

On Prisoners, Politics, and the Administration of Criminal Justice: Professor Rachel Barkow

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Professor Rachel Barkow has established herself as an indispensable voice in public and academic discourse on criminal justice reform. Beyond the very important contributions to the world of scholarship that earned her a well-deserved place in this “most-cited” list, she has also shaped policy directly (most notably as a member of the U.S. Sentencing Commission from 2013 to 2018), as well as influenced the education of countless law students through her coauthorship of the leading criminal law casebook.¹ She is also an expert on administrative law and on the separation of powers, and this shapes her distinct perspective on the way the criminal justice system works. Several of Barkow’s relatively early pieces on these topics are her most cited (unsurprisingly, as they have been available to cite for longer), but for reasons of space and my own lack of administrative-law expertise, I won’t focus this short piece on them.² Rather, I will focus on Barkow’s most substantial recent intervention in criminal justice reform debates: her 2019 book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*.

My comments here serve as a miniature book review—but published two years belatedly and thus with the benefit of hindsight. The world has changed more in this short time than anyone in 2019 could have expected, and some of the book’s arguments land differently today than they might have then. Still, the book

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¹ SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES (10th ed. 2016).

² Rachel E. Barkow, HEINONLINE, <https://perma.cc/VA53-BBBK>. See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006).

remains essential reading, and most of its insights still hold. I will begin by praising its many strengths, even though I ultimately diverge from Barkow on a core argument of the book—that criminal justice policy should be institutionally shielded from politics and delegated in substantial part to expert bodies.

I. OUR BROKEN JUSTICE SYSTEM: BARKOW'S DIAGNOSTIC INSIGHTS

Prisoners of Politics serves on one level as a tour-de-force review and searing indictment of the many overwhelming failings of our criminal justice system. Many of these are familiar to those steeped in this area of law, but Barkow shows effectively how they have worked in combination to drive the growth of mass incarceration and to make it difficult to end it. Her writing is clear and accessible to lay readers, yet filled with insights that academics will appreciate; it is a model of public-intellectual argument. She begins the book with five chapters laying out different categories of failures and injustices, and there is little here with which to disagree; it is a sad but accurate picture.

The first set of problems surround the criminal laws themselves. They are too broad, sweeping in an ever-expanding scope.³ And, crucially, they are too “lumpy”—they fail to draw distinctions between types of conduct that ought to be punished very differently.⁴ Take, for example, drug sentencing that is driven mainly by quantity, or sentencing for economic offenses that is driven mainly by the dollar value of the loss; neither accounts properly for the defendant’s role in the offense or their mental state, factors that are relevant both to moral culpability and to future crime risk.⁵ Another example is the felony murder doctrine, which treats accidental killings (by the defendant or, often, a co-conspirator) as essentially equivalent to intentional ones.⁶ Lumpiness in criminal law produces harshness because sentencing policy tends to be shaped to respond to the worst examples of a broad category of crimes; this problem is especially egregious

³ RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 19 (2019) (“The popular discussion around a given crime tends to focus on the worst category of offenders, while the statute defining the elements of the crime often sweeps far more broadly, bringing in cases that no rational voter would have ever imagined belonged to that category.”).

⁴ *See id.* at 22.

⁵ *See id.* at 22–23.

⁶ *See id.* at 25–26.

when it drives harsh mandatory minimums, given that one would think by definition that the minimum sentence for a crime ought to be tailored to the least serious version of it.⁷

Second, sentencing is simply too harsh, unsupported by any reasonable theory of punishment, and unmoored from empirical evidence; Barkow argues that our overattachment to incarceration may be counterproductive for public safety. In particular, long sentences have little benefit in terms of deterrence, and incarceration of older people who are many years past their crimes has little incapacitation benefit.⁸ She also surveys the many costs that mass incarceration has for individuals and communities as well as its fiscal costs.⁹

Third, our prisons and jails “do almost nothing to rehabilitate offenders,” and people exiting them are accordingly ill-prepared for reentry and more likely to recidivate.¹⁰ Barkow cites empirical evidence that many treatment, education, and training programs can reduce recidivism (to say nothing of their other benefits for individuals), but these kinds of services are offered only minimally in U.S. corrections.¹¹ In this chapter, Barkow also makes the distinct point that pretrial detention is also used in excess, largely due to the cash bail system. She argues that quantitative risk assessment tools can reduce detention without harm to public safety or trial appearance rates.¹²

Fourth, Barkow describes the decline of discretionary parole (abolished in some states and curtailed in others)¹³ as well as other “second-look mechanisms” that can take account of the changing risk that an individual poses over time.¹⁴ These include compassionate release, the use of which is minimal, and executive clemency (another area of Barkow’s expertise), which gave way to parole as the primary second-look mechanism in the early twentieth century but failed to reemerge as a frequently used alternative in jurisdictions that abolished parole.¹⁵

Finally, Barkow reviews the ever-proliferating web of collateral consequences that entangle individuals, often for life, after

⁷ See *id.* at 36.

⁸ BARKOW, *supra* note 3, at 38–55.

⁹ See *id.* at 46–50.

¹⁰ See *id.* at 18, 56–72.

¹¹ See *id.* at 61–67.

¹² See *id.* at 57–61.

¹³ See BARKOW, *supra* note 3, at 78–81.

¹⁴ See *id.* at 18, 73–87.

¹⁵ See *id.* at 81–87.

they have finished their sentences. These, she argues, are deeply counterproductive for recidivism prevention, ungrounded in empirics, and incredibly harsh in their results.¹⁶ They are also classic examples of “lumpy laws,” as they tend to be triggered by any felony or by broad categories of felonies, with no accounting for individual circumstances.¹⁷

On all these points (except, perhaps, the embrace of risk assessment, of which I am less enamored), I find Barkow’s analysis thoroughly convincing. Moreover, I am also largely convinced by her assessment of the reasons things have gone so wrong. These include elected officials and their constituents responding to particular high-profile crimes with hasty, overly sweeping legislation;¹⁸ more generally, a “populist politics” that is sensitive to crime victims, insensitive to the costs of incarceration, and shaped by a media culture that sensationalizes crime;¹⁹ prosecutors with far too much power and incentives to push for harsh policies and harsh results in individual cases;²⁰ and courts that, with a few exceptions, have failed to protect defendants’ procedural rights or to constrain the excesses of sentencing law.²¹ All of this is accurate. It could be criticized, perhaps, for somewhat underemphasizing the role of racism—structural and otherwise—but it is not incompatible with more race-focused explanations.

Barkow’s account shares much in common with Professor William Stuntz’s assessment, nearly twenty years earlier, of the “pathological politics of criminal law,” which remains essential reading on how mass incarceration came to be.²² But hindsight tells us that Stuntz was not entirely accurate in his predictions; criminal law did not turn out to be a “one-way ratchet” to an ever-increasing prison population.²³ Incarceration has, in fact, declined lately, and most criminal justice policymaking today surrounds the question of how to reduce incarceration as well as the burdens of intensive and violent policing.²⁴ Nobody could say we have gone far in this direction; we still have a sprawling carceral state and

¹⁶ *See id.* at 88–102.

¹⁷ *See id.* at 96.

¹⁸ *See* BARKOW, *supra* note 3, at 19.

¹⁹ *See id.* at 106–10.

²⁰ *See id.* at 129–30.

²¹ *See id.* at 130–31.

²² *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

²³ *Id.* at 509.

²⁴ *See infra* text accompanying notes 33–36.

a long, long way to go. The question is how to get there, which is where I diverge from Barkow's conclusions.

II. CAN THE PATH FORWARD BE DIVORCED FROM POLITICS?

Barkow's prescriptive arguments in *Prisoners of Politics* are provocative and reflect her scholarly strengths, bringing to bear her administrative law expertise. One set of her proposals concerns structuring prosecutors' offices to provide checks against the tendency to use discretion in ways that ratchet up harshness. For example, she argues that charging and plea-bargaining decisions should be in the hands of a different—and likely more senior—prosecutor than the one (if any) who was involved with the investigative stage of a case. This proposal reflects the principle that adjudicative decisions (which she considers charging and plea bargaining to be, because they so powerfully shape outcomes) should be separated from investigative ones.²⁵ The hope is that the charging prosecutor would be less invested in getting the biggest “win” possible (i.e., the most serious conviction and sentence) and would be able to draw on experience in seeking an outcome that is both fair and a good use of the state's incarceration resources. This, like her other proposals concerning prosecutors, is an interesting idea worth testing; it's an empirical question what the effect on outcomes would be, and I have no strong prior, but I would like to see data on it. I suspect that Barkow, an advocate of empirically driven policy, would agree.

Another set of proposals—and an overarching theme of the book, as the title suggests—concerns the need to separate criminal justice policy from the political process. In Barkow's view—like Stuntz's years ago—our criminal justice politics are so broken as to be likely irredeemable. Populist impulses will always tend toward panics over crime waves or even individual crimes, will never be sufficiently attentive to empirical evidence concerning what actually promotes public safety, and will always give too little weight to the interests of defendants. Barkow acknowledges some change in this momentum, including the progressive prosecutor movement, various reform efforts, and the recent downturn in incarceration rates.²⁶ But she argues that all these changes are just chipping away at the edges of the carceral state. Citing an estimate from the Sentencing Project, she states that,

²⁵ BARKOW, *supra* note 3, at 150–51.

²⁶ *See id.* at 9–12.

at the current pace of reduction, it will take seventy-five years just to cut the incarcerated population in half.²⁷

A better bet, she says, is to use whatever reform momentum exists in the current moment to put in place institutional changes that will take crucial policy decisions away from the political process entirely.²⁸ In short, she wants criminal justice policy to be made by experts in a setting more like an administrative agency. She argues that we defer to experts outside of electoral politics when it comes to many other important questions, such as environmental regulatory standards; criminal justice should be no different.²⁹ This institutional-reform theme runs through the book and connects together Barkow's various substantive proposals. Her implication is that, at least if the institutions are set up wisely, experts removed from politics would be driven by data, not public whims or political gains, and the data would drive them to choose the kinds of substantive changes she wants. "Rational reflection will lead to the conclusion that [our current] approaches need to change, so we just need to get the institutional architecture in place that allows for that rational reflection to take hold."³⁰

This is a novel and thought-provoking contribution to the criminal justice reform debate. But I have doubts. I believe Barkow is too pessimistic about the possibility of change through political channels, and I fear that she is too optimistic about achieving it outside those channels. I doubt both whether criminal justice policy can be substantially separated from politics and whether it should be.

Given how broken our criminal justice politics have been for so long, one might ask: Is it even *possible* to be too pessimistic about their future? And I concede: I don't know whether the current moment will last and be built on, whether real change is coming. I suspect the United States will never bring incarceration rates all the way back to our pre-1980s historic norm or to global averages, both of which are vastly lower than what we have today.³¹ And we have other challenges besides incarceration numbers—for example, unraveling the web of collateral consequences,

²⁷ *Id.* at 12–13 (citing Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?*, SENT'G PROJECT (Mar. 8, 2018), <https://perma.cc/82ME-QZAX>).

²⁸ *See id.* at 15.

²⁹ *See id.* at 2–3, 15.

³⁰ BARKOW, *supra* note 3, at 15.

³¹ *See Criminal Justice Facts*, SENT'G PROJECT, <https://perma.cc/7HEF-P3HX> (showing time trends and international comparisons).

building a correctional system that does anything but warehouse and punish, and transforming the conduct of police and narrowing their role. We might not get there through politics. But I think that politics is still our best bet.

This is the question on which the intervening two years has made the biggest impression. Even the very recent past, it seems, can be a foreign country.³² Today, after the murder of George Floyd and after months of protests nationwide, the reader cannot help but feel a certain disconnect from the idea that “populist politics” on criminal justice are necessarily anti-progressive or supportive of the carceral system. The ideas produced by experts in an agency-like setting may be good or bad, but I think that it is quite certain that they will not be as transformative as “defund the police,” for example. To be sure, in the vast majority of the United States, the more radical proposals in the present discourse will surely not carry the day anytime soon, because most people don’t support them.³³ But they have shifted the Overton window, and the period since Floyd’s murder has seen many reform proposals of various sizes from across the political spectrum. Meanwhile, the coronavirus pandemic has both highlighted our political system’s brutal indifference toward the lives of prisoners (who, due to inadequate releases and safety measures, were infected at five times the national rate and died at a higher-than-average rate despite being a population with relatively few elderly people³⁴) and, even so, has led to the sharpest one-year reduction in incarceration ever via a wide variety of policies, some of which may survive the pandemic.³⁵

Even before all this, though, the criminal justice tide was turning in a way that *Prisoners of Politics* somewhat understates. The movement for Black lives had been active for several years. While that movement has focused mostly on policing, civil rights organizations and other progressive groups had begun to emphasize decarceration as well, thanks in part to calls to action from

³² See L.P. HARTLEY, *THE GO-BETWEEN* 9 (1953). (“The past is a foreign country; they do things differently there.”).

³³ Sarah Elbeshbishi & Mabinty Quarshie, *Fewer Than 1 in 5 Support “Defund the Police” Movement*, USA TODAY (Mar. 8, 2021), <https://perma.cc/3TPD-X2ZJ>.

³⁴ *Covid-19’s Impact on People in Prison*, EQUAL JUST. INITIATIVE (last updated Apr. 16, 2021), <https://perma.cc/4WZK-SH45>.

³⁵ *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (last updated Apr. 6, 2021), <https://perma.cc/J6WX-ZL57>; Emily Widra, *How Much Have COVID-19 Releases Changed Prison and Jail Populations?*, PRISON POL’Y INITIATIVE (Feb. 3, 2021), <https://perma.cc/ZK8B-CUWS>.

Professor Michelle Alexander, Professor Bryan Stevenson, and others.³⁶ The progressive-prosecutor movement was well under way. And libertarian and fiscally conservative voices had joined with liberals in supporting reforms.³⁷

Barkow acknowledges these factors but finds the potential for serious change too limited. But while it's true that *most* criminal justice reforms have focused on low-hanging fruit (nonviolent crime, first-time offenders, marijuana), this isn't uniformly so, and it hasn't proven true that if "anyone suggested rolling back the punishment or collateral consequences for offenses involving violence . . . they would likely be voted out of office."³⁸ For example, the groundbreaking Michigan Prisoner ReEntry Initiative—an early release and reentry program that started in 2003—initially focused entirely on moderate-to-high risk releasees, including those with violent-crime convictions; spearheaded by Governor Jennifer Granholm, it did not prevent her landslide reelection.³⁹ More recently, most states have adopted policies dialing back some collateral consequences and/or expanding access to expungement,⁴⁰ and a new Clean Slate movement has brought automatic expungement to several states—including, in some, for violent and other serious offenses.⁴¹ Meanwhile, some of Barkow's examples of minimally ambitious reforms actually happened many years ago. For instance, the federal drug laws' safety valve was adopted in 1994, during the absolute heart of the tough-on-crime era; it's no surprise that it didn't help most defendants.⁴²

³⁶ See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

³⁷ In a review of *Prisoners of Politics*, Rebecca Goldstein provides more evidence of some of these phenomena and also presents survey evidence giving another reason for long-term optimism—more liberal views on criminal justice among millennial and younger voters. Rebecca Goldstein, *The Politics of Decarceration*, 129 *YALE L.J.* 446, 472–80 (2019) (reviewing BARKOW, *supra* note 3).

³⁸ BARKOW, *supra* note 3, at 13.

³⁹ See MICH. PRISONER REENTRY INITIATIVE, 2008 PROGRESS REPORT 4–5 (2008), <https://perma.cc/M2LM-GADG>.

⁴⁰ See MARGARET LOVE & DAVID SCHLUSSEL, *REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018*, at 2 (2019); MARGARET LOVE & DAVID SCHLUSSEL, *PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019*, at 10 (2020).

⁴¹ See, e.g., H.R. 4980, 100th Leg., Reg. Sess. (Mich. 2020); CAL. PENAL CODE § 1203.425 (West 2021); N.J. STAT. ANN. § 2C:52-5.4 (West 2021).

⁴² BARKOW, *supra* note 3, at 34–35; see also 18 U.S.C. § 3553(f) (1994).

The recent decline in incarceration rates is not trivial, and racial disparities—while still enormous—have also declined. Between 2006 and 2019, a period that excludes the Covid decline, the Black incarceration rate fell by 34%, the Hispanic rate by 26%, and the white rate by 17%.⁴³ But what about that sobering “75 years” projection from the Sentencing Project, which was based on data running through 2017 and implies a slower rate of change?⁴⁴ It was always based on strong assumptions about the shape of the curve (meaning that slight changes in the current slope could change the projection by quite a lot), and it was always somewhat misleading to base the projection on absolute and not per-capita rates. In the next two years, decarceration accelerated, and the projection was updated first to sixty-five years, then to fifty-seven.⁴⁵ This is still depressingly long, to be sure, but, adjusting for expected population growth,⁴⁶ it actually represents the expected time frame for a 60% reduction in per capita incarceration rates (not 50%), and the estimate could continue to come down rapidly if reform momentum continues to grow.

The point is not that we should be satisfied, obviously; it’s that we should be hopeful. And that hope is grounded not in an emerging role of professional experts but in changed politics, including a growing public passion about injustice.

But is Barkow right about the best way to take advantage of this moment? There is wisdom in the general idea of trying to adopt reforms that will be self-sustaining even when the political winds change. I am just not sure that expert administrators are the answer.

I do empirical research on criminal justice for a living, and I *love* the idea of making policy in this field more data-driven. But Barkow may be underestimating how hard it is to put together empirical studies to guide policy and how hard it is to make sense of conflicting studies in search of the “right” answer. The majority of empirical studies in this field (as in all of the social sciences, I

⁴³ John Gramlick, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://perma.cc/FX3X-MXPS>. The Black and Hispanic rates remain 5.6 times and 3 times the white rate, respectively. *See id.*

⁴⁴ Ghandnoosh, *supra* note 27.

⁴⁵ Nazgol Ghandnoosh, *U.S. Prison Decline: Insufficient to Undo Mass Incarceration*, SENT’G PROJECT (May 19, 2020), <https://perma.cc/FV8Z-USQ3>; Nazgol Ghandnoosh, *Can We Wait 60 Years to Cut the Prison Population in Half?*, SENT’G PROJECT (Jan. 22, 2021), <https://perma.cc/WD2Z-STWY>.

⁴⁶ Projections come from this site: *Population Pyramids of the World from 1950 to 2100*, POPULATIONPYRAMID.NET, <https://perma.cc/NS4Q-ZXMT>.

suspect) aren't especially good, flaws are not typically flagged on the surface for unfamiliar readers, and even good studies often have results that turn on readily contestable methodological choices. Experimental work (the gold standard for inferring causation) can rarely be conducted in criminal justice, and other causal inference methods using observational data may be viable but are often fraught. Studies are extremely resource- and time-intensive to produce. And those that already exist—despite the efforts of innumerable academic criminologists, economists, legal empiricists, psychologists, and others—address only a small fraction of the countless empirical questions embedded in the construction and implementation of a system of criminal laws (for example, the proper sentencing ranges for hundreds of different crimes). It is unlikely that whatever experts would be available to these hypothetical new criminal-justice-policy offices in every jurisdiction across the country would be able to do better.

But perhaps experts don't need data-driven answers to every question; it would be an improvement to have them for the big questions that cut across many decisions. The problem is that for many of these big questions, which have drawn academic attention, there's no real consensus. For example, do longer sentences increase crime, or do they reduce it? No clear answer emerges from academic literature (as Barkow knows; she both cites evidence that they are criminogenic and acknowledges that they might not be).⁴⁷ There is a pretty strong consensus that at least beyond a certain point, increased sentences have at best a modest general deterrent effect.⁴⁸ But incapacitation effects are much harder to dismiss,⁴⁹ and research has also produced differing results on postrelease recidivism.⁵⁰ What if an expert reviews a

⁴⁷ BARKOW, *supra* note 3, at 44–45 (citing evidence that increasing sentences “does not *always* bring a reduction in crime” (emphasis added)); *see also id.* at 49 (“None of this is to say that lower sentences are always better. . . . But all too often, there are better options for promoting public safety than long sentences.”).

⁴⁸ *See* Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LIT. 5, 24–32 (2017).

⁴⁹ Barkow, indeed, acknowledges them. BARKOW, *supra* note 3, at 46.

⁵⁰ David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 929–36 (2013) (reviewing literature). Barkow suggests that an expert weighing criminogenic effects on recidivism against crime-reducing incapacitation effects would “inevitably” favor “shortening many sentences so that people are not locked away beyond the point at which they would age out of their crimes in any case.” BARKOW, *supra* note 3, at 46–47. And this may be true (the aging-out phenomenon also has an empirical consensus behind it—although age should also mitigate any criminogenic effects). *Id.* at 46. But it also may have the uncomfortable implication that those who would otherwise be released *before* they age out of crime should be kept in prison until they do. Note

study, or many, and concludes that incarceration does reduce crime on balance? How is this to be weighed against incarceration's costs? This is an enormously complicated question because incarceration has many costs (as Barkow persuasively outlines⁵¹) and because the question of how to value the cost of crime is also highly contested.⁵²

Difficult doesn't necessarily mean not worth doing; indeed, to the extent policy is based on empirical assumptions, I think that policymakers (whoever they may be) should of course *try* to make sense of the evidence supporting those assumptions. But the problem becomes worse if this interpretation isn't done in good faith—or, more generously, is done with the sort of motivated reasoning to which all humans are prone. And this raises a related concern: what if the expert scientists or their policy-setting bosses are not the right ones?

If you gave me the option today of placing all of criminal justice policy in the hands of an office that would be run for all time by, say, Rachel Barkow, I would take that in a heartbeat, and I am sure that much would quickly improve. But my idea of a reasoned thinker is not everybody's, and ultimately, even in an agency one seeks to depoliticize, presumably politicians in power would have some influence over who is in it. For example, former Attorney General Jeff Sessions ascribed the label “the greatest thinker on criminal justice in America today” to Heather Mac Donald,⁵³ author of such works as *The War on Cops* and *The Diversity Delusion*—a person with elite degrees, a think tank post, and an enormous following. My views on Mac Donald are different,⁵⁴ but it's plain that some consider her an expert, even a leading one. “Expert” labels do not necessarily imply that a person is apolitical or that they are neutrally driven by data that inevitably takes them to a “rational” outcome. Barkow points out that parole boards, once the province of rehabilitation-focused experts, “have become political bodies made up largely of people

that the studies that Abrams reviews (although most do not support specific deterrence effects) similarly do not suggest that additional prison time is, on balance, criminogenic. Abrams, *supra*, at 929–36.

⁵¹ See BARKOW, *supra* note 3, at 46–48.

⁵² Abrams, *supra* note 50, at 940–46.

⁵³ Heather Mac Donald Bio, MANHATTAN INSTITUTE, <https://perma.cc/X8EU-X6MX> (quoting Jeff Sessions, U.S. Att'y Gen., Remarks at the 2018 Annual Meeting of the Criminal Justice Legal Foundation (June 26, 2018)).

⁵⁴ Sonja Starr (@SonjaStarr), TWITTER (June 15, 2020), <https://perma.cc/SK5W-HAAV>.

with law enforcement backgrounds.”⁵⁵ But what’s to stop the same thing from happening to any entity with power in the criminal justice system? One can potentially use this moment to create institutions, but one cannot control permanently who is in them.

Expert administrators have, in criminal justice and other contexts, not always pushed law or policy in progressive directions. This is especially true when leaders are partisan appointees; take the Department of Justice, or basically any agency, during the Trump administration. The Office of Information and Regulatory Affairs, which Barkow treats as a model, has been criticized for its structurally antiregulatory role.⁵⁶ Indeed, even the courts themselves can be seen as a sort of expert institution, removed from politics (more so than any executive agency could be), especially at the federal level with life tenure and no elections, and yet Barkow correctly observes that they have “taken the wrong legal turn” again and again, with “devastating” consequences.⁵⁷

Or consider the complex example of the U.S. Sentencing Commission, which Barkow rightly credits with achieving some important recent changes, including the retroactive release of thousands of drug prisoners.⁵⁸ But the Commission’s role has not uniformly cut in that direction, and not *only* because Congress has forced it to render the Guidelines ever harsher, as Barkow observes.⁵⁹ For example, a month after the Supreme Court struck down the mandatory Sentencing Guidelines scheme in *United States v. Booker*,⁶⁰ and then again a year later, the Commission’s chair went to Congress to testify strongly in favor of the Guidelines continuing to be given heavy weight, including asking Congress to codify appellate review standards that would so require.⁶¹ In the coming years, the Commission’s in-house empiricists produced a series of reports purporting to show that *Booker* had caused a spike in racial disparity; these used dubious methods on

⁵⁵ BARKOW, *supra* note 3, at 79.

⁵⁶ *E.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1312–14, 1329 (2006).

⁵⁷ BARKOW, *supra* note 3, at 191.

⁵⁸ *Id.* at 171–72.

⁵⁹ *See id.* at 171.

⁶⁰ 543 U.S. 220 (2005).

⁶¹ *See generally Prepared Testimony: Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Judge Ricardo H. Hinojosa, Chair, U.S. Sent’g Comm’n); *Prepared Testimony: Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Judge Ricardo H. Hinojosa, Chair, U.S. Sent’g Comm’n).

a number of fronts, and the conclusion was unconvincing.⁶² All these efforts may have been quite sincerely undertaken (although they did amount to a political defense of the Commission's power, which *Booker* undercut), but they were certainly not progressive. *Booker* inarguably reduced sentences for defendants of all races by freeing judges to vary (nearly always downward) from the Guidelines. It helped to constrain prosecutorial power by empowering judges—and thus constrained the potential role of prosecutors as a source of disparity.⁶³ A move to make the Guidelines closer to mandatory again (which fortunately Congress did not do and which would likely not have survived the Supreme Court, judging by later-established precedent⁶⁴) would have reversed these steps.

Beyond these practical problems, there is a deeper concern. Decisions about criminal law and policy are, at bottom, not technocratic. They are intrinsically normative. They are a fundamental tool for the polity to express core moral commitments. Sentencing-policy decisions and the drafting of substantive criminal law involve a balance between conflicting interests—utilitarian and retributive theories of punishment, concerns about disparities and distributive impacts, procedural concerns about notice and due process, understandings of the freedoms on which criminal restrictions encroach, and more.

None of these can be dictated by data. Indeed, even the quantitative analysis of data is shot through with normative choices. For example, every time a researcher specifies an empirical model to estimate disparities in criminal justice outcomes, the choice of what control variables to put into the model will shape the nature of what's being estimated; this seemingly technical choice expresses something about what kind of inequalities we care about.⁶⁵

⁶² See generally Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013) [hereinafter *Mandatory Sentencing and Racial Disparity*]; Sonja B. Starr & M. Marit Rehani, *On Estimating Disparity and Inferring Causation: Sur-Reply to the U.S. Sentencing Commission Staff*, 123 YALE L.J.F. 273 (2013).

⁶³ See generally *Mandatory Sentencing and Racial Disparity*, *supra* note 62.

⁶⁴ See generally *Gall v. United States*, 552 U.S. 38 (2007).

⁶⁵ *Mandatory Sentencing and Racial Disparity*, *supra* note 62, at 18 (“The choice of control variables determines what kinds of disparities one is measuring, and so it should be shaped by a sense of the types of disparities policymakers and stakeholders care about.”).

And sometimes, the choices of scientists can be normatively problematic. Take the context of algorithmic or actuarial risk assessment, a trend in criminal justice that Barkow embraces⁶⁶ and that represents perhaps the apotheosis of the idea of data-driven criminal justice choices. I'm a longstanding critic of this trend,⁶⁷ but I'll admit that the specific instrument that Barkow focuses on—the Arnold Foundation's pretrial-risk-assessment tool—doesn't bother me much. It incorporates only age and criminal history variables, and, as Barkow observes, any equity problems associated with those variables are likely already incorporated in judges' decision-making.⁶⁸ It has served the function of convincing some states to cut back on cash bail, which is a bigger equity problem. But the risk-assessment trend hasn't been limited to this tool. Rather, jurisdictions around the country (guided, often, by various sorts of expert panels) have frequently adopted, and based sentences and other decisions on, other instruments that contain deeply problematic socioeconomic and demographic variables, like zip code (often essentially a race proxy), employment status, housing instability, and the like.⁶⁹ For algorithm designers who see themselves as engaged in a neutral scientific exercise, using these variables is attractive; anything that has predictive power will improve predictions, after all. Whether to seek to maximize predictive power or to accept some loss of it in service of equality is a normative choice. And in a democracy, within constitutional constraints, collective normative choices about government policy belong properly in the realm of politics.

CONCLUSION

I hope that Barkow will forgive me for using part of this brief tribute, which I could easily have filled with nothing but points of praise, to contest one of her book's central claims. *Prisoners of Politics* is a rich, important piece of serious scholarship, and I cannot resist taking an opportunity to engage critically with it. Despite the disagreements outlined above, I consider the book to be a devastating description of the many dysfunctions of our justice system. It illustrates the many strengths on which Barkow has

⁶⁶ BARKOW, *supra* note 3, at 59.

⁶⁷ See generally Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

⁶⁸ See BARKOW, *supra* note 3, at 59.

⁶⁹ See Starr, *supra* note 67, at 821–62 (critiquing the use of evidence-based sentencing).

built her career, which made her one of our most-cited legal scholars, and with which she will continue to shape her field and the practice of criminal justice.