Strictly Taboo: Cultural Anthropology’s Insights into Mass Incarceration and Victimless Crime

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INTRODUCTION

Crime and criminals both fascinate and repel. By violating the rule of law, criminals offend that which is holy to the modern American secular society. The concept of crime thus embodies aspects of what cultural anthropologists call taboo. This paper will touch on some of the darkest and strangest areas of criminal law and the human psyche, from penal colonies to toilets, from incest and vigilante justice to sex offender registries and leper colonies, from minority mass incarceration and menstrual fluid to medical marijuana and miscegenation.

Criminal law scholarship is largely an exercise in identifying and defining problems, attempting to explain their origins, and endeavoring to offer solutions. Two of the chief controversies in criminal law today are the problem of mass incarceration and the endless cultural dialogue on victimless crime. The first looming question is “why do we have two million people in prison when mass incarceration makes so little sense in terms of crime control?” The second question is “are we justified in punishing people for acts that do not directly harm others?” Finding solutions to complicated social problems like these requires an understanding of their root causes. I suggest that cultural anthropology can shed light on the issues of mass incarceration and victimless crime through its observations about pollution and taboo. The reason that mass incarceration and victimless crime sometimes defy explanation and definition is because they are “survivals”—relics of a preindustrial worldview that do not comfortably coexist with modern notions of crime and crime control. Mass incarceration and

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victimless crime derive their existence from non-rational notions and emotions deeply-rooted in the human consciousness. Criminal violations, and certain vice-crimes in particular, can activate feelings of revulsion and rage because they assume the quasi-religious character of taboo violations.

Part I will briefly sketch the social issues of mass incarceration and victimless crime, both of which relate to the puzzle of overcriminalization. Marijuana use and consensual sex crimes will serve as exemplars of vice crimes. Part II will introduce the cultural anthropological concept of “survival,” and the “survival” of taboo in particular. Part III will synthesize the preceding parts to show how the concept of taboo can explain a great deal about the rise of mass incarceration and the persistence of victimless crime. The role of taboo in maintaining class distinctions, as well as the relationship between the metaphor of “dirt” and crime will be discussed. Part IV will explore ways in which becoming conscious of the relationship between taboo and crime control may point the way toward ameliorating the challenges of mass incarceration and victimless crime.

**PART I**

In this section, I will introduce two vexatious features of the American criminal justice system in order to use them as test cases for my thesis. My thesis is that the complex of ideas from cultural anthropology that encompasses purity, taboo, sacredness, and uncleanness has unique power to explain certain features of the criminal justice system. These taboo-related ideas are deeply rooted in the human subconscious, and understanding American culture’s own pollution taboos is an important prerequisite to dealing with the side-effects of these taboos. My test cases for exploring the power of taboo are the problem of overcriminalization and mass incarceration and the enigma of the victimless crime.

A. Mass Incarceration and Overcriminalization

The phenomenon of mass incarceration has become a key riddle in the literature of criminal justice. To state the essence of the problem, according to the Sentencing Project, in 2012, there were 2.2 million people in American prisons and jails, and another 4.8 million people on probation or parole.¹ This gives the United States the highest rate of incarceration in the

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world.\textsuperscript{2} One in every 108 Americans was in prison or jail in 2012.\textsuperscript{3} Yet, the very idea of incarceration as punishment is a relatively recent development in penology,\textsuperscript{4} and the surge in the prison population did not begin until the 1980s.\textsuperscript{5} Although the 1960s and 1970s saw an actual surge in the crime rate, that surge has since subsided.\textsuperscript{6} The spike in the American incarceration rate has far outstripped the crime rate, and can best be explained in terms of social changes and policy choices.\textsuperscript{7}

But this massive increase in incarceration is not actually making America safer and more stable. Research and scholarly consensus support the idea that increasing the length of sentences has little or no beneficial effect on the crime rate besides the short-term gains of incapacitation itself.\textsuperscript{8} Mass incarceration is actually exacerbating the social problems that contribute to criminal behavior—especially in minority communities.\textsuperscript{9} In What's Law Got to Do With It?, Sara Sun Beale asks why we would adopt policies “that so many of the experts believe to be unwise or even counterproductive?”\textsuperscript{10} I suggest that the answer lies in unconscious and irrational, yet deeply embedded ideas and feelings about crime. These will be explored in Parts II through IV.

\begin{itemize}
\item \textsuperscript{3} Id.
\item \textsuperscript{4} Martha Grace Duncan, In Slime and Darkness: The Metaphor of Filth in Criminal Justice, 68 TUL. L. REV. 725, 784 (1994). According to Martha Grace Duncan, the penitentiary emerged in the late eighteenth and early nineteenth centuries. Before that era, prisons played a relatively minor role in punishment; they served mainly as holding places prior to execution or, in the case of debtors’ prisons, as places to keep people temporarily, until they paid their creditors. Prior to 1775, prisons were rarely used, as they are today, to punish for felonies. Id.
\item \textsuperscript{6} Bruce Western & Christopher Wildeman, The Black Family and Mass Incarceration, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 221-24 (2009).
\item \textsuperscript{7} Id.
\item \textsuperscript{9} See Segall, supra note 5, at 160; Western & Wildeman, supra note 6.
\item \textsuperscript{10} Beale, supra note 8, at 24.
\end{itemize}
1. Overcriminalization

The phenomenon of mass incarceration may be symbiotic with the increasingly recognized problem of overcriminalization. Criminal codes tend to grow and not shrink. The statutory definitions of crimes tend to become broader. More human behavior is becoming criminalized, and many criminal acts can be charged under a variety of statutes simultaneously. The overall effect is to give prosecutors enormous bargaining power in plea negotiations. 11

One prominent explication of overcriminalization and its concomitant mass incarceration is found in the writings of William Stuntz. In his article, The Pathological Politics of Criminal Law, Stuntz describes the development of criminal law since the 1970s as “a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over.” 12 Criminal law has not been driving punishment, Stuntz says, but criminal punishment has been driving criminal law.13 In Stuntz’s view, “American criminal law’s historical development has borne no relation to any plausible normative theory—unless ‘more’ counts as a normative theory.”14 The surface explanation for this ratcheting, according to Stuntz, is that voters demand harsh treatment of criminals, and politicians respond with “tough on crime” policies.15 Stuntz, however, pinpoints the root cause of overcriminalization in the “deep politics” of institutional design and incentives among the three branches of government.16 Stuntz’s basic theory is that legislators acquiesce to prosecutors, who want broader crimes and overlapping crimes to increase their plea bargaining power, and judges’ hands are tied by notions of legislative supremacy.17 This institutionalized incentive for more and broader crimes is what Stuntz diagnoses as “pathological.”18

Kyron Huigens has offered a different interpretation of the overcriminalization problem. Overcriminalization, he says, “may be the distorted, mis-

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13. Id. at 506.
14. Id. at 508.
15. Id. at 510.
16. Id.
17. Id. at 528.
guided, but fundamentally legitimate expression of an expectation that the aims of the criminal law will parallel the aims of ordinary morality.” If so, he says, “then overcriminalization is not pathological.” Instead, Huigens says, it is “ordinary morality” that is pathological. Ordinary morality is pathological, according to Huigens, because it is based on the “deeply flawed” consequentialist theory of punishment.

Sara Sun Beale has attempted to explain overcriminalization (and increasingly harsh punishment in particular) in psychological terms. According to Beale, the public suffers from cognitive biases—such as overgeneralization, the availability heuristic, overconfidence, bias, and inaccurate risk assessment—that are exacerbated by depictions of crime in the media. The public thus views crime differently than scholars and places undue emphasis on condemnation as opposed to alternative rationales for punishment.

I am unable to disagree with others’ observations that the overcriminalization/mass incarceration problem emanates chiefly from the public’s moral evaluation of crime. Stuntz’s “deep politics” are also an intriguing part of the puzzle. But I suggest that cultural anthropology holds a more powerful explanation for overcriminalization than that offered by moral theory or the psychology of heuristics, although moral theories and psychological heuristics certainly play a role. In short, I believe we banish criminals en masse for quasi-religious reasons: they are ontologically unclean.

2. Disproportionate Minority Incarceration

Perhaps even more troubling than mass incarceration itself is the related issue of disproportionate minority incarceration. According to the Sentencing Project (relying on data from the Bureau of Justice Statistics):

1 in every 13 black males ages 30 to 34 was in prison in 2011, as were 1

20. Id.
21. Id. at 819-21.
22. See Beale, supra note 8.
23. Id. at 54-56.
24. Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 HARV. L. REV. 1332, 1334-35 (2008). Another theory is that of Rachel Barkow, who says that Americans are living in “punitive and unforgiving times.” Id. The “decline” of “mercy” in the criminal justice system, she says, results from “the rise of the administrative state and the key concepts of law that have emerged alongside it.” Id. In other words, “exercises of mercy,” such as executive clemency and jury nullification, “are precisely the type of unreviewable exercises of discretion that administrative law seeks to control.” Id. Barkow makes an interesting point. But I agree with Stuntz that criminal punishment is prosecutor-driven. And prosecutors retain the ability to show mercy.
in 36 Hispanic males and 1 in 90 white males in the same age group. Black males have a 32% chance of serving time in prison at some point in their lives; Hispanic males have a 17% chance; white males have a 6% chance. In 2011, the rate of prison incarceration for black women was 2.5 times higher than the rate for white women; the rate for Hispanic women was 1.4 times higher. 25

According to another analysis:

The ethnic composition of the inmate population in the United States has been inverted in the last half-century, going from about seventy percent white in 1950 to around thirty percent white today. Though blacks have been overrepresented in American prisons since the federal government began keeping records of admissions to state prisons in 1926, the extreme overrepresentation that characterizes modern prison demographics is a phenomenon of the last quarter century. This growth in the black-white inmate gap has occurred despite the arrest rates for whites and blacks remaining stable. 26

I will argue that deeply rooted ideas about crime and criminals being “unclean,” combined with similar unconscious beliefs concerning race, provide the richest explanation for overcriminalization and mass incarceration.

B. Victimless Crime

1. Vice Crime and the Harm Principle

Another topic of intense interest to the legal community is the enigmatic existence of victimless crime. Victimless crimes are as old as criminal law itself. In many of the most ancient law codes, the harshest punishments were reserved for crimes that were offenses against deity, without necessarily involving harm to an individual. 27 Under biblical law, for example, a person who did manual labor on the Sabbath day 28 or practiced sorcery or necromancy 29 was subject to the death penalty. These crimes were offenses against the Lord in that they demonstrated a lack of faith in his ability to provide his people with everything they needed. 30 The penalty for murder

26. Segall, supra note 5.
30. See JEFFREY H. TIGAY, THE JPS TORAH COMMENTARY: DEUTERONOMY 173-74
was automatic capital punishment, but this penalty was itself based on notions of humans being “the image of God.” 31 Murder was an offense against deity, and, as such, could not be recompensed through a monetary payment or substitutionary gift to the victim’s family—the common practice in other ancient Near Eastern cultures. 32

In contemporary America, most victimless crimes involve government efforts to regulate vice. “Vice” can be difficult to define. Vice scholar (and University of Chicago economist) Jim Leitzel describes vices as practices that partake both in pleasure and wickedness, in fun and iniquity. 33 Leitzel suggests that vices generally exhibit three characteristics: they suggest excess, they represent a pattern of behavior, and “the direct ill effects of vice generally are borne by the person who engages in the vice.” 34 Vices that subject the vice-indulger to criminal sanctions include such things as the use of marijuana and (in most American jurisdictions) consensual sex crimes such as incest, polygamy, and the patronage of prostitutes. Buggery laws and alcohol prohibition are examples from America’s past. In the eyes of the public, vice indulgence implicates morality.

But justifying the criminal prohibition of vice has challenged many thinkers. Although most would agree that vices should be regulated to restrict their availability to children and addicts and to control the external harms associated with vice indulgence (such as drunk driving), the law does not usually question an adult’s consumption of goods and services that involve risk (such as extreme sports and unhealthy foods). 35 Indeed, the criminal law typically operates under John Stuart Mill’s “harm principle,” which asserts that “the only purpose for which power can be rightly exercised over any [rational, adult] member of a civilized community, against his will, is to prevent harm to others.” 36 Crime and morality, according to Mill, are distinct yet overlapping spheres. In a free and secular society, the scope of criminal law must be constrained.

The importance of the harm principle in American law is illustrated by the Supreme Court’s adoption of a version of the harm principle as part of its “right to privacy” jurisprudence under the Due Process Clause of the

34. Id.
35. Id. at 10-11.
Fourteenth Amendment. In *Lawrence v. Texas*, the Court described several prior decisions that struck down state laws banning the use or distribution of contraceptives. These laws constituted consensual sex crimes, a type of vice crime, and Justice Kennedy defined the prohibitions as violations of the “privacy” and “liberty” of “free” adults in their “private conduct.” These laws were “in conflict with fundamental human rights,” especially when they applied in the “protected space” of the bedroom. The Court went on to invalidate anti-sodomy laws under a similar rationale. These anti-sodomy laws, the Court said:

[Touch] upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

“Our obligation,” said the Court, “is to define the liberty of all, not to mandate our own moral code.” Justice O’Connor concurred on Equal Protection, rather than Due Process, grounds. “Moral disapproval,” Justice O’Connor wrote, “is an interest that is not sufficient to satisfy rational basis review under the Equal Protection Clause.” “Indeed,” she says, “we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale” to justify a law that discriminates against groups of persons such as homosexuals. Justice Scalia, in dissent, asserted that the majority’s holding “effectively decrees the end of all morals legislation.” He noted that the moral basis of Texas’ anti-sodomy law was “the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.” None of these laws, he suggests, could now survive rational-basis review under *Lawrence*. Some commentators have agreed. One reading of *Lawrence*, then, is that the decision

38. *Id.* at 564.
39. *Id.* at 564-65.
40. *Id.* at 567.
41. *Id.* at 571 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)); cf. *id.* at 578 (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”) (quoting *Casey*, 505 U.S. at 847).
43. *Id.*
44. *Id.* at 599 (Scalia, J., dissenting).
45. *Id.*
46. *Id.*
47. See Michael Lindenberger, *Should Incest Be Legal?*, *Time* (Apr. 5, 2007), available at http://www.time.com/time/nation/article/0,8599,1607322,00.html; Eugene Volokh,
heralds the triumph of the harm principle over community notions of morality as the basis for criminal liability.

Although the Supreme Court has said that the moral “harm” associated with consensual sex crimes like adult sodomy is not a sufficient basis for criminal liability, the Court has not extended a similar analysis to the war on drugs. The reality is quite the opposite: in *Gonzales v. Raich,* the Court held, under the Commerce Clause, that the federal government could enforce the Controlled Substances Act against a person who was growing her own medical marijuana at home, for her own use, in conformity with California’s Compassionate Use Act. To the extent that the harm principle may serve as a limit to the reach of criminal statutes at the Supreme Court, that principle does not appear to extend to the use of marijuana. In Part III, I will attempt to explain why.

“Victimless crime” or “vice-crime” thus exists in tension with the “harm principle” that animates most of criminal law. The remainder of this section will briefly sketch two areas of criminal law in which this debate is undulating: the criminalization of marijuana use and the criminalization of some adult consensual sexual couplings.

### 2. Vice Crime: Marijuana Use

Few would disagree that drug abuse has immense potential to harm individuals, families, and societies—whether the drug is alcohol, tobacco, prescription drugs, or illicit substances. All such chemicals are regulated, and rightly so. Nevertheless, the harm principle is violated when *criminal sanctions are levied against a mere user.* The user may be harming herself, but American concepts of freedom and autonomy, like those described in *Lawrence v. Texas,* generally prohibit the criminalization of activities that merely put oneself at risk. Some people would consider the drug user criminally culpable because the user, by purchasing drugs, provides incremental support to the illicit drug trade. But again, this invisible, incremental kind of harm is not the sort that typically concerns the criminal justice system. Furthermore, *Gonzales v. Raich* illustrates that even a user that operates outside the stream of drug commerce is subject to serious criminal penalties.

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Federal law regulates drugs by placing them into a series of five “schedules.” The most serious schedule is Schedule I, which includes drugs that have “a high potential for abuse;” “no currently accepted medical use;” and “a lack of accepted safety for use of the drug... under medical supervision.”\(^49\) Marijuana is placed on Schedule I, along with such drugs as heroin, ecstasy, LSD, peyote, mescaline, and psilocybin.\(^50\) Cocaine and methamphetamine are found in Schedule II.\(^51\) Drugs can be re-scheduled by act of Congress, or by the Attorney General.\(^52\)

Many believe that marijuana has been mis-scheduled either because it does not have “a high potential for abuse” or because it has legitimate medical benefits.\(^53\) One well-known study by the Institute of Medicine found “a potential therapeutic value for cannabinoid drugs, particularly for symptoms such as pain relief, control of nausea and vomiting, and appetite stimulation.”\(^54\) Furthermore, animal studies suggest that, while marijuana has a potential for dependence and withdrawal, these tendencies are mild compared to other drugs.\(^55\) In fact, twenty states and the District of Columbia have de-criminalized the use of marijuana for medical purposes (and Maryland has reduced marijuana possession to a civil offense).\(^56\) Additionally, the Pew Research Center found that four out of ten Americans admitted to having used marijuana.\(^57\) Despite the drug’s ubiquity, despite the federal government’s clash with several states, and despite intense lobbying pressure from groups like NORML (the National Organization for the Reform

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51. Id.
53. MARIJUANA POLICY PROJECT, 2010 MARIJUANA POLICY REPORT 1 (2010), available at http://docs.mpp.org/pdfs/newsletter/MPR-1-2010.pdf (according to the Marijuana Policy Project, the American Medical Association changed its policy stance on medical marijuana, and “urges that marijuana’s status as a federal Schedule I controlled substance be reviewed with the goal of facilitating the conduct of clinical research and development of cannabinoid-based medicines, and alternate delivery methods”).
55. Watson et al., supra note 54.
of Marijuana Laws) and Americans for Safe Access, the federal government has not budged in its stringent classification of marijuana. Some possible reasons will be explored in Part III. This paper takes no stand on whether medical or recreational marijuana should be legalized. I only suggest certain reasons why the drug exists on Schedule I, with implications for those who seek future policy changes.

3. Vice Crime: Consensual Sex Crimes

Next to drug use, the most controversial vice-crimes are those that penalize certain types of consensual sex.

Although all societies recognize sexual taboos, the postindustrial west has been moving toward the decriminalization of most forms of consensual adult sex. The Supreme Court’s decision in Lawrence v. Texas, which held criminal anti-sodomy laws to be unconstitutional, is well known. In many places, including most of Europe and South America (and rural Nevada), prostitution has been legalized. Recently, a Canadian appeals court in Ontario ruled that, in light of the fact that “sex work” is legal in Canada, laws banning brothels were unconstitutional and that these laws put prostitutes in danger by denying them a safe place to do their work.

This liberalization is not happening across the board. Some forms of consensual sex remain illegal, and penalties for certain sex crimes are becoming more and more severe. Consensual adult incest remains banned in North America, Australia, the United Kingdom, and much of Europe. Polygamy remains banned in Europe and the Western hemisphere.

I have introduced marijuana use and consensual sex crimes as common exemplars of what might fall under the broad umbrella of so-called “victimless crime.” My thesis is that the persistence of victimless crime in a secular postindustrial society is best explained in terms of taboo. Western society persists in viewing certain sexual relations and certain consumable substances as “unclean.” Furthermore, this aura of uncleanness may subconsciously be associated with the “dirtiness” sometimes ascribed to lower classes and other races.

This section will briefly introduce the field of cultural anthropology and
a few relevant insights from the discipline. My thesis is that the irrational
aspects of mass incarceration and victimless crime can be explained in cul-
tural anthropological terms. The concept of taboo, in the sense of revulsion
at the unclean, is a surviving vestige from our cultural past. Crime, as a vi-
olation of the secular sacred, is unclean and generates pollution in the crimi-
nal. Society quarantines these sources of pollution en masse in prisons in
order to protect the sacred space of people’s communities from defilement.
Taboo-related notions and feelings also persist in the domains of sexuality
and race, and these taboos help explain the vehemence with which society
punishes certain vice crimes. First, this section will introduce the concepts
of survivals, taboos, and uncleanness. Then, this section will explore sever-
al aspects of taboo that are relevant to the criminal law, including taboo’s
paradoxical tendency to attract and repel, taboo’s contagiousness, taboo’s
connection to racial and class distinctions, taboo’s connection to sex, and
 taboo’s continued survival in the post-industrial world.

A. The “Survival” of the Sacred and Profane in the Modern World

Anthropology is the study of human kind, and cultural anthropology is
the study of human culture, as distinct from physical anthropology, linguis-
tic anthropology, and archaeology. Cultural anthropology seeks to sys-
tematically compare different cultures. It often draws on inductive infor-
mation gleaned from participant-observation within those cultures.

Cultural anthropology was originally closely allied with theology, and
theologian anthropologists debated whether the study of primitive cultures
proved humans to be hopelessly degenerate or whether primitive societies
were capable of advancement. The application of more systematic scien-
tific principles to the discipline eventually yielded a consensus that human
communities were capable of evolving from a primitive state of nature to
an advanced stage of civilization.

One key piece of evidence in developing this evolutionary theory was
the identification of “survivals.” Survivals were defined by their original
proponent, Henry Tylor, as “processes, customs, opinions, and so forth,
which have been carried by force of habit into the new society . . . and . . .
thus remain as proofs and examples of an older condition of culture out of

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63. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 282 (10th ed. 1993) (defining cul-
tural anthropology as concerning itself especially “with respect to social structure, language,
law, politics, religion, magic, art, and technology”).
64. See MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF
65. Id. at 13.
which a newer has evolved.\textsuperscript{66} In other words, the continued existence of primitive ideas in western culture, such as the persistence of fairy tales and superstitions, illustrates western culture’s primitive roots. Survivals are the cultural equivalents of Darwin’s “vestigial organs.” Like the appendix or the beard, they remain attached to us despite having outlived their usefulness.\textsuperscript{67}

Taboos, to the extent that they persist in postindustrial cultures, are often classified as survivals. Taboo is a Polynesian word describing how something becomes forbidden—either by being holy or unclean.\textsuperscript{68} Severe penalties are often attached to the violation of a taboo, and violations are sometimes believed to arouse the ire of supernatural beings.\textsuperscript{69}

At its most basic symbolic level, any discussion of taboo, ritual purity, holiness, sacredness, and uncleanness is really just talk about dirt. Mary Douglas begins her seminal anthropological treatise, \textit{Purity and Danger}, with this observation.\textsuperscript{70} Dirt, she says, “is essentially disorder.”\textsuperscript{71} In contrast to previous cultural anthropologists who sometimes expressed utter disdain for primitive cultures’ taboos and purity rules,\textsuperscript{72} Douglas recognizes that cleaning or avoiding dirt—that which offends against order—is not a negative movement, but a positive effort to organize the environment.\textsuperscript{73} Taboo—in terms of the relationship between the clean and the unclean—is really about ordering the universe and putting things in their proper place.\textsuperscript{74} Dirt is fine when found in the garden, but once dirt appears on my dress shirt, it must be eliminated.\textsuperscript{75} In tidying our homes, Douglas says, we are not being irrational.\textsuperscript{76} Cleaning and organizing is a creative attempt “to re-

\begin{footnotesize}
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  \item \textsuperscript{66} \textit{Id.} (quoting \textsc{Henry Burnett Tylor}, \textit{Primitive Culture} I 16 (7th ed. 1873)).
  \item \textsuperscript{67} \textsc{Mary Douglas}, \textit{supra} note 64, at 14. One early anthropologist described survivals rather negatively as “fossil[s]; meaningless petrified appendage[s] to the daily business of living.” \textsc{Douglas}, \textit{supra} note 64, at 14 (paraphrasing Robertson Smith).
  \item \textsuperscript{68} \textsc{Albert Mutsch}, \textit{Cultural Anthropology} 325 (2nd ed. 1936).
  \item \textsuperscript{69} \textit{Id.;} \textsc{Hutton Webster}, \textit{Taboo: A Sociological Study} 2-3 (Stanford Univ. Press 1942).
  \item \textsuperscript{70} \textit{See} \textsc{Douglas}, \textit{supra} note 64, at 7. John Nagle notes that Douglas was posthumously knighted for her contributions to anthropology, and that \textit{Purity and Danger} made the Times Literary Supplement’s 1995 list of The Hundred Most Influential Books Since the War. \textsc{John Copeland Nagle}, \textit{The Idea of Pollution}, 43 \textsc{U.C. Davis L. Rev.} 1, 3 n.2 (2009).
  \item \textsuperscript{71} \textsc{Douglas}, \textit{supra} note 64, at 2.
  \item \textsuperscript{72} \textit{See, e.g.,} \textsc{Mutsch}, \textit{supra} note 68, at 325 (describing taboo as “[a] most distressing and darksome feature of primitive life,” a “depressing and barbarous” area of anthropological discovery which he labels “a reign of unreason”).
  \item \textsuperscript{73} \textsc{Douglas}, \textit{supra} note 64, at 2-3.
  \item \textsuperscript{74} \textsc{Nagle}, \textit{supra} note 70, at 78 (“[P]ollution always involves boundary violations . . . .”).
  \item \textsuperscript{75} \textit{See} \textsc{Douglas}, \textit{supra} note 64, at 36-37.
  \item \textsuperscript{76} \textit{Id.} at 2.
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late form to function, to make unity of experience.” And, Douglas argues, pre-industrial notions of taboo, purity, and “the unclean” should be studied in the same light. Rituals of purity and impurity, she says, are “positive contributions to atonement.”

Purity and taboo basically concern the sometimes-paradoxical relationship between the sacred and the profane. The very word “holy” means “set apart,” and some things are set apart because of their sacredness, while others are set apart because of their uncleanness. “The sacred,” Douglas explains, is often just “a very general idea meaning little more than prohibition.” For example, among ancient Jewish priests and scribes, manuscripts of sacred writings were considered holy, but they were also spoken of as “that which defiles the hands.”

A priest or copyist who handled the written scriptures had to wash his hands afterward to cleanse himself from contact with that which was qādōš, “set apart.”

The clean and the unclean each have their proper place, and there are profound cultural barriers designed to keep them apart. The religion of the ancient Hebrews provides several well-known examples. For example, the Torah deems certain foods, like pork, to be unclean and corrupting if eaten (and sometimes if touched). The Lord commands the Israelites “to put out of the camp everyone who is leprous, or has a discharge, and everyone who is unclean through contact with a corpse . . . they must not defile their camp, where I dwell among them.”

The prototypical uncleanness was leprosy, a term for certain types of skin diseases that rendered the suf-

77. Id.
78. Id. at 2-3.
79. Id. at 8.
80. See NORMAN L. GEISLER & WILLIAM E. NIX, A GENERAL INTRODUCTION TO THE BIBLE 205 (Moody 1986).
81. THOMAS E. MCCOMISKEY, THE THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT 788 (R. Laird Harris, Gleason L. Archer, Jr. & Bruce K. Waltke, eds., Moody 1980) (referencing the definition of qādōš): The adjective qādōš (holy) denominates that which is intrinsically sacred or which has been admitted to the sphere of the sacred by divine right or cultic act. It connotes that which is distinct from the common or profane . . . . the inviolability of the spheres of the sacred and the profane forms the ground for the ethical aspects of the concept of holiness.
82. Leviticus 11:2-8, 24-45.
83. See DAVID P. WRIGHT & RICHARD N. JONES, 2 ANCHOR BIBLE DICTIONARY 204-07 (David Noel Freedman ed., 1992) (noting “discharges” included menstruation, seminal emissions, afterbirth, and abnormal genital discharges from both men and women).
84. Numbers 19:11, 16, 19; 31:19, 24 (noting contact with a corpse rendered one impure for seven days); see WRIGHT, supra note 83, at 730 (noting later rabbinic literature called human corpse contact “the father of the fathers of uncleanness”).
ferer both religiously unclean and contagious. The leper lived a life of quarantine away from the general populace. He was required to “wear torn clothes and let the hair of his head be disheveled,” and to “cover his upper lip and cry out, ‘Unclean, unclean.’”

The biblical law delineates different levels of holiness among the people. Priests lived under a more stringent code of conduct than non-priests. They wore special garments made of special materials. Men of priestly lineage who had physical defects were forbidden from performing priestly functions. A separate group of men, called the Nazirites, took a special vow of holiness, which forbade them from ever cutting their hair, touching a corpse, or tasting anything associated with wine—even the skin or seed of a grape. The Bible conceives of the Israelite nation as purer than other peoples—they are, in relation to the Gentiles, “a kingdom of priests and a holy nation.”

The ultimate taboo in the Hebrew Bible is the hērem, or “the ban.” The ban typically refers to something that so impedes God’s work it is considered accursed before God. The banned object is said to be totally devoted or surrendered to God (in a sense, hyper-holy), and therefore must be utterly destroyed. Certain wicked Canaanite cities were placed under the ban, and the Israelite armies were commanded to kill all men, women, children, and livestock, and to take no spoils of war.

B. Taboo: That Which Attracts and Repels

The biblical “ban” illustrates one interesting feature of taboo: its paradoxical ability both to repel and to fascinate and attract. Taboos can be both sickening and seductive. This attraction is the “forbidden fruit effect” captured in the biblical stories of the Creation and the Fall, found in Genesis two and three. After God warned Adam and Eve that eating the fruit of the Tree of Knowledge of Good and Evil would result in death, the talking

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86. See Leviticus 13.
87. Leviticus 13:46.
90. Exodus 28.
91. Leviticus 21:16-23.
95. Id.
snake exploited the fruit’s taboo qualities to make it more appealing to naked Eve. “The moment you eat from that tree,” the serpent says, “you’ll see what’s really going on. You’ll be just like God, knowing everything, ranging all the way from good to evil.” The same effect was described by Frank Sinatra whenever he sang “I Get a Kick Out of You.” Although the singer “know[s] it’s strictly taboo,” he “get[s] a kick” out of the person to whom he is singing. And the “kick” he gets from his taboo love affair eclipses the “kick” he gets from the vices of snorting cocaine and swilling champagne. One is left wondering whether the love would be so exciting if it wasn’t forbidden. Shakespeare’s Romeo and Juliet are the exemplars of the attractive power of forbidden love—its prohibition made the attraction all the more powerful. Certain sex crime statutes have even been labeled “Romeo and Juliet laws.”

Although few of us yearn to experience crime up close, the attractive force of the crime taboo can be seen in our television dramas, which often revolve around crime and criminals. Our entertainments never cease to be engaging when they depict criminals both breaking taboos and being caught and punished. We have dramas that take place inside of prisons. We even have a popular police procedural drama devoted entirely to sex crimes.

The simultaneous attraction and repulsion to crime mirrors taboo’s paradoxical functions of both identifying things that are holy and things that are polluted. However, the attraction/repulsion effect can exacerbate an individual’s hostility toward an unclean thing: not only is one revolted initially by the pollution, but one also experiences self-revulsion for being attracted to the unclean thing. Although crime stories in entertainment may be a “guilty pleasure,” in the real world, the combined effect of revulsion toward crime and self-revulsion for being fascinated with crime can enhance our antipathy for criminals. They become more unlike us, more like monsters. Thus, a society’s fascination with criminals can actually enhance society’s hostility toward them.

C. Contagious Pollution

As previously noted, uncleanness can transfer from one object to another. Perhaps the most provocative biblical illustration of this principle is the use of the scapegoat in Israel. Once a year, on Yom Kippur, the people

100. *Law & Order: SVU* (NBC television broadcast).
gathered together and the high priest placed his hands on a goat, transferring the people’s sins onto the animal.\textsuperscript{101} The animal was then driven into the wilderness, carrying the sins of Israel with it. The uncleanness was thus purged from the camp and transferred to some desolate, far-away place.\textsuperscript{102} Of course, “scapegoat” has become a contemporary idiom for a person who is made to bear the blame for others or to suffer in their place.\textsuperscript{103} Criminals (and especially sex and drug criminals) may be our contemporary scapegoats in a more literal sense. Polite society\textsuperscript{104} transfers its anxieties about chaos and disorder onto these violators, and then banishes them in highly ritualistic fashion, to enclosed concrete deserts outside the city limits.\textsuperscript{105}

D. Pollution, Taboo, and Social Class

Another important theme in the cultural anthropology of taboo and pollution is how taboos often serve to reinforce social boundaries. In certain cultures, in order to avoid transferring the uncleanness of a person of a lower caste onto a person of higher caste, people of different castes are not to touch each other nor are they to touch the same object. Mary Douglas recounts an example from the Havik Brahmin—a priestly caste in India:

\begin{quote}
A Havik, working with his untouchable servant in his garden, may become severely defiled by touching a rope or bamboo at the same time as the servant. . . . A Havik cannot receive fruit or money directly from an Untouchable. But some objects stay impure and can be conductors of impurity even after contact.\textsuperscript{106}
\end{quote}

The feeling that a person of a lower social caste is unclean is so extreme

\begin{enumerate}
\item \textit{Leviticus} 16:8, 10, 21-22.
\item \textit{Id.}
\item See \textsc{Merriam-Webster’s Collegiate Dictionary}, supra note 63, at 1108 (defining “scapegoat”).
\item I am using “polite society,” a euphemism for the upper class, to describe the upper—and middle—class segments of American society that wield the most political influence, and that have the least daily interaction with street crime and the criminal justice system.
\item Branding and banishing members of the “criminal class,” members of polite society, who also commit crimes, deflect the blame from themselves. Joseph E. Kennedy, \textit{Monstrous Offenders and the Search for Solidarity Through Modern Punishment}, 51 Hastings L.J. 829, 832-33 (2000). “[T]he severity revolution is best understood as an exercise in scapegoating . . . .” \textit{Id.} Society attempts “to identify the sources of social problems as external to the group.” \textit{Id.} Polite society thus make monsters out of criminals, and deals with the monsters through a suitably “ draconian system of punishment.” \textit{Id.} The concept of criminals as monsters is similar to my thesis, but I believe the metaphor of criminal as ritually unclean, polluted, and contagious more fully reflects the nuances of society’s language about crimes and society’s treatment of criminals.
\item \textsc{Douglas}, supra note 64, at 35.
\end{enumerate}
that the Havik must bathe himself if he touches the same object as an Untouchable.\(^\text{107}\)

Americans should be able to relate to the idea that different social groups have their own designated spaces, and that contact between them would communicate some type of contagion. Men are not allowed in the ladies’ room. Nonwhites used to have separate restrooms, separate drinking fountains, and separate sections on the bus or in the theater. This physical separation only makes sense if those of an allegedly inferior social class are perceived as unclean and capable of transmitting that defilement to others by mere physical contact (or intermediary physical contact through a water fountain or toilet seat). Our immediate ancestors thus were not really that different from the Havik Brahmin. Black males who violated the taboo of interracial sexual relationships could find themselves the victims of lynching. Interracial marriage was officially criminalized in some jurisdictions.\(^\text{108}\)

Sociological boundaries continue to separate the social classes in contemporary America. Without a certain amount of wealth, for example, a person will be unable to live in certain neighborhoods or attend certain clubs or schools, or use certain facilities. Some sociologists identify money as the instrument of purification and atonement in our culture. Fines and civil monetary damages have become the method whereby those who have committed offenses may be received back into society’s good graces.\(^\text{109}\) Tobacco use is becoming another powerful social taboo. As tobacco use wanes among the upper classes, it becomes increasingly associated with the lower classes.\(^\text{110}\) Hence, tobacco users (cigarette smokers in particular) are now banished from most spaces in polite urban society. One finds them huddled together in small, inconvenient outdoor spaces. Smoker circles can resemble miniature leper colonies, with the rest of polite society shielded from the corrupting effects of their unclean tobacco smoke. This type of quarantine would probably not have been politically possible if tobacco use

\(^{107}\) Id. at 33-34.


had not become a symbol of lower class status. A similar phenomenon is evolving in the field of nutrition. Fast food is becoming stigmatized in some circles. This culinary condemnation is not simply the corollary to the stigma of obesity; it also comes from fast food’s association with the underclass.\footnote{111}

E. Taboo and Sex

The most powerful and persistent taboos are those associated with human sexuality.\footnote{112} Hutton Webster’s seminal early-twentieth-century study of taboo notes that, for “primitive peoples,” “mystic dangerousness invests the organs of generation: they are a seat of occult power.”\footnote{113} The uncanny power of the genitals to generate new life brings them squarely within the matrix of the sacred, the mysterious, and the unclean. Thus, as previously noted among the ancient Hebrews, childbirth, menstruation, and other sexual discharges are harbingers of uncleanness. Often in primitive cultures women, by virtue of the menstrual cycle, are “regarded as temporarily or permanently unclean.”\footnote{114}

Taboo also serves to circumscribe certain sexual couplings. Social groups, governments, and religious institutions often codify rules and taboos, and accordingly nurture feelings of revulsion toward such practices as premarital sex, adultery, incest, polygamy, homosexuality, and non-procreative sex. One of the best-known lists of forbidden loves is found the biblical book of Leviticus, Chapter 18. Here, in a quaint Hebrew idiom, the Lord, through Moses, instructs Israelite men that they “shalt not uncover the nakedness of” their step-mothers, aunts, sisters, and so on.\footnote{115} In doing these detestable things, the Israelites would “defile” themselves and defile the land, which would then “vomit[] [them] out,” and they would be “cut off from . . . their people.”\footnote{116} Similarly, the Code of Hammurabi instructs that a man who has intercourse with his daughter is to be banished from the city.\footnote{117} The man who fornicates with his daughter-in-law is to be bound


\footnote{112. HUTTON WEBSTER, TABOO (Stanford Univ. Press 1942) (cataloging taboos in primitive cultures including chapters on “The Reproductive Life,” “Separation of the Sexes,” and “Sexual Intercourse”).}

\footnote{113. Id. at 129.}

\footnote{114. Id.}

\footnote{115. Leviticus 18:12-17.}

\footnote{116. Id. at 18:24-30.}

\footnote{117. THE ANCIENT NEAR EAST: AN ANTHOLOGY OF TEXTS AND PICTURES 169 (James B. Pritchard ed., 2011).}
and thrown into the river.\textsuperscript{118} When a man has sex with his widowed mother, both of them are to be burned.\textsuperscript{119} These punishments appear to recognize the sticky, polluted, contaminated, contagious nature of the infraction: the perpetrators are either banished from the community (quarantined) or destroyed by water or fire—both of which are agents of purification.

F. Taboo Abides

One important aspect of Douglas’s study is how she identifies the ways in which purity and taboo continue to operate in modern postindustrial societies.\textsuperscript{120} Dirty dishes are fine if they remain in the kitchen, but they do not properly belong in the bedroom.\textsuperscript{121} Shoes are not particularly unclean, but it would be taboo to place them on the kitchen table.\textsuperscript{122} Some might scoff at the Jew’s or Muslim’s aversion to pork, but that same person might disgorge if she was told she just ate dog meat.

The age of advertising incited an arms race in the war on dirt. We have gone from brooms and dustpans to vacuum cleaners to carpet steamers to Swiffers to air purification systems to steam mops to Roombas. Enormous industries supply us with aids for housekeeping and personal grooming and hygiene. Maintaining the veneer of civilization necessitates the eradication of dirt. To the extent that dirt is both unhygienic and a metaphorical moral symbol, human nature drives us to eradicate things that offend the moral and social order.

Thus, this psychological and cultural complex of taboo—of holiness and pollution—is a persistent and deeply rooted aspect of the human experience. Taboo’s power to make people feel attraction and revulsion endures, despite its modern unmooring from superstitious and religious rationales. This brings us to where I believe cultural taboo is most keenly felt in contemporary America—crime.

PART III

This section takes the concepts from cultural anthropology that was discussed in Section II, and applies them to the criminal law. The important role of “uncleanness” in criminal justice is seen in the justice system’s resemblances to religion, and in society’s language that equates crime with dirt. This conception of crime as pollution leads naturally to the mass disposal of criminals in enormous seemingly airtight containers called prisons. Additionally, the survival of taboos in the modern world explains some of

\textsuperscript{118.} \textit{Id.}
\textsuperscript{119.} \textit{Id.}
\textsuperscript{120.} See \textit{DOUGLAS, supra} note 64, at 2, 36-37.
\textsuperscript{121.} \textit{Id.}
\textsuperscript{122.} \textit{Id.}
society’s response to “victimless” drug crimes and sex crimes.

A. Criminal Law as Civic Religion

I will begin by making a rather direct comparison between crime and primitive taboo. Both crime and ritual uncleanness are dealt with through the performance of rituals that are essentially religious. Joseph E. Kennedy suggests that criminal punishment “has come to serve as a new civic religion of sorts for a society which worries about its ability to cohere.” 123 First, he says criminal punishment “serves as a communicative realm for the expression of sacred values,” what he calls “the secular sacred,” within our society. 124 Members of our diverse and fractured society gather around stories of horrible crime as “moments of communion” for a society “that no longer comes together within the walls of any one church or around any one text.” 125 If criminal justice is the new civic religion, we should expect to find within it things that are holy, things that are taboo, and methods for managing the interactions between them.

A temple or church is a place where the sacred and the profane interact. Worship occurs when and where worlds collide, which explains the importance of ritual and purity in approaching a temple. Here, sinners come into the presence of a sinless God; mortals meet immortality. People come to church in special clothes, and cleanse their consciences upon entering through the recitation of prayer, overseen by the clergy.

The modern courtroom is a similar sacred space. It is a space where people transition into, and out of, the realm of state punishment. Just as the space inside a jail or prison is unclean and the space outside is clean, a courtroom is where the two spaces converge and interact. Here, the criminals—the social lepers in their prison jumpsuits—interact in a tightly controlled environment with the clean-cut representatives of the state. Little wonder, then, that the pomp and ceremony of a courtroom so resembles what one might see in church. Where else but in a courtroom or in church will the average person see, on a regular basis, an authoritative figure in a black robe spouting Latin phrases? Where else do people sit in pews, and where else are they commanded to rise and to sit at designated times? Where else do people swear oaths, except in a church where they might mouth the creed, catechism, or confession? The judge is the priest mediating and controlling the interaction between the untouchables and the unde-filed. 126

123. Kennedy, supra note 105, at 831.
124. Id. at 834.
125. Id. at 847.
126. See SpearIt, Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment, 82 Miss. L.J. 1, 12 (2013). Although I think Professor SpearIt overstates the
Religious institutions and the criminal justice system perform overlapping social functions. This should come as no surprise, in light of anthropologist Emile Durkheim’s observation that the earliest judges and lawgivers tended to also be priests.127 Religion and criminal justice both seek to rehabilitate sinners, to deter misconduct, and to correct injustice through mechanisms such as restitution, confession, and the assignment of blame. Religion also concerns itself with punishment—whether that punishment materializes in the afterlife or in the present, in the form of penance.

B. Crime/Criminals as Dirt

If, as Mary Douglas says, taboo (in the sense of separating the sacred from the unclean) is all about dirt, then we should expect to find the language of dirt and pollution in criminal justice. Indeed, we do. “Strongly repelling and strongly attracting,” says Martha Grace Duncan, “filth serves as an apt metaphor for criminals, who likewise evoke our simultaneous hate and love, repudiation and admiration.”128 Humanity’s language about crime, dating back for millennia, is saturated with references to dirt, filth, disease, crime, mud, and slime—language which Martha Grace Duncan also characterizes as fecal. In fact, Duncan suggests, “we may be incapable of reflecting about criminals without concepts such as slime, scum, and excrement.”129 From Shakespeare to Dickens to Conan Doyle to films and television to Supreme Court opinions, Duncan catalogs “the pervasiveness of the anal metaphor for criminals.”130 Although Duncan finds that “words like pollution, refuse, garbage, and scum were commonly used to refer to [British] convicts, the dominant metaphor was stain or its closely associated term taint. . . . Stain and taint are discolorations that tend to spread.”131

contemporary relationship between Christianity and American civil religion (which includes the ritual aspects of criminal justice), his article is an important contribution to the discussion of the mass incarceration phenomenon. See also Angela P. Harris, Comments on SpearIt, “Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment,” 82 Miss. L.J. 45 (2013) (critiquing SpearIt’s article).

127. See DURKHEIM, supra note 27, at 64-65 (“[T]he law was essentially religious in origin.”).

128. Martha Grace Duncan, In Slime and Darkness: The Metaphor of Filth in Criminal Justice, 68 Tul. L. Rev. 725, 729 (1994). See generally Nagle, supra note 70. Duncan’s article and John Copeland Nagle’s article are the only two law review articles I found applying Mary Douglas’ ideas about taboo to crime. Duncan uses both cultural anthropology and Freudian psychology to explore the language of filth and banality as applied to criminals. Nagle’s article explores how, although the word “pollution” is typically used today to describe environmental pollution, the term’s pre-industrial usage was typically moral in content.

129. Duncan, supra note 128.

130. Id. at 730, 732-48, 792-97.

131. Id. at 764-65 (internal quotation marks omitted).
Duncan also describes in detail the Botany Bay project, in which Great Britain, according to Duncan’s analysis, symbolically shot out its prison population onto an island off the coast of Australia.132 This penal colony was founded on the opposite end of the globe, which, under Duncan’s analysis, represented the geographical anus of the earth—a fitting repository for the scum of the British empire.133 Duncan bolsters her thesis by describing how a successful rehabilitative project undertaken by the warden Alexander Maconochie was shut down by the British government.134 The point of Botany Bay was not to reform criminals, Duncan says. It was to flush them away or condemn them to an earthly hell.135 Duncan may have gone a bit overboard in her Freudian “anal”-ysis, but the data she compiled concerning the ubiquity of pollution metaphors for criminals is illuminating.

If crime is dirt, and criminals are dirty, then we should expect society to devise ways to contain this chaos, to sweep away the filth from the sacred space of our own neighborhoods. Thus, we have prisons.

C. Mass Incarceration: Society’s Spring Cleaning

Contemporary Americans have their own modern equivalent to the leper. The most obvious class of unclean and infectious people in our society is criminals, and prisons serve as modern-day leper colonies. The abuses and deprivations suffered by inmates in our most advanced and modern correctional institutions is well-documented.136 In a nation which so values human rights, the only explanation for our abusive treatment of inmates is that they have been de-humanized. With concrete walls, electric fences, and razor wire, polite society prevents criminals from contaminating the clean world. Even when inmates are sent out on work-release teams into the community, these prisoner-workers are usually accompanied by orange signs announcing their presence, an unmistakably-marked prison bus, and either orange or black-and-white striped jumpsuits. People are warned of their presence. It’s like a modern leper-bell.

One possible explanation for the growth of mass incarceration is that American society still feels an irrepressible need to define its purity and goodness in terms of separation from those who are alleged to be inferior in

132. Id. at 731.
133. Id. at 761-63.
134. Id. at 775-77.
135. Id. at 777.
some respect. In other words, a vestige of slavery and Jim Crow may yet survive.137 In the twenty-first century, the majority may no longer oppress the black man—at least not overtly. Instead, polite society now oppresses and segregates the criminal, perhaps often as a proxy for race or class. The oft-noted fact of disproportionate minority incarceration is consistent with this observation. Another example is the justice system’s heightened punitiveness toward crack, which was associated with poor blacks, as compared to cocaine, which was often used among urban and suburban whites. Prior to 2010, 21 U.S.C. § 841(b)(1)(B) specified the same sentence for possession of 500 grams of powder cocaine as for five grams of crack. As Abrams, Beale, and Klein point out, academic commentators have “almost uniformly attacked” this 100:1 ratio “as evidence of racial bias.”138 After much lobbying,139 the disparity has now been reduced to eighteen-to-one.140 This disparity is still quite large and difficult to explain without recourse to sociological factors.

I am not arguing that crime is an absolute proxy for race. I am merely noting the similarities between the old racial taboos and the current crime taboos, and suggesting a relationship exists. To some extent, the crime taboo may have absorbed the old race taboos. America’s current mass incarceration phenomenon is not a rational response to crime. But it is a natural response to the visceral experience of uncleanness and taboo.

Race ought not to be ignored as one ingredient in the calculus of criminals becoming the untouchables. Crime is unclean according to the sensibilities of polite society.141 Due to the infectious nature of uncleanness, this pollution infects the criminal, who becomes unclean and thence must be quarantined. First, the criminal is deemed to be socially out-of-place, like Mary Douglas’ ‘dirt.’ Second, the criminal is quarantined to avoid transmitting the uncleanness. Family members or close associates of the criminal may also, in the eyes of some people, be considered unclean by association.

Disproportionate minority contact in the criminal justice system is a well-documented phenomenon. Strong historical evidence links race-based antipathy to cultural taboo. There appears to be overlap between racism (which corresponds functionally to the caste system in other cultures) and

139. See id. at 338-47.
141. For a discussion on “polite society,” see Kennedy, supra note 105.
the segregation of criminals as unclean individuals. This brings us back to marijuana.

D. Victimless Crime as Taboo

1. Marijuana and Taboo

As is now well-known, despite the federal government’s placement of marijuana under Schedule I of the Controlled Substances Act, a burgeoning and diverse movement claims that the drug is relatively safe and effective for treating certain medical symptoms. If marijuana’s negative effects are mild compared to those of other drugs, including alcohol, then what explains the stringent prohibition? The reason has something to do with taboo. Many advocates for the legalization of marijuana make this point. For example, Bonnie’s and Whitebread’s historical study of marijuana regulation concluded that the marijuana laws passed from 1915 to 1931 were “essentially kneejerk responses uninformed by scientific study or public debate and colored instead by racial bias and sensationalistic myths.” These authors concluded that “racial prejudice” was the “most prominent” of the three major influences on the criminalization of marijuana. The use of the drug was first noted in the Southern and Western states among Mexican immigrants, and the drive to criminalize was fueled by sensationalistic media reports of “crimes allegedly committed by Mexican marijuana users.” By the 1920s, the use of marijuana was noted among “Negro, jazz musicians and ‘degenerate’ bohemian sub-cultures.”

When America’s earliest comprehensive drug laws were being developed, these associations with the alleged violent behavior of Mexicans and “Negroes” seemed to be all that was needed to rank marijuana among the banned substances, even in the absence of valid scientific data documenting the drug’s harmful effects. When scientific data has arisen to question marijuana’s Schedule I status, lawmakers have generally balked at suggestions to treat it more leniently. Doing so would be politically unpopular, it seems. Various factors are at play here, including the fact that so much energy has been invested in educating the public on the dangers of marijuana that

143. See infra note 175-80 and accompanying text.
145. Id. at 1011.
146. Id. at 1011, 1016.
147. Id. at 1035 (quoting Mandel, Hashish, Assassins and the Love of God, 2 ISSUES IN CRIMINOLOGY 149 (1966)).
backtracking even an inch would sting too much as an admission of error. But I think the visceral power of cultural taboo is even more on-point. We still don’t like marijuana because marijuana is dirty. We don’t need scientific research to know that marijuana is associated with fringe people and fringe movements that threaten social stability and social boundaries. Pot is the dirty drug used by dirty radicals and dirty hippies. Marijuana is associated with the counterculture, with communism, with protesters, dropouts, and the underclass. As such, it belongs on the outside. The drug is so unclean, we even refer to a discarded marijuana cigarette as a “roach.” Being taboo and unclean, polite society does not want marijuana polluting its homes and defiling its children. So, just as it does with sexual abuse against children (which will be discussed later) society builds a legal “hedge” around marijuana.148 Society not only criminalizes marijuana use, but also marijuana possession and the mere possession of drug “paraphernalia.”149

Marijuana, then, is more than just a dangerous chemical. It is fundamentally unclean. It is a symbol of the disintegration of social boundaries. It is a “survivor” in a world where the concept of taboo is otherwise out of fashion.

2. Sex Crimes and Taboo

Although modern society appears to have abandoned its fears of menstrual and seminal fluids, our regulation of certain sexual couplings remains vibrant. Incest is one area where taboo-related sentiment may still control the law.150 Although intercourse among siblings and between parent and child has been scientifically shown to produce a high risk of birth defects, the spawn of first cousins bear no significantly increased risk of genetic

148. In this sense, a “hedge” is a rule that exists for the express purpose of preventing the violation of another, more serious rule. The ancient rabbis famously hedged the Law of Moses with the additional rules contained in the Mishnah. The Bible’s first instance of “hedging” the law is found in Genesis 3:3, where Eve alters God’s command not to “eat” the fruit from the tree of knowledge, to “you shall not touch it.” See ROBERT ALTER, THE FIVE BOOKS OF MOSES 24, n.3 (W.W. Norton & Co. 2004).


abnormalities. Yet, the marriage of first cousins remains forbidden or regulated in thirty-one U.S. states. In eighteen of these states, first-cousin marriage counts as incest. Some states apply incest laws to non-blood relations, such as step-parents, step-siblings, and in-laws.

The enduring taboo nature of certain sexual relations in contemporary society can be observed in how the law concerning certain sex crimes is growing, while other types of sex crime are in retreat. Penalties in the United States for sex crimes against children, including statutory rape, have become more expansive and punitive in recent years, as exemplified by the rise of sex offender registry and monitoring laws, such as the Adam Walsh Act (SORNA) of 2006, Jessica’s Law(s), and Megan’s Law(s). Sex offender registry laws typically cover behavior ranging from rape (of a minor or adult), to prostitution, soliciting prostitution, incest, kidnapping, voyeurism, disseminating pornography to minors, and even “sexual misconduct” offenses, such as mooning or streaking. In 2011, the Tennessee Code was amended to enlarge the definition of sexual contact with a minor by an authority figure, a class-A misdemeanor. The crime now includes when “the defendant intentionally touches or kisses the minor’s lips with the defendant’s lips if such touching can be reasonably construed as being for the purpose of sexual arousal or gratification.” The law, as written, contains no requirement of harm or even lack of consent. Adult-child kissing can be harmful in itself in many situations. Yet here, the law, in some of its applications, has transcended the “harm principle” to perhaps embrace the “yuck factor” as a justification for criminal sanctions. Society’s intense aversion to child sexual abuse, has led us to begin criminalizing things that even hint


152. See U.S. State Laws Explained, COUSINCOPLES.COM, http://www.cousincouples.com/?page=states (last visited Oct. 24, 2014). Some of these states regulate first-cousin marriage by requiring genetic counseling, or permit or deny marriages based on the parties’ age or childbearing ability. Id.

153. See id.


157. 2011 TENN. PUB. ACTS c. 88, § 1.

158. TENN. CODE ANN. § 39-13-509 (b).
of pedophilia.

Child molestation is a horrible thing. Yet the current criminal law’s response to sex crimes against children has arguably become hyper-punitive beyond the need to punish and prevent crime, and has served to make rehabilitation more difficult. A *New York Times* article collects stories of juvenile sex offenders who, after being discovered on a sex offender registry have been “ostracized by their peers and neighbors, kicked out of extracurricular activities or physically threatened by classmates.” The same *New York Times* article traces how child sexual abuse became a “media sensation” in the 1980s, as victim advocates appeared on popular television programs like *Oprah*, making pronouncements like “sex offenders can’t be cured,” and “victims are damaged for life.” Some of these same advocates now acknowledge that such alarmist pronouncements were not “based on good research.” American sex offender registration laws are even being scrutinized as human rights abuses. Although some adult-child kissing can be harmful in itself, Tennessee’s criminalization of kissing a child can be viewed as a “hedging” of child sexual assault in which the harm is difficult to pinpoint. America hyper-punishes sex offenders and builds legal hedges around sexual contact with children because sexual misuse of minors has become the ultimate taboo. Not unjustifiably, child sexual abuse appears to sicken and revolt Americans more than any other crime.

On February 7, 2012, the evening news in Nashville was filled with images of dozens of law enforcement officers from five agencies guarding the courthouse in the sleepy rural town of Linden, Tennessee with sniper rifles, dogs, and M-16s. Why this show of force? Michael Bates, who had been accused of running an Internet child pornography ring, was being arraigned inside. Police were worried about the safety of Bates and others, and planned on implementing “a similar level of protection” throughout the case. This show of force was illustrative of a trend. This trend exists at the intersection of various modern notions of the taboo and the sacred.


160. *Id.*

161. *Id.*

162. See HUMAN RIGHTS WATCH, *supra* note 155.

163. For “hedging,” *see supra* note 148.


165. *Id.*

166. *Id.*
revolting form of crime. Third, children are held to be sacred. Their sexual innocence is especially sacrosanct. The crime of child sexual abuse is thus a perfect storm of uncleanness, of taboo, of slime, of dirt.

In contemporary America, the child molesters are the ones who elicit the type of violent revulsion and indignation that used to be reserved for witches, effeminate homosexuals, or black men who had sex with white women. Today, it is the child molesters who are most in danger of public lynching. They get the death threats. They are the ones who have to be protected in prison against the other inmates. According to one ABC News report, child sex offenders in prison “are at risk of being murdered, having their food taken, having their cells defecated and urinated in... Their life is truly a living hell.” In response to the ABC News article, one commenter invoked the language of “filth” and emotional revulsion:

I believe that Pedophiles deserve hell, and the fact that we are protecting them is offensive to every value I hold dear. They are NOT mentally ill, they are spiritually ill, and what better place to get justice than from God himself. So, I say, rid our world of such filth and put the death penalty on the table.

These observations are absolutely not intended to minimize the seriousness of sex crimes against children. I merely observe that sexuality remains a source of significant taboos in American society. As the taboos against homosexual, premarital, and nonprocreative sex recede from the mainstream, taboo-like reactions against sex with minors have intensified to a remarkable degree—almost as if to fill the vacuum. The Internet commenter quoted above exemplifies those who view child sex offenders as different from other criminals. They are not people who are sick and need treatment or people who made mistakes and need rehabilitation. They are evil.


168. Philia, PHILIA (Sept. 2006), http://philia.ws/index.htm. This website is dedicated to the prevention of violence against pedophiles (and collecting information on the phenomenon). Id. This site is actually part of a larger site dedicated to providing “resources to religious support groups for adults who are attracted to minors.” Id. The group is opposed to both child sexual abuse and violence against adults who are attracted to children. Id.

169. Michael S. James, Prison is ‘Living Hell’ for Pedophiles, ABC News (Aug. 26, 2003), http://abcnews.go.com/US/story?id=90004#.T3c5uNm8C0s. Note how the other prisoners associate the pedophilia offender with urine and feces. Id.

170. Id.
and filth and need to be destroyed.

Thus, sexuality maintains its power in the visceral world of contemporary taboo. America continues to penalize some sexual relations that do not violate the harm principle, and hyper-punishes certain crimes which violated multiple taboos, even to the point of lynching the offenders.

Racial undertones and religious undertones—both of which relate to the idea of the unclean—continue to animate victimless crimes like drug use and consensual sex crimes. These undertones are just what one would expect when these crimes are actually violations of taboos.

PART IV

The foregoing discussion has established that overcriminalization, mass incarceration, and victimless crimes can be explained as manifestations of deep-rooted notions of uncleanness in the human psyche. Criminals are lepers. Marijuana is the drug of minorities, malcontents, and dirty hippies. Even though many of the old dirty deeds are not considered dirty any more, some types of sexual couplings still make people say yuck. This yuck factor is expressed most powerfully in American society’s increasingly hostile reaction to child sex crimes. Things that are unclean threaten the purity and order of people’s lives and homes. Society imposes order on this chaos by flushing these things away, even if people’s lives are flushed away in the process.

Mary Douglas is correct that cleaning up dirt is a positive and creative activity. But to the extent that dirt metaphors dehumanize, we have a problem on our hands. Taboos may be survivals, the equivalents of vestigial organs. But when these organs interfere with good societal health, they have to be removed.

The powerful, nonrational influence of subconscious taboo helps explain why America suddenly lurched toward mass incarceration, when the trend had previously been for criminal sanctions to become more offender-centered and rehabilitative. My thesis suggests that mass incarceration, as a mechanism for pollution management, is indicative of the perceived disordering of society. The demolition of social barriers can shock the sensibilities of the majority culture—both consciously and unconsciously. This disorienting realization that things are no longer in their proper place begs for a hygienic response. The twentieth century’s civil rights movement and sexual revolution created a sense of chaos in American culture. Like a bedroom that’s been ransacked by thieves or FBI agents, the elements in

171. DOUGLAS, supra note 64, at 2-3.

172. See SpearIt, supra note 126, at 32-40 (explaining the theory that mass incarceration can be understood as a backlash against the social upheaval that accompanied the civil rights movement).
our social universe may appear to many like they are no longer in their traditional, prescribed places. As old social boundaries become more permeable, and previously taboo sexual behaviors escape from the social dustbin, it may become imperative to something deep within the human psyche to re-impose some sort of order on the social world. And tagging this order to “crime” is not irrational. If criminals epitomize the forces of social chaos (sociological “dirt”), then the automatic response would be to suck up that dirt using society’s vacuum cleaner of criminal justice, and deposit it in a sturdy, sealed container. Thus, the criminal has been transformed in the popular consciousness from a fellow human in need of rehabilitation to a dehumanized representation of social decay.

Despite the foregoing discussion, society’s revulsion toward crime—and especially sex crime—is generally a healthy thing. Taboo is not a wholly vestigial “survival”; it has its socially useful applications. Hutton Webster recognized that “a taboo system must be included among the most important of socializing forces.” Yet taboo, as a powerful psychological phenomenon, can create unhealthy side-effects. Transferring our pollution anxieties onto the people who commit crime, rather than just the crimes themselves, can dehumanize. Criminals become “the other,” the “problem”; they become dirt, slime, scum, trash. They become our scapegoats, in the original sense of the word. When people become trash, society may no longer care about their civil rights, privacy interests, or personal freedom. Society flushes them away to high-security prisons or monitors them with offender registries and tracking devices. The end result is a sprawling criminal code that makes everyone a lawbreaker, mass incarceration, and offender control techniques that ironically serve to exacerbate crime.

Combating this tendency in our deepest selves requires knowledge of the legislative, judicial, and criminal justice systems, and of the human psyche. We need a moral theory. We need to understand heuristics. We need a working knowledge of the machinations of legislators, prosecutors, and judges. But the puzzle is not complete without an appreciation for the religious, racial, and ceremonial aspects of the criminal justice system. The challenge of the crime taboo is encapsulated in the old Christian cliché: hate the sin, but love the sinner. I agree with Martha Duncan that the metaphor of crime as filth cannot be fully erased from our vocabulary. The metaphor has been a part of the human consciousness too long. The chal-

173. HUTTON WEBSTER, TABOO: A SOCIOLOGICAL STUDY 373 (Stanford Univ. Press 1942). Webster extols the “disciplinary function” of taboos: “Even if a man’s taboos relate only to himself, their observance imposes a restraint on human passions and requires the mastery of self-regarding impulses which otherwise would be irresistible.” Id. Webster also concludes that taboos, by their collective nature, help “establish and maintain social solidari-

174. Duncan, supra note 128, at 800.
lence is to keep the metaphor a metaphor, to prevent the language from shaping our perceived reality, to preserve the humanity and dignity of people who make revolting mistakes. The first step is for people in the system to self-edit their rhetoric about crime.

The United Nations’ Global Commission on Drug Policy recognized this aspect of the war on drugs in its June 2011 report. One of the Commission’s four “core principles” is that “we should end the stigmatization and marginalization of people who use certain drugs . . . and treat people dependent on drugs as patients, not criminals.” The first of the Commission’s eleven “recommendations for action” is to “break the taboo.” The Commission even commissioned a documentary film entitled “Breaking the Taboo,” which features testimonials from Presidents Bill Clinton and Jimmy Carter.

The tide may already be turning against the stigmatization of marijuana use. A 2010 Pew Research poll found that over seventy percent of Americans favor state laws allowing the prescribed use of medical marijuana.

But this statistic does not imply that the street use of marijuana is no longer considered filthy, or that illicit marijuana use is no longer associated with the underclass or rebellious elements of society. The medical use of marijuana is now being seen in a different light from recreational use, the latter of which is less likely to be legalized. The same survey that found broad public support for medical marijuana legalization found that forty-one percent of the public favored non-medical legalization, while the majority, fifty-two percent, did not.

This paper’s thesis illustrates why medical marijuana has been able to overcome the taboo, while recreational marijuana does not. The medical marijuana patient enters the temple, the quiet sacred space of the medical clinic. A ritual takes place, in which the patient interacts with the doctor, a priest-like figure who mediates the passage of the “demon weed” from the realm of the unclean to the realm of the clean. The patient may even wear a white gown, reminiscent of a baptismal robe. The priest-doctor (medicine man), by reciting the written formula known as a prescription, renders the

176. Id. at 5.
177. Id. at 10.
180. Id.
marijuana clean. Violations of taboo are always healed this way—by ritual. By passing through the liturgy of patient consultation and physician prescription, the cannabis is rendered clean and legitimate and safe for use in polite society. The drug is no longer a “roach.” It is now, in fact, the opposite of unclean. It is “medical.”

This analysis demonstrates that the marijuana taboo is not about the chemicals in pot; it is about the social meaning attached to the drug. Those who seek broader legalization will only succeed if they can change the drug’s image.

What about other victimless crimes? What about consensual sex crimes like prostitution and first-cousin marriage? Even assuming that some forms of adult consensual sex are immoral, it does not necessarily follow that the criminal law should be concerned with punishing them.\textsuperscript{181} After \textit{Lawrence v. Texas}, pure moral disapprobation (absent some legally cognizable harm)\textsuperscript{182} no longer appears to be a legally sufficient basis for criminalization.\textsuperscript{183}

Other victimless crimes may vanish the same way anti-sodomy laws did: by the battle of dueling taboos. Although homosexuality had long been perceived as a morally repugnant mental disorder, during my lifetime a convergence of innumerable educational, policy reform, and public relations campaigns\textsuperscript{184} has engendered a sea change in the public perception of homosexuals and the repeal or invalidation of anti-sodomy laws. Remarkably, as the \textit{Christian Science Monitor} noted in 2003, “surveys show public

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\item[181.] See supra Part I.B.1 for discussion of \textit{Lawrence v. Texas}. To provide one example, prostitution harms society in the way it damages families and can spread venereal disease. But the same harms exist with ordinary adultery and fornication. The Supreme Court has held, under its version of the harm principle, that these forms of sexual immorality cannot constitutionally be criminalized, although they had been in the past. It is difficult to see how the existence of a business contract between two adulterers increases the harm or transforms the harm into the sort that is cognizable under the criminal law.
\item[182.] I recognize that John Stuart Mill’s harm principle is itself a moral principle. Criminal law has always rested on moral principles. But among contemporary legal thinkers, the harm principle, which finds support from popular notions of fairness, remains vital. To return to the metaphor of criminal law as the new civic religion, the harm principle may be a key moral component of the emerging civic church.
\item[183.] See \textit{Lawrence v. Texas}, 539 U.S. 588, 589-90 (Scalia, J., dissenting) (recognizing that \textit{Lawrence’s} holding implied a rejection of “the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.” Further recognizing that post-\textit{Lawrence}, “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity . . . [are] called into question.”).
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acceptance of gays underwent nearly a generation of change between 1990 and 1995 alone. Many factors contributed to this change, including the AIDS epidemic and a series of likable celebrities coming out of the closet. Reformers targeted educational institutions at all levels, infiltrated academia and the healing professions, and relentlessly pursued positive depictions of homosexuality in the media. But perhaps the most effective maneuver was the way in which the gay rights movement subverted the taboo against homosexuality by fomenting social opprobrium against a newly-minted taboo called homophobia. Gay rights were equated with civil rights for racial minorities, and hostility toward homosexuality and homosexuals was re-branded as a new form of discrimination. Homophobia was labeled “the last prejudice,” and homophobes became the new monsters. A watershed moment was the release of the film Philadelphia, in which Tom Hanks, who had recently warmed the cockles of America’s collective heart as the lovably autistic Forrest Gump, played the part of a sympathetic gay man and AIDS patient who was bullied by his straight co-workers. This new narrative of immoral homophobes bullying harmless and lovable homosexuals succeeded in crafting a new taboo. This new taboo—homophobia—was able to establish itself so quickly because reformers linked homophobia to existing taboos against racial and gender prejudice that had been developed during the Civil Rights era.

Thus, the way to eradicate victimless crime and to tone down the hyper-punishment of other crimes may be to develop a more robust taboo against punishing people who have not harmed anyone and against overpunishing people who have. Fight anathema with anathema. As with the homosexuality/homophobia taboo switcheroo, a campaign to humanize criminals and stigmatize excessive punishment and excessive criminalization would require cooperation from educational institutions, academia, and the entertainment media. Although criminals are already often portrayed in a positive light—as romantic outlaws—the key to this reform is to establish the motif of the criminal as victim. Just as civil rights leaders have portrayed racial minorities and homosexuals as innocent victims of a bigoted, fearful, and intolerant society, criminals—especially those who committed victim-
less crimes or who have been grossly overpunished—can be portrayed as martyrs suffering at the hands of The Man. This new narrative, like the Gay Rights narrative, has a similar strategic advantage. The narrative of vice criminal (or overpunished criminal) as the victim can be connected to the existing taboo against racial prejudice because the issue is closely related to disproportionate minority sentencing.

PART V

In conclusion, the root cause of mass incarceration is cultural, psychological, and quasi-religious. Crime is dirt; criminals are dirty; filth is revolting; dirt must be purged. Large prisons are simply one of the latest technological advances in the war against dirt. Language itself links criminals with grime, and these mental subroutines will always interfere with recognizing the humanity and value in those who breach social boundaries. Taboo is as old as civilization itself, and will never disappear from popular sentiment. Taboo remains useful because the feelings of revulsion it summons prevent us from committing crimes. But taboo does its job too well when that revulsion dehumanizes others.

Because the trend of discarding criminals results from people’s deep cognitive judgments about them, this trend can only be undone through education. Taboo is functionally a religious belief, and religious beliefs only change through contact with incompatible ideas. America’s treatment of criminals is revolting, but society will only experience that revulsion when people become fully aware of the extent of the problem. Overt racism has become taboo, but the reality of disproportionate minority incarceration may not yet be fully realized or internalized. People must come to feel that overcriminalization, mass incarceration, and disproportionate minority incarceration give us dirty hands. These phenomena are themselves polluting society. Our culture is being made sicker when everyone becomes a criminal, and when a large chunk of the young male African-American population comes of age inside the walls of a prison.

Victimless crime remains incompatible with the criminal law’s commitment to the harm principle, but we can understand vice-crime’s endurance when we see it as a manifestation of taboo. Some acts may not cause direct harm, but they still feel dirty to us. We use the machinery of criminal justice to sweep that dirt out of our communities. We will always feel uneasy about people putting certain things in their bodies or having certain kind of

190. For more on “disgust theory” as it relates to criminal law, see Courtney Megan Cahill, Abortion and Disgust, 48 HARV. C.R.-C.L. L. REV. 409, 432-33 (2013).

191. The dehumanization of criminals is, in fact, a failure of religion. A key tenet of Christianity, for example, is solidarity with and caring for the incarcerated. See, e.g., Hebrews 13:3; Matthew 25:35-46; Luke 4:18.
sexual relationships. These are the oldest and most common taboos. What we can do is shape our taboos through information and education, even to the point of replacing old taboos with new, more socially useful ones. Change will come when society becomes more revolted by the idea of criminalizing vice than by the idea of the vice itself.