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KEYNOTE: THE CRISIS AND CRIMINAL JUSTICE

Bernard E. Harcourt

There has been a lot of recent debate over whether the economic crisis presents an opportunity to reduce prison populations and improve the state of criminal justice in this country. Some commentators suggest that the financial crisis has already triggered a move towards reducing the incarcerated population. Some claim that there is a new climate of bipartisanship on punishment. Kara Gotsch of the Sentencing Project, for example, suggests that we are now in a unique political climate embodied by the passage of the Second Chance Act under President George W. Bush—a climate that is substantially different than the era marked by President Bill Clinton’s Omnibus Crime Bill.¹ Others, such as Jonathan Simon at Berkeley, have suggested that our prison population is a bubble that will eventually burst. In his article in *Daedalus*, *Clearing the “Troubled Assets” of America’s Punishment Bubble*, Simon suggests that the crisis of mass incarceration can be mapped onto the housing crisis and argues that the analogy may reveal potential remedies to the current situation.²

In previous work, I have suggested that the growth in prisons during the 1990s may resemble the real estate bubble we experienced in the 2000s. There are lots of parallels between the indebtedness that came with the process of prison building—including the excess “real estate” capacity in prisons, irresponsible state borrowing, and growth beyond our capacity.³ And there is some evidence that the rate and number of persons incarcerated are declining. Professor John Pfaff at Fordham will present evidence at this conference about the historical

1. Kara Gotsch, *Bipartisan Justice*, THE AM. PROSPECT, Dec. 2010, available at http://prospect.org/cs/articles?article=bipartisan_justice#. Incidentally, this issue of THE AMERICAN PROSPECT is entirely dedicated to mass incarceration and has a number of interesting contributions.

2. Jonathan Simon, *Clearing the “Troubled Assets” of America’s Punishment Bubble*, DAEDALUS, Summer 2010, at 91. Simon has also posted a blog on this topic: <http://governingthroughcrime.blogspot.com/search?q=great+recession>.

3. BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS 238 (2011).

trajectory of incarceration, revealing that prison populations reached a high point in 2008, but began to subside in 2009 and 2010.⁴ By the end of 2010, the number of persons under supervision by adult correctional authorities declined by 1.3%, or 91,000 offenders, reaching a total population of 7.1 million.⁵ The number of incarcerated individuals in jail experienced a percentage decline of approximately 2.4%, and the number of persons in the prison population decreased by 0.4% for 2010.⁶ So we have indeed witnessed a slight plateau and, over the last year or year and a half, some declines in the prison numbers and rates.

But not everyone is as sanguine or optimistic about the economic crisis's long-term effects on prison populations. Professor Marie Gottschalk, in her *Daedalus* 2010 article *Cell Blocks and Red Ink*,⁷ argues that the economic crisis alone will not necessarily be a catalyst for decarceration. She writes that “mounting fiscal pressures on their own will not spur communities, states, and the federal government to empty jails and prisons.”⁸ Her historical analysis of the twentieth century suggests that times of economic distress and growing economic inequalities often ignite support for more punitive penal policies. I tend to agree with Professor Gottschalk that the economic crisis alone is unlikely to bring about future declines in the population without real political leadership in this area. Professor Gottschalk writes that the deinstitutionalization of mental hospitals in the 1960's and 70's “demonstrates the enormous importance of the political context for the development and implementation of

4. U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., NCJ-236319, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 3 (December 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>.

5. *Id.* at 1.

6. *Id.* at 3.

7. *Daedalus* 2010 was, incidentally, a particularly excellent volume addressing the problem of mass incarceration.

8. Marie Gottschalk, *Cell Blocks and Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, DAEDALUS, Summer 2010, at 62 [hereinafter Gottschalk, *Cell Blocks*]. The original formulation of Gottschalk's argument traces to her earlier book, where she argued that financial crisis does not necessarily mean that Left and Right will end up reaching across the aisle or that the results will be a reduction in punishment. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS* 240–45 (2006).

successful federal and state policies to shrink state institutions.”⁹ I will return to this idea later, but it does indeed seem that political leadership is crucial to achieving long-term gains.

So what will ultimately happen? Is it possible to reform the criminal justice system in our time of economic crisis? To be honest, I am not sure and I do not have a crystal ball. Any prediction I make would, in truth, be more a reflection of my personality than a statement about reality. These kinds of predictions resemble a Rorschach test: they tell us far more about the personality and psychological well-being of the person predicting than they do about what will actually happen.

Rather than lying down on the couch and confessing my personality, I would like to take a step back and ask a larger question, namely: Why is the “criminal,” why is this character that we call “the criminal,” so often overlooked by social justice reformers? Why, for instance, did the Civil Rights Movement walk right past the criminal justice system and never really see it? Why did the Civil Rights Movement never really address it? How come the criminal justice system has been so resistant to civil rights interventions?

I spent a number of years working with Stephen Bright—who will be speaking after lunch and who has led the Southern Center for Human Rights for many years—litigating death penalty cases in the state of Alabama. I was always struck by the fact that the criminal justice system was the exceptional space that civil rights discourse had not touched. Back then I often found myself in an Alabama small town courthouse, looking around at the defendants, shackled and chained to each other in their orange jumpsuits, and feeling that the image harkened back to the antebellum period. How come the Civil Rights movement had made such little gains in the criminal justice arena? Why did the communists come to the rescue of the Scottsboro Boys in the 1930s instead of the NAACP?¹⁰ What was the resistance

9. Gottschalk, *Cell Blocks*, *supra* note 7, at 68.

10. *See generally* DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1979).

in the punishment field? Why do we still see so much exclusion and discrimination around us?

The problem, I take it, precedes the modern period. Much of the story revolves around race and can be traced back to slavery and to lynching. Loïc Wacquant has excellent work on this, particularly with regard to what he calls the “*deadly symbiosis*,” and the four stages of the peculiar institution.¹¹ Wacquant traces a causal, historical relationship of homologous institutions that, through historical sequencing and substitution effects, led from slavery to Jim Crow, which itself resulted in the great migration and the creation of Northern ghettos, ultimately leading to “hyper-ghettoization and mass incarceration.” His work has been powerful and influential. More recent work, such as Michelle Alexander’s book on *The New Jim Crow*, places similar emphasis on the way in which the criminal justice system has replaced other mechanisms of social coercion.¹²

Michelle Alexander does an excellent job capturing the racial dimension of the problem. The percentage of non-white admissions to prisons over the course of the 20th century has risen consistently, from less than a third to more than two-thirds over the course of the century. It has been a consistent trend.¹³ Adam Gopnik’s article in this week’s *The New Yorker*, titled *The Caging of America*,¹⁴ contains an additional stunning fact on the relationship between race and incarceration. “[T]here are more black men in the grip of the criminal-justice system—in prison, on probation, or on parole—than were in slavery”¹⁵ Of course, the total population has grown significantly since slavery, but the statistic remains profound—we

11. See generally Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001).

12. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

13. *Supra*, note 12.

14. Adam Gopnik, *The Caging of America*, NEW YORKER, Jan. 30, 2012, available at http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik.

15. *Id.*

imprison more black men today than were slaves in the antebellum period.¹⁶

These remarkable statistics help demonstrate the pivotal role of race in our punishment system. And they contribute importantly to an understanding of why we fail to see or address the composition of the criminal, the deviant, or the excluded. This problem, however, is larger than race. There is an even larger resistance to seeing or addressing the exclusion of the deviant—the abnormal, the other. This becomes apparent when we explore institutionalization writ large (not only in prisons, but in other public facilities) through the course of the 20th century.

There have been other periods of mass institutionalization in twentieth century. The largest previous episode of mass institutionalization occurred at the height of the rehabilitative state during the 1940s, '50s, and '60s, but it took place in a different type of institution: the mental hospital and the asylum.¹⁷ The rates of institutionalization in asylums are extraordinary, and it becomes shockingly apparent that mass incarceration is not a phenomenon unique to twentieth century United States. Like jails and prisons, these institutions also involve exclusion (or what Erving Goffman referred to as “total institutions”).¹⁸ In fact, there is surprising consistency in the high level of exclusion in the United States throughout the century. This holds true even if we include the jail population to the total number of institutionalized people. What seems to emerge is a tendency to use detention or exclusion as a form of social control—and unfortunately as a common practice.

16. Gopnik includes other shocking facts, such as “there are now more people under ‘correctional supervision’ in America—more than six million—than were in the Gulag Archipelago under Stalin at its height. *Id.*”

17. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, (2006) [hereinafter Harcourt, *Asylum*]; Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934-2001*, 40 J. LEGAL STUD. 39 (2011) [hereinafter Harcourt, *Institutionalization Effect*].

18. ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATIONS OF MENTAL PATIENTS AND OTHER INMATES* 1–8 (1961).

What is particularly fascinating about this earlier period of mass institutionalization is the distinctly different population excluded. In relationship to the current prison population, which is 95% male, predominantly non-White, and younger, the asylum population was much older, whiter, far more female.¹⁹ Indeed, 50% of the institutionalized persons were women during the '40s and '50s. And so it would appear that there is something deeper about deviance and about the manufacturing of conceptions of deviance that needs to be excavated.

How do we come to see the criminal, the deviant, as so deserving of punishment? Who exactly is it that we define as deviant and excludable? Why do we identify criminality in some places but not others—even when that other place stares us in the face? To address these questions, I would like to focus on a few examples of situations where we might have expected to see the fabrication of criminality, but do not—as a way to reflect on how deviance is in fact manufactured.

A good starting point is Naomi Klein's book, *The Shock Doctrine*.²⁰ Klein documents the privatization of our military forces and the movement toward privatized military engagements since the Clinton administration. This shift resulted in the transfer of wealth from the United States government to entities like the Halliburton Company. As you know, Dick Cheney was recruited as CEO of Halliburton in 1995 when President Clinton was engaged in the Balkans. During his five years at the helm of Halliburton, Cheney almost doubled the amount of money the company extracted from the U.S. Treasury from \$1.2 billion to \$2.3 billion, while also increasing federal loans and loan guarantees fifteen-fold.²¹ Halliburton did extremely well, as did Dick Cheney who received approximately \$6 million to \$30 million in stock. (According to the *Wall Street*

19. Harcourt, *Asylum*, *supra* note 15, at 1786; Harcourt, *Institutionalization Effect*, *supra* note 15.

20. NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007).

21. *Id.* at 369.

Journal, Cheney was able to hang on to approximate 200,000 shares and 500,000 unvested options as he entered the Vice Presidency.²²)

During the War in Iraq, we witnessed—and Naomi Klein documents—a significant outsourcing of the war and auxiliary military operations to subcontractors such as Halliburton, effectively funneling considerable financial resources from the government war chest and to private, for-profit enterprises that did not always provide the best or most efficient services. *The Shock Doctrine* provides disturbing reports of waste. For instance, a contract for air conditioning was given to a private firm, subcontracted to second firm, and sub-subcontracted to third entity, before eventually having a few fans end up in an office space. In the process, public monies from the country's war chest ends end up in subcontracted, foreign, private bank accounts.

What is interesting is that we do not tend to think of the financial flows in this context as criminal. We do not “other” these types of actions or these actors in the same way that we do small-time delinquents and street crimes—even though, when you aggregate street-crime behaviors, the petty delinquents are not redistributing wealth at nearly the amount and rate at which an enterprise like Halliburton, or an activity like the privatization of war, would have done.

Another good example comes from the documentary *Inside Job*. If you have not seen the documentary, I recommend it to you, it is quite stunning. It concerns the financial crisis and collapse of 2008. The opening of the documentary, and one of the main story lines, implicates Frederick Mishkin, an economics professor at the Columbia Business School and a former member of the Board of Governors of the Federal Reserve System. By way of background, as you may recall, Iceland went through a massive period of privatization beginning in 2000. Three banks in Iceland borrowed and lent billions of dollars, leveraging their equity at high rates which led to a financial bubble that ultimately collapsed in 2008. The

22. *Id.* at 395.

collapse resulted in net losses to numerous pension funds that had invested in their sovereign debt. As bank leverage increased and the bubble expanded throughout the period, rating agencies continued to give Iceland a AAA rating and many economists and academics, like Professor Mishkin, wrote favorable articles about investing in Iceland and the stability of the country.

Here is a passage from an interview of Professor Mishkin in *Inside Job*, the award-winning documentary from 2010. Charles Ferguson is the director, and asks the questions:

CHARLES FERGUSON: In 2006, you coauthored a study of Iceland's financial system.

FREDERIC MISHKIN: Right, right.

CHARLES FERGUSON: "Iceland is also an advanced country with excellent institutions, low corruption, rule of law. The economy has already adjusted to financial liberalization – while prudential regulation and supervision is generally quite strong."

FREDERIC MISHKIN: Yeah. And that was the mistake. That, it turns out, that . . . the "prudential regulation and supervision" was not strong in Iceland. And particularly during this period –

CHARLES FERGUSON: So what led you to think that it was?

FREDERIC MISHKIN: I think that, you're going with the information you have at, and generally, the view was that . . . Iceland had very good institutions. It was a very advanced country –

CHARLES FERGUSON: Who told you that?

FREDERIC MISHKIN: – and [they had not] –

CHARLES FERGUSON: Who did, what kind of research –

FREDERIC MISHKIN: Well, it –

CHARLES FERGUSON: – did you do?

FREDERIC MISHKIN: – you, you talk to people, you have faith in . . . the Central Bank, which actually did fall down on the job. Uh, that, uh, clearly, it, this, uh –

CHARLES FERGUSON: Why do you have "faith" in a central bank?

FREDERIC MISHKIN: Well, that faith, you, you do, because you have, [you] go with the information you have.

...

CHARLES FERGUSON: How much were you paid to write it?

FREDERIC MISHKIN: I was paid, I think the number was, it's public information.

[NARATOR: Frederic Mishkin was paid \$124,000 by the Icelandic Chamber of Commerce to write this paper]

...

CHARLES FERGUSON: On your CV, the title of this report has been changed from "Financial Stability in Iceland" to "Financial Instability in Iceland."

FREDERIC MISHKIN: Oh. Well, I don't know, if, it's, whatever it is, is, the, the thing – if it's a typo, there's a typo.

...

The documentary then flips to an interview of Dean Glenn Hubbard, an economist, dean of Columbia Business School, and former economic advisor under President George W. Bush:

GLENN HUBBARD: I think what should be publicly available is whenever anybody does research on a topic, that they disclose if they have any financial conflict with that research.

CHARLES FERGUSON: But if I recall, there is no policy to that effect.

GLENN HUBBARD: I can't imagine anybody not doing that – in terms of putting it in a paper. You would, there would be significant professional sanction for failure to do that.

...

CHARLES FERGUSON: I didn't see any place in the study where you indicated that you had been paid, by the Icelandic Chamber of Commerce to produce it. Um –

FREDERIC MISHKIN: No, I [MUMBLE] –

CHARLES FERGUSON: Okay.²³

Professor Mishkin was paid \$124,000 to write the paper, but nowhere within the study did he disclose the compensation. I am by no means suggesting, in any way whatsoever, that Professor Mishkin engaged in improper behavior. What I think is interesting, though, is that, for some reason, we tend not to categorize this type of incident the same way we would petty theft or street crime—we see the two through very different lenses. Despite our vexations with conflicts of interest, few of us would apply the model of exclusion and marginalization that is so common in the punishment system.

Let me share another discussion about the issue of conflicts of interest, from the same documentary:

CHARLES FERGUSON: I'm looking at your resume now. It looks to me as if the majority of your outside activities are consulting and directorship arrangements with the financial services industry. Is that, would you not agree with that characterization?

...

GLENN HUBBARD: No, to my knowledge, I don't think my consulting clients are even on my CV, so –

CHARLES FERGUSON: Who are your consulting clients?

GLENN HUBBARD: I don't believe I have to discuss that with you.

CHARLES FERGUSON: Okay. Uh, uh –

GLENN HUBBARD: Look, you have a few more minutes, and the interview is over.

...

CHARLES FERGUSON: Do you consult for any financial services firms?

GLENN HUBBARD: Uh, the answer is, I do.

23. INSIDE JOB (Sony Classics 2010), transcript available at http://www.sonyclassics.com/awards-information/insidejob_screenplay.pdf.

CHARLES FERGUSON: And –

GLENN HUBBARD: And, but . . . I do not want to go into details about that.

. . .

CHARLES FERGUSON: Do they include other financial services firms?

GLENN HUBBARD: Possibly.

CHARLES FERGUSON: You don't remember?

GLENN HUBBARD: This isn't a deposition, sir. I was polite enough to give you time; foolishly, I now see. But you have three more minutes. Give it your best shot.

. . .

NARRATOR: In 2004, at the height of the bubble, Glenn Hubbard coauthored a widely read paper with William C. Dudley, the chief economist of Goldman Sachs. In the paper, Hubbard praised credit derivatives and the securitization chain, stating that they had improved allocation of capital, and were enhancing financial stability. He cited reduced volatility in the economy, and stated that recessions had become less frequent and milder. Credit derivatives were protecting banks against losses, and helping to distribute risk.

The documentary then turns to an interview with Professor John Campbell, chair of the economics department at Harvard University:

CHARLES FERGUSON: A medical researcher writes an article, saying: to treat this disease, you should prescribe this drug. It turns out the doctor makes 80 percent of personal income from manufacturer of this drug. Does not bother you?

JOHN CAMPBELL: I think, uh, it's certainly important to disclose the, um – the, um –

Well, I think that's also a little different from cases that we are

talking about here. Because, um – um –²⁴

Those are long pauses in the original documentary, and clearly Professor Campbell did not have a good answer to the question. Now, again, I am not suggesting that there is any criminal activity here, nor am I necessarily suggesting that we attempt to solve these conflicts of interest with criminal prosecutions and punishment. I think it is far too easy to turn to punishment.

But it does raise an important question: Why is it that we seem to define “otherness” or deviance today as involving a young black man engaged in small drug transactions so easily—and why, similarly, did we so easily define it in the 1950’s as involving the hysterical woman. And why do we not apply the same register of deviance and marginalization in the context of the financial crisis, of conflicts of interest—where the dollar amounts are so vastly greater?

The statistics on how we define crime are astounding. In Georgia, for example, “Drug and property offenders represent almost 60 percent of all admissions to Georgia prisons. In fact, five of the top six most common prison admission offenses are drug and property offenses.”²⁵

Judge Todd Markle, who spoke today, brought to our attention remarkable facts about Georgia prison admissions in 2010:

- Two-thirds of prisoners are admitted for a non-violent offense
- Three-fifths are admitted for drug and property offenses
- The most frequent offenses leading to 2010 admissions:
 1. Burglary
 2. Aggravated assault
 3. Forgery 1st degree

24. *Id.*

25. REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 19 (Nov. 2011), <http://www.legis.ga.gov/Documents/GACouncilReport-FINALDRAFT.pdf>.

4. Possession of cocaine
5. Theft by taking
6. Theft by receiving stolen property
7. Selling cocaine
8. Possession of marijuana with intent
9. Possession of gun by convicted felon
10. Robbery

Notice the astounding role of drug offenses and petty theft. The prisons are filled with small-time offenders whose offences, aggregated, hardly rise to the level of the financial losses suffered by the American people as a result of the financial collapse of 2008 and the mortgage-backed security catastrophe. Yet these are the marginalized “others” that we send to prison—small-time burglars and marijuana possessors. How have we come to defined deviance in this way?

One easy answer, of course, is that social and political elites largely overlap with prosecutorial ranks. Professor John Pfaff’s article about the “black box” of prosecutorial discretion is relevant here and probably contributes in subtle ways. There is also a longer story about class and social standing that we could develop to help explain the subjects that we choose to marginalize.

But, rather than develop that story, I think it is more important here to explore and rethink some of the taken-for-granted sets of belief about the role of the state and place of the individual that predominate in this country. In *The Illusion of Free Markets*, I argue that the dominant conception of political economy in this country has facilitated the excessive use of punishment and excess policing that we have experienced since the 1970s—and at various other times in history.²⁶ In so doing, I trace this dominant conception of political economy back to the 18th century and demonstrate a link between the idea of natural orderliness in the economic sphere to a conception of the need for the strong fist of the state in the policing and

26. See generally HARCOURT, *supra* note 3.

punishment arena. What I would like to suggest here is that this dominant notion of political economy also influences the type of subjects that we more easily marginalize.

My argument supplements the various studies that explore the direct material causes of the increased prison populations since the 1970s—the many factors that we have been discussing this morning, including the law-and-order movements, three-strikes laws, the War on Drugs, increased charges per arrest, etc. Clearly these direct causes have fed the prison population. But, behind these direct material factors, there are larger social and cultural forces at play that have facilitated or fueled the penal excess. You are familiar with many of these larger explanations and theories, ranging from the notion of an emerging “culture of control” in David Garland’s words, to Loïc Wacquant’s work on race and poverty, to the idea of “governing through crime” about which Jonathan Simon has written.

To these accounts, I would like to add a certain mindset—a set of common share beliefs that the government is not competent when it comes to economic matters, and that its legitimacy and competence is limited to policing and punishment (as well as military interventions). In this view, the space of legitimate government in the United States tends to be in the area of domestic and international security.

This reasoning underlying these beliefs traces back to the 18th century, and to the birth of liberal economic ideas in the writings of the Physiocrats in France, notably François Quesnay, who embraced, on one hand, the notion of natural orderliness in the economic sphere, conjoined with the idea of legal despotism in the punishment arena. François Quesnay’s major intervention in 1758, his *Tableau Economique*,²⁷ was intended to demonstrate, with his many zig-zag arrows, how internal economic flows of monies within France, without any governmental intervention, was the only way to produce wealth—or what he referred to as net product. But this ideal of natural orderliness in the economic sphere was joined at the hip and went hand in hand with a political theory of “legal despotism.” The

27. FRANÇOIS QUESNAY, TABLEAU ECONOMIQUE (1758).

theory of legal despotism that the Physiocrats advocated was the idea that there was no need for man-made positive laws, because natural law governed. Positive law could only distract from the effect of natural law except in one area: the area of crime and punishment. There, the country needed a harsh sovereign to administer punishment and keep people straight, particularly those who did not understand that there was a natural order in the economic sphere.

I also suggest in previous work that, since the 18th century, these two ideas have consistently been joined: natural orderliness in the economic sphere on one hand, and a form of policing or legal despotism that limits the government's legitimate role to punishing on the other. It was classic during the early 19th century *laissez faire* period to minimize the function of government, to give the state a *de minimis* role—and it is by no means pure coincidence that this *de minimis* role was often referred to as “the night watchman.” The function of the state was limited to a police function.

The same conjunction of economic liberty and policing is evident in Jeremy Bentham's writings. Bentham was a strong advocate, in the economic domain, of a relatively quietist state. There are, of course, a lot of different interpretations of Bentham's economic writings. Like the future of criminal justice reform, Bentham is a bit of a Rorschach test: your interpretation of Bentham says more about your personality than about the text itself. Bentham's “Be Quiet” in the economic context has a number of different interpretations. On the penal side, however, Bentham was a strict interventionist. In his view, the penal code was a grand menu of pricing. And, as you know, Bentham invented the *panopticon* prison, a space marked by the greatest possible state intervention where the prison guard could at all times see all of the movements and actions of every single prisoner.

This brings us to the present. Our present is marked by similar ideas as the previous centuries, but contains different language, jargon, and rhetoric. We do not speak of “natural order” anymore. It would sound a bit antiquated. Instead our discourse is filled with talk of “efficient markets,” which, when competitive, do not require any kind of state intervention. The state has a role in creating competitive

markets (though of course the very notion of a “competitive” market itself is loose); but once they are determined to be competitive, there is no longer a role for the state—except to deter market bypassing. Here again, there is, joined at the hip, the idea of market efficiency and state quietism on the one hand with the role of the criminal law being to police the borders and make sure that people are interacting only in the efficient space of the market. As Judge Richard Posner has written, the major function of the criminal law in a capitalist society is to prevent “market bypassing.”²⁸ The government does not have any role once a competitive market is in place *except* to police and punish those who are bypassing the market.

There is an eerie similarity over the ages that has led us to think that the government is somewhat incompetent in regulating economic matters. It often translates into the role of the state being simply to deter force and fraud. The state cannot be trusted to regulate issues like conflicts of interest that might result in publications of tainted studies, because those raise more complicated economic questions. But the state can be trusted to crack down severely on young kids engaged in the drug business. What I would like to suggest is that this shared rationality has facilitated some of the excess that we have seen in our punishment practices over the course of the twentieth century, especially the late twentieth century.

What I would like to add is that this shared rationality is closely tied to a particular notion of individualism and choice—of choosing, as individuals, our paths and goals—that has also facilitated excess in the penal sphere. A natural place to start here is with Friedrich Hayek’s masterful book, *The Road to Serfdom*.²⁹ Hayek is one of the more refined thinkers of this notion of individualism and its role in the United States. Hayek argued, as you will recall, that this notion of individualism is the fountain head of Western civilization: these

28. Richard Posner, *An Economic Theory of the Criminal*, 85 COLUM. L. REV. 1193, 1196–97 (1985)

29. See generally F. A. HAYEK, *THE ROAD TO SERFDOM* (Bruce Caldwell ed., Univ. of Chicago Press 2007) (1944).

“essential features” of individualism, including “the respect for the individual man *qua* man, that is the recognition of his own views and tastes as supreme in his own sphere . . . and the belief that it is desirable that men should develop their own individual gifts and bents,” have come to represent, in his words, “what we know as Western civilization.³⁰ At the root of the idea of natural orderliness in economics or what would become, in Hayek’s work, the idea of spontaneous order, lies the importance of “freedom of choice in a competitive society,” and a certain kind of consumer freedom to choose particular ends and goals.³¹ Hayek refers to our freedom in economic activities, “in our capacity as consumers,” and draws attention to the fundamental notion of choice: “what matters is that we have some choice”³²—which also brings into place a certain individual responsibility. These are guiding principles for Hayek, and they are reflected in our ways of thinking about individual responsibility in the criminal justice system.

My concern, though, is that this notion of individuality tends to disregard the way in which individuality is itself shaped by the market, by advertising, and by our interdependencies. The critical theorist, Nikolas Rose, has helped us see these interdependencies and the force of advertising and marketing in shaping our desires.³³ In a marvelous study, Rose deconstructs the way in which we have come to desire, believe it or not, ice cream, and the symbolic significance that has come to surround ice cream. Rose documents an entire marketing campaign that turned ice cream into a comfort food. Today, we have come to think of ice cream as something that we give to our children to make him feel loved after a sad event or after going to the doctor. We associate it with maternity and consolation. But, as Rose shows, these are fabricated associations, meanings that were

30. *Id.* at 68.

31. *Id.* at 127.

32. *Id.* at 128.

33. See generally NIKOLAS ROSE, *INVENTING OUR SELVES: PSYCHOLOGY, POWER, AND PERSONHOOD* (1996); see also PETER MILLER & NIKOLAS ROSE, *GOVERNING THE PRESENT: ADMINISTERING ECONOMIC, SOCIAL AND PERSONAL LIFE* (2008).

deliberately created through marketing. What I would suggest is that in many ways, our conceptions of individuality and our notions of the individual and of individual responsibility are also similarly constructed and manufactured. Howard Becker talks about this through the rubric of labeling theory: how, as we begin to give people certain labels, the individuals begin to act in precisely the kinds of ways that are associated with those labels.³⁴ Others today, as Mario Small observes, are returning to a notion of culture to explain this—to notions of scripts, narratives, ways in which peoples' behaviors are shaped by the scripts that they see, the narratives that they hear, the frameworks to which they are accustomed.³⁵ I would suggest a slightly more philosophical interpretation: there is a manufacturing or a production of truth surrounding the individual. What we need to explore, then, is how we are shaped as subjects and how we come to believe our beliefs, including how we come to believe things about individuality and about the genuineness or authenticity of our own individuality—how we come to believe in the very notion of individuality.

This triggers a lot of questions about our duties to both ourselves and others; about our place in society; about what is success for the individual; about what we might owe each other; about the role of cooperation; and about the role of interdependency. It is important to avoid, as much as possible, the conventional, ideological debates in this area—to avoid the poles of individualism and collectivism. If at all possible, it is also important to escape moralizing and preaching ethics. I am certainly not trying to push the discussion in that direction, nor in a more communitarian direction. What I am trying to suggest, though, is that just by examining our own ideas of what it means to be an individual, and what it means to succeed, one might begin to think more about how one's conception of oneself as an individual is shaped by interdependencies with others. This might

34. HOWARD BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1997).

35. Mario Luis Small, David J. Harding & Michèle Lamont, *Reconsidering Culture and Poverty*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, May 2010, at 6.

make us reexamine the movement to “other” the deviant—an exploration of the relationship between ourselves and those who we consider different. We might ask how individual aspirations might relate to issues of interdependency and their effect on others—for instance, how the goals of an economist writing about the stability of Iceland might implicate and impact the pension funds of retired people.

How to initiate this discussion seems important. Some of it today is beginning through a national conversation about “greed”; but I am concerned that that is too moralizing. Again, that is something I would want to avoid. I am not sure whether there is more or less greed today than there was at any previous time; my preference would be to look elsewhere, to explore our conceptions of individualism and our connectedness to others.

Let me conclude. We are in a time of crisis—of economic and financial crisis and of crises in our punishment systems. In terms of possible reform, this symposium has already offered a number of suggestions. Cecelia Klingele has made a convincing case for restructuring early release. Matthew Parlow has emphasized the need for diversionary programs. Cara Drinan has urged the increased use of clemency. David Ball has suggested maybe going in the direction of a “pay as you go” system at the county level. Mike Vitiello was discussed sentencing reform. John Pfaff has focused the spotlight on the prosecutorial “black box.” These are all important steps, and there are more as well. Many of them may be small and incremental, but as Adam Gopnik suggests, small and incremental changes can have effects. “Ending sentencing for drug misdemeanors, decriminalizing marijuana, leaving judges free to use common sense (and, where possible, getting judges who are judges rather than politicians)—many small acts are possible that will help end the epidemic of imprisonment as they helped end the plague of crime.”³⁶

36. Gopnik, *supra* note 12, at 77.

We have experienced deinstitutionalization before. We have seen it happen in this country. It is not impossible. We have witnessed dramatic social change. In the past, it has been important to have leadership at the state and federal level. We saw leadership in 1963, when President John F. Kennedy decided to—and did—tackle the issue of mental hospital institutionalization. And with his leadership, there followed massive reductions in hospital populations—greater than the 50% reductions he had hoped for.³⁷ It was not all his doing, to be sure; it was a combination of creating community mental health facilities and changes in funding mechanisms that arose out of the creation of Medicare and Medicaid, giving states incentives to states to move people into those community facilities. State facilities were not being federally funded, but community centers were. These were creative and inventive ways to make important reforms happen.

Similar types of interventions can be invented today—diversionary programs, reentry programs. In addition, it is important, as lawyers, to look at the role of prison litigation. I believe that the *Plata*³⁸ litigation at the Supreme Court has had a significant effect. The shocking image of overcrowding in California prisons has greatly impacted the public imagination. The photographs—included in the Court's decision itself—have begun to play a role somewhat similar to *Titiculi Follies*, the 1967 film about mental hospitals. The photos have helped raise questions, stimulate conversation, and bring the issue to the front page of the *New York Times*. So there are incremental steps that can be made, and many of you in this room are working on them. Many involve Faustian bargains that need to be carefully examined. Some may involve some transinstitutionalization. Some will need to be explored further to ensure that they do not increase the racial imbalance in the criminal justice system. We need to proceed cautiously, but there are many

37. Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011).

38. *Brown v. Plata*, 131 S.Ct. 1910 (2011).

steps and initiatives to be taken. This symposium is a testament to that.

What I hope to have added to these efforts, this afternoon, is to also stimulate a broader conversation, a national conversation, addressing some of the more fundamental issues of the way in which we think about the role of the state—where government is competent and where it is not competent—and also the way in which we think about conceptions of individuality and interdependence in society today and, in addition, the way we invent and manufacture “the criminal.”

