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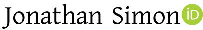
Dignity Defied: Legal-Rational Myths and the Surplus Legitimacy of the Carceral State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Abstract

A decade ago, it seemed that America's punitive system of mass incarceration was on the precipice of a transformation, stimulated by a legitimacy crisis as great as any in a century. A decade later, far more modest steps toward reform have been accomplished, and mass incarceration in the United States has proven stubbornly resilient. While overall imprisonment rates are modestly lower, there is little evidence of improving prison conditions or a fundamental reorientation of the use of prolonged incarceration. This prompts a deeply historical question, to which answers, of necessity, must be speculative. What makes the carceral state so resilient, not just in recent decades but also across centuries? Following recent law and society scholars, who have brought together the literature on the historical political-economy of punishment with new institutionalist accounts of the role of myth and ceremony in formal organizations and the bureaucratization of modern societies, this article identifies five "legal-rational myths" about crime and punishment that have perennially delayed a reckoning with its lack of alignment with central public values like respect for human dignity and racial justice. The article turns to California as the epicenter of this most recent legitimacy crisis to chart how myths work to bolster the carceral state against efforts to shrink or abolish it.

Introduction

The early 2010s seemed to mark a possible turning point in the US prison boom (Simon 2014; Aviram 2015; Gottschalk 2016; Zimring 2020). Forty years of increasing prison admissions tailed off in many states and dropped more steeply in a few. In the years following the Great Recession, a bipartisan willingness to squeeze savings from prisons seemed to gain ground in legislatures across the country. The US Supreme

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Court, which had more or less ignored overcrowding as a chronic side condition of mass imprisonment, found in its toxic combination with grave medical and mental health neglect a threat to human dignity and, thus, a violation of the Eighth Amendment.[1] In addition to its problems of inhumanity, American mass incarceration has a very clear racial injustice problem. More Americans than ever believe that our criminal justice system is riddled with systemic racism and a lack of regard for human dignity, but, for many, this skepticism does not go beyond tinkering at the margins. We could tell a similar story about policing (Subramanian and Arzy 2021).

Yet, despite these very real legitimacy problems and after a decade and half into this window for reform, it is clear that the reduction in mass incarceration will be modest at best. If imprisonment rates continue to shrink, it will be slow as legislatures and parole boards cautiously test the public acceptance for marginal changes. Not even the shock of the COVID-19 pandemic, which posed an immediate and apparent threat to overcrowded prisons, did much to nudge open the doors of decarceration (Aviram and Goerzen 2024). As a result, imprisoned people died of COVID-19 at more than twice the levels of other Americans, despite being considerably younger on average (Marquez et al. 2021). In the meantime, alternative forms of carceral control that feed into prisons, such as probation, continue to expand (Phelps 2020). Indeed, it does not take long to recognize the signs of a backlash against criminal justice reform in many sectors.

What makes the carceral state[2] so resilient, not just in recent decades but also, when we survey history, across centuries of changing social values, political institutions, and social conditions (Gottschalk 2006, i)? The answer in a word that has too much meaning is "punishment," which enjoys a surplus of legitimacy as a tool of government lacking in other dimensions. This article identifies five "legal rational" myths about punishment that infuse punishment with a "taken for granted" legitimacy (Suchman and Edelman 1996), a surplus of which shelters it from ever facing a serious reckoning with failure and a normative non-alignment with core social values (Beetham 2013). Collectively, they endow the carceral state with the stature of a "civil religion," one whose essential goodness remains uncompromised by repeated disappointment (Bellah [1967] 2006). An overview of these myths and their historical context is provided in Table 1.

Each myth corresponds to a moment of institutional expansion of the power to punish and a new technology of power harnessed to punishment. There is a more than a passing resemblance among some of these myths and the canonical purposes of punishment that are taught in most Western legal systems and relied on in the United States by the US Supreme Court in interpreting the Eighth Amendment's prohibition on "cruel and unusual punishment": retribution, deterrence, reform, and incapacitation (Frase 2005). To take only the most significant example, the myth that suffering punishment is the exclusive way to repay a debt to both law and society is the original source material out of which both retribution and deterrence were refined and

[1] *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Brown v. Plata*, 563 U.S. 493 (2011).

[2] The term "carceral state" is not perfect as it implies a unity and coherence that is lagging in even the most centralized nation-states and especially so in the profoundly fragmented governmental structure of the United States (Rubin and Phelps 2017). However, for present purposes, it is useful to emphasize the essentially political nature of punishment and its need for legitimacy (and its role in enabling legitimacy of the state more broadly).

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Table 1. Myths in their historical context

Arcs of carceral history New political technology invests punishment	**Political economy (crisis)** What political and economic problems does expanding the carceral state solve?	**Institutions of punishment** The carceral state	**Myths about crime and punishment** • Crime as a distinctive threat to the polity • Punishment as a civic religion and source of legitimacy
Sovereignty in the twelfth century • Monarchies (military, tax)	Birth of the legitimate legal state (awe)	• Courts • Prosecutors • Jails • Scaffolds	**Repayment of debt** • Crime creates a debt to the sovereign that can only be repaid in punishment
Racial threat in the seventeenth century • Slavery and colonialism	Racial capitalism	• Slave ship • Convict lease • Mass incarceration	**Racial profiling and managing racial threat** • Predominantly Black communities create a high risk of crime • Punishment can keep Black political and demographic power in check
Discipline • Eighteenth-century (factories, plantations)	Accumulation of capital through production of a laboring class (subordination)	• Prisons • Asylums • Orphanages • Police	**Reform of the idle** • The idleness of the poor leads to vice and then serious crimes • Punishment can create habits of hard work and thrift.
Eugenics in 1900– • Segregation (racial) • Sterilization • Immigration Restriction • Prohibition Imperialism	**Globalization I** • Creating an unequal multi-racial order (social control; segregation)	• Life sentences • Parole • Probation • Juvenile • Justice • Reformatories	**Removal of the dangerous** • Most crime is the product of a dangerous, deviant minority of offenders • Punishment can eugenically remove the irredeemably dangerous from society (while reforming the reformable)
Expulsion in the 1950s– • Slum clearance • Suburbanization • Downtown revitalization • Postcolonial counter-insurgency wars	**Globalization II** • Creating post-industrial cities (counter-insurgency; "gentrification")	• Mass incarceration • Planning agencies • Federal investment in modernizing law enforcement • Prosecutorial superpower • Total incapacitation policies • Mass deportation and detention	**Reinforcement of the social order (Broken Windows)** • Disorder and minor illegality deteriorates neighborhood safety • Aggressive policing and punishment can reinforce the public standards and keep cities economically viable

revitalized by the philosophers of the "age of enlightenment," which preceded the wave of penal reforms associated with prisons, police, and discipline (Foucault 2019). The myths of reform and removal are twinned aspirations of the criminological movements of the nineteenth century and early twentieth century (Garland [1986] 2018; Muhammad 2019). But these resemblances are mediated by the efforts of philosophers to refine them into justifications for suffering at the hands of the law and do not fully capture the attractions that punishment has as a form of state action in Western legal systems. Some have argued forcefully that the problems of mass incarceration might be addressed by seeking to bring our current punishment institutions more in line with what a consistent and principled approach to the penal purposes would recommend (Duff 2001; Chiao 2018). But if the purposes are themselves refined and modernized versions of the myths, ideas that activate and authorize rather than limit punishment, they will be of little use in sustaining a legal or political process to shrink it. Abolition from this perspective is not utopian but, rather, realistic (Davis et al. 2022).

After returning each myth to the context of its emergence and reviewing its enduring place in our penal imagination, I turn to a case study that can illuminate how real punitive organizations navigate severe challenges to their legitimation by using symbols and ceremonies to realign themselves with the myths. While the carceral state is especially a fiction in the US version of federalism that gives subnational states the vast majority of power to make and enforce criminal law, California has been much studied in the course of mass incarceration both because of its very distinctive turn from rehabilitation to mass incarceration and because, as a western state, it does not have the distinctive carceral history of the states in the Deep South (Zimring, Hawkins, and Kamin 2001; Gilmore 2007; Campbell 2014).

Literature Review

This article draws together two literatures in socio-legal studies that have only recently begun to be in more dialog: new institutionalist accounts of the role of law in organizational structures and punishment and society studies of penal change (Schoenfeld 2018; Rubin 2019, 2021). Sociologists have argued that organizational forms and structures evolve to provide legitimacy to organizations by aligning them with hegemonic myths in their legal, political, and social environments in ways that allow organizations to manage environmental risk (Meyer and Rowan 1977, 343; DiMaggio and Powell 1983). Mark Suchman and Lauren Edelman (1996, 905) coined the term "legal rational myths" to highlight the way in which law and society research on organizations and law could benefit from relaxing the assumption that organizations respond primarily to "material constraints of legal sanctions" and instead viewing them as "culturally constructed and responsive primarily to the normative and cognitive constraints of legal symbols." Myths help organizations manage their environment by providing a legitimacy that is "taken for granted" whether because they have become cognitive schemas that require no conscious participation or external rule systems that must be engaged but not critically (911). Recently, scholars of penal change have developed institutional accounts of how law can establish successful templates for penal organizations to symbolically align with institutionalized beliefs (Rubin 2019, 2021). The myths discussed here are not to the exclusion of others but may be foundational to some.

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The role of legal rational myths in the cultural construction and reconstruction of the organizations that make up the carceral state can be contrasted with two other cultural accounts of penal change. Emile Durkheim's ([1896] 2013) influential account of punishment emphasized the role of the violation of deeply held religious or moral values in motivating members of society to punish crime. More recently, scholars of penal populism have looked at the role of politically charged emotions in motivating punitive policy turns (Pratt 2007). No doubt on some occasions, the carceral state can indeed derive legitimacy by visibly enacting some of the emotional responses of people to publicized crimes (for example, the recent sentencing of sports doctor Larry Nasser for multiple sexual assaults on his patients over many years (see Kaba 2021, 58). But while emotions create one kind of currency that may be helpful to the carceral state, I argue that legal rational myths provide a far more reliable source of legitimation, one that operates at the constant and cool level of cognition rather than the hot and intermittent nature of emotions.

This exercise in theory development establishes a very long historical frame and therefore inevitably draws with a broader brush and with fewer examples than might be desired. In doing so, it creates a very abstract and overly stylized framework out of the richly nuanced literatures on the history of the carceral state globally (for examples of some classics, see Rothman 2017a, 2017b; Thompson 1975; Foucault 1977, 2018; Garland 2001; Wacquant 2009; Rusche and Kiercheimer [1939] 2017; Garland [1985] 2018; Melossi and Pavarini [1982] 2018) and on punishment as a form of racial capitalism (Gilmore 2007; Davis [1971] 2016; Du Bois [1899] 2014; Stevenson 2019; Alexander 2020). My argument, however, does not turn on the always interesting claim that the history of punishment is best understood as one of radical ruptures or transformations—that is, the disappearance of torture (it never disappeared) and the birth of the prison (it is always being invented). There is considerable support for the claim that, in the penal field, "the more things change, the more they stay the same"[3] and that change is incremental and the result of agonistic struggle (Spierenberg 1984; Goodman, Page, and Phelps 2017; Garland [1985] 2018). Moments of innovation where new carceral institutions are created in response to social crises, new political technologies introduced into the production of punishment, and new myths institutionalized are helpful in understanding the growth of the carceral state over time, but they cannot be taken at face value for the transformational change promised. By emphasizing the role of symbolic alignment with prevailing punitive myths in our broader political and legal culture, my account can help explain the relative stasis that we find in the carceral state over time (new things are added, but few powers or practices are taken away).

Five Legal Rational Myths of the Modern Carceral State in The United States

The five myths profiled in this article, which appear in order of their historical emergence in North America, are far from the only political logics of crime and punishment that can be found in the state building of the last few centuries. If these can be considered "core" myths of the carceral state, it is because they are so closely

[3] Attributed to Jean-Baptiste Alphonse Karr, a French critic, journalist, and novelist, in 1849: "plus ça change, plus c'est la même chose."

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associated with the institutionalization of new forms of authority and technologies of power in the legal fields that first crystalized around courts. Each one emerged in a foundational role in the historical campaigns to expand the carceral state. Over time, these five have coalesced into a complimentary body of doctrine or, to use Robert Bellah's ([1967] 2006) account of America's presidential cult, a "civic religion" in which punishment is taken for granted as the solution to crime although through different legal rational myths about how it works. By situating each myth in terms of its originary historical context, my aim is to call them back from self-evidence and highlight their basic strangeness (see Table 1).

Myth 1: Punishment Repays the Debt of Crime (and Is the Exclusive Currency of Repayment for Criminal Debt), Twelfth Century

Crime creates a debt to the sovereign that must be repaid in punishment

Many would recognize this idea as the simplified core of what is often called the retributive justification for punishment, one centered on the goal of delivering to the offender "deserved" punishment that repays the crime (Frase 2005). We also allude to it in the oft-invoked formula that a person released from a prison sentence has "paid their debt to society" and should receive a "second chance" at full citizenship. But this reassuring phrase and the sense of fairness that often takes for itself the name of justice disguises a complex set of political, legal, and even theological moves that have played out over centuries, wherein the political authority of the state gradually replaced the human victim of crime with its own injury to its sovereignty and replaced a complex tactical field of violence and negotiation that attended local justice methods prior to the twelfth century with a set of formal state ceremonies of public torture (Berman 1983). Behind the seemingly simple metaphor of punishment being about paying debt, there looms in fact an unbridgeable gulf between the sovereign, who, as prosecutor, judge, and executioner, will set the very terms of the repayment, and the offending citizen, who has in the end only a single body and life with which to pay (Foucault 2018, 33). The result is a debt that can never in fact be paid.[4]

The myth of repayment and its many modern manifestations are the echoes of the birth of the carceral state itself—criminal accusation and judgment by the sovereign state and public punishment—and part of an even larger revolution in legal and political authority in Western Europe in the late Middle Ages as territorial monarchies began to emerge and struggle to distinguish themselves from church and local authorities (Berman 1983). Kings shifted their claim to a divine right based on their charismatic or mystical connection to Christ to a new kind of divine connection as the source of territorial law—from what historian Ernst Kantorowicz (1957) called "Christ-centered kingship" to "law-centered kingship." Law would become the theology of a new kind of secular religion of sovereignty, with judges and lawyers as its priestly class. Crimes were no longer a battle between families, clans, or villages but an attack on the ruler's quasi divine body. The age of torture (at least on the

[4] In contemporary criminal justice, this often takes a literal form of fees and fines that come along with other forms of punishment and extend a person's contact and risk of further punishment (Harris 2016).

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continent) and punishment without limit had begun (Foucault 1996; Pihlajamaki and Korpiola 2014, 213, citing Langbein 1978).[5]

Crucial in this process was the model of canon law, which, infused by the close proximity within the new university law school between canon (church) and civil (Roman) law became "perhaps the most dynamic legal body of the medieval world" (Pihlajamaki and Korpiola 2014, 202). An important portal of transmission between theologians and law professors in this period was the Decretum of Gratian, one of the first compilations of canon law on the model of the new scholastic system based on Roman law, initiated by Gratian, a professor of canon law at Bologna University in the mid-twelfth century and considered directly influential on Pope Gregory's authoritative restatement of canon law a century later. Gratian appears to have been influenced by the increasingly punitive turn in late medieval theology in which confession and repentance of sin are not enough and in which "satisfaction" or punishment was also required to atone (Larson 2010, 201; emphasis added). By the thirteenth century, in addition to confession and penitence for private sin, the church had embraced a doctrine of systematic public punishment for public sin, adopting as central the principle "*ne crimina remaneant impunita*" (crimes shall not go unpunished). This new way of thinking about punishment flowed directly into secular criminal law along with many of the central preoccupations of criminal law like intentionality (*mens rea*) and individual responsibility (Pihlajamaki and Korpiola 2014, 203).

Thus law, theology, and political theory came together around a central role of punishment in reaffirming the sovereignty of the state by extracting payment for crimes in a manner that was as important to the good order of the polity as atonement for sin was to the moral order of the universe for this time of deep faith. While it would take centuries for the carceral state to grow beyond its early base in courts and scaffolds, the entire panoply of modern justice became possible in this birth moment of the punitive carceral state: prosecutors, criminal investigation, police, juries as representatives of society, criminology as a study of deviant subjects, all were arrayed against an offender who had become the quintessential "social enemy" (Foucault 2018, 34).

We get an allegorical picture of this new logic of law, punishment, and sovereignty only a couple of centuries into its development in Europe in Ambrogio Lorenzetti's frescos titled *The Allegory of Good and Bad Government*, which were hung in the Palazo Pubblico in the city state of Siena in 1340 (Bartlett 2001, 94). Located where they would influence the work of one of the most advanced administrations in Europe at that time, the panels clearly signal the centrality of punitive justice in the new civil religion of law and provide reminders that failure to rigorously observe it leads to catastrophe. *The Allegory of Good Government* shows us precisely the importance that crime be punished for the balance of the social and political order (see Figure 1). The figure of the sovereign (the representation of the commune of Siena) is shown parallel to a goddess-like figure representing justice in its various faces. The goddess is assisted by angelic figures in undertaking the tasks of law, including one carrying a

[5] Both Michel Foucault (1996) and John Langbein (1978) emphasize the importance of the shift from adjudication based on a duel or contest to one based on proof, which generated a new state of responsibility for the truth of the verdict, one that was initially met with judicial torture and overtime through the creation of a vast forensic and punitive investigative machinery.

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Figure 1. The Allegory of Good Government

sword to execute criminals and a crown to reward valor, and the other angel seems to be resolving disputes among civil parties. The figure of the ruler is accompanied by a series of figures representing the ideal traits of political leadership. Above him are figures representing faith, hope, and charity. Accompanying him to the right (from the viwers perspective) are figures of peace, fortitude, and prudence. The most important figures by allegorical location (to the right) are magnanimity, temperance, and justice. Justice, who is furthest to the right and, thus, according to the allegorical conventions of the time, the most important, holds on her lap the severed head of a criminal and a crown, representing the direct role of punishment in sustaining sovereignty. In the foreground, beneath the allegorical sovereign, stands a row of citizens and warriors guarding prisoners, including one prisoner wearing the black cap typically reserved for condemned prisoners.[6] In case the civic point was not clear enough, the companion panels show the good effect of this regime of governance on town and country (see Figure 2). Unshown in this cropping of Figure 2, the gates of the thriving city are guarded by the figure of "security" who is depicted as an angel carrying a hanging device.

Lorenzetti's equation of good rule with exacting punishment marked a substantial hardening of the view of punishment in European society. The reality beyond the allegory was of course, much different. With little state capacity to investigate and prosecute crime, and little will to execute or exile all whom were brought to the courts for serious crimes, the reality of European penal justice would remain heavily leveraged toward ignoring the vast majority of offenses while using the other dimensions of monarchical virtue—in particular, magnanimity and temperance (those companions of justice)—to justify frequent reliance on the prerogative of

[6] Two accompanying frescos show the good effect of justice on economy and society in both town and country, while a parallel set documents the extremely bad effects of bad government, represented by a horned ruler who rather than replicating the work of justice has bound her for execution.

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Figure 2. The Effect of Good Government (City)

mercy (Hay et al. 1976). The persistent threat of impunity—the failure to punish crime—runs through our politics of law from the late medieval world to postmodern populist democracies of the twenty-first century. Today, the modern state prefers to present itself in court as the champion or representative of the actual victim and a representative of the aggrieved community (Garland 2001; Gottschalk 2006; Simon 2007), but, in practice, the state's power over the price to be charged for crime and the terms of repayment are in no way limited by the harms suffered by specific victims. The modern victim has been left as a badge to be worn by the state in its war against those it labels criminals, a symbol of common sympathy in modern social conditions but with no power over a vast punitive system operating in their name.

Myth 2: Punishment Manages "Racial" Threat (Myth of "Black Crime"), 1649

Predominantly Black communities create a high risk of crime, and punishment can keep Black political and demographic power in check

Sociologist Hubert Blalock (1960) framed the "racial threat hypothesis" at the outset of the civil rights era, which holds that expansions of punitive social control are often a response by political authorities to increases in Black demographic or political power. Punitive laws and institutions constituted a political signal to white majorities threatened by the power of an oppressed minority. The victories of the Black-led civil rights movement and its institutionalization in federal legislation constituted exactly the kind of empowerment that Blalock predicted would trigger demand for punitive reactions. Had he wanted to, Blalock might have predicted the wave of mass incarceration that was still a decade or so off. The racial threat hypothesis is not a fact about crime or about white voters, it is, in fact, a myth in the sociological sense. The racial threat hypothesis has been replicated many times, but sociologists have differed on how this threat mechanism works—whether it is a racially charged political threat, an economic threat, a crime threat, or all three (Eitle, D'Alessio, and Stolzenberg 2002). While it has taken different forms in accord with the threats and solutions of the age, I would argue that anti-Blackness is a foundational myth of the

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carceral state in the United States, one that dates to its introduction to colonial North America and has been updated in each new stage of carceral state building since.

As historically institutionalized, the myth that punishment checks the potential threat of Black empowerment has always incorporated all three aspects. As recent historical research has shown, almost every aspect of the organization of chattel slavery was infused with the existential threat to the settlement project whether slowly by labor resistance (partial self-liberation) or more acutely by uprising (Hadden 2003; Johnson 2013; Browne 2015; Tomlins 2020). Many of our most enduring carceral practices—from caging as a form of punishment, patrol-style policing, and heavy doses of white vigilante violence as an adjunct form of state social control—all began in slavery and still shape our carceral state today. Alongside more direct forms of control and suppression, like slave patrols and militias (against Native Americans), the American carceral state has evolved along with the changing forms of the racial threat myth. Indeed, once formal legal racial equality was established in the late twentieth century, making both Native Americans and Black Americans theoretically full citizens under the law, the carceral state has become the most important form of state violence enforcing racial hierarchy as a social fact (Stevenson 2019; Alexander 2020). All the major forms of political power that constitute the modern state have incorporated a dimension of the racial threat myth.

Sovereignty, as it was expressed after imperial conquest in the Americas (by England, Spain, and Portugal) incorporated enslavement from the earliest stages and forged racial classifications that marked Black and Indigenous people, who were the most commonly enslaved, through their legal systems as having few, if any, rights that White settlers had to respect (Lytle Hernández 2017). They were marked as a clear and present danger to the White settler community since an uprising of enslaved people, along with any union between enslaved and Indigenous, formed the greatest military threat to White settlers until the middle of nineteenth century (Hadden 2003). Both military forces and nascent law enforcement capacity was from the start shaped by this anti-Black agenda.

The disciplinary remaking of the carceral state in the early nineteenth century that we associate with the birth of the prison, mostly in the northern states, was matched in the South by the carceral shape of the plantation's physical design and operational logic (Johnson 2013; Browne 2015). After slavery, there were explicit efforts to reinforce the discipline of the now technically free Black workforce with the threat of convict leases for those who left their employment to seek fortune in cities (Lichtenstein 1996; Alexander 2020). Prisons and police had spread to every state, and most large cities by the end of Reconstruction and everywhere became focused on Black citizens as soon as enough of them were present to be perceived as a threat (Du Bois [1899] 2014).

The eugenic expansion of the carceral state was initially aimed at immigrants deemed racially inferior but quickly refocused on Black migrants to the urban North, drawn in part by the successful restriction of immigration from Europe and Asia on eugenic grounds (Muhammad 2019). By the Great Depression, suppressing Black communities had surpassed labor radicals as the chief preoccupation of American policing (Balto 2019). From the end of the Second World War on, the continued growth of Black populations in large northern cities was perceived by both national and local governments as an existential threat to the economic future of the

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industrial cities addressed by the redeployment of people in the name of modern urban planning (Murakawa 2014; Hinton 2017). We can see this as an extension of the power to expel people and infrastructures from territories, a power that was historically reserved for Indigenous populations, who were targeted for removal in favor of settler communities and a move to apply them to domestic urban projects (Self 2003; Schwarzer 2021).

The repeated institutionalization of racially charged myths about punishment in the United States has embedded racial threat so deeply in our cultural/cognitive systems that the association between blackness and crime (in both directions) now shows up as one of the most well-established forms of implicit bias (Eberhardt et al. 2004). This means that any real opportunity to shrink the carceral state is tied up in a dialectical relationship with anti-Black racism. Concern about racial injustice has proven to be a potent challenge to the legitimacy of the contemporary carceral state, but racial justice movements have proven to be a potent stimulant to the fear of crime.

Myth 3: Punishment Reforms the Idle, Nineteenth Century

The idleness of the poor leads to vice and then serious crimes, and punishment can create habits of hard work and thrift

Today, talk of idleness leading through vice to crime may seem a bit antiquarian, and the claim that hard labor in prisons disciplines people whose bad habits led them to lives of crime seems a bit simplistic. Yet the persistent hope that their punishment—especially, punishment by incarceration in a penitentiary-style prison—will lead to positive change in those incarcerated remains one of the most popular sources of public support for prison and, where parole laws require demonstration of such change, one of the most important features of how the imprisoned come to understand their punishment. Likewise, the enduring appeal of forcing imprisoned people to work for nominal compensation remains a nearly universal feature of prison sentences in most states and continues after release through parole work requirements in many (Simon 1993; Seim and Harding 2020).[7]

The mythic connection between idleness and crime, punishment, and reform has deep roots in European theology and cultural lore, but it became institutionalized in new ways as the commodification of land drove a large portion of the rural laboring poor into forced mobility beginning in England in the sixteenth century. The workhouse as a space of carceral discipline and labor emerged first as part of poor policy and then became institutionalized in the penal field in the form of the penitentiary in North America in the nineteenth century (Foucault 1977; Melossi and Pavarini [1982] 2018; Rothman 2017a). The belief that crime is a product of idleness among the laboring classes and could be reformed through forced labor would become institutionalized in new penal institutions such as transportation to the colonies (perhaps the most perfect way to merge punishment and labor for a settler

[7] On the other side of the conflation of poverty and criminality at the heart of the idleness trope (it is never the idle rich that are perceived as being in danger of a anomic spiral of moral decline and depravity), we see the fear of letting poor people leave work (or leave off looking for work), which constrained welfare policies starting in the 1960s and continuing in the United States right up to the present.

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colonial empire) and the penitentiary—a solution once the nation is taken as the boundary of lawful punishment (McLennan 2008; Anderson 2016). All three (workhouse, transportation, and penitentiary) marked the introduction into the juridical space of punishment of new disciplinary technologies of power that were associated with labor control, enslavement, and colonization. A huge increase in both the scale and capacity of the carceral state, confinement with disciplinary labor would address the scandals of cruelty and impunity increasingly leveled at the classical regime of punishment in the course of the eighteenth century by its Enlightenment critics (Johnson 2013; Browne 2015; Anderson 2016).

A crucial link between idleness and crime ran through the figure of the vagrant, a folk devil who became an increasing focus of criminalization in Europe on the cusp of rural land privatization and was also a concern with urban laboring and dangerous classes in the course of the early nineteenth century (Chevalier 1973). In his lectures while preparing his study of the birth of the prison, Michel Foucault (2018, 173) describes how idleness came to be seen less as a problem of poverty and more as an existential threat to the population as a whole: "What is dangerous is the worker who does not work hard enough. Who is lazy, who gets drunk, that is to say everything by which the worker practices illegalism, not in this case on the body of the employers wealth, but on his own body, on the labor power that the employer considers he owns." These developments—the criminalization of everyday illegalities—were deeply resented and resisted by the popular classes, experienced by many as a form of "taxation" as well as the loss of popular "judicial and therefore political power," and Foucault asks: "[S]o why was it tolerated?" (125). Part of the answer lies in the myth that punishment reforms the idleness that will otherwise lead the idle poor to an increasingly bloody path of crime. By the nineteenth century, this linkage was a standard cliche in both popular culture and police science.

Engraver William Hogarth, whose work was widely copied and venerated around the Atlantic, devoted his most famous work to this very subject—a set of thirteen engravings from which paper prints could be cheaply made and distributed. *Industry and Idleness* (1747) begins with two eponymous "apprentices" at work in what appears to be a textile factory (see Figure 3). The "idle" apprentice is soon let go from employment where a long descent leads ultimately to the gallows for highway robbery. In the penultimate image, the two apprentices come together again with the virtuous "industrious" apprentice, who has risen to be Lord Mayor of London, having to decide whether to place his old friend in the gaol to await a capital trial and likely execution (see Figure 4). Much as Lorenzetti's frescoes used allegory to depict the marriage between justice and sovereignty as an engine of good government, Hogarth's much reprinted series (which, unlike most of his work, was produced for cheap mass production) provides an allegorical marriage of discipline and sovereignty referenced by its character's factory beginning and public gallows ending.

A more "expert" view of the link between crime and idleness was framed by Patrick Colquhoun, a business consultant and crime prevention specialist who was well acquainted with the entire imperial supply chain from India to the ports of England and Scotland. His *Treatise on the Police of the Metropolis*, which was popular throughout the Atlantic world, addressed idleness among the poor as "a never failing road to criminality" and the chief threat to property (Colquhoun [1797] 2012). Left to occupy themselves, according to Colquhoun, the poor would pursue "unnecessary

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Figure 3. William Hogarth, *The Fellow Prentices at Their Looms*, 1747.

Figure 4. William Hogarth, *The Industrious 'Prentice Alderman of London, the Idle One Brought before Him and Impeach'd by His Accomplice*, 1747

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wants" and "improper gratifications," leading in time to "every kind of violence, hostile to the laws, and to peace and good order" (88).

Beginning in the twentieth century, the grip of forced labor as a tool of discipline loosened somewhat as the influence of modern criminology with its more individualized construction of criminality took hold. Interest in the use of psychology, even surgery, in the quest to root out criminality spread. New prisons were built in many states to serve as correctional institutions, a trend that reached a peak in the 1970s and 1980s and was backed up by federal court interest in fostering more equality in prison conditions. Beginning in the 1980s, a new punitive populism spread, and rehabilitation became associated with "soft on crime" policies (J. Wilson [1973] 2013). But, in its mythic form, the hope that the bad habits of people who commit crimes will be disciplined out of them by the hardships, if not the hard work, of prison remains a perennial source of faith in punishment.

Myth 4: Punishment Removes the Dangerous

Most crime is the product of a dangerous, deviant minority of offenders, and punishment can remove the irredeemably dangerous from society (while reforming the reformable)

> [Eugenics] must be introduced into the national conscience, like a new religion. It has, indeed, strong claims to become an orthodox religious tenet of the future, for eugenics cooperate with the workings of nature by securing that humanity shall be represented by the fittest races. What nature does blindly, slowly, and ruthlessly, man may do providently, quickly, and kindly. As it lies within his power, so it becomes his duty to work in that direction. The improvement of our stock seems to me one of the highest objects that we can reasonably attempt.
>
> — Francis Galton, "Eugenics: Its Definition, Scope, and Aims"

The idea that punishment, especially prison, removes the dangerous minority of highly deviant individuals whose criminality disproportionately harms society is perhaps the most powerful and durable myth in our modern civil religion of punishment. Although the idea of monstrous offenders has its origins earlier in the demonization of the idle in the form of the vagrant or vagabond, the modern notion of a criminal population as a natural category is only about a century old, institutionalized in the great wave of carceral state building in the early twentieth century that historians often group together as part of the progressive reform era (Rothman 2017b). New punitive institutions emerged in this period that extended the power and capacity of courts to individualize punishment, including juvenile courts, probation, and the indeterminate prison sentence (Willrich 2003; Platt 2009; Rothman 2017b; Ward 2019). On top of the national alcohol prohibition, which was aimed at achieving many of the same goals of preventing degeneracy and the resulting crime, this movement created the first large-scale federal role in law enforcement (McGirr 2015).

Driving this growth was another perceived social crisis associated with labor violence, vice, and crime—namely, the huge wave of immigration from Eastern and Southern Europe (and Asians on the west coast), which grew to a mass scale at the end of the nineteenth century (Okrent 2020). This view was further amplified by the

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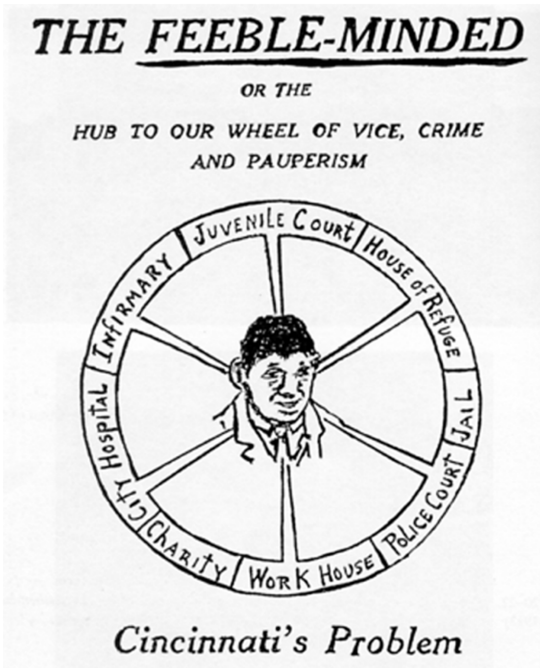

Figure 5. *The Feeble-Minded* (Juvenile Protective Association of Cincinnati 1915)

extraordinary success of a new science—eugenics—which, as noted in the expository essay by its inventor Francis Galton (1904), quoted above, was presented as a little less than a new religion fit for modern civilization. Galton, a noteworthy scientist and statistician, argued that most social problems were the product of inherited traits and that controlled human breeding would perfect humanity. In the first few decades of the twentieth century, these theories achieved enormous uptake in the rapidly growing research universities and in the more general middle-class culture. For its enthusiasts, eugenics was a model of everything that could be hoped for from the bold synthesis of science, law, and government power being expounded by many progressives whose influence on both major political parties reached a crescendo in the 1920s and 1930s.

According to eugenicists, most crime and other social problems like mental illness, unemployment, and the like were caused by inherited traits and especially feeblemindedness and could be eliminated by preventing the feebleminded from procreating (through segregation and sterilization) or entering the country (through immigration restriction) (Leonard 2017; Appleman 2018; Muhammad 2019; Grasso 2024) (see Figure 5). At another scale, most eugenicists believed that these unwanted traits were grouped by nationality as well and that the northern European stock from whom many middle-class Americans traced their lineage were naturally superior to other Europeans and especially to Asians and Africans (Davenport 1910; Goddard 1915; Grant 1916). Accordingly, perceived high levels of crime in American cities required both systemic efforts to restrict and segregate those from "inferior" racial backgrounds and using the punishment capacity of the carceral state to remove

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"degenerate" individuals (Simon 2020). In perhaps the most infamous public justification for eugenics in the twentieth century, Justice Oliver Wendell Holmes Jr. brought these dimensions together in a short opinion for seven other justices upholding the power of the State of Virginia to involuntarily sterilize Carries Buck whom they accused of being an "imbecile," the daughter of an imbecile, and the mother of a third imbecile. In language that managed to invoke national sovereignty as well as the discipline of military forces, Justice Holmes placed eugenics as the ultimate extension of both:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. *It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind*. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.[8]

Associated with even more extreme eugenic measures (euthanasia and racial genocide) undertaken by the Nazi regime in Germany in the 1940s, eugenics soon came to be seen as both bad science and an abusive form of government at its worst (Cohen 2017; Whitman 2017). Yet its patterns remain in many aspects of American government, including immigration law and the discriminatory treatment of the disabled (Appleman 2018), and nowhere more so than in our enduring faith in punishment as a form of incapacitation and the belief that targeting a dangerous minority among the population with long prison sentences holds the key to public safety. Ideas of what makes people a criminal type have shifted away from biology (although it has never totally lost favor), to sociology, actuarialism, and, today, machine-learning algorithms (Mehozay and Fisher 2019), but the idea that some identifiable minority among the population must be disproportionately responsible for crime remains strong, and belief that law enforcement is good at identifying such criminal types is a solid lock on its legitimacy. What has changed the most since the interwar years is the scale of the population deemed dangerous (Grasso 2024). The selective removal suggested by the Progressives became mass incarceration (Hinton 2017). The myth that punishment is a way of removing the dangerous and degenerate from society remains among the most consequential legacies of the eugenic arc of carceral state building.

Myth 5: Punishment Reinforces Neighborhood Social Order

Disorder and minor illegality deteriorate neighborhood safety, and aggressive policing and punishment can reinforce social norms and keep neighborhoods safe and economically viable

The most recent punitive myth is associated with the unprecedented growth of both policing and punishment in the United States in the late twentieth century. Central to

[8] *Buck v. Bell*, 274 U.S. 200 (1927) (emphasis added).

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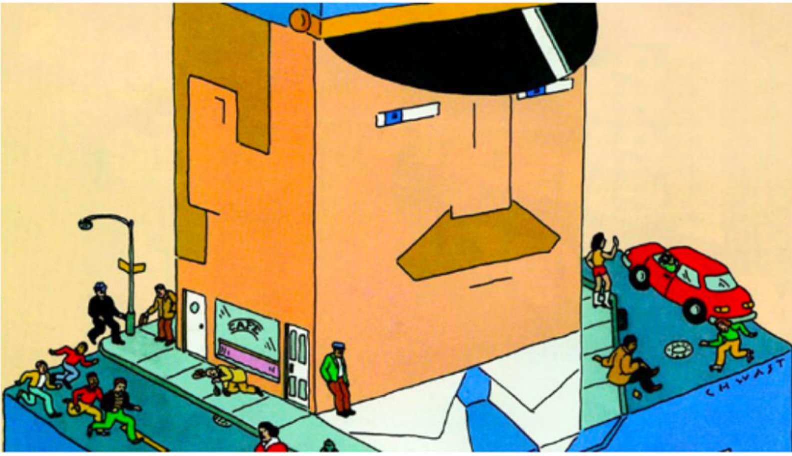

Figure 6. Broken Windows: The Police and Neighborhood Safety (*Atlantic Magazine*, 1982)

this project was the claim that minor crime such as drug sales and possession, vandalism, and disorderly conduct is the main force that pushes safe neighborhoods over into being high crime ones and that punishment of minor crime could help neighborhoods ward off the presumptive threat of serious crime, followed by social and economic disintegration. This myth is still part of our contemporary policy discourse where it is best known to both its friends and critics as "broken windows" after the popular magazine article by criminologists James Q. Wilson and George L. Kelling (1982; see also Harcourt 2005) (see Figure 6). Although most frequently associated with policing, the broken windows idea centers the relationship of crime and disorder in a way that drives punishment as well as policing.

Unlike the earlier punitive expansions that we have surveyed thus far, this mobilization was less associated with the emergence of novel penal institutions than with the enormous expansion of existing institutions (courts, prisons, police, probation, and so on), along with a coordinated effort to "harden" their response toward incarceration for increasing numbers of people (Gottschalk 2016; Zimring 2020). Imprisonment rates, which were stable for most of the twentieth century, rose more than four times their historic norm from 1975 to 2005 and became even more disproportionately composed of Black and Brown Americans (National Research Council 2014).

The political economic horizon in which a "war on crime" would dominate much of social policy for the last decades of the twentieth century has been extensively examined (Garland 2001; Gilmore 2007; Simon 2007; Wacquant 2009; Hall et al. 2017; Schoenfeld 2018). In the late 1960s and 1970s, violent crime and drug-related crime were perceived as part of a larger urban crisis marked by disinvestment, loss of middle-class (tax-paying) residents, declining home values, and high concentrations of poverty in historically segregated (generally Black) neighborhoods (Gilmore 2007). Crime, particularly gun violence and drug crimes (and the alleged nexus between the two), were perceived clearly as an impediment to revitalizing cities with new investment and residents who could only be attracted back by efforts to contain and

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clear them. In Ruth Wilson Gilmore's summary of California in that era: "crime" and "violence" seemed to be identical" (112). Together with political dissent and turmoil and one of the greatest waves of labor strikes in the century, this crime and violence nexus became the target of a broader appeal to restore social norms by reemphasizing punishment and discipline (perceived at the time as lacking even in the correctional systems with their talk of rehabilitation).

But the case for a massive expansion of the carceral state was hardly obvious in the 1960s and 1970s. Many critics of criminal justice administration already considered it riddled with racial discrimination and lacking in effective methods of correctional treatment. The liberal Kennedy and early Johnson administrations were focused on using national resources to fight poverty through investing in high poverty communities, not police and prisons (Hinton 2017). It is in explaining this rapid shift from a "war on poverty" to a "war on crime," and the considerable political and professional resistance to such a punitive expansion, that we can understand the institutionalization of the myth that punishment is necessary not so much to eliminate crime but, rather, to contain it in some neighborhoods and keep it out of others—a kind of urban counter-insurgency (Hinton 2017; Harcourt 2018).

In recent years, there has been a growing rejection of mass incarceration and the war on drugs by voters and some political leaders. Some cities—most famously at the moment, San Francisco (Shellenberger 2021)—have moved away from the broken windows philosophy (only to move back following a backlash), and it remains popular in its hybrid expression of a kind of urban revitalization strategy and has been adopted in other countries (Mejia et al. 2022). By feeding the criminal legal system with a permanent penumbra of people under arrest, in jail, in arrears on fines, or on probation, who are on a track that will eventually incarcerate them unless current policies are changed, the reinforcement myth of punishment will make mass incarceration permanent. And by building popular backlash against efforts at decriminalizing low-level offenses—the low hanging fruit of criminal legal reform—the myth with its demonization of the disorderly makes changing those policies unlikely.

Analysis

My central claim is that episodic expansions of the carceral state have institutionalized a series of "legal rational myths" about crime and punishment that provide powerful foundations for the legitimacy of the carceral state as it has evolved (Suchman and Edelman 1996). Each of these myths now constitute an independent basis for widespread faith in the efficacy and morality of punishment. Collectively, they reinforce each other, coalescing into a modern "civil religion" (Bellah [1967] 2006) around "law and order" (Scheingold [1984] 2011).

How Myths Matter

The influence of the past on the present, operating through a conjunction of institutions and myths that are in turn linked to enduring political technologies and the encoded memories of past social crises, takes place not all at once, or once and for all, but repeatedly and over and over again as new conjunctural conditions generate

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social crises that both test and call upon the legitimacy-conferring capacity of punitive institutions (see Table 1). In sequence, each myth has played a leading role at a crucial historical juncture in the development of the carceral state. As a body of dogma, they provide a formidable array of punitive beliefs that circulate in the general legal and political culture, easily mobilized to make future expansions easier and efforts at retrenchment or abolition harder. Periodic debates about the scale and function of punishment (which seem to occur every fifty years or so in the United States—the 1920s, the 1970s, and the 2020s) thus start out with an enormous advantage for those institutions and interest groups seeking to defend or expand the scale of punishment or make it more aggressive for three reasons.

First, a society that has embraced more of these myths (and more extreme versions of them) will provide more productive grounds for those looking to assemble the relevant elite coalitions whose sustained enthusiasm for punishment will be needed to create new penal institutions or significantly expand old ones. Most legal systems that trace their origins to European colonialism (and that is most of them) have some version of the myths of repayment and reform. Most countries, however, lack the institutionalized versions of the myths of racial threat, removal (eugenics), and reinforcement. Europe, in particular, which has taken important steps to limit both sovereignty and disciplinary power, so far lacks the punitive turn associated with mass incarceration and the war on drugs (Snacken 2010; Cliquennois, Snacken, and Van Zyl Smit 2021).

Second, these myths cut across major divides in society, making the demand for more punishment a unifying theme in politics (Simon 2007). At certain moments in history, the punitive power of the state can become the subject of dissent and resistance (we are arguably in the midst of one now). Much more commonly, however, crime and its punishment form the foundations of crosscutting coalitions.

Third, having a set of myths about the existential threat of crime and the social benefits of punishment that touch on different narratives about good and evil and human behavior and yet share a common focus (especially fear of the poor, Black people, and the deviant) makes it easier to sustain a common punitive campaign over the decades that it takes to actually accomplish a transformative expansion of the carceral state—for example, the recent era of the war on drugs and mass incarceration (Hinton 2017) or, half a century earlier, prohibition (McGirr 2015).

Fourth, having multiple myths makes it easier for the carceral state to navigate a period of legitimacy-challenging criticism and calls for change. The deep bank of interconnecting myths makes it relatively easy for the carceral state to reestablish legitimacy by symbolic steps that reaffirm its alignment with existing myths or with a new emerging one. It is this fourth role that we are seeing play out in California today following the deep legitimacy crisis into which the state entered with respect to prisons in 2011 (Simon 2014).

A Case Study: Punitive Myths and the Transformation of California Penality from Rehabilitative Penology to Mass Incarceration and Back, 1970–2020

I want to illustrate how punitive legal rational myths operate to rebuff legal and political challenges and demands for shrinkage or abolition with one of the best studied cases of one state's path to mass incarceration—California (American Friends

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Service Committee 1971; Irwin 1980; Zimring, Hawkins, and Kamin 2001; Gilmore 2007; Campbell 2014; Simon 2014). The main focus here is less on the road to mass incarceration than on the recent challenges to it that reached an inflection point with the US Supreme Court's 2011 decision in *Brown v. Plata*, imposing the largest prison population cap in history (Simon 2014).[9] A decade later, there has been reform, moderate decarceration but no "dignity cascade" (Simon 2014), as illustrated well by the state's lethal indifference to the threat of the COVID-19 pandemic on its still highly overcrowded prisons, an epidemic that ended up infecting over eighty-five thousand imprisoned people and prison workers and killing 256 (California Department of Corrections and Rehabilitation 2022).

From the late 1970s through the middle of the 2000s, California embraced mass incarceration as a state project at practically every layer of government (Campbell 2014; Zimring 2020). At the local level, district attorneys used their historically extensive discretion to send more Californians to prison, while the legislature adopted hundreds of individual laws lengthening prison terms and adding new sentencing enhancements. The most infamous of the latter—California's toughest in the country "three-strikes" law—created a massive legacy prison population of life sentences that continues to stymie shrinkage of the prison system (Zimring, Hawkins, and Kamin 2001). As a result, the imprisonment rate, once among the lowest in the country, grew a staggering 500 percent between 1977 and 1998, comparable to the Deep South and the biggest gain of any large state (Simon 2014, 88).

The law-and-order campaign that helped produce mass incarceration strategically invoked four of the punitive myths (repayment, removal, reinforcement, and racial threat) while distancing California from the reform myth that had come under attack from both the left and the right as illegitimate (American Friends Service Committee 1971; J. Wilson [1973] 2013). The White political backlash against the demographic growth of Black communities in California, and their political expression in civil rights activism, created the perfect conditions for a racial threat moment and activation of the myth of Black crime (Gilmore 2007). A growing victims'rights movement activating the myth of repayment insisted that longer sentences were necessary to recognize the harm to victims and that anything that made prisons less destructive or prison sentences shorter was favoring criminals over their victims (Garland 2001; Gottschalk 2006).

California's transition from a heavy industrial economy to one dominated by technology, finance, consumerism, and tourism came along with profound structural unemployment, especially for poorer Black communities concentrated in the now economically marginal areas of the central city (Gilmore 2007), and the perception that the traditional crime danger of the idle poor was now supercharged by the existence of an "underclass" isolated from work altogether (Murray 1999; W. Wilson 2012). As the carceral target population became predominantly Black and characterized by structural unemployment, the myth of reform faded, but the myth of removal scaled up from targeted eugenics to mass incarceration (Feeley and Simon 1992; Grasso 2024).

By the end of the first decade of the twenty-first century, California's bloated carceral state was entering a legitimacy crisis, one that would center on racial

[9] *Brown v. Plata*, 563 U.S.

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discrimination as well as medical neglect and prison overcrowding (Simon 2014). The politics of building prisons draws on different circuits and geographically situated power than that of filling them (Campbell 2014; Eason 2017). Support for longer prison sentences stayed strong through the end of the twentieth century, but the parallel consensus behind building new prisons, which had produced more than twenty in two decades, broke down in the face of an enduring fiscal crisis and increasing popular resistance (Gilmore 2007). The result was a period of chronic hyper-overcrowding that saw California's imprisoned population reach nearly 200 percent of designed capacity for over a decade. The hyper-overcrowding intensified the problem of medical and mental health neglect, a built-in feature of California's focus on using punishment as a main response to social disorder. In *Brown v. Plata*, the US Supreme Court upheld a population cap that compelled the state to engage in limited decarceration. Much of California's overcrowding came from repetitive short-term incarceration for people convicted of relatively minor felonies and people on parole found guilty administratively of technical violations like drug use or failure to report.[10] Under the pressure of the court-ordered cap, some of those fell away.

A decade later, California's carceral practices have indeed shifted. Between 1983 and 2018, California's prison population increased by 225 percent, and between 2000 and 2018, the population dropped 20 percent (*Vera Incarceration Trends* 2024). Governor Gavin Newsom has announced the closure of three prisons (Auhumada 2022). Despite this success, California prisons continue to fail to achieve a constitutional level of medical care and mental health treatment and remain under one of strictest regimes of federal court oversight in history (with ongoing receivership of its prison medical system). While criminal law reforms like the ones noted are departures from penal populism of California in the late twentieth century, they leave California with a hugely punitive profile for a blue state, including over seven hundred condemned prisoners (capital punishment remains a legal sentence, but executions are under a moratorium), heavy use of life without parole sentences (Seeds 2022), and a large number of lifer's eligible for parole who are likely to die in prison for lack of approval. Whether California is largely on its way to resolving the legitimacy crisis that opened up in the first decade of the century remains to be seen, but we can see evidence of how actors and institutions seeking to defend and stabilize the carceral state have used all five of the punitive myths cataloged in this article.

Distancing the California Department of Corrections and Rehabilitation from Mass Incarceration and the Myth That Punishing Disorder Reinforces Neighborhood Safety

As a world of ritual, ceremony, and symbolism, carceral institutions can address a legitimation gap most directly by distancing themselves symbolically from those meanings of punishment most discredited by the current crisis. The broken windows myth of using punishment to reinforce a fragile social order was precisely the rationale for the state's much criticized reliance on prison for low-level felonies and parole violations. Even though the state and its leaders complained bitterly about

[10] *Coleman-Plata v. Schwarzenegger*, US District Court, E.D. and N.D. Cal., Three-Judge Court Pursuant to 28 U.S.C. section 2284, No. CIV S-90-0520 LKK JFM P and No. C01-1351 Opinion and Order, August 4, 2009.

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Brown v. Plata, the population cap and the realignment law that channeled most non-violent, non-sexual, non-serious felonies to either county jail incarceration, probation, or a combination effectively signaled that the era of mass incarceration was over in California and gave the state a pass on producing a coherent new approach while opening the door to symbolic realignment with alternative myths and the repertoire of penal templates developed over the centuries to signal punishment virtues (Rubin 2019; Petersilia 2016).

Repayment

Given the problems of medical neglect, exacerbated by the aging population of people serving long sentences for either violent crimes or one of the state's many enhancement laws that turned ordinary felonies into life sentences, the state might have used its considerable administrative powers (parole and clemency primarily) to release this low-risk (because of age), high-vulnerability population. But to do so would risk offending powerful victim organizations by appearing to cancel decades of carceral "debt." Instead, population caps were met prospectively by using the state's largely invisible law-making powers to effectively reset the terms of penal payment going forward (sentence lengths stayed the same but shifted the locus of payment from prison to jail and probation), a measure justified in political economic terms as ending the "correctional free lunch" (Zimring and Hawkins 1993; Aviram 2015). The modest decarceration undertaken to improve social distancing during the COVID pandemic came almost entirely from advancing the release of people within one hundred days of their release and not from the release of those most endangered by COVID (Aviram 2022).

Reform

On the eve of mass incarceration, as part of the 1976 Uniform Determinate Sentencing Law, which eliminated the indeterminate sentence system (a relic of the eugenic era) for most California felonies, California expressly denounced its former reputation as the leading US center of modern penal rehabilitation, pronouncing that prison was good for "punishment" only (Gilmore 2007). Many considered rehabilitation already a myth in California (American Friends Service Committee 1971; Irwin 1980; Cummins 1994). Nearly forty years later, as the California prison system careened toward a showdown with the federal courts in 2006 and increasing demands for fiscal restraint, Governor Arnold Schwarzenegger responded by renaming the California Department of Corrections (established in the 1940s to emphasize rehabilitation) as the California Department of Corrections and Rehabilitation. There was no substantial effort to invest new resources in rehabilitative programming, which was virtually impossible given that the state could not achieve the medical and mental health-care improvement targets being set by the courts because of overcrowding.

The next governor, Jerry Brown, who had presided over the aforementioned jettisoning of the rehabilitative model during his first term in office in the 1970s, now embraced it with enthusiasm, insisting that the state already had one of the world's most progressive rehabilitation programs (against all evidence). Brown eventually did introduce a voter initiative that returned parole release for many people under

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determinate sentences based on the completion of supposedly evidence-based rehabilitation. Evidence of any real investment in that programming is scarce. In the most recent example of leaders following the symbolic logic of the myth to almost absurd extensions, Governor Newsom, who came into office in 2019 and is expected to leave in 2027, declared his intention to turn California's oldest prison, San Quentin, into a Scandinavian-style rehabilitation center (Gans 2023; *The Guardian* 2023). However, San Quentin's reputation as a site of rehabilitation today is based largely on the self-help provided by inmates, volunteers teaching a wide variety of skills, and peer support. Mostly, rehabilitation remains an unfunded mandate of a state that has invested in little actual programming. More concerningly, it lays the foundation for investing new funds in carceral expansion at San Quentin while leaving much of the mass incarceration-era prison system untransformed and intact.

Removal

While eugenics as a science and as a racial ideology has been largely discredited and repudiated, as a template for action on crime, it remains alive in the carceral state revitalized by new versions (Muhammad 2019; Grasso 2024). Two ideas remain incredibly sticky: first, that most serious crime is the product of a minority of highly deviant and dangerous offenders and, second, that police or at least prosecutors can identify the right people and address their danger by removing them from the community (Frampton 2021). The era of mass incarceration continues to enhance the claim that its law enforcement establishment, especially its elected local prosecutors, have the expertise to select out the very dangerous using enhancements like "three-strikes and you're out" or numerous enhancements for guns and gang involvement (Zimring, Hawkins, and Kamin 2001; Simon 2014). They have also deepened the portrait of California prisons as being filled with very dangerous people by relying heavily on super-max-style solitary confinement incarceration (Reiter 2016).

The legitimacy crisis sparked by overcrowding and the state's realignment plan has left these beliefs intact. Indeed, the courts' criticisms of mass incarceration have been based on the claim that California was imprisoning far too many people who did not pose a danger. Parallel challenges to solitary confinement, including a hunger strike and a class action lawsuit from people incarcerated for more than ten years in solitary, resulted in modest reforms, but Governor Newsom vetoed a law that would have ended the practice in 2023, citing the need to deal with dangerous inmates.

Conclusion

This article argues that an important source of resilience to the carceral state is a portfolio of powerful cultural myths that have turned punishment into an American civic religion and infused the carceral state and its organs with a surplus legitimacy capable of outlasting the most sustained resistance that history has thrown at it. Reforms themselves can help restore legitimacy for challenged punitive institutions, a concern that abolition theorists have raised for years (Gilmore 2007). But this is particularly true when the "reforms" draw on long existing templates of criminal justice practice anchored in the five myths outlined in this article.

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Readers may well accuse me of flipping from an unfounded optimism in 2014 to an unfounded pessimism today. Following Antonio Gramsci's famous dictum "pessimism of the intellect, optimism of the will," we need both (Antonini 2019). The growth of the carceral state is not inevitable (indeed, it looks likely to shrink slowly). Dignity cascades can take decades to happen. The transformation of the European carceral states, including the abolition of the death penalty and a strong human rights framework for penal policy, began with the aftermath of the Second World War but did not produce the observable changes until the 1980s and 1990s (Van Zyl Smit and Snacken 2009). Space precludes a more extensive comparison. If dignity is denied by the strength of our legal rational myths about punishment, we American reformers and abolitionists, working together, need to develop reform ideas that challenge all the myths, not just one and not by shoring up some of the other myths (the way reform is being done today in California).

The language of myths may leave the impression that the battle to shrink and transform the carceral state in the United States will be won by better and more objective data about crime and punishment. Data will have a role to play, especially data produced in ethical and collaborative ways with the communities most impacted by crime and independently from the carceral state and its abundant knowledge sources. Some of the work will be empirical (myth busting, so to speak), but much will be the work of organizing and then collectively imagining the forms that justice and safety could take outside of the crystallized templates that we have inherited and passed on.

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