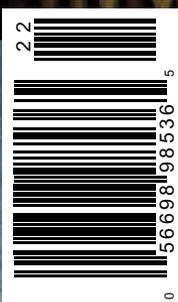


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## **PUNISHMENT AND THE MYTH OF NATURAL ORDER: AN INTERVIEW WITH BERNARD E. HARCOURT**

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In the US today, the “free market” is almost universally praised as the mechanism best suited to the efficient allocation of resources in society; the government’s role in education, health care, and other arenas crucial to civil society is to be kept to a minimum. Just as fundamental as this faith in the free market is the belief that government’s only legitimate function is to police and punish. In his latest book, *The Illusion of Free Markets* (Harvard University Press, 2011), Bernard E. Harcourt argues that this paradoxical combination of free market ideology and a Big Brother state in fact hinges on the illusion that the former reflects a supposedly natural order in the economy, and that our faith in free markets has determined the vast scale and draconian nature of the current penal regime in the US.

Harcourt—Julius Kreeger Professor of Law and professor of political science at the University of Chicago—has written numerous books on the sociology of punishment, including *Against Prediction: Punishing and Policing in an Actuarial Age* (University of Chicago Press, 2007) and *Language of the Gun: Youth, Crime, and Public Policy* (University of Chicago Press, 2005). Eric Anthamatten spoke to Harcourt by phone.

**Your book focuses on the “paradox” of our faith in free markets and the fact of our expanding prisons and jails. What is the illusion of free markets and how is it connected to what you call the growing “carceral sphere”?**

My main purpose is precisely to explore the link between what we think is the proper and legitimate role for the state in economic matters and our practices of punishment. I start from that fundamental paradox: the fact that so many people in this country tend to believe in limited government—especially in the socio-economic realm—yet we operate the largest government-run prison system in the world. One percent of our adult population is behind bars—over 2,300,000 people. An amazing paradox—hence the subtitle.

**“Punishment and the Myth of Natural Order,” which is not exactly transparent.**

I’d have done better, perhaps, with a more translucent subtitle like “*Laissez-faire* and Mass Incarceration.”

But that’s the paradox the book sets out to elucidate: In the country that, throughout the Cold War and before, has done more than any other country to promote a hands-off government, a country that prides itself on the being the “land of the free,” we’ve built our own Gulag archipelago—a massive population of unemployed, impoverished, poorly educated young men, mostly of color, whom we warehouse in cement blocks. The statistics are staggering, numbing, so disturbing that we don’t even pay attention to them anymore. We all know but don’t want to be reminded: One in nine black men between the ages of twenty and thirty-four is behind bars—more than eleven percent. That’s not the rate of unemployment, it’s the rate of incarceration! And this, in the country that has done more than any other nation to promote—not just at home but across the globe—the notion of a limited, hands-off government? A country that preaches free market economics as a way to promote political freedom and democracy?

The paradox is striking, and even more problematic because of the color dimension. Anyone who walks through a state prison or a county jail today will be struck, no, floored by the black-and-brownness of the men there. I routinely take my students to prisons—Stateville penitentiary at Joliet and the Cook County Jail—and their shock is palpable. A racial caste system is emerging in this country that you can see the minute you walk into a jail or prison, or into our criminal courts for that matter.

**Is “Gulag” an appropriate characterization of the carceral condition in the US?**

Metaphors are always treacherous, but they often reveal dimensions we wouldn’t otherwise see, and they make us ask difficult questions. The raw numbers are what raise the analogy, but in this case, it is the inverted parallel that is haunting to me. Although it’s hard to get an accurate count of the prison population in the Gulag at its height under Stalin, the more reliable sources place it between two and five million people by 1953. As Adam Gopnik recently suggested in the *New Yorker*, there are far more people under correctional supervision in this country today—over seven million people in prison or jail, or actively on probation or parole. The comparable scope of the problem is shocking, and is what puts it in relief.

What I find even more troubling is the eerie contrast between forced labor in the Gulag and the coercive exclusion from the labor force today, which raises haunting questions about what it means to be a political dissident or politically excluded today. There were

sizable numbers of political dissidents in the Gulag, as well as what we would call ordinary and petty criminals. But who is politically excluded today? What are these armies of young black and Hispanic men in our prisons? What is this racial and class-based caste that we disappear behind prison walls, and who return in the deep of night to certain impoverished zip codes? We've not provided them with an education and aren't willing to invest in them until we get their prison bill—on average, it costs \$30,000 a year to keep someone in prison—and then all of a sudden, we're willing to pay. They're an army of often barely literate, unemployed, unskilled men, cycling in and out of these "correctional" facilities—and when they are on the outside, their main contact with the state is getting stopped-and-frisked by the police.

Clearly there are differences with the Gulag. It's not forced labor—but somehow, it's eerily connected. A warehoused caste, politically excluded, forced *un*labor, in an economy that has no place for them, so marginalized from productive society that the only thing we seem to be able to do with them is put them in a cage.

**How does this connect to our belief in a hands-off government? How does it relate to the title of your book, to "the illusion of free markets"?**

That's the paradox, isn't it? A "hands-off government"—nothing could be further from the truth. A government that so many people believe is completely incompetent and can't even be trusted to run a railroad, a health care system, or manage a retirement system. And yet, it's a government we allow to imprison 2.3 million people. How can we render this paradox legible?

Let me answer that as directly as possible: It's precisely our skepticism about the competence of government in most areas, especially in the economic domain, and our tendency to believe that the state is only legitimate and competent at policing and punishing, that fuels and makes possible the kinds of excessive policing and punishing that we've seen since the 1970s. It's these taken-for-granted beliefs that make us resist government intervention, resist regulating the banking sector, even when we're in a deep financial crisis, but makes us willing to criminalize and punish at every turn. It's that paradoxical set of beliefs that prevents us from having single-payer universal health insurance, but fuels the growth in prisons (and, incidentally, the growth in military spending). These conflicting sets of ideas, this collective imagination, is what makes it hard to pass even an impotent Dodd-Frank Act or Volcker Rule, but so easy to pass penal legislation that lengthens sentences,

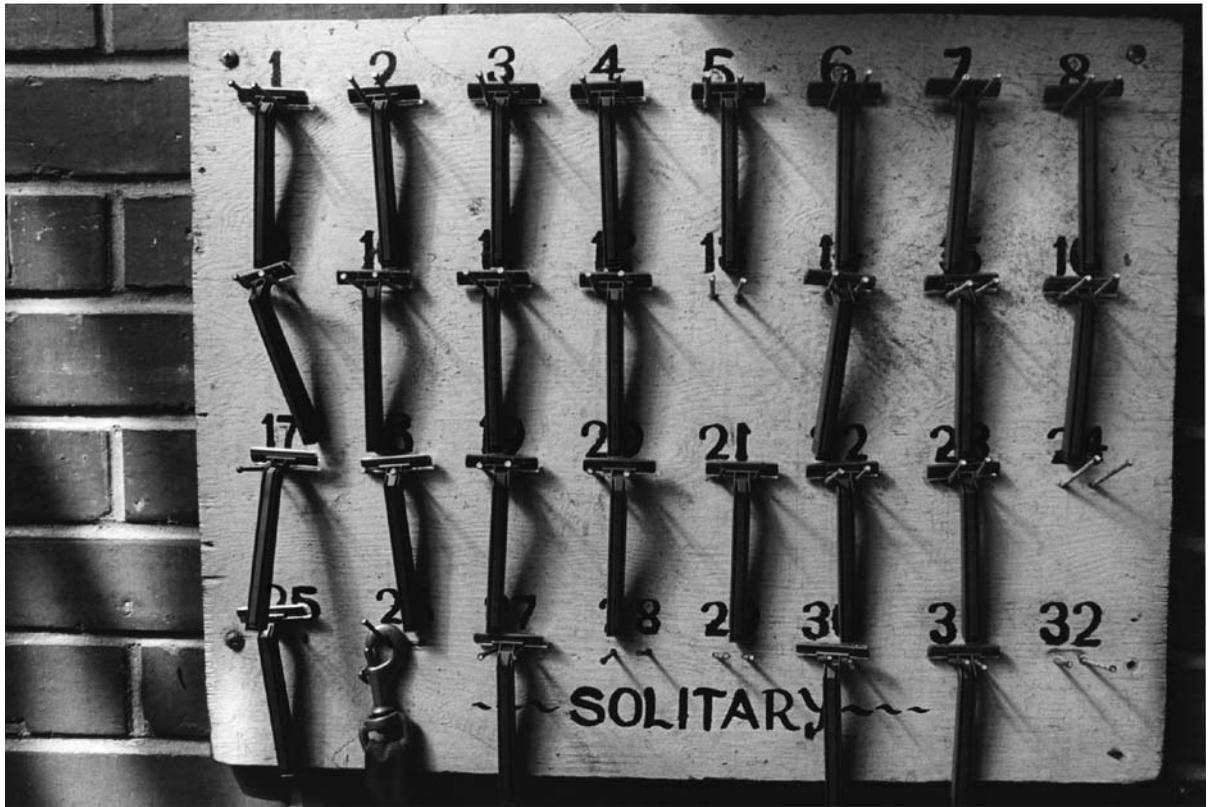
imposes mandatory minimums, "three-strikes" laws, and draconian anti-drug provisions, and builds more prisons. This is all made possible by a pure illusion: the illusion that you could even have a space that is unregulated, a market system that is "free" of regulation. All made possible by the myth that there is a "natural order" in the economic domain.

**Why exactly is the "free market" not "free"?**

Let me be clear. I mean that in the strongest possible sense; not only is it the case that the space of economic organization is never free of regulation—many people would agree with that and with the fact that we need a state apparatus to create and maintain markets, to stabilize them, to make them competitive, to keep them in order. But I would go further and maintain that even the idea that there can be a scale or spectrum of more or less regulation is fictitious. It's a myth that is false, dangerous, and has blinded us to increasing forms of inequality over the past four decades.

Here's what I mean. In January 2009, the banking system in this country was on the verge of collapse. We bailed out several of our largest financial institutions. We—you and me—became the single largest shareholders in Citibank and Bank of America. We partially nationalized those banks, masking it behind talk of "pre-privatization." But the truth is, we nationalized—as we would the large automobile manufacturers, mortgage lenders, and insurance companies. Despite all that, it wasn't clear those bailouts and takeovers were enough. Yet what was clear is that the US government was prepared to nationalize all the banks if necessary. (If I recall, this was written about in a *New York Times* article titled "Nationalization Gets a New, Serious Look.") The consensus was clear: If push came to shove, and it was necessary to save the banking system, the federal government would have been—and is today—ready, willing, and able to nationalize all the largest American banks. It hasn't had to—so far. But it would, and it will.

Now, here's the question: What's the real difference between the federal government being there to catch the entire financial sector and a government fixing the rate of loans or controlling the lending practices of banks? Put aside for a moment the fact that the Federal Reserve does just that and sets the price of money—the most essential commodity—by setting interest rates. What is the difference between the government putting its full faith and credit—with all its immense resources—behind the American banking system, and the government setting the prime rate two percentage



Razors belonging to prisoners on death row at Huntsville Unit, Texas, 1999. Photo copyright Ken Light.



Inmates on death row playing chess on a handmade board, Huntsville Unit, Texas, 1999. Photo copyright Ken Light.

points lower than “market”? In what sense is the market “freer” in one case versus the other?

It’s pure fantasy to think that there is a real difference between the “amount of regulation” in the situation where the government is prepared to rescue the entire economy versus the situation where the government actively manages the economy. The difference, in terms of the “amount of regulatory intervention,” is trivial at best. There are, however, huge differences as to who reaps the benefits. In this country, we privatize gains, but socialize losses. To be sure, there are enormous differences in the distribution of wealth, but not in the “amount” of regulation.

**Do you see the relationship between the rhetoric of “market efficiency” and the increasing expansion of regulation in the penal sphere as a relationship of correlation or causation?**

Let’s be careful about how we talk about causality, especially when discussing ideas or a collective imaginary about the free market. It’s tricky to speak about causal relations in the context of ideas or rationalities. In my work, I’m trying to make a link between free market ideas and mass incarceration—and I’m inching forward in small steps. Before we can even start talking about mechanisms, we first need to do the historical work necessary to unearth the paradoxical link. That’s the work I’m doing: exposing how these ideas have been linked over the past two-plus centuries.

There are others who have also spoken to this question of what I call “neoliberal penalty,” that mix of neoliberal ideas and massive punishment. I’m thinking here of Loïc Wacquant or Jean and John Comaroff. Those accounts tend to focus predominantly on the period since the 1970s, especially at the millennial turn—the period we have come to associate with “neoliberalism.” My goal in this book is to unearth a deeper connection going back to the very introduction of the notion of “natural order” in economic thought in the 1760s.

What I show is that the very idea of “natural orderliness” that was introduced into economic thought in the eighteenth century—and which would gradually evolve over the next two centuries into the notion of “market efficiency”—was joined at the hip, from the very beginning, with the need for a strong-fisted police state. I show this in the writings of those thinkers who originally incorporated the idea of natural order into economics and who also developed a theory of what they called “legal despotism,” which argued that the king’s only function was to police and punish severely.

**Are there connections between this myth of natural order and Christian notions of natural law? Do you think this is one explanation for the persistent connection between free market rhetoric and religious rhetoric?**

For sure. There was, and still is, a deep connection between the idea of natural order and divine notions of natural law. The original economists who introduced the idea of natural order into economic thought, the French Physiocrats, were drawing specifically on notions of divine order and natural law. They believed that natural law governed agriculture and economic exchange, and the human realm.

I was reading about a religious survey, conducted by Baylor University, which found that about twenty percent of American adults combine a belief in God with faith in the free market—as a matter of faith. The sociologist in charge, Paul Froese I think, suggested that these respondents saw the invisible hand of the free market really as God’s hand. For many, the link remains strong today.

This raises the question whether the “illusion of free markets” is best described as an illusion or as something else—perhaps a fantasy, maybe a delusion, or an ideology. Freud used the term “illusion” to describe religious belief in his masterful *The Future of an Illusion*. He was trying to capture the idea of wish fulfillment. It may well be that the illusion of free markets is also, in part, fantasy or delusion—or, ultimately, ideology.

**So, the descriptive claims you make about the various myths about markets and punishments, their histories and their relationships, is a way of illuminating the fact of increasing inequalities and injustices in terms of distribution of wealth, and, consequently, the distribution of those who are punished and who are not. Can you say more as to precisely how this happens?**

I’ll try. The mechanism can be described as naturalization and normalization—naturalization of the market and normalization of the resulting distributions of wealth. When we think that the market is functioning “by itself,” that it is unregulated (as if that were possible), that it is not controlled by the human hand, the economic outcomes become more “natural.” They appear to be the product of nature, or merit, the way things should be. “We are not interfering,” we tell ourselves. “We only put in place neutral rules that everyone has to follow.” It’s as if we’re just watching a race and seeing who is the

strongest, the most able. And the one who wins, we perceive as more *deserving*. All the while, there are myriad hidden rules and regulatory mechanisms that we put in place that favor certain outcomes. By masking those regulations, by talking about that illusion of “deregulation” and failing to recognize that in all cases we simply *reregulate*, we insulate the unequal distributions that follow, we do not subject them fully to critique. We normalize growing inequality—as evidenced by the sharp and constant increase in inequality in this country since the 1970s.

**Why do you think that this myth of natural order or market efficiency persists, especially in the popular public mind?**

For many reasons. First, it is beneficial to many—and is closely tied to our system of political campaigns and elections. It shouldn’t come as a surprise that even a liberal Democratic candidate, such as Obama, would perpetuate the myth. In his presidential campaign in 2008, then-candidate Obama declared that “the market is the best mechanism ever invented for efficiently allocating resources to maximize production. ... I also think that there is a connection between the freedom of the marketplace and freedom more generally.” One would think it was Milton Friedman talking, especially that last sentence linking economic freedom to political freedom. But it wasn’t Friedman, or Hayek, it was a Democratic presidential candidate—in 2008, *after* the financial collapse! Why did he feel compelled to say this? Because it’s important, it’s vital to American business interests—precisely because it normalizes unequal outcomes and as a result serves interests that fund political campaigns and capitalize our elections.

**Are you saying that the Democratic and Republican platforms regarding punishment are essentially the same?**

They’re hardly distinguishable. Recall that it was President Bill Clinton who brought back the federal death penalty in 1994 and then extended its reach to over fifty capital offenses. President Obama mercifully reduced the crack-powder cocaine sentencing disparities from 100-to-1 to 18-to-1, an improvement no doubt, but his attorney general has hardly budged from the previous administration in the criminal justice area. Take the recently decided *Florence* case, for example, where the Obama administration took the extreme position that jails need no reasonable suspicion, nothing at all,

before strip-searching everyone arrested even for the most minor infraction. This is the area—the carceral sphere—where the two parties never really compete.

But let me get back to the previous question. The production of knowledge does not happen by accident. It takes huge effort and lots of financial resources to create ideas, to convince and shape the way people think. The Chicago School was built with lots of resources, it did not materialize out of thin air—and it continues to be consolidated and reinforced through large gifts that help build institutions, like the Milton Friedman Institute at the University of Chicago. The Nobel Prize in economics—so often won by free market economists like Hayek, Friedman, and others—is a fabricated Nobel. It’s not part of the original prizes established by Alfred Nobel’s will in 1895. It was created in 1968—the irony!—by Sweden’s central bank. This is not to detract from the brilliance of the people who have received the prize. But realize, that’s the only Nobel prize in the social sciences, and it has a tremendous effect on how ideas and how thinkers are perceived by the rest of us. There is no Nobel in sociology, political science, or anthropology. That, I assure you, will have significant effects on the weight we give to different ideas.

Knowledge is not produced for free, nor by accident. We shouldn’t be surprised that the ideas we come to believe, the ideas that come to shape our collective imagination, have particular valences, or tilts in relation to political economy.

**That ties to what you write at the end of your book, namely that the free market “is illusory and serves as a cover that simply renders distributional outcomes more natural. ... All the while, the state actually facilitates and makes possible the new order.” Are you saying that there is a cigar smoke-filled room where the “illusion” is being concocted and deployed?**

No, sadly, that would be far too simple a story. It would make for a good movie, though. I can imagine some scenes: a pan of the first gathering at the Mont Pèlerin Hotel in Switzerland in 1947 including Hayek, Ludwig von Mises, Friedman, George Stigler, Karl Popper, and others. I have no idea whether the room was smoke-filled, but ideas do not arise from nowhere. It takes a lot of effort and coordination, many connections, and often a lot of money to make them stick, to get others to deploy them.

But these “conspiratorial” moments, though important, are not determinative. What matters is that *all of us* believe these illusions. That’s where we—every one of

us—come into the picture. I simply can't be a conspiracy theorist because there is far too great a role for our own subjectivity. I'm always struck when I look at that 1930s poster of the French state, with a large locomotive headed straight at you, and the words, in large black letters: "State: Exactitude." The idea that in other cultures or at other historical moments people would have associated government with exactitude is remarkable. How is it that we, today, in this country, have come to see the state as relatively incompetent? What did it take? How did we convince ourselves, each and every one of us? How much work did it take on our own subjectivities?

**If the function of neoliberal penalty is to maintain the natural order of the market, facilitate its efficiency, and encourage rational participation in this market, by that very logic it would seem that neoliberal penalty should also encourage government intervention that allows those who are not participating in the market to become active members, not only by the negative reinforcement of punishment, but by the positive reinforcement of various social programs—education, health care, a living wage—that would allow those not participating in the market to become active members. But rabid champions of the free market are also rabid opponents of government intervention in precisely these social spheres. Why?**

I actually think that this ties back to the underlying theory of human capital that was, and remains, so central to the development of notions of efficient markets. The theory of human capital—of viewing ourselves as entrepreneurial selves and as returns-on-investment—means that there are going to be some populations that are worth investing in, and others that are not. It means that, as a society, we may begin to discriminate in our investment decisions—investments in education, health, jobs, training, etc. These discriminations may have devastating effects on certain underprivileged populations—who may, at some point, become the target of complete or practically complete disinvestment. This is a danger that others before me have identified—I am thinking here of Foucault's critique of American neoliberalism in his 1979 lectures. The explanation I think lies there.

**The excess of the carceral state is obviously one of the major moral problems of this country, despite the fact that it gets little popular notice. If the "illusion" of the free market has a direct effect on distributional outcomes, something that certainly contributes to inequality, poverty, and crime, how are we to shatter**

**this illusion? Must it involve simply "seeing" the reality behind the shadows? Or must it involve a serious restructuring of our economic system? In other words, what is the way out?**

If I knew the way out, I would have written a self-help manual. Unfortunately, I don't have a twelve-step program, or even a road map. I do think that the path forward—as I mentioned I am only inching forward in this—is to abandon the conventional dichotomy between free markets and regulation, to abandon this dangerous legacy of the Cold War, to abandon the worn-out ideologies that have permeated our public discourse since the Cold War, and only increasingly so since the fall of the Berlin Wall.

These simplistic but tired Cold War ideologies have been extremely detrimental to political life in this country. For the past forty years, the false dichotomy and the fabricated fear of government regulation is precisely what made it possible for political and socio-economic elites to reregulate the economy in such a way as to reap more social resources and wealth, and to magnify inequality.

By perpetuating this haunted specter of government regulation, we've now reached a point that is no longer tenable. In this country, the four hundred wealthiest Americans have a combined net worth equal to that of one hundred-fifty million of their compatriots. It's untenable—a recipe for social turmoil, even revolution. What's made it possible, what has resolved the cognitive dissonance, is precisely the belief in free market efficiency. It's the illusion that there can be unregulated spaces that produce natural outcomes—when all the while we've constructed every inch of the market. It's time to leave those simplistic dichotomies behind and come to see that all forms of economic organization are regulated through and through, so that we can finally begin to honestly evaluate and assess the distributional consequences of different market mechanisms. The path forward, I firmly believe, is to torch those Cold War ideologies and honestly face our own choices.