

2012

On the American Paradox of Laissez Faire and Mass Incarceration

Bernard E. Harcourt

Follow this and additional works at: [http://chicagounbound.uchicago.edu/
public_law_and_legal_theory](http://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Recommended Citation

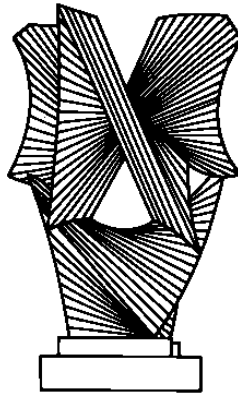
Bernard E. Harcourt, "On the American Paradox of Laissez Faire and Mass Incarceration" (University of Chicago Public Law & Legal Theory Working Paper No. 376, 2012).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 590
(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 376



ON THE AMERICAN PARADOX OF *Laissez Faire*
AND MASS INCARCERATION

Bernard E. Harcourt

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

March 2012

This paper can be downloaded without charge at the John M. Olin Program in Law and Economics Working Paper Series: <http://www.law.uchicago.edu/Lawecon/index.html> and at the Public Law and Legal Theory Working Paper Series: <http://www.law.uchicago.edu/academics/publiclaw/index.html> and The Social Science Research Network Electronic Paper Collection.

ON THE AMERICAN PARADOX OF *LAISSEZ FAIRE*
AND MASS INCARCERATION

*Bernard E. Harcourt**

Forthcoming in the *Harvard Law Review Forum*

Abstract

In The Illusion of Free Markets (Harvard 2011), Professor Bernard Harcourt analyzes the evolution of a distinctly American paradox: in the country that has done the most to promote the idea of a hands-off government, we run the single largest prison complex in the entire world. Harcourt traces this paradox back to the eighteenth century and demonstrates how the presumption of government incompetence in economic affairs has been coupled with that of government legitimacy in the realm of policing and punishing. Harcourt shows how these linked presumptions have fueled the expansion of the carceral sphere in the nineteenth and twentieth centuries.

Professor James Q. Whitman's book review in the Harvard Law Review criticizes The Illusion of Free Markets for engaging the writings of Michel Foucault on punishment, and for being surprisingly callous about the problem of mass incarceration. In this response to Professor Whitman's review, Professor Harcourt clarifies the theoretical stakes of the debate in order to demonstrate, first, that the book represents an attempt to get beyond both the Chicago School and Foucault's concept of discipline. Second, Harcourt returns to the problem of mass institutionalization to argue that a more nuanced reading of the available data is necessary. Overall, Professor Harcourt stresses the importance of questioning what so often passes as received wisdom.

* Professor and Chairman of the Department of Political Science, and Julius Kreeger Professor of Law and Criminology, The University of Chicago.

ON THE AMERICAN PARADOX OF *Laissez Faire*
AND MASS INCARCERATION

Bernard E. Harcourt

What we come to believe — so often, in reality, mere fiction and myth — takes on the character of truth and has real effects, tangible effects on our social and political condition. These beliefs, these human fabrications, are they simply illusions? Are they fantasies? Are they reflections on a cave wall? Over the past two centuries at least, brilliant and well-regarded thinkers have proposed a range of theories and methods to emancipate us from these figments of our imagination. They have offered genealogies and archaeologies, psychoanalysis, *Ideologiekritik*, poststructuralism, and deconstruction — to name but a few. Their writings are often obscure and laden with a jargon that has gotten in the way of their keen insights, but their central point continues to resonate loudly today: our collective imagination has real effects on our social condition and on our politics. It is important, it is vital to question what passes as truth.

Any sophisticated listener, for instance, would have understood immediately what Barack Obama was doing when he declared on the campaign trail in 2008 that “[t]he market is the best mechanism ever invented for efficiently allocating resources to maximize production.”¹ Or when he quickly added, “I also think that there is a connection between the freedom of the marketplace and freedom more generally.”² Obama was tapping into a public imaginary, one reflected at the time by the overwhelming belief, shared by more than two-thirds of Americans, that “the free enterprise system and free market economy is the best system on which to base the future of the world.”³ A sophisticated reader immediately would have caught the *sub rosa* reference to Milton Friedman — who repeatedly extolled the “intimate connection” between

¹ David Leonhardt, *A Free-Market-Loving, Big-Spending, Fiscally Conservative Wealth Redistributionist*, N.Y. TIMES, Aug. 24, 2008, § 6 (Magazine), 28, at 32.

² *Id.*

³ 20-Nation Poll Finds Strong Global Consensus: Support for Free Market System but Also More Regulation of Large Companies, GLOBESCAN INC., http://www.globescan.com/news_archives/pipa_market.html (last visited Feb. 27, 2012).

“economic freedom” and “the achievement of political freedom.”⁴ As Friedman put it: “Historical evidence speaks with a single voice on the relation between political freedom and a free market.”⁵

These beliefs about the relationship between free markets and political liberty have had tangible effects on our politics — and they have brought about unexpected and often pernicious consequences. As President, Obama would appoint Timothy Geithner to succeed Henry Paulson as Secretary of Treasury, thereby ensuring continuity in fiscal and monetary policy. This would entail that, despite the temporary nationalization of our largest banks (Citigroup and Bank of America) and of the automobile industry (GM and Chrysler), and despite the bailouts of the largest mortgage and insurance companies in the country (Fannie Mae, Freddie Mac, and A.I.G.), the Obama Administration could maintain the fantasy that “[w]e have a financial system that is run by private shareholders, managed by private institutions, and we’d like to do our best to preserve that system.”⁶ Such assertions would go hand-in-hand with the Administration’s failure to recognize the other major crisis: mass incarceration, the fact that the United States imprisons about one percent of its adult population and has the highest rate of incarceration on the globe, five times the rate in England and twelve times the rate in Japan, as well as the highest raw number of prisoners in the world. And so, during a time of desperate deficit reduction, fiscal crises, and massive cuts in social programs, the Obama Administration would propose an eleven percent increase in federal spending on prisons in its 2012 budget.⁷ A prior

⁴ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 8 (1962).

⁵ *Id.* at 9 (“Clearly, economic freedom, in and of itself, is an extremely important part of total freedom. . . . Political freedom in this instance clearly came along with the free market and the development of capitalist institutions,” *id.* at 9–10).

⁶ Paul Krugman, *Bailouts for Bunglers* N.Y. TIMES, Feb. 2, 2009, at A21, available at <http://www.nytimes.com/2009/02/02/opinion/02krugman.html?scp=4&sq=krugm> (quoting Timothy Geithner).

⁷ See *Budget Wrongly Invests in Policing and Prisons Not Prevention and Communities*, JUST. POL’Y INST. (Feb. 16, 2011), <http://www.justicepolicy.org/news/2091>; see also *Doing the Same Thing and Expecting Different Results*, JUST. POL’Y INST., http://www.justicepolicy.org/images/upload/11-02_FAC_FY2012Budget_PS-AC-JJ.pdf (last visited Feb. 27, 2012). I have written about this at *Balkanization*. See Bernard E. Harcourt, *Deficits and Defense Spending*, BALKINIZATION (Aug. 8, 2011, 4:40 PM), http://balkin.blogspot.com/2011/08/deficits-and-defense-spending_08.html; Bernard E. Harcourt, *Standard & Poor’s Downgrade of the USA: Defense Spending, Insider Trading, and the Myth of Unregulated Markets*, BALKINIZATION (Aug. 6, 2011, 12:32 PM), <http://balkin.blogspot.com/2011/08/standard-poors-downgrade-of-usa-defense.html>; Bernard E. Harcourt, *Reducing Mass Incarceration — It’s Not About “Free-Market Innovation,” Grover Norquist!*, BALKINIZATION (Feb. 19, 2011, 4:41 PM), <http://balkin.blogspot.com/2011/02/reducing-mass-incarceration-its-not.html>. To be sure, the federal prison budget and federal prisons comprise only a tiny fraction of the country’s expenditures on prisons, which reached over \$49 billion in 2008, up from \$12 billion in 1987. See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS* 198–99 (2011) [Hereinafter HARCOURT, *ILLUSION OF FREE MARKETS*]. However, it is the obliviousness of the Administration to possible budget savings in the prison area that is revealing here, as well as its blindness to the problem of mass incarceration.

presidential administration might have taken on the issue of excessive institutionalization; President John F. Kennedy, for instance, went to Congress to reduce state asylum populations and pledged to bring them down fifty percent — and he overshot that goal.⁸ But not this Administration, not in these times.

The belief in the free market has real effects. It shapes the way we govern ourselves and others. It also has a history. It emerged as an important concept in the eighteenth century⁹ and became dominant during the nineteenth and twentieth centuries — in this country, notably, during the “Market Revolution” in the Jacksonian era and, since the 1970s, during a period that many have labeled “neoliberal” (a neologism referring to a new, but different belief in the kind of economic liberalism generally associated with Adam Smith).¹⁰ Equally important, the belief in the free market has gone hand in hand, historically, with a faith in government competence and legitimacy in the area of policing and punishing — in both domestic and international security. It is this odd combination of beliefs that has facilitated what I call the paradox of *laissez faire* and mass incarceration: in the country that has done the most to promote the idea of a hands-off government, we run the single largest prison complex in the entire world.

In *The Illusion of Free Markets: Punishment and the Myth of Natural Order*, I explore how the concept of the free market emerged from eighteenth-century notions of natural order, carefully tracing the transformations and variations from an early divine notion of orderliness tied to natural law in the work of François Quesnay and the Physiocrats, through the more secular ideas of self-interest, expertise, and informational advantage reflected in Jeremy Bentham’s maxim that the government should “Be Quiet” in economic affairs, to cybernetic notions of “spontaneous order” elaborated by Friedrich Hayek, to the more scientific and technical economic theories of the Chicago School about the efficiency of competitive markets. I also

⁸ See generally Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011), available at http://moritzlaw.osu.edu/osjcl/Articles/Volume9_1/Harcourt.pdf.

⁹ As I emphasize in the book, the idea of natural order in economics was not entirely new and was not, strictly speaking, born in the eighteenth century, but it emerges as an important concept in that period. Simone Meyssonier, in her detailed history of the origins of French liberal thought, *La Balance et l’Horloge* (1989), traces the idea back to Pierre Le Pesant de Boisguilbert who wrote in the period 1695 to 1707. Joseph Schumpeter, in his magisterial *History of Economic Analysis* (1954), traces the notion back to Aquinas, the Scholastics, and the medieval natural order theorists of the fourteenth and fifteenth centuries. See generally HARCOURT, *ILLUSION OF FREE MARKETS*, *supra* note 7, at 28–29.

demonstrate how these subtly varying notions of economic orderliness have been accompanied, since their inception, by a paradoxical trust in governmental competence when it comes to policing and punishing. This latter concept of penal policing, like the idea of the free market, has evolved over time, from early notions of “legal despotism” in Quesnay’s writings and in the policing practices of the Physiocrat Le Mercier de la Rivière as *Intendant* of Martinique, to pervasive state intervention in Bentham’s criminal jurisprudence (recall that he viewed the penal code as a “grand menu of prices” and invented the *panopticon* prison), to the “night-watchman” role of the state in classical nineteenth-century laissez faire, to the symbiotic relationship between the criminal law and the competitive market in Chicago School theory.¹¹

Throughout, I demonstrate the paradoxical linkage of the notion of orderliness in economics with the need for a Big Brother state when it comes to policing and punishing. I trace the original paradox to the different receptions of Cesare Beccaria’s writings in economics and his influential 1764 tract *On Crimes and Punishments*¹²: for Denis Diderot and the *philosophes* of the *Encyclopédie*, Beccaria’s interventionist economics (his cameralism) fit perfectly with the idea of a regulated and proportional schema of strict punishment; but for Du Pont de Nemours and the Physiocrats, Beccaria’s advocacy of regulated policing had to be stripped from his economic thought. It is precisely in the struggle over the reception of Beccaria’s work — still today, with the one-sided reading of Beccaria by the Chicago School — that the paradox was born and continues to influence our contemporary political landscape. By digging through eighteenth-century police archives and rereading closely the formative texts of Beccaria, Quesnay, Le Mercier de la Rivière, Smith, and Bentham (as well as, and perhaps more importantly, by exploring their reception by their peers and by our contemporaries), and by reexamining the writings of more modern theorists such as Ronald Coase, Gary Becker, Richard Epstein, and Richard Posner, I unearth a paradoxical link that goes back to the eighteenth century.

In contrast to others who also study what has been called “neoliberal penalty” — this paradox of a supposed hands-off government and a massive prison apparatus — I argue that the

¹⁰ For definitions of neoliberalism, see, for example, WENDY BROWN, *EDGEWORK* 39–40 (2005); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005); and James Ferguson, *The Uses of Neoliberalism*, 41 *ANTIPODE* 166, 170–71 (2009).

¹¹ See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *COLUM. L. REV.* 1193, 1195 (1985).

symbiotic relationship preceded the 1970s and is inscribed in early liberal thought. I resist Loïc Wacquant's suggestion that "the expansive penal state is the distinct creation of *neo*-liberalism, and not an inheritance from or resurgence of classic liberalism."¹³ I trace our present conundrum further back and argue, in essence, that this paradoxical set of beliefs — on the one hand, in the incompetence of government in the economic domain and, on the other hand, in the legitimacy of government in the penal sphere — has facilitated the exponential growth of the prisons in America, not only with mass incarceration in the twenty-first century, but also at the very birth of the penitentiary during the "Market Revolution" in the Jacksonian era. It is, in the end, these paradoxical beliefs that have contributed importantly to the deafening silence about mass incarceration today (and, to a lesser degree, about military spending) during a period of drastic fiscal belt-tightening. It is these paradoxical beliefs that facilitate the expansion of the prison, by making it easier to resist government intervention in the marketplace while passing new criminal statutes and wielding the punitive sanction more liberally in the penal sphere, because that is where government intervention is perceived as legitimate, effective, and necessary.

In terms of theory, *The Illusion of Free Markets* draws on a strand of nominalism that I trace back at least to the medieval Franciscan friar William of Ockham, forward to the sixteenth-century Renaissance essays of Michel de Montaigne, through the nineteenth-century polemics of Friedrich Nietzsche, to twentieth-century thinkers such as Michel Foucault and Ian Hacking. As I write in the book, this theoretical approach

starts by conceptualizing "free markets" and "excessive regulation," or "natural order" and "administration," or "policing" — or, more simply, "freedom" and "discipline" — as what William of Occam would have called universals, and then explores what work those universals are accomplishing. It challenges the very existence of those universal categories in order to discover, first, how the designations work, but second, what they hide regarding the unique aspects of individual entities — in this case, individual forms of social, political, and economic organization. And it develops what could be described as a nominalist thesis: that we have developed and deployed these universals to make sense of what are in fact irreducibly individual phenomena, to place discrete and divergent practices into a coherent framework, to deploy simple heuristic devices or stereotypes to expedite our eval-

¹² CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Richard Bellamy ed., Richard Davies trans., 1995).

¹³ Loïc Wacquant, *Three Steps To A Historical Anthropology Of Actually Existing Neoliberalism*, 20 *SOC. ANTHROPOLOGY* 66, 76 n.9 (2012).

uation and judgment, and that, in so doing, we have created structures of meaning that do work for us — at a steep price.¹⁴

My project throughout is to show that we come to believe things about natural order, liberty, and free markets — but also conversely about discipline, regulation, and over-regulated markets — that are fictions, but have real effects. My writings seek not to reify those notions, but on the contrary to demonstrate how vacuous they are and to show what detrimental work they do. As I explain in *The Illusion of Free Markets*, “The fundamental problem is that the foundational categories of, on the one hand, ‘market efficiency’ or ‘free markets,’ and on the other hand, ‘excessive regulation,’ ‘governmental inefficiency,’ or ‘discipline,’ are illusory and misleading categories that fail to capture the irreducibly individual phenomena of different forms of market organization.”¹⁵ Let me quote from my book here — I will explain why in a moment:

The categories of “free market” and “regulated,” it turns out, hinder rather than help. They are, in effect, illusory and distort rather than advance our knowledge. Ultimately, the categories themselves — of “free markets” and “excessive regulation,” of “natural order” and “discipline” — need to be discarded The central problem is that we use these categories for purposes of evaluation and practice — for purposes of policy making. We classify forms of market organization into “free” and “regulated” in order to embrace or reject those forms of economic organization. Even today, politicians and commentators continue to argue for more “regulation” as if “regulation” were a solution. The issue is not more or less regulation; the issue is how regulatory mechanisms and regimes distribute wealth. And the categories of “free” and “regulated” are simply not useful when evaluating different forms of economic organization and their distributional consequences. The idea that “government tends to be inefficient” or that “markets are naturally efficient” is not helpful — no more so than their opposites, that “government is a more efficient regulator” or that “market failure is pervasive.” There are examples of remarkably efficient government projects (high-speed rail and mass transport in certain countries), just as there are dramatic examples of waste in private enterprises (consider the recently disclosed overpriced office and bathroom renovations for CEOs at private investment banks). When it comes to evaluating how resources are distributed, these categories simply do not help. And that is the only important goal: to determine how resources are allocated and distributed, and whether those distributions correspond to our political values.¹⁶

¹⁴ See HARCOURT, ILLUSION OF FREE MARKETS, *supra* note 7, at 45.

¹⁵ *Id.* at 47.

¹⁶ *Id.* at 44, 48.

Imagine my surprise, then, when I read the book review in the *Harvard Law Review* by James Q. Whitman, Professor of comparative and foreign law at Yale Law School, and learned that the fundamental flaw in *The Illusion of Free Markets* is that my concepts of the “free market” and of “overly-regulated markets” are far too abstract to be analytically useful. I was surprised to see Whitman attribute the concepts to *me* — to see him refer to these concepts as (referring to me) “*his* concept of ‘the market,’” “*his* concept of ‘market,’” and “[*h*is . . . concept of ‘discipline.’”¹⁷

To begin with, the concepts are not, by any stretch of the imagination, *mine*. It is Barack Obama who referred to “the market” as “the best mechanism ever invented for efficiently allocating resources to maximize production.”¹⁸ Milton Friedman who wrote that political freedom comes with “the free market,”¹⁹ Friedrich Hayek who praised the “system of free enterprise,”²⁰ and reinvented a notion of “spontaneous order.”²¹ It is Ronald Coase who wrote that “government regulation should be curtailed,”²² and Richard Posner who writes that “[t]he major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange — the ‘market,’ explicit or implicit.”²³ These are not *my* concepts, obviously.

But even more importantly, the theoretical thrust of *The Illusion of Free Markets* is to demonstrate precisely that these categories are empty and misleading, that they hinder more than they help. Imagine my delight, then, when eighteen pages into the review, I would find Whitman agreeing entirely with my central thesis. These categories, he writes, are “poorly designed to make careful analytic distinctions.”²⁴ That is precisely my point.

¹⁷ James Q. Whitman, *The Free Market and the Prison*, 125 HARV. L. REV. 1212, 1230, 1232 (2012) (reviewing HARCOURT, ILLUSION OF FREE MARKETS, *supra* note 7).

¹⁸ Leonhardt, *supra* note 1.

¹⁹ FRIEDMAN, *supra* note 4, at 9.

²⁰ FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 134 (Bruce Caldwell ed., 2007) (1944).

²¹ See HARCOURT, ILLUSION OF FREE MARKETS, *supra* note 7, at 128–30.

²² See *id.* at 124–25.

²³ Posner, *supra* note 11, at 1195.

²⁴ Whitman, *supra* note 17, at 1230.

This is puzzling, but not entirely surprising. Blinded by some kind of animus towards Michel Foucault, Whitman fails to grasp the theoretical stakes. This is most evident when Whitman remarks: “It is, I think, very odd to call Michel Foucault a ‘nominalist.’”²⁵ Of that, naturally, there can be little doubt. Paul Veyne, an accomplished historian, put the question to rest in his book, *Foucault, sa pensée, sa personne*.²⁶ The issue is not *whether* Foucault was nominalist. It is whether he was nominalist *enough* — which is the point of my intervention. “More than anyone,” I emphasize in *The Illusion of Free Markets*, “Foucault reified the idea [of discipline].”²⁷ One central theoretical objective of the book is to move us beyond Foucault’s analysis.²⁸

Fortunately, this has not escaped those with a more subtle theoretical bent. Keally McBride, the political theorist and author of *Punishment and Political Order*,²⁹ caught on immediately, writing in her review of *The Illusion of Free Markets*:

One might initially think that Harcourt is pointing to the similarities between these two historical junctures, thereby questioning the assumption that the market back then was regulated and the market today is free. Instead, he is doing something even more ambitious, *he is taking on both Foucault and the Chicago School in one volume*.³⁰

Indeed, as in my other work, the critical task is to think beyond Foucault — to push our analyses beyond his categories of discipline and security. To suppose that they too, like the categories of madness, delinquency, and sexuality, *do not exist*. To be nominalist to the core. To resist our fabrications, not to reconstitute them.³¹ In effect, to perpetually *denominate* truth.

²⁵ *Id.* at 1229.

²⁶ See PAUL VEYNE, *FOUCAULT, SA PENSÉE, SA PERSONNE* 19 (2008) (“Foucault est nominaliste . . .”). Foucault’s nominalism was the source of an earlier controversy between Paul Veyne and Marcel Gauchet. See generally Paul Veyne, *Foucault révolutionne l’histoire*, 201–42, in COMMENT ON ECRIT L’HISTOIRE (1978); and Marcel Gauchet, *La nominalisme historien. A propos de “Foucault révolutionne l’histoire”, de Paul Veyne*, 25 INFORMATION SUR LES SCIENCES SOCIALES 401 (1986).

²⁷ HARCOURT, *ILLUSION OF FREE MARKETS*, *supra* note 7, at 46.

²⁸ I do this as well in a more technical paper. See generally Bernard E. Harcourt, *Supposons que la discipline et la sécurité n’existent pas — Rereading Foucault’s Collège de France Lectures (with Paul Veyne)*, 4 CARCERAL NOTEBOOKS 153 (2008), available at http://www.thecarceral.org/cn4_harcourt.pdf.

²⁹ See KEALLY MCBRIDE, *PUNISHMENT AND POLITICAL ORDER* (2007).

³⁰ Keally McBride, Book Review, 8 L. CULTURE & HUMAN. 176, 177 (2012) (emphasis added).

³¹ Here, I would point the reader to another paper that seeks to do precisely this. See generally Bernard E. Harcourt, *Radical Thought from Marx, Nietzsche, and Freud, through Foucault, to the Present: Comments on Steven Lukes’s In Defense of “False Consciousness,”* 2011 U. CHI. LEGAL F. 29.

Whitman had already revealed an aversion to Foucault's work on the third page of his last book, back in 2003, where he wrote that Foucault's approach "must be rejected *out of hand*."³² In his book review of *The Illusion of Free Markets*, Whitman goes further, mocking "Foucaultphilia,"³³ and "Foucaultphiles," deriding "the portentous and jargon-ridden writings of second-rate literature scholars and specialists in cultural analysis," and poking fun at "the writings of what a recent critic sneeringly calls 'Foucaultphiles.'"³⁴ Whitman writes derisively of the "fundamental weaknesses in Foucauldian historiography and Foucauldian social science"³⁵ and ridicules that "sort of Foucaultphile book."³⁶ Though he absolves me of those sins, in his apparent anger, Whitman misdirects his fire at me, seeing the specter of Foucault lurking in every shadow. But we should not let that distract us. *The Illusion of Free Markets* specifically seeks to go beyond the categories of *both* the free market *and* regulation — of *both* natural order *and* discipline.

It is not surprising that Whitman, having failed to grasp the theoretical stakes, confuses the *category* of the free market with "free-market *policies*" — which are, of course, distinct and would push the analysis in a different direction.³⁷ *The Illusion of Free Markets* focuses on dominant beliefs and their real effects on the penal sphere, not on the material consequences of purportedly neoliberal policies, such as deregulation, privatization, or the Washington Consensus. For good reason. The notion of "free-market policies" is itself misleading and does not accurately reflect what has actually occurred since the 1970s: the United States has not experienced free-market deregulation, but instead has undergone massive *reregulation* that predominantly has benefited the wealthier members of society.³⁸

³² See JAMES Q. WHITMAN, HARSH JUSTICE 5 (2003) (emphasis added).

³³ Whitman, *supra* note 17, at 1224.

³⁴ *Id.* at 1220.

³⁵ *Id.* at 1224.

³⁶ *Id.* at 1220.

³⁷ *Id.* at 1214–15. My argument is *not* that there is "some demonstrable link between free-market *policies* and rising rates of incarceration." *Id.* at 1215 (emphasis added). See generally Bernard E. Harcourt, *Neoliberalism and Punishment Theory*, BALKINIZATION (Apr. 2, 2011, 8:28 PM), <http://balkin.blogspot.com/2011/04/neoliberalism-and-punishment-theory.html>.

³⁸ I develop this idea more in an online editorial for *The New York Times*. See Bernard E. Harcourt, *Occupy Wall Street's 'Political Disobedience'*, N.Y. TIMES OPINIONATOR (Oct. 13, 2011, 4:15 PM), <http://opinionator.blogs.nytimes.com/2011/10/13/occupy-wall-streets-political-disobedience>.

If indeed the book focused on economic policy outcomes, it would be important to engage in the type of applied political economy practiced by Professors Nicola Lacey or Michael Cavadino and James Dignan.³⁹ But the book focuses on conceptions of free and regulated markets and their real effects on penal policies, and this does not map well onto the “varieties of capitalism” literature. For instance, while both Germany and France may qualify as Western European coordinated market economies, the traditions of economic thought in the two countries are sharply distinct, with a form of statist capitalist rationality in Germany at midcentury referred to as “*ordo-liberalism*” compared to the French neoliberal framework of President Valéry Giscard d’Estaing in the 1970s or President Nicolas Sarkozy in this century.⁴⁰ By pointing out the real effects of the American paradox of *laissez faire* and mass incarceration, the book does explore in effect what we might call “actually existing neoliberalism,”⁴¹ but that is very different from examining purported free-market policies.

Without the theory, it is no surprise that Professor Whitman can neither discern the model nor correctly identify the method of the book.⁴² Following a nominalist tack, *The Illusion of Free Markets* analyzes the two purest and most pristine cases within the two competing categories. In effect, it takes on the two hardest cases: on the one hand, the cleanest illustration of the free market, a contemporary wheat pit at the Chicago Board of Trade, and on the other hand, the most notorious case of an overly regulated market, the Parisian grain markets of the eighteenth century, which formed the very basis of the liberal economic critique. The method, in other words, is to take the two cases at the epicenter of the categories, in order to demonstrate, through a meticulous analysis of eighteenth-century police archives, pamphlets, dictionaries, and theoretical writings, and of twentieth-century legal regulation, litigation, enforcement records, and cases, that the grain markets of the eighteenth century were haphazardly policed

³⁹ I discuss these studies in HARCOURT, *ILLUSION OF FREE MARKETS*, *supra* note 7, at 226–31.

⁴⁰ See generally François Denord, *French Neoliberalism and Its Divisions: From the Colloque Walter Lippmann to the Fifth Republic*, in *THE ROAD FROM MONT PÉLERIN* 45 (Philip Mirowski & Dieter Plehwe eds., 2009); Ralf Ptak, *Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy*, in *THE ROAD FROM MONT PÉLERIN*, *supra*, at 98.

⁴¹ See Neil Brenner & Nik Theodore, *Cities and the Geographies of “Actually Existing Neoliberalism,”* 34 *ANTIPODE* 349 (2002); Wacquant, *supra* note 13; see also NOAM CHOMSKY, *PROFIT OVER PEOPLE* 30–40 (1999) (focusing on “really existing free market doctrine,” *id.* at 34).

⁴² Whitman, *supra* note 17, at 1225.

and that today's wheat pits are regulated through and through — to demonstrate, in essence, the liberty in discipline and conversely the regulation of the free market.

The policing of the Parisian grain markets are of central importance *not* to “invoke Foucault speaking to ‘his overflowing auditoriums’ on the subject of the eighteenth-century *police des grains*,”⁴³ as Whitman suggests; but rather because the policing of the grain markets was at the heart of Beccaria's writings on public economy and punishment, and forms the touchstone of both the liberal and neoliberal paradox. It is exactly there that the markets met and meshed the police — as evidenced by the remarkable dictionary entry for “markets” (*marchés*) in Fréminville's *Dictionnaire ou traité de la police générale* in 1758:

MARKETS. *SEE* POLICE.

The term “markets” did not even get a dictionary definition at the time Beccaria and the Physiocrats were writing, but instead a direct cross-reference to the entry for “Police.”⁴⁴ For Beccaria, policing (and the example of the Parisian *police des grains*) was a central topic in his lectures on public economy; similarly, the young Adam Smith, when he was still at Glasgow, inscribed his public economy within the rubric of “Police.”⁴⁵ For both Beccaria and the young Smith, the policing of markets was at the fountainhead of their economic thinking — and it would become the locus of the struggle over the introduction of the idea of natural order in economics in the writings of Quesnay and the Physiocrats in the 1760s. The policing of markets was at the crux of the disputed reception of Beccaria's work by Du Pont de Nemours — leading Du Pont ultimately to declare that he hoped the young Italian “would change considerably his opinions on very many points”⁴⁶ — and remains at the heart of the divergent receptions and readings of Beccaria's celebrated tract, *On Crimes and Punishments*,⁴⁷ to the present.

⁴³ *Id.*

⁴⁴ EDMÉ DE LA POIX DE FREMINVILLE, *DICIONNAIRE OU TRAITE DE LA POLICE GENERALE DES VILLES, BOURGS, PAROISSES ET SEIGNEURIES DE LA CAMPAGNE* 367 (Paris, Chez Gissey 1758); *see also* HARCOURT, *ILLUSION OF FREE MARKETS*, *supra* note 7, at 6.

⁴⁵ HARCOURT, *ILLUSION OF FREE MARKETS*, *supra* note 7, at 19–22.

⁴⁶ This is quoted in HARCOURT, *ILLUSION OF FREE MARKETS*, *supra* note 7, at 61.

⁴⁷ *See* BECCARIA, *supra* note 12.

(It is precisely what escaped the Chicago School, in large part because Beccaria's economic writings never have been translated into English.)

Whitman refers to my method as “discourse analysis.”⁴⁸ Again, that is not exact. To begin with, the term “discourse analysis” has been so watered down today that it has become essentially meaningless — a derogatory term, as Whitman intends to use it. It would be far better to reserve the term for a formal analysis that closely examines the formation of objects, of enunciative modalities, of concepts, and of strategies in the tradition of Foucault's *Archaeology of Knowledge*.⁴⁹ In any event, my method is far more polyglot. As anyone familiar with my work knows, I view methods as precise tools and am prepared to deploy the method most suited to the theoretical stakes — whether it is ordinary least squares regression analysis, fixed-effects modeling, ethnographic fieldwork, qualitative interviews, econometric modeling, content analysis, correspondence analysis, archival research, or another method.⁵⁰ Methods are dictated by theory — not the other way around.

In this project, accordingly, I examine eighteenth-century police archives in minute detail, I run quantitative analyses of the historical documents, I engage in close contextual readings of the reception of eighteenth-century texts in the manner of the Cambridge School, I conduct legal analyses of enforcement litigation at the Chicago Board of Trade, I collect state-level data on mental hospitalization, I consult my Chicago School colleagues, and so forth. In the process, I demonstrate, for instance, that on a close inspection of 932 sentences and ordinances from the period 1668 to 1787 contained in cartons Y-9498 and Y-9499 at the National Archives in Paris, only 9.2% were related in any way to the policing of the grain markets. Only a tiny fraction of major fines (2.6% to be exact) were grain-related offenses.⁵¹ These statistics help establish, among other findings, that the *police des grains* was less strict and disciplinarian than

⁴⁸ Whitman, *supra* note 17, at 1219–20.

⁴⁹ MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A. M. Sheridan Smith trans., Tavistock Publ'ns Ltd. 1986) (1972).

⁵⁰ See, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER* 59–78 (2001) (applying multivariate regression analysis); BERNARD E. HARCOURT, *LANGUAGE OF THE GUN* 13–103 (2006) (relying on in-depth interviews, content analysis, and correspondence analysis); BERNARD E. HARCOURT, *AGAINST PREDICTION* 132–36 (2007) (employing economic modeling); Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934–2001*, 40 J. LEGAL STUD. 39 (2011) [hereinafter Harcourt, *Institutionalization Effect*] (applying state-level panel-data fixed effects regression model and Prais-Winsten regression model); Bernard E. Harcourt, *Policing L.A.'s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time]*, 2005 U. CHI. LEGAL F. 325 (employing ethnographic methods).

has been made out. I also analyze intricate legal enforcement proceedings at the Chicago Board of Trade today, to establish that the wheat pit — that exemplar of the free market — is regulated through and through. As is clear from my lengthy book, I employ a range of analytic methods to carefully establish the thesis.

That brings us to perhaps the most puzzling charge. Whitman contends that I am “casually lumping mental institutions together with prisons”⁵² and accuses me of being “surprisingly callous” in my treatment of mass incarceration.⁵³ This is stunning — and incorrect — but once again not entirely surprising because Whitman has failed to grasp the *theoretical* stakes in the debate over asylums and prisons.

For those unfamiliar with my research in the area, I have written extensively about the deinstitutionalization of mental hospitals in the 1960s and 70s, and the staggering rate at which this country institutionalized people in asylums in the 1930s, 40s, and 50s.⁵⁴ The various strands of my research have their common source in the discovery that the United States institutionalized individuals in asylums and mental hospitals at such high rates in the second quarter of the twentieth century, even as compared to the astoundingly high rate of imprisonment during the last quarter of the century — a discovery that is reflected well in this graph, which I have begun to call, simply, “Figure 1”:

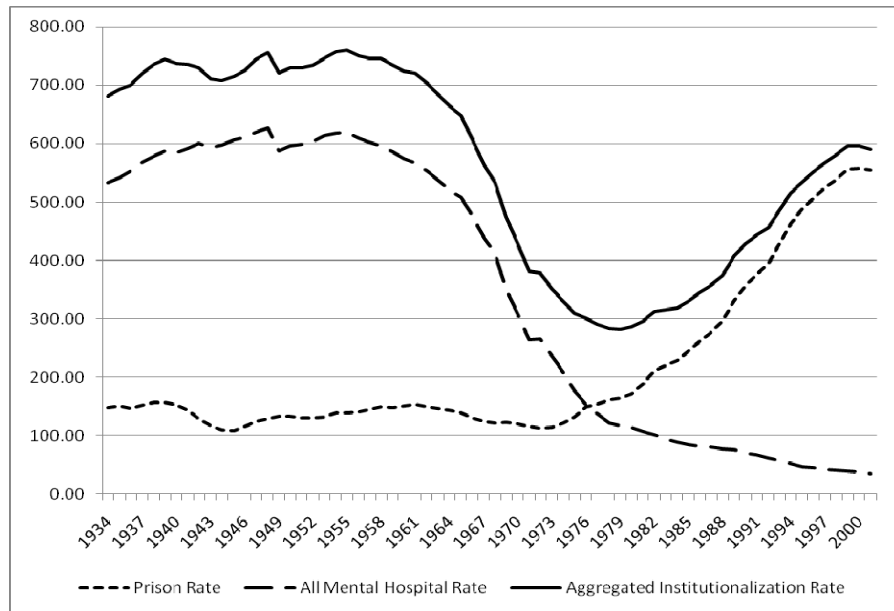
⁵¹ HARCOURT, ILLUSION OF FREE MARKETS, *supra* note 7, at 166.

⁵² Whitman, *Free Market*, *supra* note 17, at 1233.

⁵³ *Id.*

⁵⁴ See, e.g., Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006) [hereinafter Harcourt, *From the Asylum to the Prison*]; Harcourt, *Institutionalization Effect*, *supra* note 50; Harcourt, *Reducing Mass Incarceration*, *supra* note 8; Bernard E. Harcourt, *The Mentally Ill, Behind Bars*, N.Y. TIMES, Jan. 15, 2007, at A15, available at <http://www.nytimes.com/2007/01/15/opinion/15harcourt.html>.

FIGURE 1.



Although the trends, at first glance, might suggest that we have simply taken the mentally ill and put them in prison, a closer examination reveals significant disparities in the two populations. In the 1960s, about half of the institutionalized patients were women, whereas throughout the twentieth century, about 95% of the incarcerated were men.⁵⁵ In the past, the mental hospital populations were far more white and older. In 1923, for instance, 92.2% of asylum patients were white and only 7.6% percent were African American,⁵⁶ in sharp contrast to prisons today which are over 40% African American and 20% Hispanic.⁵⁷ That year, the mental institutions were 52.6% male and 47.4% female.⁵⁸ The asylum population was far whiter, older, and included more women. The demographics have changed dramatically.

⁵⁵ See Harcourt, *From the Asylum to the Prison*, *supra* note 54, at 1781; see also *id.* at 1781–84 (discussing other institutionalization and imprisonment statistics); Bernard Harcourt, *Asylums and Prisons: Race, Sex, Age, and Profiling Future Dangerousness*, VOLOKH CONSPIRACY (May 3, 2007, 7:05 AM), <http://volokh.com/posts/1178175819.shtml> (same).

⁵⁶ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PATIENTS IN HOSPITALS FOR MENTAL DISEASE, 1923, at 19 (1926).

⁵⁷ See MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 1–2 (2007), available at http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf.

⁵⁸ See U.S. CENSUS BUREAU, *supra* note 56, at 118.

Naturally, this does not detract in any way from the fact that, as I have argued in *The New York Times* and elsewhere, we face a major crisis in the provision of mental health care in our prisons today.⁵⁹ But it does mean that we need a more nuanced interpretation of the data. It is not the case — as Whitman’s remarks would suggest — that we simply took mentally ill populations and began “throwing the mentally ill into prison,”⁶⁰ or that we are, again in his words, “a society that sends [mentally ill people] to prisons.”⁶¹ The prison population is demographically different from the asylum population and we need to be more exact and careful about our interpretation of what is going on. The excessive punishment in asylums in the 1930s that disproportionately targeted marginalized women (during a period when other modes of social control, such as Jim Crow laws, targeted African Americans) and the excessive punishment in prisons today that disproportionately targets young African American men raise larger issues beyond mental illness. Of course, the history of institutionalization also raises many issues about the label of mental illness, especially hysteria and schizophrenia, at mid-century.⁶²

My preliminary sense — and I am still working this out — is that today’s mass incarceration and the mass institutionalization in the early twentieth century represent different forms of excessive punishment that were shaped by importantly distinct sets of ideas. The growth of the asylum in the 1930s reflected faith in the state as protector. It was based on a rehabilitative model associated with the welfare state. As I write in *The Illusion of Free Markets*, referring specifically to Frances Fox Piven and Richard Cloward’s classic book *Regulating the Poor: The Functions of Public Welfare*,⁶³ the “rise of welfarism and the gradual turn to prudentialism” represented, at its worst, a distinct kind of punitiveness.⁶⁴ By contrast, the contemporary prison as warehouse is completely divorced from a state rehabilitative model. The focus of the prison and criminal justice is on blameworthiness and punishment, not on madness or rehabilitation.

⁵⁹ See sources cited *supra* note 54.

⁶⁰ Whitman, *supra* note 17, at 1213.

⁶¹ *Id.* at 1230.

⁶² For excellent work addressing how the concept of mental illness has served as a means of social control, see JONATHAN METZL, *THE PROTEST PSYCHOSIS* (2009); and Mark S. Micale, *On the “Disappearance” of Hysteria: A Study in the Clinical Deconstruction of a Diagnosis*, 84 *ISIS* 496 (1993).

⁶³ FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* (1971).

⁶⁴ HARCOURT, *ILLUSION OF FREE MARKETS*, *supra* note 7, at 223–24.

And it is here, in the penal domain, that neoliberal government is viewed as most fully legitimate and competent — in policing and punishing harshly.⁶⁵

I suggest in *The Illusion of Free Markets* that the privilege accorded to regulation during the welfarist period — in effect, the opposite of the notion of the free market — might itself have led to excessive forms of institutionalization. This, I wrote, is entirely in keeping with the nominalist foundations of my theory:

The problem is not just with the category of “free markets,” but also with the category of “regulation.” The ultimate goal is to displace both of these categories so that our evaluations and assessments of social and economic forms of organization are no longer determined ex ante. That requires reevaluating periods of regulatory triumph just as it does periods of free-market dominance.⁶⁶

My point is that beliefs and certitudes often breed excess. It is important to explore both the certainties that lead to the prison gate, but also the beliefs that produced massive asylum populations.

This is, in the end, the most important task: to question these certainties. To explore how accepted truths have come to be held as such — as truths — and to interrogate the implications of such beliefs acquiring that force of authority. Not to take accepted truths at face value, but to probe deeply and explore how they are embedded in, and themselves embed, distinct relations of power in society, in the family, in political economy — relations of power that have identifiable distributional consequences in terms of resources, privilege, and status, as well as stigma, exclusion, and punishment — and to never shy away even when it becomes threatening to others. That, I take it, is a life’s mission.

⁶⁵ See *id.* at 224.

⁶⁶ See *id.* at 225.

Readers with comments should address them to:

Professor Bernard E. Harcourt
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
harcourt@uchicago.edu

Chicago Working Papers in Law and Economics
(Second Series)

For a listing of papers 1–550 please go to Working Papers at <http://www.law.uchicago.edu/Lawecon/index.html>

551. Douglas G. Baird, Car Trouble, May 2011
552. Omri Ben-Shahar, Fixing Unfair Contracts, May 2011
553. Saul Levmore and Ariel Porat, Bargaining with Double Jeopardy, May 2011
554. Adam B. Cox and Richard T. Holden, Reconsidering Racial and Partisan Gerrymandering, May 2011
555. David S. Evans, The Antitrust Economics of Free, May 2011
556. Lee Anne Fennell, Property and Precaution, June 2011
557. Omri Ben-Shahar and Anu Bradford, Reversible Rewards, June 2011, revised November 2011
558. Alon Harel and Ariel Porat, Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics, June 2011
559. Randal C. Picker, After Google Book Search: Rebooting the Digital Library, June 2011
560. Julie A. Roin, Privatization and the Sale of Tax Revenues, July 2011
561. Joseph Issenbergh, Last Chance, America, July 2011
562. Richard H. McAdams, Present Bias and Criminal Law, July 2011
563. David Weisbach, Is Knowledge of the Tax Law Socially Desirable?, July 2011
564. Louis Kaplow and David Weisbach, Discount Rates, Judgments, Individuals' Risk Preferences, and Uncertainty, July 2011
565. Louis Kaplow, Elisabeth Moyer and David A. Weisbach, The Social Evaluation of Intergenerational Policies and Its Application to Integrated Assessment Models of Climate Change, July 2011
566. David A. Weisbach, Carbon Taxation in Europe: Expanding the EU Carbon Price, July 2011
567. Nuno Garoupa and Tom Ginsburg, Hybrid Judicial Career Structures: Reputation v. Legal Tradition, August 2011
568. Richard A. Epstein, F. Scott Kieff, and Daniel F. Spulber, The FTC's Proposal for Regulation IP through SSOs Would Replace Private Coordination with Government Holdups, August 2011
569. Dhammika Dharmapala, Nuno Garoupa, and Richard McAdams, Do Exclusionary Rules Convict the Innocent? August, 2011
570. Andres Sawicki, Better Mistakes in Patent Law, August 2011
571. Jonathan S. Masur and Eric A. Posner, Regulation, Unemployment, and Cost-Benefit Analysis, August 2011
572. Adam B. Cox and Eric A. Posner, Delegation in Immigration Law, September 2011
573. Joseph Bankman and David Weisbach, A Critical Look at a Critical Look—Reply to Sanchirico, September 2011
574. M. Todd Henderson and Frederick Tung, Pay for Regulator Performance, September 2011
575. William H. J. Hubbard, The Problem of Measuring Legal Change, with Application to *Bell Atlantic v. Twombly*, September 2011
576. Adam M. Samaha, Regulation for the Sake of Appearance, October 2011
577. Ward Farnsworth, Dustin Guzior, and Anup Malani, Implicit Bias in Legal Interpretation, October 2011
578. Anup Malani and Julian Reif, Accounting for Anticipation Effects: An Application to Medical Malpractice Tort Reform, October 2011
579. Scott A. Baker and Anup Malani, Does Accuracy Improve the Information Value of Trials? October 2011
580. Anup Malani, Oliver Bombom and Mark van der Laan, Improving the FDA Approval Process, October 2011
581. Brian Leiter, The Boundaries of the Moral (and Legal) Community, October 2011
582. David S. Evans, Governing Bad Behavior by Users of Multi-Sided Platforms, October 2011
583. Stephen J. Choi, Mitu Gulati and Eric A. Posner, Political Risk and Sovereign Debt Contracts, November 2011
584. Lee Fennell, Ostrom's Law: Property Rights in the Commons, November 2011
585. Lee Fennell, Lumpy Property, January 2012

586. David A. Weisbach, Should Environmental Taxes Be Precautionary? January 2012
587. Ariel Porat and Eric A. Posner, Aggregation and Law, January 2012
588. Oren Bar-Gill and Ariel Porat, Beneficial Victims, February 2012
589. Eric A. Posner and E. Glen Weyl, An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets, February 2012
590. Bernard E. Harcourt, On the American Paradox of *Laissez Faire* and Mass Incarceration, March 2012