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## Our Criminal Laws, Our Constitution

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# OUR CRIMINAL LAWS, OUR CONSTITUTION

Sarah A. Seo\*

RISA GOLUBOFF, *VAGRANT NATION* (OXFORD UNIVERSITY PRESS 2016). PP. 471. HARDCOVER \$29.95.

THOMAS ANDREW GREEN, *FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT* (CAMBRIDGE UNIVERSITY PRESS 2014). PP. 520. HARDCOVER \$88.00. PAPERBACK \$34.99.

JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (HARVARD UNIVERSITY PRESS 2015). PP. 416. HARDCOVER \$39.95.

In 1764, the Italian philosopher Cesare Beccaria made the case for eliminating the death sentence in an essay entitled *On Crimes and Punishments*. Capital punishment, he argued, made mercy necessary to soften its cruelty, especially when imposed for minor crimes. But any modification to the punishment mandated by the laws violated the principle that “the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact.”<sup>1</sup> According to Beccaria, the pardon, “one of the noblest prerogatives of the throne,” acted as “a tacit disapprobation of the laws,” prompting his proclamation that “[h]appy [is] the nation in which [clemency] will be considered as dangerous!”<sup>2</sup> He continued, arguing that absurdly harsh laws also obliged judges to interpret, rather than to apply, laws. Legislating from the bench, like sovereign pardons, led to arbitrary power and posed a danger to liberty. After brandishing these criticisms, Beccaria wrote, “I should have every thing to fear if tyrants were to read my book; but tyrants never read.”<sup>3</sup>

More than a few American colonists read this essay, including George Washington and lead drafter of the U.S. Constitution, James Madison.<sup>4</sup> So did John Adams, Thomas Jefferson, William Bradford, James Wilson, and Dr. Benjamin Rush. Jefferson listed *On Crimes and Punishments* among the six most important works on civil

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1. CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENT*, 20 (Edward D. Ingraham trans., 2d ed. 1819).

2. *Id.* at 198.

3. *Id.* at 26.

4. JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 151, 173 (2014).

government.<sup>5</sup> The revolutionary ideas that the founding fathers applied to the new American government included the separation of powers, the basis of Beccaria's critique of the death penalty. Upon defeating British tyranny, several state legislatures, including Pennsylvania, New York, and Virginia, revised their penal codes to replace frequent grants of clemency under draconian laws with milder punishments and fewer pardons.<sup>6</sup> "[C]apital punishments," Rush declared, "are the natural offspring of monarchical governments."<sup>7</sup>

In the American experience, criminal laws and their enforcement have been profoundly connected to the constitution of government and the health of democracy. As a preeminent judge once commented, the "quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."<sup>8</sup>

This essay reviews three recently published books that further explore this insight in the twentieth century. At first glance, vagrancy laws, the free will problem, and criminal records may seem to share little in common. But each study illuminates how criminal laws have defined our nation by creating what historian Barbara Welke has termed "borders of belonging," a boundary that laws create between people who enjoy full citizenship and those who do not.<sup>9</sup> After all, a conviction and imprisonment are acts of social and political exclusion. Even the policing of suspected offenders often reveals who does not completely belong.

The reviewed books are also distinctly modern tales, in which questions of identity—whether and which individuals are free to determine and reimagine who they are—inform both the workings of the criminal justice system and inclusion into the body politic. In addition to highlighting the importance of criminal justice to constitutional studies, this review essay brings attention to what history can offer legal scholars, law students, and activists.

#### A PLURALIST CONSTITUTION

Given the foundational role of criminal law in constituting the American polity, it is not too surprising that constitutional law historian Risa Goluboff's latest book examines the demise of vagrancy laws during the "long 1960s" (specifically, from 1949 to 1972).<sup>10</sup> These age-old status-crime laws targeting beggars, habitual loafers, common drunkards, prostitutes, disorderly people, and even jugglers may at first appear trivial compared to laws on, say, voting rights or anti-discrimination. But, as

5. Louis P. Masur, *The Revision of the Criminal Law in Post-Revolutionary America*, 8 CRIM. JUST. HIST. 21, 23 (1987).

6. See, e.g., STEVEN WILF, *LAW'S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* 165 (2010); Masur, *supra* note 5, at 21.

7. BENJAMIN RUSH, *CONSIDERATIONS ON THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH* 18 (1792).

8. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956). The article was delivered in April 1956 as the Oliver Wendell Holmes Lecture at Harvard Law School.

9. BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* 144 (2010).

10. On the debate over the periodization of the "Sixties," see, e.g., M. J. Heale, *The Sixties as History: A Review of the Political Historiography*, 33 REV. IN AM. HIST. 133, 135-36 (2005).

Goluboff explains, vaguely and broadly worded vagrancy laws offered police a flexible, easy-to-use tool for subjecting anyone “out of place” to the criminal process.<sup>11</sup> By mid-twentieth century, those subjects included not just vagrants in the common meaning of the word, but also communists, civil rights activists, anti-war protestors, interracial couples, and individuals with indicia of nonconformity like men with beards. After centuries of unquestioned legitimacy, vagrancy laws began to seem problematic not just to their alleged offenders, but also to Ivy League trained lawyers. By 1972, when the Supreme Court in *Papachristou v. City of Jacksonville* finally invalidated a vagrancy ordinance whose vagueness had given beat officers virtually unlimited discretion to patrol the “borders of belonging,” no less than the Constitution’s meaning had changed. The nation’s highest court had embraced a new understanding of constitutional rights—of belonging—that protected more than different political views; it also validated lifestyle choices that defied dominant mores.

Until *Vagrant Nation*, no one had realized that every social movement of the 1960s had confronted the punitive discipline of what Goluboff refers to as “the vagrancy law regime.”<sup>12</sup> Looking back through this new framework adds substantial support for the depiction of the sixties as a period that moved towards greater diversity and inclusiveness rather than one mired in discord and disintegration.<sup>13</sup> What labor unionists, gay rights advocates, the Civil Rights Movement, the Counterculture, anti-war protestors, and poor people all had in common was a pluralist vision of America. They demanded a place in the community of rights-bearing individuals free from police harassment. By identifying a unifying theme for an unruly decade, Goluboff has distilled the essential conflict in American society at the time. At the heart of every social movement was a challenge to the authority of a white, capitalist, middle-class, heterosexual, and male-dominated culture.

Notwithstanding the ambitiousness of the project, Goluboff describes her book as “a, not *the*, legal history of the sixties.”<sup>14</sup> She leaves out some perspectives because “the focus of [her] story always remains [on] vagrancy laws and their challengers.”<sup>15</sup> One of those unexamined perspectives is the other side of vagrancy litigation: advocates of policing. As a result, the book at times reads like hearing one side of a telephone call; the listener can fill in most of what the other side is saying, but not everything. In Goluboff’s account of the legal cases that culminated with the invalidation of vagrancy laws, it is clear enough that the police had a mandate to maintain social order and safety. But what *Vagrant Nation* does not entirely capture is how widespread and deep was the appeal of security that vagrancy policing was intended to provide. As Goluboff explains, policing vagrants—that is, anyone “out of place”—meant policing difference, which explains why the *Papachristou* opinion celebrated its opposite,

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11. RISA GOLUBOFF, *VAGRANT NATION* 3 (2016).

12. *Id.* at 10.

13. Compare, e.g., JOHN M. BLUM, *YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY, 1961-1974* (1991); MAURICE ISSERMAN & MICHAEL KAZIN, *AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S* (1999); with, e.g., DAVID FARBER, *THE AGE OF GREAT DREAMS: AMERICA IN THE 1960S* (1994); DAVID CHALMERS, *AND THE CROOKED PLACES MADE STRAIGHT: THE STRUGGLE FOR SOCIAL CHANGE IN THE 1960S* (2nd ed. 1996).

14. GOLUBOFF, *supra* note 11, at 10.

15. *Id.* at 9.

nonconformity. Twenty-first-century Americans may readily understand the allure of individualism and cultural and racial pluralism. More difficult to appreciate is not just mainstream Americans' fear of difference at mid-century, but also their desire for sameness. That fear and desire both stemmed from the same place, from the need for security during the postwar, Cold War, atomic age. According to historian Elaine Tyler May, security was associated with the warmth of domestic life after years of economic depression, a period of wartime separation, and continuing nuclear threats from abroad.<sup>16</sup> The suburban home outfitted with the latest consumer goods for the breadwinning father, his homemaker wife, and a couple of children represented security and freedom. Many Americans conformed to this familial and economic model, or at least aspired to it, and for them, rejections of that way of life seemed more dangerous than giving police a great deal of discretionary authority to enforce social norms. *Vagrant Nation* does discuss the imperatives of law and order, but that impulse came from more than the need for streets clear of riffraff or the alarming scenes of urban riots in the later years of the sixties. It flowed deeply from a particular idea of liberty and happiness.

*Vagrant Nation* ends in 1972 with *Papachristou v. City of Jacksonville*, which represented a victory for a pluralist United States. Interestingly, the conclusion is not quite triumphant, but measured with reality. In Goluboff's telling, the Court shied away from the more difficult task of formulating a fundamental right to be free from police harassment. Instead, it voided the vagrancy ordinance for being too vague, which permitted order-maintenance policing to continue as long as legislators rewrote laws that spelled out the offensive conduct (these include today's anti-loitering and drug laws). Also, the Court decided *Papachristou* only after it had already approved the police practice of stops and frisks in the 1968 case *Terry v. Ohio*. Vagrancy challengers sought to eliminate both sources of discretionary authority—vague vagrancy laws and stop-and-frisks—that empowered beat officers to decide questions of belonging as they patrolled the streets. But constitutionally legitimizing stops and frisks was what made the invalidation of vagrancy laws more palatable and thus possible. In other words, abolishing or severely cutting back on policing as a method of social control never seemed to be an option on the table. Finally, while Goluboff recognizes the “revolutionary” changes that the pluralists had achieved, she points out that “they did not demand complete equality, inclusion, or freedom.”<sup>17</sup> Our vagrant nation may be a vastly more tolerant one, but it is still not without inequality, exclusion, or coercion.

The reasons for this partial victory may lie in the faults of human nature. Or it could suggest the enduring desire for security based on middle-class values and gendered and racial norms. Or it could reflect the process of legal advocacy, which is the

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16. Elaine Tyler May, *Cold War—Warm Hearth: Politics and the Family in Postwar America*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, 158-68 (Steve Fraser & Gary Gerstle ed., 1989). See also ARTHUR M. SCHLESINGER JR., *THE VITAL CENTER: THE POLITICS OF FREEDOM 2* (1949) (“Yet for the United States the world tragedy still has the flickering unreality of a motion picture. It grips us as we see it; but, lingering over the familiar milkshake in the bright drugstore, we forget the nightmare in the resurgence of warmth and comfort.”).

17. GOLUBOFF, *supra* note 11, at 337.

explanation that Goluboff explores. *Vagrant Nation* traces the path from social problem to constitutional right: how lawyers had come to identify a problem in the real world, converted it into legal questions, tried out different strategies, and taken the most viable or desirable arguments all the way to the Supreme Court again and again until they succeeded. One lesson of *Vagrant Nation* is that reform by litigation often has a winnowing effect that ends up “crowd[ing] out other possible solutions to the problem.”<sup>18</sup> A legal movement might end with a hard-won constitutional right that addresses only one facet of a larger social problem.

But lawyers cannot take all the blame for the shortcomings, just as they cannot receive all the credit for the successes. The history of vagrancy law shows how complicated narratives of legal change can be. Forces beyond the work of lawyers were at play as well. With or without lawyers, American society was changing. *Vagrant Nation* recounts many of these transformations, including the sexual revolution and the coming of age of the Baby Boomer generation. Notably, vagrancy-law challenges turned an important corner when police began to harass and arrest middle-class, white teenagers. They “made hippies familiar to lawyers, reporters, and judges, who might have had children, siblings, or other relatives making similar, if disparaged, choices.”<sup>19</sup> No doubt, the work of lawyers became all the easier when judges began to empathize with the defendants appearing before them. It marked a truly transformative social change when a sitting justice of the U.S. Supreme Court, the most elite level of the legal profession and, frankly, society as well, would exaggerate his past as a hobo and relish being mistaken for a tramp.<sup>20</sup> This then raises a question about the contours of change. Is the story about greater acceptance of those in the margins of society? Or is it about how the marginal became mainstream? Goluboff describes the demise of vagrancy laws as “shockingly quick—twenty years is a metaphorical blink of an eye given a four-hundred-year-old regime.”<sup>21</sup> Perhaps such swiftness was possible because of deeper changes occurring over a longer period of time. For instance, economic shifts and technological innovations played important roles in transforming how individuals understood themselves in the modern world.<sup>22</sup>

This is not to dismiss cause litigation as striving towards the inevitable. The dynamic between individual agency and structure is a conundrum that historians will endlessly debate. Goluboff has chosen to focus on how legal actors participated in a larger story by working out social issues through law. For Goluboff, it made sense to adopt this perspective because she sees law as central to life in twentieth-century America.<sup>23</sup> The social conflicts of that era were fundamentally legal problems precisely because, in Goluboff’s words, “the laws were critical to the maintenance of an

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18. *Id.* at 334.

19. *Id.* at 257.

20. *Id.* at 106.

21. *Id.* at 8.

22. See, e.g., ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 12, 169 (1930) (on “agencies of menace”).

23. Christopher Tomlins would point out that law was central in American life not just in the twentieth century, but even earlier, beginning in the mid-eighteenth century. CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 21 (1993).

increasingly contested order and hierarchy in American society.”<sup>24</sup> Of course, the tumult of the sixties reflected other problems as well, such as racism. But Goluboff’s point is that vagrancy laws provided a one-size-fits-all tool for defending the status quo amidst change in every dimension. Law was so embedded in the life and governance of American society that it was difficult for vagrancy challengers to diagnose what, exactly, was the problem with the laws that made them vulnerable to police harassment. It has also made it easy to forget, until now, how momentous their victory had been. Overthrowing the vagrancy-law regime was an important moment in U.S. history. By focusing on action in the courts that spilled in from the streets, *Vagrant Nation* highlights the difference that diffused and outnumbered protest movements actually made. Defending their way of life had changed the meaning of the Constitution.

#### THE WILL TO BE PUNISHED

Thomas Green’s magnum opus employs a different organizing framework to examine one hundred years of criminal law scholarship: the free will problem, that is, the tension between belief in individual agency on the one hand and the idea that historical, environmental, and biological conditions determine that agency on the other. This is a productive approach to studying the intellectual foundation of the American state, for our understanding of the human condition—the answer to the irresolvable question, to what degree do we freely choose our actions?—has marked the boundaries of the state’s most coercive power, the power to punish. So it is that the metaphysical definition of human freedom and how it ought to restrain state power has informed the entire criminal process. The free will problem appears in nearly every major issue related to crime and punishment: the definition of crime, the validity of defenses, the role of juries and experts, the relevance of evidence, the treatment of juveniles, and sentencing and prison reform. The history of the free will problem is thus of utmost importance to anyone interested in how criminal laws and procedure have defined a person’s most elemental status as a self-determining being. In the United States, this determination has qualified the rights of criminal defendants and decided the suitability of punishment versus treatment, all of which implicated questions of belonging.<sup>25</sup>

Rather than delving into real-world consequences, *Freedom and Criminal Responsibility* offers an indefatigable exercise in intellectual history. The project, as Green has defined its scope, was to read every significant text on the free will problem written by law professors over the course of a century. The book begins with Gino Speranza, an obscure Italian lawyer in *fin de siècle* New York who acted as a “missionary to lawyers” bringing the truths of behavioral science.<sup>26</sup> It then lingers over Roscoe Pound’s

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24. GOLUBOFF, *supra* note 11, at 8.

25. See, e.g., MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003) (on how the treatment of juvenile delinquents, deadbeat fathers, and poor women in specialized municipal courts often violated their due process rights).

26. THOMAS ANDREW GREEN, *FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT* 30 (2014).

legal progressivism before proceeding seriatim, covering—to list a random selection—Sheldon Glueck, John Wigmore, Francis Sayre, Jerome Hall, Thurman Arnold, three Herberts (Wechsler, Hart, and Morris), Henry Hart, Michael Moore, Lloyd Weinreb, Sanford Kadish, Joshua Dressler, Peter Arenella, John Hill, Richard Boldt, and more.

The ambitiousness of the book, however, has its limits. In the postmodern era of critical scholarship, it is a curious choice to remain solely in the realm of written words and to describe them at face value. Green himself will not be surprised by this critique, for he “readily admit[s] that [his] account is less a history, as that term is now conventionally understood, and more a sketchbook.”<sup>27</sup> The exclusive examination of ideas worked out in scholarly monographs, without adding much context, is a methodology that historians have faulted for some time.<sup>28</sup> This essay will not rehash those criticisms and instead consider the tradeoffs.

Among the benefits is that Green’s thoughtful textual analyses provide an invaluable resource to anyone who would like to know more about what a particular legal academic wrote about criminal responsibility. But Green did not intend for his tome to serve as a reference book. Reading everything on one topic over a long timeframe has enabled Green to observe big-picture shifts in a debate that, at any particular moment, may seem to dissipate into a cacophony of views. These observations form an “impressionistic narrative” about how academic writing on the problem of free will changed over the twentieth century.<sup>29</sup>

In brief, Green identifies three moments of shift in the scholarly literature and accordingly divides the book into three parts. The first period, from the turn of the century to the 1920s, comprised the heyday of determinism. During this Progressive Era, law professors were occupied with incorporating the determinist lessons of the social sciences into a legal system that was based on the existence of free will.

Moving onto the “forgotten years” of the 1930s to the 1960s, progressivism retreated as even positivist scholars began searching for ways to reincorporate traditional ideas of free will and just deserts into the criminal process.<sup>30</sup> One example of what Green calls the “wages of conventional morality” is the “as if” proposition that did not accept free will as truth, but nevertheless treated it as a useful idea.<sup>31</sup> In other words, the justice system could exact punishment “as if” individuals exercised free will. Another example is Jerome Michael and Herbert Wechsler’s attempt to sweep general deterrence under the banner of utilitarianism.<sup>32</sup> Instead of relying on old-fashioned retribution, they justified individual punishment on its societal benefits.

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27. *Id.* at 477.

28. For criticisms, see, e.g., William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1067-72 (1997); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969).

29. GREEN, *supra* note 26, at 4.

30. *Id.* at 125.

31. *Id.* at 135, 187-88.

32. See *id.* at 170.



Finally, the 1960s to the present witnessed the emergence of “neo-retributivism.”<sup>33</sup> Rather than harking back to vengeance-based punishment, modern desert theories were based on new ideas of personhood that included a “‘right’ to punishment” (more on this below), or a compatibilist belief in both free will and determinism, or agnosticism about both.<sup>34</sup> Even in this return to retributivism, Green sees progressivism’s indelible influence on criminal legal thought that made a complete reversion to traditional understandings impossible.

As it turns out, the shifts that Green traces are not too surprising, given what we already know about Progressive Era reforms, the revival of rule-of-law values amidst midcentury fears of totalitarianism, and the war on crime followed by the War on Drugs in what one historian has called the “severity revolution.”<sup>35</sup> To be sure, it is interesting to confirm how closely abstract inquiries into individual will and responsibility have mapped onto political events. Even law professors do not reason in a vacuum, leaving one to wonder, just how determined is legal thought?

Notwithstanding the jab at legal academics, it goes to make a point about Green’s methodological choices. The “small world” of law professors appealed to Green because they played the dual roles of “truth-seeker *and* prescriptivist.”<sup>36</sup> Their legible struggle to integrate the scientific truth of determinism into a workable criminal legal system that can attribute responsibility and mete out punishment produced a great deal of source material for the intellectual historian. But this is precisely why it is disappointing that Green narrowed his inquiry to ideas found in the pages of law review articles. The role of prescriptivist plays out in the real world of constraints, or, in a word, politics. Arguably, so also the role of truth-seeker. This explains one of Green’s recurring themes that “juristic positivists rarely challenged the idea of free will head-on.”<sup>37</sup> Legal academics could not declare that free will did not exist when its existence often proved inescapable in specific cases, policy questions, and doctrinal debates. The need for compromise, or resort to avoidance, explains some aspects of the legal system we have today. One of Green’s examples is the bifurcated criminal process, in which conventional morality informs the guilt stage while scientific determinism informs the sentencing stage. These passages that discuss particular issues in the context of the free will problem—the other examples include the role of criminal juries and the insanity defense—are where the reading is most interesting. The reason goes to the heart of what draws us to history. We study the past not simply to know who said what, but to understand the “why” question.

To be sure, the “what” question is crucial to history as well, for it precedes questions of causation. Green recognizes that what he has extended is a launching pad for other historians “who will perhaps seek to contextualize and elaborate on the

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33. *Id.* at 286.

34. GREEN, *supra* note 26, at 317-18.

35. Michael Willrich, *Criminal Justice in the United States*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 195, 199, 222 (Michael Grossberg & Christopher Tomlins ed., 2008).

36. GREEN, *supra* note 26, at 3.

37. *Id.* at 169.

ideas [he has] traced.”<sup>38</sup> Indeed, *Freedom and Criminal Responsibility* offers much to mine for future studies. For instance, Green’s analysis of Herbert Morris’s “Persons and Punishment” makes no note of significant paradoxes that come to light only in social and political context.<sup>39</sup> The essay sought to prove that individuals had a “‘fundamental’ right to be treated as a person,” which included the choice to commit an offense, which, in turn, entailed a choice to be punished.<sup>40</sup> According to Green, Morris’s essay marked “a more resolute turn to what might be called neo-retributivism.”<sup>41</sup> But whence did the reemergence of retributivism come? Green writes that Morris was responding to the scientific positivism of Bertrand Russell, B. F. Skinner, Benjamin Karpman, and Karl Menninger.<sup>42</sup> But the year of its publication, 1968, suggests a larger story. It was a year overcome with what one historian describes as “rip tides,” with the assassination of Martin Luther King Jr. and Robert Kennedy, the Tet Offensive, and student protests around the world.<sup>43</sup> These currents crested during a period of sharper and broader claims to individual rights (Goluboff’s *Vagrant Nation* provides one account). Perhaps we can see Morris’s “right to punishment” of a piece with the sixties’ rights movements. If so, there is a poignant irony that the very notion of individual agency that powered the decade’s social and legal activism also served as the basis for neo-retributivism—an irony that comes to the fore in the racialized war on crime. Even more, it would expose the tensions in twentieth-century liberalism if the “right to punishment” fed the rhetoric of personal responsibility that would soon reverse the War on Poverty’s attempts to address the social roots of crime.<sup>44</sup>

Recent books suggest further twists to the plot. According to Naomi Murakawa and Elizabeth Hinton, the carceral state had its origins right at this liberal moment, when the War on Poverty included a war on crime that was based on notions of black pathology, which policymakers attributed to inequality, poverty, and urbanity.<sup>45</sup> Was Morris also responding to this determinist understanding of crime that rationalized large investments not just in social welfare but also in law enforcement? If so, then how might the history of the free will problem illuminate the contradictions in liberalism in the late twentieth century? How far did the idea of the person in criminal legal philosophy find its way into political discourse? Green hints that how enthusiastically subsequent scholars adopted Morris’s concept of human autonomy “may well have depended – it is hard to be certain about this – on the particular social justification for retributive punishment that one found persuasive.”<sup>46</sup> It remains for other scholars to sort out the strands of determinism and free will underlying the

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38. *Id.* at 477.

39. See *id.* at 317-24.

40. *Id.* at 318-19, 321.

41. GREEN, *supra* note 26, at 317.

42. *Id.* at 318.

43. TERRY H. ANDERSON, *THE MOVEMENT AND THE SIXTIES: PROTEST IN AMERICA FROM GREENSBORO TO WOUNDED KNEE* 183 (1995).

44. See DANIEL T. RODGERS, *AGE OF FRACTURE* (2011) (describing how theories about society and social utility were fractured into theories of individualism).

45. ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* (2016); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

46. GREEN, *supra* note 26, at 324.

policies that have created the justice system that we have today.

#### CRIMINAL BIOGRAPHIES

In *The Eternal Criminal Record*, James Jacobs traces the path of a criminal record, from the rap sheet created upon arrest at the local police station to the integrated, “national rap sheet” system called Triple I (for Interstate Identification Index), from court records created upon an individual’s first court appearance to entry in a commercial database. He does not stop there. Jacobs follows the record into the hands of sentencing judges, probation officers, immigration officers, social welfare workers, college admissions officers, potential landlords and employers. Expungement is difficult to procure and often comes too late. In any case, a record never really disappears in the information age. Individuals with criminal records have a harder time getting into college and finding jobs, both of which go a long way to staying out of trouble and becoming a productive member of society. They also lose various constitutional rights, including the rights to vote, serve on a jury, hold office, and bear arms. The justice system, by leaving a written trail of misdeeds, erects impenetrable “borders of belonging,” using Welke’s phrasing, and creates “second-class citizens by law,” in Jacobs’ words.<sup>47</sup>

Jacobs’ depiction of the reality confronting those with criminal records is tragic enough. But it is even more heartbreaking when we see the problem following the history of vagrancy laws, for the person with a record has become the new vagrant. The “eternal criminal record” not only exacts an additional, lasting punishment; it also creates a status that justifies harsher treatment at every step of the criminal process, beginning with extra scrutiny from law enforcement. To be sure, the eternal criminal record is not an exact replica of the vagrancy law regime, although both function similarly to comparable ends. The contribution of historical studies to legal studies lies not so much in revealing how history repeats itself. Rather, knowledge of the past can help us to see the full scope of today’s injustices. In a passage that evokes *Vagrant Nation*, Jacobs writes, “The police give greater attention to an individual listed in an organized crime, gang, or other criminal intelligence database. In deciding whether there is probable cause to arrest, the police will be more likely to detain, search, and arrest the person who has a criminal record.”<sup>48</sup> Even more reminiscent of vagrancy policing, criminal recordkeeping places a tremendous amount of power in the hands of police officers since an arrest, even if it never leads to prosecution or conviction, generates a record. As a result, the police’s discretion to make an arrest or not can be all that separates full citizens from legally and socially marginalized individuals, similar to how that same discretionary authority had segregated citizens from vagrants at midcentury. A case that Jacobs discusses is illustrative. In *Paul v. Davis*, decided in 1976, the U.S. Supreme Court ruled that the Constitution did not prohibit the police from sending local businesses an “Active Shoplifters” circular with

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47. WELKE, *supra* note 9 at 144; JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 246 (2015).

48. JACOBS, *supra* note 47, at 2-3.

the names and pictures of persons who had previously been arrested for shoplifting.<sup>49</sup> The criminal record has effectively become, as Jacobs puts it, “the modern equivalent of branding.”<sup>50</sup> It labels and discriminates with complete legal legitimacy.

Throughout the book, Jacobs discusses the justifications for the various policies that have led to this result. An obvious one is security. For example, assembling investigative and intelligence databases serves crime control needs, while making records accessible to the public is believed to protect vulnerable people like neighborhood children from past sex offenders, and elderly residents from former swindlers. According to Jacobs, both common experience and empirical data support the underlying premise that individuals act “in character.”<sup>51</sup> Apparently, past behavior usually indicates future behavior, regardless of time served in between. Interestingly, the public’s understanding of predictive criminality suggests that determinism—which in Green’s book was associated with elite legal thinkers and contrasted against “common views” of “conventional morality” based on free will—has penetrated the lay mind as well.<sup>52</sup>

Another rationale for criminal recordkeeping practices is the value of transparency at the heart of democratic government. The idea, articulated in cases like *In re Gault*, is that keeping court records confidential encourages secret proceedings, which in turn invite arbitrariness, abuse of authority, and discrimination.<sup>53</sup> Several ironies come to mind. For one thing, the fear of arbitrary judicial and administrative power that motivated public access to records in the first place has ended up redoubling the *police’s* discretionary power, in light of how a criminal record magnifies the consequences of the police’s decision to arrest. Moreover, as Jacobs notes, the “more transparent and efficient the criminal records system, the less chance an ex-offender has to blend successfully into society.”<sup>54</sup> At least for critics of over-criminalization and mass incarceration, which disproportionately harm racial minorities, current policies appear to overvalue transparency at the expense of other democratic values.

An important part of *The Eternal Criminal Record* is devoted to highlighting “the criminal record policy choices that have been made or ignored and identifi[ing] choices still open to us.”<sup>55</sup> To advance the possibility of reform, Jacobs argues that open criminal records are not an inevitable feature of open government. For support, an especially illuminating chapter offers a comparison of the accessibility of conviction records in the United States and in Spain. Although both countries value individual privacy and public courts, Spanish courts tend to choose the former and American courts favor the latter when the two values conflict, resulting in a “stark difference” between their policies.<sup>56</sup> The more important point, however, is that the Spanish judicial system still promotes the virtues and the general-deterrence goals of

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49. *Id.* at 205.

50. *Id.* at 209.

51. *Id.* at 119.

52. GREEN, *supra* note 26, at 10.

53. JACOBS, *supra* note 47, at 183.

54. *Id.* at 4.

55. *Id.* at 7.

56. *Id.* at 164.

transparency by, for example, publishing opinions with defendants' names anonymized. Private and public needs need not be seen as mutually exclusive.

One question that such comparative analyses raise is: to what extent do policy differences reflect differences in constitutional culture, which could make legal change more difficult? One distinct aspect of American constitutionalism that many scholars, including Jacobs, have identified is its strong protection of the First Amendment. In the context of criminal records, free speech poses a hurdle so high that efforts to shut down businesses that basically engage in blackmail—posting mug shots online and requiring a fee to remove them—have, in Jacobs' estimation, no certain chance of surviving a First Amendment challenge.<sup>57</sup> As another example, laws that prohibit the media from publishing the names of convicted rapists as well as their victims have run afoul of the First Amendment. Such a premium on free speech principles has Jacobs convinced that "European-type data protection, especially for criminal records, [is] inconceivable in the United States."<sup>58</sup> So, then, how is legal change possible when confronting an entrenched constitutional tradition?<sup>59</sup>

This is where history can be helpful. Goluboff's *Vagrant Nation* offers an account of a different, but just as cherished, constitutional tradition that has not only repudiated the criminalization of status; it also celebrates the inclusion of people from marginalized political, social, racial, and cultural backgrounds into a nation of rights-bearing citizens. We can—and should—invoke this tradition as well. Another lesson of histories of constitutional outsiders is to show how constitutional meanings have changed dramatically and frequently over time. The moral of these narratives is not necessarily that constitutional history devolves into political history. Legal historian Dirk Hartog once commented on the paradox of how solid and permanent constitutional rights seem, even to those seeking to destabilize others' rights while endowing their own rights claims with immanent and fixed meaning.<sup>60</sup> Both insiders and outsiders alike have taken part in a shared culture and language of constitutional rights that evolve even as they are rooted in history. Threats to this heritage come not from those who seek change, but from those who have given up and reject it altogether. Books like *The Eternal Criminal Record* that show how current policies perpetuate injustice are important to keeping alive the "constitution of aspiration."<sup>61</sup> Perhaps what change may come of it will someday be one for the history books.

We still have to reckon with the difficult realization that complete equality remains elusive despite constitutional change. Perhaps theologians and philosophers are better suited than historians to explain the persistence of injustice and suffering. Most historians pay scant attention to the constants of humanity, disclaim the idea that history repeats itself, and instead emphasize change. And yet, many find their

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57. *Id.* at 86-87.

58. Jacobs, *supra* note 47, at 177.

59. Most recently, the Second Circuit overturned a trial judge's expungement of all records of a valid criminal conviction, citing lack of jurisdiction. *Doe v. United States*, No. 15-1967, 2016 WL 4245425 (2d Cir. Aug. 11, 2016).

60. Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987).

61. *Id.* at 1016.

research topics in the pressing issues of their times. Marc Bloch spoke of this connection between past and present when he wrote, “I am a historian. Therefore, I love life.”<sup>62</sup> Although the historians are right that history cannot tell us what we ought to do today, it is a human impulse to understand our present through the past. There is truth to this impulse. History brings perspective to contemporary problems and seeks to explain their development. As much as I recommend each of the books reviewed here—two on legal history and one on contemporary law—I suggest even more enthusiastically to read all three together.

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62. MARC BLOCH, *THE HISTORIAN'S CRAFT* 43 (Peter Putnam, trans., 1954).