, I think Barkow deserves credit for being forthright in her consequentialism.

<sup>57</sup> See generally *id.* at 171-75.

<sup>58</sup> See *id.* at 174-75

<sup>59</sup> *Id.* at 171.

<sup>60</sup> See *id.* at 177-83.

<sup>61</sup> See *id.* at 183-85.

<sup>62</sup> And, elsewhere, I have begun to examine seminal issues with a specific eye to the role of judges in the criminal system. See generally Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379 (2016)

Act stresses the offensiveness of courts' general deference to decisions made by prison management.<sup>63</sup> Deferring to prison regulatory authorities is framed as a means of enabling abuse, rather than an outgrowth of the New Deal social order.<sup>64</sup> Judges excuse their failure to vindicate the rights of the incarcerated by nodding to the expertise of prison officials.<sup>65</sup> To those concerned about the brutal conditions faced by people inside, this deference is an outrage. But, for believers in the administrative state, why is deference to the Federal Bureau of Prisons inherently more objectionable than deference to the Food and Drug Administration or any other regulatory authority?

Similarly, defense attorneys and advocates for the rights of people with sex offense convictions have sought to challenge the Sex Offender Notice and Registration Act (SORNA) under the non-delegation doctrine, a dead-letter theory that has remained a hobby horse of libertarian critics of the administrative state.<sup>66</sup> The response to the Supreme Court's decision in *Gundy v. United States* (in which the Court upheld SORNA) revealed fascinating fault lines,<sup>67</sup> as many critics of U.S. carceral policies decried the draconian law,<sup>68</sup> while other liberals and progressives framed the decision as an important victory for the administrative state.<sup>69</sup>

Or, to use one final familiar example, consider discussions of police expertise. Here, the dynamic is slightly different: *i.e.*, we aren't dealing with an actual administrative agency. Nevertheless, a large body of scholarship critiques judges' reliance on police expertise as a justification for permissive Fourth Amendment rules and shoddy enforcement of civil rights law.<sup>70</sup>

So, what to make of this selective preference for deference among many left-leaning critics of the carceral state? The easy response to this inconsistency is that it is simply inconsistent – commentators

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<sup>63</sup> See, e.g., Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT. R. 245 (2012); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986-2010*, 5 UC IRVINE L. REV. 89 (2015); Keramet Reiter & Kelsie Chesnut, *Correctional Autonomy and Authority in the Rise of Mass Incarceration*, 14 ANN. REV. L. & SOC. SCI. 49, 58 (2018); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2037 (2018).

<sup>64</sup> See generally Dolovich, *supra* note 63.

<sup>65</sup> See, e.g., *Beard v. Banks*, 548 U.S. 521 (2006); *Turner v. Safley*, 482 U.S. 78 (1987); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

<sup>66</sup> See, e.g., Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019); Aaron Gordon, *Nondelegation*, 12 NYU J.L. & LIBERTY 718 (2019)

<sup>67</sup> 139 S. Ct. 2116 (2019).

<sup>68</sup> See, e.g., Wayne A. Logan, *Challenging the Punitiveness of "New-Generation" SORN Laws*, 21 NEW CRIM. L. REV. 426, 430 (2018); Brief for the American Civil Liberties Union as Amicus Curiae in Support of Petitioner, *Gundy v. United States of America*, 139 S. Ct. 2116 (2019) (No. 17-6086).

<sup>69</sup> See, e.g., Mark Joseph Stern, Opinion, *The Supreme Court's Conservatives Are Ready to Take a Wrecking Ball to the Entire Federal Bureaucracy*, SLATE, June 20, 2019, <https://slate.com/news-and-politics/2019/06/neil-gorsuch-supreme-court-conservatives-gundy-sex-offender.html>; Noah Feldman, Opinion, *This Supreme Court Decision Should Worry the EPA and FDA*, BLOOMBERG, Jun. 22, 2019, <https://www.bloomberg.com/opinion/articles/2019-06-22/supreme-court-s-gundy-decision-should-worry-administrative-state>; Nicholas Bagley, Opinion, *Most of Government is Unconstitutional*, N.Y. TIMES, Jun. 21, 2019, SR 3.

<sup>70</sup> See, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997–98 (2017) (observing that “judicial deference to police judgment in criminal procedure has inspired a small library of criticism”); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521 (2015); Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407 (2013); Josh Segal, Note, *“All of the Mysticism of Police Expertise”: Legalizing Stop-and-Frisk in New York, 1961-1968*, 47 HARV. C.R.-C.L. L. REV. 573 (2012); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847 (2014).

and academics are driven by their political commitments, so any attempt to tease out intellectual coherence is misguided.

Maybe that's right. But, I think that answer misses another possibility, a possibility that should raise major concerns for Barkow's technocratic turn: expert-based solutions make sense when there's a generally agreed-upon regulatory purpose (*e.g.*, making sure that consumers aren't poisoned by adulterated drugs or that factories aren't spewing out large quantities of toxic gas); the technocratic turn is a worse fit when it's not clear what values or metrics the regulators should be quantifying. (And, particularly, when there's not agreement that the regulatory purpose is a worthy one.) "When agencies have multiple goals and they come into conflict," Barkow explains, "they adhere to their primary mission."<sup>71</sup> Yet that primary mission here remains elusive.

If everyone agreed that the goal of the criminal system were maximizing "public safety" or "reducing recidivism" (for example), then it might make sense to turn to technocrats who might use their expertise to maximize these values. Similarly, if there were a general consensus on the purpose of prisons, maybe it would make sense to allow wardens greater deference in determining how to maximize rehabilitation, fitting moral punishment, or some other value. But, as decades of criminal scholarship and policymaking have shown, there is no such first-principles agreement.<sup>72</sup> The retributivist and the expressivist, the victims' rights advocate and the deterrence proponent might all have very different goals and very different visions of what criminal law and its practitioners should accomplish.

The Administrative Procedure Act, *Chevron* deference, and the structures of administrative law rest on some belief that experts charged with a legislative mandate can use their expertise to advance that statutory goal. If the goal is unclear, then what exactly are experts doing? And, what's the justification for deferring to their judgments and insulating their decisionmaking from democratic accountability?

Maybe this critique could (or should) cut more broadly. Maybe, taken seriously, this critique cuts to the core of the administrative state and helps explain the deeply politicized nature of regulatory agencies and the major swings in policy from administration to administration. That's a bigger discussion for another day. But, for the time being, it's worth recognizing the deeply contested framework of and justifications for criminal punishment. Whether other spaces of governance are more easily suited to expert oversight or not, the fraught discourse on criminal punishment reveals that there is no overarching agreement on what exactly criminal law is supposed to do.

Relatedly, the growing strand in scholarship and advocacy that questions the basic foundations of criminal law and punishment makes any appeal to expertise a difficult fit. If one believes that the problem of mass incarceration is one of scale or right-sizing (as Barkow's account suggests), then it certainly would make sense to figure out how to get it right – *i.e.*, to determine who should be incarcerated, for what, and for how long. Of course, such questions rest on generally agreed-upon views of the purposes of punishment, but, assuming that we as a society *could* agree, there would be discrete problems for the experts to solve.

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<sup>71</sup> BARKOW, *supra* note 9, at 146.

<sup>72</sup> And, as Barkow notes in closing, the continued appeal of retributivism remains one of the greatest obstacles to her proposals and her general approach. *See* BARKOW, *supra* note 9, at 205.

If one embraces abolitionist or similarly totalizing critiques of the carceral state, though, what exactly is the appeal of expert-driven solutions? If one believes that the system isn't broken and actually is working as it's supposed to (*i.e.*, as a vehicle of social control targeted at marginalized populations), then the problem with the status quo is hardly its irrationality. Maybe it adds insult to injury that – as Barkow argues compellingly – so many policies don't even advance public safety. Marginalized populations are suffering, and public safety hasn't even increased in exchange for that harm done. But, if the starting point of critique is one rooted in a radical or transformative vision that rejects the institutions of prison and police, then offering new management strategies rooted in rationality and expertise would provide cold comfort.

By way of analogy, consider the case of capital punishment. There certainly are many objections to how the state goes about killing people on death row. Decades of Eighth Amendment litigation by death penalty opponents have challenged every aspect of the process, and doctors and pharmaceutical companies have increasingly shied away from executions altogether, leaving some states to adopt haphazard drug cocktails and methods of killing individuals on death row.<sup>73</sup> Enhancing expert oversight certainly might eliminate some of the horror stories of defendants writhing in agony or taking hours to die. But, for death penalty abolitionists who believe that executions are inherently illegitimate and inhumane (as Carol and Jordan Steiker have argued), “more humane” death isn't really the goal.<sup>74</sup>

Indeed, perhaps it's this insight more than any other that helps explain the hostility to discretion and administrative deference in the prison context: if one simply believes that prisons are cruel and inhumane places, constructing a better science of prisons or appointing a new warden won't do the trick. Perhaps these are acceptable incremental improvements (or perhaps not), but they don't actually get at the fundamental problems of incarceration itself.

In short, agreeing on expert solutions requires agreeing on what's actually wrong with the carceral state. To be clear, I think that many different commentators and advocates could agree on some basic problems that experts could address. And, Barkow's approach might be an important first step in addressing some of those less controversial issues (*e.g.*, prison rape, harsh punishment for certain types of non-violent offenses, etc.). But the harder questions – the ones that so often have led to punitive popular policy-making (*e.g.*, what to do about violence, sex crimes, etc.) – might remain unanswered. Or, they might result in answers that would be highly unsatisfactory to many critics of the carceral state.

### B) *What Is Criminal Justice Expertise?*

Even if we agree with Barkow that experts can solve the myriad problems with the administration of criminal law, another question remains: who are the appropriate experts? In some sense, this question can't be divorced from the previous question – the experts on the proper retributive scope of punishment might be very different from the expert on recidivism, or deterrence, or what have you.

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<sup>73</sup> See generally DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2012); BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* (2017); CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016).

<sup>74</sup> See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995)

(As Barkow acknowledges, the strength of her proposal may depend significantly on the underlying purposes of criminal law.)<sup>75</sup> More pressingly, though, this question speaks to contemporary debates about public participation in the criminal system as well as to democratic- or political-economy-based concerns about the nature of expertise.

The criminal system – like the legal system generally – is dominated by elites who purport to exercise some degree of expertise. Judges, police, prosecutors, defense attorneys, probation officers, wardens, and others exert control over individual defendants and the outcomes of individual cases. Case law and statutes reinforce and embrace the turn to these experts. But, recent critical scholarship asks why *these* experts are owed deference and why their expertise deserves legitimacy or greater attention.<sup>76</sup> For example, viewed through such a critical lens, perhaps the statements of someone previously incarcerated or someone who has been stopped repeatedly by police should be afforded greater weight – she, too, has extensive experience with criminal law, so why shouldn't her "expertise" receive the same recognition?<sup>77</sup> And, coming from a different political vantage point, why isn't the crime victim treated as an expert whose views and opinions are deserving of judicial and/or legislative deference? In other words, viewed through the right frame, perhaps the victims' rights movement actually represents a turn to expertise.

This observation needn't undermine Barkow's arguments. While she does note that "prosecutors often lack the necessary expertise to know what does and does not work across a range of criminal justice options,"<sup>78</sup> I don't necessarily read Barkow as embracing a technocratic turn that rests on a specific vision of (or set of qualifications for) criminal justice expertise. Rather, I think Barkow's argument could be read as a claim that we should be transparent about our goals and advance policies rationally designed to address those goals, which strikes me as an important intervention in any policy debate.<sup>79</sup> If the goal is public safety, for example, Barkow contends that the right experts are "criminologists or social scientists" who are steeped in "broader data" and "empirical analysis."<sup>80</sup>

That said, such a slippery concept of "expertise" would appear to complicate, and perhaps undermine, the cold, neutral, apolitical vision of expert-driven policymaking. Indeed, a conception of expertise that would allow for treating crime victims as experts seems as though it would reify the sort of populism that Barkow decries. (To be clear, I also think that re-framing victims' rights advocacy as expertise would be bad news, but I think it's a theoretically defensible framing that highlights the contingency of any appeal to expertise.) Deciding who gets to claim expertise and who is an expert

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<sup>75</sup> See BARKOW, *supra* note 9, at 167-68.

<sup>76</sup> See, e.g., Akbar, *supra* note 15; Simonson, *supra* note 15; Mariana Valverde, "Miserology": *A New Look at the History of Criminology*, in THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff, eds. 2017).

<sup>77</sup> Indeed, in discussing the movement to elect reformist DAs, Barkow notes that at the local level "voters may have a better sense of actual crime rates and practices and how they affect their lives and communities." *Id.* at 155.

<sup>78</sup> BARKOW, *supra* note 9, at 166.

<sup>79</sup> See, e.g., Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 CARDOZO L. REV. DE NOVO 23, 24 (2011) (identifying public ignorance of sentencing law as a contributor to public punitiveness); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000) ("Judicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decision-making."); Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1287 (1999) ("[E]mpirical knowledge is most useful in unmasking the theoretical assumptions that undergird constitutional law. . .").

<sup>80</sup> BARKOW, *supra* note 9, at 166.

necessarily would affect policy outcomes. And, rejecting some claims of expertise as too political, too personal, or too divorced from a more easily quantifiable expert model necessarily has a political valence. Further, while Barkow stresses that “[a]ny agency responsible for criminal justice policy requires a diverse membership that reflects all of the relevant interests in the given area,” the question of which voices to privilege remains.<sup>81</sup> So, to the extent that one of data- or expert-driven policymaking’s greatest strengths is its ostensible neutrality or insulation from politics, I remain skeptical.

C) *Can We Really Divorce Technocratic Approaches from Politics?*

All of which leads to the biggest question that lurks beneath any technocratic approach: is it fair to frame expertise or technocracy as distinct from politics or populism? Barkow’s account, not unlike Stuntz’s, focuses on a pathology of U.S. politics, a “punitive populism” that has driven the carceral state. To be clear, I don’t disagree that the story of mass incarceration is a story of political economy and public opinion. Further, any discussion of U.S. criminal policymaking needs to reckon with deep cultural forces – narratives of racialized fear of crime, understandings of “accountability” and “incarceration” as interchangeable, etc. But, I remain unconvinced that turning to some set of elite actors would necessarily avoid the biases, fears, and political whims of more democratic approaches (or, that elite actors are necessarily *less* susceptible to those fears, biases, and whims).

Any expert-based institution (be it an agency, a commission, or some other group of elite actors) can’t truly be insulated from politics or political forces. For example, take the federal judiciary. Certainly, a federal judge won’t lose her seat due to a recall election because of a lenient sentence, while an elected judge might. Nevertheless, the entire appointment process is deeply embedded in electoral politics. The move by presidential candidates to announce potential Supreme Court appointees indicates that the appointment process may only operate as a fig leaf to cover overtly political decisions about which elite actors should be entitled to make “expert” decisions. Similarly, administrative agencies, are generally recognized as deeply politicized institutions, despite their elite, expert status. That is, no one would assume that a Republican Environmental Protection Agency or National Labor Relations Board and a Democratic one would behave similarly.

This observation certainly isn’t lost on Barkow. Indeed, Barkow’s insight into these dynamics is part of what makes the book (and her scholarship generally) such an important contribution to the literature on criminal law and its administration. In the closing chapter of the book, Barkow actually notes this dynamic in critiquing the U.S. Sentencing Commission. The problem with the Federal Sentencing Guidelines and the Commission, Barkow argues, is not a fundamental flaw with technocracy and its failure to address the background conditions against which it operates (the problem of “bias in, bias out,” as Sandy Mayson describes it).<sup>82</sup> Rather, the Commission – like many parole boards and analogous criminal justice experts – has been insufficiently shielded from politics and the passions that define punitive populism.

If the problem were merely one of insulation from obvious conflict or corruption (of the sort that become the province of judicial ethics and recusal inquiries), then I would be much more sanguine about the possibility of remedying technocracy’s flaws. In fact, much of the appeal of these expert-

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<sup>81</sup> *Id.* at 175.

<sup>82</sup> Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218 (2019).

based solutions is their ostensible distance from the criminal system's current reliance on institutions that (to many) already suggest such conflict of interest: an elected prosecutariate and an elected judiciary comprised largely of former prosecutors. Yet, I believe that such a conclusion allows for too convenient a dismissal of the deeper political problems that underpin Barkow's account of punitive populism. Sure, there are awful cases of judges explicitly conspiring with DAs, but what about the judge who firmly believes that she is upholding her oath, but who actually brings deep biases about criminal defendants with her to the bench?

Elite institutional actors – not just voters, demagogues, or punitive populists – have been key players in the rise of the carceral state.<sup>83</sup> And, indeed, this point is one that Barkow makes compellingly in describing the role of prosecutors and judges as drivers of mass incarceration.<sup>84</sup> From federal prosecutors, to sentencing commissions, to appointed judges, the punitive impulse and the embrace of the “new penology” have transcended a story of interest groups or populism. It was, after all, professors, not a mayor or elected DA who came up with broken windows policing.<sup>85</sup> Put differently, there is something about the ideology, assumptions, or politics (in a broader, non-electoral sense) of these actors that has allowed them to advance similar ends as their elected counterparts.<sup>86</sup> Whether this similarity in approach is understood in terms of race and class, of punitive impulses, or shared understandings of the role and legitimacy of criminal law, I think it's important to recognize that experts have hardly been immune from the cultures of punitivism that Barkow describes.

### Conclusion

Ultimately, my three questions aren't meant to diminish the significance of *Prisoners of Politics* or the magnitude of Barkow's contribution to the study of criminal law and policy. Regardless of whether one falls in the democratizers' camp and remains wary of bureaucratic solutions, or one shares Barkow's affinity for administrative solutions, the reality is that any way forward in dismantling the carceral state must reckon with the deep-seated punitive impulses that helped build it. By teasing out those impulses and showing how they have spawned draconian policies, Barkow does a tremendous service. Similarly, by highlighting the mismatch between the policy justifications of criminal law and its actual results, Barkow reminds us to keep focused on results amid a sea of rhetoric.

Yet, if ours really is a culture awash in punitive populism, is the problem *populism* or *punitivism*?<sup>87</sup> Barkow is careful to note that “there are limits to what the expertise model can accomplish” and that addressing the U.S. addiction to punishment “would require cultural shifts beyond the scope of an institutional fix.”<sup>88</sup> I agree wholeheartedly. And, I also agree with Barkow that incremental

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<sup>83</sup> See generally ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019).

<sup>84</sup> See generally BARKOW, *supra* note 7, at 143-64, 186-201.

<sup>85</sup> See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

<sup>86</sup> This is argument or observation unique to the criminal law realm. See, e.g., JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 1-4 (1983); GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 8-13 (1999); Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 509 (1999); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1218 (1990); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766 (1997).

<sup>87</sup> To be clear, if the problem is cultural punitivism, this should be a concern not just for Barkow and other bureaucratizers, but also (if not more so) for democratizers.

<sup>88</sup> *Id.* at 177.

institutional fixes she proposes could do much to improve the lives of people affected by the system. But that doesn't stop me from worrying about the costs of de-democratization and the ostensible neutrality of expertise. It might be reassuring to imagine that the way to end mass incarceration is to take away the angry mob's pitchforks so that cooler heads may prevail. Yet, if decarceration is the end goal, the cooler heads (presumably those of us who study criminal law and other elite actors within the system) need to reckon with the reality that we actually are a part of the mob and that the pitchforks hidden deep in our own closets might just be waiting for the right defendant, the right case, or the right class of crimes. Maybe we'll take out the pitchforks less often than the non-experts. But, when we do, our own punitivism may all too easily be cloaked in the language of our own expertise. We would bring more legitimacy. I don't know if we would bring more justice.