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Challenging Leviathan

POLICING AND PUNISHMENT are fundamental institutions in modern society and so are rarely up for debate in any deep or far-reaching way. But in the summer of 2020, the legitimacy of America's criminal legal system was challenged in a critique that went to the root of the institutions. That challenge was all the more impactful because it occurred in the middle of a historic plague year, when government efforts to control the spread of COVID-19 disrupted social and economic life, putting millions of people out of work and giving rise, simultaneously, to widespread insecurity and to a vague optimism that the crisis might create the possibility of real structural change.[1]

In late May and June of that year, following a shocking, widely publicized episode of police violence, a wave of demonstrations brought America's criminal legal system to the forefront of public attention and, momentarily at least, persuaded a great many Americans that such a system was simply intolerable. In cities around the nation, millions of people marched beneath the banner "Black Lives Matter," pressing for a radical transformation of policing and punishment and an end to racial oppression. Millions more watched at home as, night after night, protesters assembled to demand that authorities "defund the police," "end mass incarceration," and dismantle a criminal legal system they insisted was deeply imbued with anti-Black racism.[2]

That radical moment was especially striking because for much of the previous fifty years, a very different politics had prevailed: a law and order politics focused not on the problem of excessive policing and punishment but on precisely the opposite: the perceived need for aggressive policing, severe punishment, and extensive control to protect against dangerous predators, unsafe streets, and violent crime. That earlier politics had given America proactive policing, hard-charging prosecution, mass incarceration, and the world's most extensive system of penal control. And surprising as the protests made it seem,

it had, until relatively recently, enjoyed decades of broad bipartisan support and little organized opposition.[3]

For anyone following the news, there had been no end of police violence and excessive punishment in the period before 2020.[4] And in the years immediately preceding, opposition to mass incarceration and the penal state—which had long been a concern of activist and advocacy groups, public interest lawyers, progressives, civil liberties organizations, and so on—had begun to attract more mainstream political support, as violent and property crime rates continued to decline and the public grew less fearful.[5] But the event that caused this opposition to catch fire was the killing of George Floyd—a forty-six-year-old Black man murdered by a police officer in Minneapolis following his arrest for the passing of a counterfeit $20 bill. Though Mr. Floyd was unarmed, subdued, and lying prone on the ground, Officer Derek Chauvin knelt on his neck for more than eight minutes until he died from lack of oxygen. Captured on a teenage girl's cellphone video and uploaded onto social media, the scene was soon being viewed by millions around the world. Street protests ensued, first in Minneapolis and eventually, massively, everywhere.[6]

In the days that followed, this singular event took on a more universal meaning. Mr. Floyd's image became a quasi-religious icon, his face painted on city streets and protest banners. On social media and in popular culture, his murder became a meme: a rapidly circulating symbol standing for the problem of police violence and the oppression of Black people. An incident that began as a low-level police arrest came to symbolize all that was wrong with America's penal state.[7]

Isolated, alternately anxious and frustrated, and confined to their homes by COVID lockdowns, many Americans longed for a chance to be outside and reconnect with others.[8] And because they had been released from the demands of work and school, millions who in normal times would have been unavailable and indifferent were now willing and able to join the protests.[9] Organizers responded to the moment by doing everything they could to maximize participation; the brilliant simplicity of the mantra "Black Lives Matter" enabled people of all backgrounds to come together and demand fundamental change.[10] Seemingly overnight, a problem that had persisted for decades without attracting much popular attention became a matter of urgent public concern. Mainstream journalists discovered that police killings occur much more frequently in the United States than in any comparable nation—and that America's rate of imprisonment massively exceeds those of every other country. They also learned there was no national government agency charged with keeping a tally of how

many such deaths occurred. Because only things that count get counted, this too implied a disparagement of Black people's lives. For much of that summer, these were the stories that dominated the headlines.

News reports made clear the anger and despair with which many activists and demonstrators regarded the criminal legal system and the possibility of reforming it. So reviled was the penal state in that moment that the truly radical idea of *abolishing* the police and the prison came to seem morally compelling and urgently relevant. Rather than being dismissed as utopian fantasy, "abolition" was presented as a serious moral imperative: the only appropriate response to an intolerable system.[11] In that radical moment, the audaciousness of the idea made it appealing to journalists and commentators, causing it to burst into public discourse. Before long, abolition and the related idea of "defunding" were being discussed in liberal parts of the mainstream media and given serious consideration by editors, journalists, and political representatives.[12]

Supporters of "abolition" took a familiar progressive trope—the idea that crime should be traced to its root causes and dealt with at a deeper societal level—applied it to policing and punishment, and gave it a new urgency. America's policing problems were not, its advocates claimed, the fault of "bad apples" or rogue officers: the police were acting as they were supposed to act—as a force to manage the poor and protect ruling class property.[13] Similarly, it was "no accident" that America's jails and prisons imposed racial controls while generating commercial profits: that was the point of the prison-industrial complex.[14] Nor was it anomalous that places like Ferguson, Missouri, extracted millions of dollars from justice-involved individuals and their families: local policing was not an arm of justice but instead a form of state predation targeting the poor.[15] These egregious penal state arrangements were, the radicals insisted, dictated by the underlying structures of American society—by corporate capitalism, neoliberalism, and White supremacy. And these problems would be alleviated only when their root causes were eliminated.[16] The radical critique took a familiar liberal idea and pushed it to its logical conclusion.

For those swept up in the movement, the summer of 2020 promised to mark a turning point: a moment when the injustices that activists and advocacy groups had long protested—police violence; stop-and-frisk searches; "no knock" warrants; fees and fines; cash bail; racialized law enforcement, mass incarceration, the "New Jim Crow"—were at last making an impact on the consciences of a broader public. In that moment, it seemed possible that America's penal state might yield to the demand for fundamental change.

In that same moment, critics of America's political economy also had reason to hope that government responses to the pandemic might bring deep and lasting change to that larger domain. Those with a sense of history knew that progressive structural change rarely occurs, but when it does, it is most often in the wake of some major disruptive event, such as a war, a revolution, or an economic catastrophe. And by March 2020 Congress had already enacted the first of a remarkable series of government measures designed to prop up the economy and support working people.[17] By 2021, barely a year into the pandemic, the federal government had abandoned the hands-off logic of neoliberalism and pumped trillions of dollars into the economy to boost demand, preserve jobs, and patch together a pop-up European-style welfare state that provided income support, child-care allowances, health care, protections against eviction, student loan forgiveness, and free vaccines to all Americans. Amidst a years-long public health catastrophe, there appeared to be glimpses of a manifesting future in which the iniquities of America's penal state and political economy would be remedied once and for all.

But the moment of radical hope soon passed. The masses who took to the streets during the summer months did not stay around for fall and winter. The protests and large crowds became less frequent. By the end of 2020, challenges to the penal state had become more muted—on the streets and in the media.[18] Similarly, the European-style welfare measures hastily assembled at the height of the pandemic were, one by one, dismantled in the years immediately following.[19] As so often before, federal support and welfare provision were viewed not as citizenship entitlements but as emergency measures to be discarded once the crisis was over. The structures of the nation's political economy—and the social forces empowering them—had flexed in response to the emergency. But they forcefully reasserted themselves as soon as that moment had passed. The point of the Keynesian-style intervention had been to preserve American capitalism, not to transform it.

In retrospect, this reversal appears inevitable, in the penal sphere as well as the wider political economy. An extraordinary moment of that kind was always going to be difficult to sustain over the longer term. America's "free market" capitalism is, as everyone knows, stoutly defended, but so too is the penal state, even if the events of summer 2020 made it appear open to radical change. Continual mass mobilization over time requires an organizational infrastructure, a coherent leadership, a core membership, and a mass following—features BLM lacked in 2020.[20] And public attitudes that had been framed by George Floyd's killing were always liable to soften when that event was no

longer in the news. But there were also deeper causes for the waning of radical energies—causes rooted in enduring structures rather than contingent events—and it will be helpful to point these out here.

For all its symbolic resonance, the Floyd case was not typical of the larger phenomenon it came to represent. Deadly encounters between police officers and civilians more often involve split-second decisions by officers who feel themselves or others to be in danger. And public opinion about such incidents is usually divided, making it difficult for prosecutors to persuade grand juries to indict the officers concerned. Officer Chauvin's conduct was, in that respect, extraordinary: not a momentary decision that might be second-guessed but a deliberate, prolonged assault resulting in the death of a helpless, unarmed man.[21] Chauvin's trial, which ended with jury verdicts of second- and third-degree murder and a twenty-two-year prison sentence, was also exceptional.[22] Police witnesses in such cases often cover up for one another. On this occasion, Minneapolis police testified against their fellow officer, insisting his behavior was outside the bounds of permitted police conduct and distancing themselves from his unlawful acts.

If the Floyd case was exceptional, so too was the historical conjuncture in which it occurred. For a decade and a half prior to these events, violent crime had been in steady decline and America's cities had become noticeably safer. This enhanced sense of safety relaxed the grip of crime fears on the American public. In 1994, 37 percent of Americans had identified crime as the nation's most important problem; by 2012 that number had fallen to 2 percent.[23]

During the high-crime decades of the 1980s and 1990s, when homicide, robbery, and crack cocaine dominated the evening news, American voters consistently embraced aggressive policing and harsh punishment, turning a blind eye to the injustices that followed in their train.[24] But when the crime threat receded, and with it the felt need for tough policies, attention began to turn to the penal state's pathologies.[25] Policies that had commanded widespread support in the 1990s—the War on Drugs, mass stop and frisk, "broken windows" policing, the all-purpose use of incarceration—were increasingly seen as ineffective, racially biased, and unconstitutional.[26] Prominent Republicans complained about exorbitant costs and urged that criminal justice be rolled back like any other overreaching government program.[27] State and local authorities pushed to trim correctional budgets. Progressive prosecutors were elected in big city districts, vowing to reduce mass incarceration and the harms it inflicted.[28] And following the high-profile deaths of Michael Brown and Eric Garner in 2014, police killings became, for a while, a recurring news topic.[29]

By the time of George Floyd's murder in late May 2020, a critique of America's penal state had been assembled. The public was primed to revise its views, and a movement seemed ready to take off.[30]

Yet within a year of the protests, law and order politics had made a forceful return. What explains this rapid reversal?

The answer, I want to suggest, is the constraining effect of social and economic structures, together with settled patterns of public opinion and political alignment that support them. Most Americans abhor overt racism and brutal behavior by officials, so it was understandable that graphic depictions of police violence against Black victims shocked people into action, especially at a time when millions were laid off from work and school by the COVID pandemic.[31] But most Americans, most of the time, are broadly supportive of law enforcement. And in normal times, American public opinion, particularly White working-class opinion, defaults to pro-police positions, a preference that is well understood by centrist and conservative politicians.[32]

Unless they are poor people of color, most Americans' life chances are not adversely affected by police violence or over-incarceration.[33] But they *are* affected by crime—and middle-class, home-owning voters become alarmed and vocal whenever rising crime rates appear to jeopardize their safety, their neighborhoods, or their property values. In late 2020, when reports began to appear of sharp increases in robberies, shootings, and homicides, right-wing news outlets downplayed pandemic disruptions as the likely explanation and insisted that crime was rising because of lawless protestors and because Democratic mayors and "woke" city councils were hamstringing police and undermining their authority.[34]

Before long, President Donald Trump was tweeting out law and order messages; counterdemonstrators were proclaiming "*Blue* Lives Matter"; signs appeared on suburban lawns urging neighbors to "Support Our Local Police"; and electorates were voting to recall progressive prosecutors. Meanwhile, on the streets, protests were being met by aggressive police responses, leading to mass arrests and widespread allegations of police brutality.[35] BLM demonstrators were also attacked by right-wing groups; on one occasion, three protesters were shot, two fatally, by a teenager armed with an AR-15 style rifle.[36] In the course of 2020, homicide rates spiked by 30 percent—the highest single-year increase in more than a century—and gun purchases surged, with Americans buying almost 60 million firearms during the pandemic years.[37] If the immediate aftermath of George Floyd's killing had suggested a nation united in protest, it wasn't long before the familiar deep divisions reappeared.[38]

So the radical moment passed. And measured by electoral outcomes, legislative achievements, or public attitudes, the challenge to America's penal state has had few victories in the years since then. Several years on from the death of George Floyd, little has changed in the basic character of America's criminal legal system. "Defund the police" is widely regarded as an electoral liability. "Abolition" has returned to the activist margins of local politics. The prison population in 2022 was higher than the prior year. Police killings were higher in 2023 than in any year since systematic counts began. In 2024, Donald Trump regained the presidency, having run on a platform that stated, "There is no higher priority than quickly restoring law and order and public safety in America."[39]

In the longer term, however, electoral success and legislative victories are not the only indicators of political change. And if we look closely, we can see that the events of 2020 brought important shifts in public consciousness, in the crime-control discourse, and in the politics of policing and punishment. The entry into the mainstream of radical ideas such as "defunding the police" and "ending mass incarceration" and "abolishing the prison" has expanded the field of action and the range of possibilities, establishing new horizons for reform, even if these horizons remain quite distant.[40] Similarly, that government action could so swiftly protect working families, fund broader healthcare, and reduce child poverty by half provided an instructive example of what can be done if the political will is present—a lesson that will surely feature in future debates. Journalists and academics have assimilated these ideas, as has a generation of young people and political activists on the left of the Democratic Party. So even though they remain highly controversial, the presence of these ideas structures political debate in a way that is altogether new.

The events surrounding George Floyd's death reset the debate about America's penal state. The social movement that gathered pace in the wake of that event foregrounded racial injustice, overly aggressive policing, and mass incarceration in a way that will not soon be forgotten. But the widely felt need for more effective crime control has not disappeared, and the background sensibility of the American public remains decidedly conservative on these issues.[41] Above all, the United States continues to be a society marked by extraordinarily high rates of lethal violence—the surge of gun crime and gun sales during the pandemic being a sharp reminder that the recent improvements in urban safety were always a precarious achievement. And, of course, these "safety" levels were only ever relative: America's homicide rates in the 2010s may have been much lower than the peak years of the 1980s and mid-1990s, but they were still off-the-charts high when compared to other developed nations.[42]

This last, comparative, point, seems to me to be vital to understanding the whole problem. As the sociologist Eric Klinenberg points out, the COVID-19 pandemic was a global event, but America's reactions were in many respects exceptional. Other countries "experienced a spike in generalized anxiety when the pandemic started. Their lockdowns were extensive. Their social gatherings were restricted. Their borders were sealed. Their offices were closed. Yet no other society experienced a record increase in homicides. None saw a surge in fatal car accidents. And of course, none had skyrocketing gun sales either."[43]

The pandemic years did not transform America into a progressive, liberal society, newly merciful toward lawbreakers. They did not lastingly alter the social and economic foundations of the nation's law and order Leviathan. But they did produce a shift in the balance of political forces to the point where progressive reforms to police and prisons—and to the nation's welfare state and political economy—stand an improved chance of winning support among an otherwise conservative electorate, at least in the longer term, as today's young voters reach political maturity.[44]

It is in this political conjuncture that I situate the following reflections on America's extraordinary penal state, its structural causes, and its political prospects.

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