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Rethinking the Boundaries of “Criminal Justice”

Benjamin Levin*

THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff eds., N.Y.U. Press 2017).

I. INTRODUCTION

“[T]he criminal justice ‘system’ is not a system at all,” observed Lawrence Friedman in his 1993 history of punishment in the United States.¹ Over twenty years later, John Pfaff concluded that “[t]he criminal justice ‘system’ in the United States . . . is not a ‘system’ at all, but rather a chaotic swirl of local, county, state, and (less frequently) federal actors, all with different constituencies and incentives.”² And this framing of U.S. criminal law, enforcement, and adjudication as fragmented and balkanized has become a common theme in contemporary literature.³

* Associate Professor, University of Colorado Law School. For helpful comments and conversations, thanks to Jenny Braun, Eric Miller, Carolyn Ramsey, Scott Skinner-Thompson, and the editors of *The Ohio State Journal of Criminal Law*.

¹ LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993).

² John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013) (reviewing ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA (2011)). Cf. generally Bernard E. Harcourt, *The Systems Fallacy: From Operations Research to Contemporary Cost-Benefit Analysis: The Perils of Systems Analysis, Past and Present* (Apr. 7, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062867 [<https://perma.cc/MY6X-887X>] (tracing the use of “criminal justice system” as a concept in legal and social thought); Sara Mayeux, *The Idea of the “Criminal Justice System,”* AM. J. CRIM. L. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050263 [<https://perma.cc/E54D-DHSH>] (same).

³ See, e.g., Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313, 362 (2006) (“It is common wisdom that the criminal justice system is not a system. It is not organized and directed to seek and achieve a single goal. Rather, it is a collection of usually autonomous agencies, each pursuing its own aims.”); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 558 (2015) (“The criminal justice system lags behind most other government agencies when it comes to data tracking, for a very simple reason: the ‘system’ is not a system at all. Instead, it is a loose affiliation among independent law enforcement agencies, individual counties, local jails, and state prisons.”); Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—the Center Doesn’t*, 117 YALE L.J. 1374, 1401 (2008) (arguing that the federal system of criminal law enforcement “is not a system at all”); Gregory C. Keating, Note, *Settling Through Consent Decree in Prison Reform Litigation: Exploring the Effects of Rufo v. Inmates of Suffolk County Jail*, 34 B.C. L. REV. 163, 198 (1992) (“The Task Force [on Justice addressing the problem of prison overcrowding] concluded that the criminal justice system in Massachusetts was ‘not a “system” at all, but rather a myriad of unconnected bureaucracies lacking shared goals, adequate resources, or clear policy direction.’”).

In fact, not only have scholars critiqued the characterization of the criminal justice system as a system, but some scholars and activists have begun to challenge the use of the term “criminal justice” at all. Given the widely articulated concerns about structural inequality and the massive U.S. prison population, is “criminal justice” an accurate or appropriate description of the nation’s model of criminalization, policing, prosecution, and punishment? Framed as deep structural critiques, a new cluster of critical accounts refers simply to the “criminal system” or the “criminal legal system,” omitting any reference to justice.⁴

In a moment of crisis and reexamination for criminal law and policy, it is fair to say that even the basic terms are up for debate. While it has become popular to speak in terms of a “consensus” on criminal justice reform,⁵ it is not clear how broad and meaningful any such consensus is or even what “reform” means.⁶ Scholars have leveled increasingly damning critiques at mass incarceration, racialized policing, and the dramatic expansion in the carceral state, but they have done so from many disparate and distant corners.⁷ Armed with different methodologies, disciplinary tools, and normative and ideological commitments, they have undertaken different battles and waged different wars, sometimes joining forces, but sometimes moving at cross purposes.⁸ The carceral state may be under siege, but not by a unified army.

Enter Sharon Dolovich and Alexandra Natapoff. In their ambitious and exciting edited volume, *The New Criminal Justice Thinking*,⁹ Dolovich and

⁴ See, e.g., Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 862 (2012); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 617 (2009); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013); Andrea J. Ritchie, *The Pertinence of Perry to Challenging the Continuing Criminalization of LGBT People*, 37 N.Y.U. REV. L. & SOC. CHANGE 63 (2013); Michael Zuckerman, *Criminal Injustice*, HARV. MAG. (Sept.–Oct. 2017), <https://harvardmagazine.com/2017/09/karakatsanis-criminal-justice-reform> [<https://perma.cc/C2B7-PLJV>] (quoting civil rights attorney Alec Karakatsanis, noting that “if you say things like ‘the criminal justice system,’ people might get the sense that you’re talking about a system that does justice”).

⁵ See, e.g., Eric Holder, *Remarks at the National Press Club*, 27 FED. SENT’G REP. 297, 299 (2015); Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 126–27 (2017).

⁶ See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135053.

⁷ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

⁸ See generally Levin, *supra* note 6.

⁹ *THE NEW CRIMINAL JUSTICE THINKING* (Sharon Dolovich & Alexandra Natapoff eds., 2017).

Natapoff step back from the fray to take stock of the critiques, the moves, the methods, and the commitments that are shaping the current moment in scholarship and commentary.¹⁰ Dolovich and Natapoff do not offer a comprehensive typology of critiques, nor do they provide readers with a survey of each discipline or group of scholars that has waded into the tangle of criminal justice. Instead, the book offers a sampling of essays from leading voices in law, sociology, and criminology that each provide a range of insights and analyses.

The book is divided into five parts, with four of them structured around essays and responses: (1) "Systemic Perspectives";¹¹ (2) "Legal Doctrine in Principle and Practice";¹² (3) "Getting Situated: Actors, Institutions, and Ideology";¹³ and (4) "Humanizing the Question."¹⁴ Each of these parts contains at least one anchor essay that articulates a specific problem or approach to criminal scholarship. Each part also contains at least one response essay framed (to varying degrees) as inspired by that part's anchor essay. Only two essays truly stand alone: Dolovich and Natapoff's "Mapping the New Criminal Justice Thinking" (the introduction)¹⁵ and Mariana Valverde's "Miserology": A New Look at the History of Criminology" (which comprises the entire fifth part of the book entitled "The New (Old) Criminal Justice Thinking").¹⁶ While neither of these two essays features a formal "response," each is deeply responsive to the themes and arguments introduced throughout. They stand as responses not to a specific essay or a specific argument, but as broader responses to an amorphous body of scholars and literatures focused on the problems of the carceral state.

This Review treats the two standalone essays that bookend the volume as lenses through which to view not only the rest of the essays, but the broader moment in criminal justice thinking. Dolovich and Natapoff in their introductory "Mapping" treat the criminal system as a sprawling entity (or set of entities) that extends well beyond the traditional confines of the criminal courtroom or the other spaces of criminal law and procedure.¹⁷ That is, in thinking about criminal justice, they suggest, we must be willing to confront a vast web of institutions that are embedded in and shape the social, economic, and political framework of daily life. Where Dolovich and Natapoff provide a broad vision of what comprises the criminal system, Valverde provides a similarly broad vision of what comprises

¹⁰ See generally Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 1–30.

¹¹ See *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 31–108.

¹² See *id.* at 109–96.

¹³ See *id.* at 197–272.

¹⁴ See *id.* at 273–322.

¹⁵ See Dolovich & Natapoff, *supra* note 10.

¹⁶ See Mariana Valverde, "Miserology": A New Look at the History of Criminology, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 323–38.

¹⁷ See generally Dolovich & Natapoff, *supra* note 10.

criminological scholarship.¹⁸ Her historical account finds the roots of criminology in a range of sources—from the novels of Victor Hugo, Elizabeth Gaskell, and Émile Zola, to the theorizing of Frederick Engels.¹⁹ Just as the introduction provides a call to seek out the impact and institutions of the criminal system in all corners of society, so too does the closing essay invite us to look more widely for sources, wisdom, and authority as we consider the “New Criminal Justice Thinking.”

This Review proceeds in two Parts. Part I uses the Dolovich and Natapoff essay as a frame through which to read the book’s contributions and to highlight the growing universe of scholarship that reflects their broad conception of the criminal system. Part II uses the Valverde essay as a frame through which to question and examine sources of authority and hierarchies of knowledge in the current moment of criminal justice reform. Drawing on a growing body of scholarship that centers or elevates the voices of activists and individuals directly affected by the criminal system,²⁰ I ask to what extent Valverde’s essay might have significant presentist lessons. I conclude by asking how criminal justice scholars and scholarship does and should (or shouldn’t) interact with other accounts of the system produced by journalists, filmmakers, attorneys, and others. How might such a move lead scholars to question baseline assumptions and examine more radical solutions?

II. A BOUNDLESS CRIMINAL JUSTICE SYSTEM

The scope of the criminal system has long been a source of debate, and a survey of scholarship by legal academics does little to resolve the question of which laws, which institutions, and which actors are a part of the system.²¹ Theories-of-punishment scholars and others concerned with overcriminalization have debated the proper scope of criminal punishment at great length.²² But a

¹⁸ See generally Valverde, *supra* note 16.

¹⁹ See *id.* at 330–31.

²⁰ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3061917 [<https://perma.cc/7HZG-XWHZ>]; Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

²¹ See, e.g., JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (examining criminal law’s role in a range of disparate social institutions); Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285, 288 (2017); Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. (forthcoming 2018).

²² See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011); Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407 (2008); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to*

range of scholars increasingly has shifted away from the normative question of justified criminalization (*i.e.*, when is criminal law or criminal punishment justified) or even the descriptive question of statutory criminalization (*i.e.*, what conduct does the law proscribe) to ask a bigger descriptive question—where is criminal law operating surreptitiously or what is the importance of under-examined aspects of the system?²³ As Jonathan Simon has argued, criminal law and criminalization have become the vehicles for addressing social problems; as he puts it, the state is “governing through crime.”²⁴ While we know a great deal about the massive expansion in substantive criminal codes over the course of the last half century,²⁵ that just tells us about formal criminal law and criminalization—*i.e.*, what conduct is now the subject of criminal prohibition. But recent years have seen an increasing focus on collateral consequences, low-level offenses, and the pervasive role of criminal law in structuring the lives of marginalized populations.²⁶

Identifying the criminal system’s reach is not merely a theoretical or semantic inquiry; it also has significant implications for institutional design.²⁷ As Bernard

Overfederalization, 54 AM. U. L. REV. 747 (2005); Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1535 (1997); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967), reprinted in 7 AM. CRIM. L.Q. 17 (1968); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Victor Tadros, *Criminalization and Regulation*, in THE BOUNDARIES OF THE CRIMINAL LAW 163 (R.A. Duff et al. eds., 2010).

²³ See, e.g., *supra* note 21; Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218 (2012); Benjamin Levin, *Criminal Labor Law*, 37 BERKELEY J. EMP. & LAB. L. 43, 44 (2016); Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321 (2015); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 929 (2016).

²⁴ SIMON, *supra* note 21. See also *infra* note 97 (discussing the use of criminal law as a replacement for the welfare state and for other regulatory regimes).

²⁵ See, e.g., HUSAK, *supra* note 22, at 1–41; Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 227 (2007); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1599 (2012); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4–5 (1997).

²⁶ See, e.g., Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255 (2015); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963 (2013); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

²⁷ Indeed, as Sara Mayeux argues, characterizing a disparate set of institutions and actors as a “system” is an inherently normative project. See Mayeux, *supra* note 2, at 5–7; see also Harcourt, *supra* note 2, at 5–7.

Harcourt has argued, “practically all of the normative content [of the phrase ‘criminal justice system’] is determined by the very definition of the boundaries of the system itself. The normative work is thus already accomplished *sub silentio* by setting the scope of the system”²⁸ That insight resonates heavily with Dolovich and Natapoff. “If we are to fix the current criminal system,” they explain in their introductory essay, “we need a complete and nuanced understanding of what exactly the system *is*: What social and political institutions, what laws and policies, does it encompass?”²⁹ Dolovich and Natapoff identify “the criminal system” as the vast web of regulations, institutions, and actors.³⁰ The identification of this web with its amorphous and changing nature serves as a unifying theme for the essays that follow.

Throughout *The New Criminal Justice Thinking*, we see the various contributors struggle to define the system and its relevant actors. While none of the scholars set out to define the limits of the “criminal justice system” (or “criminal system”), the authors repeatedly reckon with the system’s scope. Issa Kohler-Hausmann suggests that we retire the trope of the law on the books versus the law in action.³¹ As she puts it, law, by its very nature, requires enforcement and rests on the decisions of the enforcers.³² We shouldn’t be surprised by the tension, she argues. Rather, we should embrace the messiness: the law *is* the law in action, and what matters is “how frontline legal actors come to understand law on the books in the first instance.”³³ Whatever laws, actors, and institutions may comprise the criminal system, we should be able to agree that the system is much more than a collection of statutory text housed in the criminal chapters of state and federal codes.

In keeping with this expansive view, the essays demonstrate a move beyond the sort of criminal law and procedure scholarship that focuses exclusively on felonies, culpability, and the realm of *malum in se*. Instead, the sociological or criminological bent of many of the essays reflects Kohler-Hausmann’s call for interdisciplinarity and, consequently, there is a focus on the operational details of the system. This shift, which is not surprising given the editors’ seminal work in sociology and criminology, yields a focus on low-level offenses and prison conditions.

²⁸ Harcourt, *supra* note 2, at 5. Harcourt suggests that much writing, thinking, and policymaking about the administration of criminal law reflects “the mistaken belief that there could be a non-normative, objective, or neutral—that is to say, scientific—Archimedean point from which we could establish the proper parameter of the figurative system in question” *Id.* at 7.

²⁹ Dolovich & Natapoff, *supra* note 10, at 1.

³⁰ *See id.* at 1–3.

³¹ *See* Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 246, 246–47.

³² *See id.* at 267.

³³ *Id.*

A. Mass Processing as Mass Incarceration

Violent crime is a major part of the system and serious violent crime needs to be reckoned with in any reform movement,³⁴ but addressing low-level crimes and the quotidian administration of justice allows for a more systemic approach or a broader engagement with the structures and institutions of criminal law.³⁵ That is, understanding mass incarceration requires confronting the mass processing of defendants that occurs in courtrooms across the country.³⁶

Natapoff, in her essay on “the penal pyramid,” focuses on low-level offenses and the different treatment reserved for different types of offenses (or classes of alleged offenders).³⁷ She asserts that the system as applied to affluent defendants is a different system from the one that governs the conduct of poor or marginalized defendants.³⁸ Natapoff claims that the bottom of the pyramid (*i.e.*, prosecutions of poor defendants, particularly for less serious crimes) is a space that cannot be described with reference to legal doctrines and formal rules. At the same time, she suggests that the top of the pyramid (*i.e.*, prosecutions of privileged defendants) actually retains the procedures, rules, and framework of constitutional criminal procedure. In Natapoff’s account, there are (at least) two different systems. Traditional, doctrinal legal scholarship might describe what goes on at the top of the pyramid, but it has little to say about the bottom. Conversely, sociological accounts that focus on social dynamics and discount legal rules provide tremendous insight into the workings of the pyramid’s base, but they may be of less use when it comes to describing white collar investigations, and the like.

Whether Natapoff is correct, as an empirical matter, that the top of the pyramid retains a respect for due process values or a more legalistic framework,³⁹

³⁴ See, e.g., JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 221–22 (2017); GOTTSCHALK, *supra* note 7, at 165–69; PFAFF, *supra* note 7; Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 621 (2011).

³⁵ There certainly is a vast body of criminal scholarship (at least in the legal academy) that does not purport to offer a systemic account or systemic critique, but merely engages with individual doctrines and their justifications. I do not mean to suggest that there is some impenetrable wall between that more traditional criminal law scholarship and the sorts of approaches adopted by the scholars in this volume. Indeed, the projects may often be complementary. I simply wish to emphasize that the more traditional model was historically less concerned with low-level crime and questions of criminal law’s administration. In contrast, much of “the new criminal justice thinking” focuses on these areas as a means of understanding the criminal system as a social, political, and bureaucratic institution.

³⁶ See generally Kohler-Hausmann, *supra* note 256 (describing the process by which courts process misdemeanor defendants).

³⁷ See Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 71.

³⁸ See *id.*

³⁹ It is worth noting that a significant amount of the literature on overcriminalization points to white-collar or regulatory offenses as a space defined by criminalization’s over-reach. See, e.g., GO DIRECTLY TO JAIL: *THE CRIMINALIZATION OF ALMOST EVERYTHING* (Gene Healy ed., 2004); Alex Kozinski & Misha Tseytlin, *You’re (Probably) A Federal Criminal*, in *IN THE NAME OF JUSTICE:*

the underlying claim is critical: the system is not monolithic. It is not simply that poor defendants have access to fewer resources. It is—as scholars have observed—that the system is not a system. The securities fraud prosecution in the Southern District of New York looks very different from the simple assault prosecution in Cook County, which looks very different from the homicide investigation in Dade County, or the material support investigation carried out online by federal agents. In each of these places and in each of these cases, there is an administrative reality—“frontline legal actors” (prosecutors, but also law enforcement officers, magistrates, judges, and defense attorneys) have developed methods for addressing, processing, and disposing of cases. If Natapoff is right, we might assume that the process accorded the SDNY securities fraud case looks more like Law (as a set of doctrines and practices that is cloaked in the language and trappings of authority and legitimacy),⁴⁰ while the process accorded the simple assault case looks like, well, something else.

Rachel Barkow and her respondents, Stephanos Bibas and Daniel Richman, speak to the need to address this sort of systemic variety and perhaps also to that “something else.” Natapoff and Kohler-Hausmann, both here and elsewhere, have described an assembly-line-style adjudicative process as the method by which courts dispose of misdemeanors, low-level crimes, and poor defendants (largely poor people of color in urban jurisdictions). Barkow’s intervention is different, but shares a similar interest in the way in which the criminal system fails to represent the ideals of an adversarial process.⁴¹ Barkow has been a vocal proponent of viewing the criminal system through the lens of administrative law and seeking administrative solutions.⁴²

LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” 43–56 (Timothy Lynch ed., 2009); Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 CRIM. JUST. 4, 4–6 (2013). One might conclude that these critiques are motivated by a libertarian, neoliberal, or “deregulatory” impulse. Nevertheless, I think that it is worth asking to what extent similar patterns of prosecutorial pressure, plea bargaining, and even aggressive or violent law enforcement also might play out at the top of the pyramid. This is not to disagree with Natapoff’s fundamental claim about different systems embedded within the system. Rather, it is to suggest that the pathologies of the system may extend quite broadly. The impact of these dynamics might be less dramatic at the top of the pyramid; but that does not mean that those dynamics are not still at work.

⁴⁰ See, e.g., EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (W.D. Halls trans., 1984) (1893); RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 59 (1981); DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* (Beard Books 2006) (1975).

⁴¹ See generally Rachel Barkow, *The Criminal Regulatory State*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 33–52.

⁴² See generally Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 717 (2005); Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 316–17 (2014); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873–74 (2009); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272–75 (2013).

While Barkow’s essay does speak to concerns about the regulatory apparatus of the criminal system and the ways in which prosecutors and courts effectively process and manage populations, the normative implications of her move to administrative law appear to be very different. Barkow—unlike Natapoff and Kohler-Hausmann—does not frame the administrative realities of the system as (necessarily) a bad thing. Unlike her respondent Stephanos Bibas, Barkow does not suggest that the system has gone awry in straying from the space of an idealized morality play.⁴³ Instead, she suggests that the system is failing to operate *effectively* as an administrative apparatus.⁴⁴ That is, taking a sort of technocratic approach, Barkow expresses concerns about the ways in which policymakers have failed to adopt evidence-based solutions and have created a system that is both destructive *and ineffective*.⁴⁵

In some sense, then, Barkow’s essay and its responses speak to an issue that appears to lurk below the surface of *The New Criminal Justice Thinking*: do scholars actually agree on what’s wrong with the system and what the system should do? I take the answer to that question to be a resounding “no.”⁴⁶ In a certain respect, the fact that a diverse collection of scholars does not agree on matters of first principles is hardly worth mentioning. It would be remarkable—if not slightly unsettling—to find fourteen authors who had thought deeply about a topic and ended up feeling the same about critical big picture questions.

Reading Barkow’s essay in the context of both the direct responses and the other essays that take a different tack is valuable in and of itself. But it is critical to appreciate the ways in which a difference in frame, in method, or—perhaps most significantly—a difference in worldview makes essays that often appear to speak in unison diverge. Do we want the criminal system to resemble an administrative (or bureaucratized) regulatory system? Or do we want the criminal system to focus on public education or displays of public morality? Do we think that a “penal pyramid” is inevitable or desirable—*i.e.*, is a rationing process a legitimate means of doing criminal law? Or should lawmakers craft legal rules and allocate resources so that every case and every defendant are treated similarly? By providing descriptive accounts of low-level criminal administration, *The New Criminal Justice Thinking* helps us appreciate the realities of the system(s), but, for the most part, it leaves unanswered these questions of values or normative commitments that might inform future scholarship.

⁴³ See generally Stephanos Bibas, *Improve, Dynamite, or Dissolve the Criminal Regulatory State?*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 61–70.

⁴⁴ See Barkow, *supra* note 41, at 45–46.

⁴⁵ See *id.* This is not to say that Barkow celebrates the administrative model. Rather, taking a pragmatic approach, she treats the regulatory model of criminal law as a fixed starting point. See generally *id.*

⁴⁶ See generally Levin, *supra* note 6.

B. Incarceration's Place in "Mass Incarceration"

Certainly, focusing on the front-end apparatus of criminal processing is essential to appreciating the realities of the criminal system. But seriously taking to heart the multiplicity and unbounded nature of the system (or non-system) requires thinking beyond the front-end administration or processing of cases. As Dolovich, Jonathan Simon, and their respondents remind us, in a moment of mass incarceration, we need to reckon with incarceration.

Dolovich has written broadly on prisons and on courts' complicity in the degradation of prison conditions and the lives of incarcerated people.⁴⁷ A powerful and recurring trope in Dolovich's scholarship has been the relative invisibility of the prison in U.S. legal scholarship and law schools: she rightly notes that prisons and prison conditions are largely absent from the core doctrinal courses on criminal law and procedure.⁴⁸ Despite massive prison populations and much-deserved hand wringing about mass incarceration, prisons and the laws that govern (or don't govern) them receive surprisingly little attention in the legal academy and in the canon of law taught in U.S. law schools. Indeed, this line of critique has gained ground in the courts. Justice Anthony Kennedy has emphasized the importance—and under-appreciation—of prison conditions as a part of the U.S. criminal system: “[t]oo often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind.”⁴⁹

In a number of doctrinal critiques, Dolovich has shown how courts' deference to prison officials effectively enhance this invisibility. The shield of judicial (and legislative) deference make prisons a lawless space, insulated and legitimated (or “kosherize[d],” to use Hadar Aviram's formulation)⁵⁰ by the legislature and the judiciary.⁵¹ Dolovich's contribution here, as well as the responses of prison law

⁴⁷ See, e.g., Dolovich, *supra* note 23; Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259 (2011); Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245 (2012); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237 (2009); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011); Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 967 (2012).

⁴⁸ See generally Dolovich, *supra* note 23.

⁴⁹ *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). Justice Kennedy does go on to note that “[t]here are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular.” *Id.* at 2210.

⁵⁰ Hadar Aviram, *Taking the Constitution Seriously?: Three Approaches to Law's Competence in Addressing Authority and Professionalism*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 9, at 155 (citation omitted).

⁵¹ See, e.g., Dolovich, *Forms of Deference in Prison Law*, *supra* note 47; Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 47.

scholars Aviram and Lisa Kerr, addresses these troubling issues involving prison officials. While Aviram focuses on questions of institutional competence in understanding that deference, Kerr focuses on the rights (or lack thereof) afforded to incarcerated mothers as a means of understanding prison social function and dysfunction. Kerr and Dolovich take a largely doctrinal tack, while Aviram advocates for the use of “systems theory.”⁵² But the effect is the same: to shed light on an otherwise dark and obscured corner of the system. That is, if we were to take the book’s introduction as a challenge, this trio of essays shows how rigorous engagement with a neglected (or, at least relatively less studied) area of the system can yield benefits.

Indeed, Jonathan Simon’s contribution, taken alongside Dolovich’s, speaks to those tangible benefits. Simon, in his essay, calls for a judicial embrace of “dignity” as a concept in regulating the system and, specifically, in regulating punishment.⁵³ Combined with Dolovich’s call to reexamine and reign in “deference,” Simon outlines not only a research agenda for scholars, but also a potential litigation strategy for advocates. I remain skeptical of the turn to dignity. “Dignity,” Jeffrey Fagan suggests in his response to Simon, functions similarly to “legitimacy” in the procedural justice literature.⁵⁴ While Fagan’s analogy is framed in approving terms, I worry that dignity and legitimacy might be susceptible to similar critiques: the concepts face concerns about indeterminacy, and they might elevate the perception of fairness over substantive fairness.⁵⁵ That is, dignity, like “rights” or “legitimacy” provides a language for describing a problem, but it does not have clear content in terms of a solution because there is not necessarily a broader societal agreement on what constitutes dignity.⁵⁶

The potential limitations of “dignity” and the possibility that it will serve a negative legitimating function are very much worth discussion. But it is impossible to ignore the importance and effectiveness of the dignity turn in recent prison litigation (and impact litigation, generally). As Simon notes, the Supreme Court (at least Justice Kennedy) has been particularly receptive to arguments

⁵² See Aviram, *supra* note 50.

⁵³ See generally Jonathan Simon, *The Second Coming of Dignity*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 275–307.

⁵⁴ Jeffrey Fagan, *Dignity Is the New Legitimacy*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 308–22.

⁵⁵ While there is an extensive procedural justice literature that treats legitimacy and perceptions of legitimacy as goals in and of themselves, there is a growing critical literature that is skeptical of legitimacy as a goal or that views procedural justice scholarship as embracing too narrow a vision of justice and social change. See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2083 (2017); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176, 2190 (2013); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 *U. CHI. LEGAL F.* 295, 298 (2016).

⁵⁶ The Court, for example, uses the same word to describe the harm suffered by an individual in solitary confinement as the harm suffered by a state when the federal government challenges its authority. See generally Leah M. Litman, *Inventing Equal Sovereignty*, 114 *MICH. L. REV.* 1207, 1252–58 (2016).

framed in the language of dignity.⁵⁷ Certainly that language was at the heart of the majority opinion in *Obergefell*, but it also served as the backbone of the Court's decision in *Brown v. Plata*⁵⁸ and has recurred in Eighth Amendment cases.⁵⁹ Like the language of rights, then, the language of dignity may have serious flaws. But, what Simon helps show us is that it may provide assistance to the attorneys and activists seeking to effect change on the ground.

III. A BOUNDLESS CRIMINAL JUSTICE LITERATURE

The question of legal scholarship's interaction with the movement(s) to reform the criminal system brings us to the second theme or set of questions that runs through *The New Criminal Justice Thinking*: what is "criminal justice thinking" and who gets to do that thinking? Reading the volume reveals not only a concern with identifying the criminal system itself, but also with identifying or conceptualizing the field. By necessity, the charge of taking the criminal system seriously in its breadth would also require a literature (or "thinking") of great breadth.

In her essay, Valverde provides such an expansive vision of criminal justice thinking. Her essay tracks the nineteenth century practitioners of "miserology"—novelists, social workers, and activists who studied or wrote about "misery."⁶⁰ Valverde in turn defines "misery" with reference to Victor Hugo's work: "Poverty, the miserologists said, has always existed, and exists still in the countryside; but misery—a hybrid of moral degradation, physical ill health, spatial marginality, and collective despair—was found only among the new urban proletariat."⁶¹ According to Valverde, these miserologists have been forgotten by or excluded from the academic discipline of criminology, but she contends that the miserologists deserve credit "as the pioneers of 'criminology.'"⁶²

Despite its interdisciplinary focus, *The New Criminal Justice Thinking* generally restricts its interdisciplinarity to the social sciences, primarily sociology. (This should come as no surprise given the importance of sociologists, or at least scholars housed in sociology departments, to the discussion of the U.S. criminal system.) The historical (or at least historicized) approach in Valverde's essay

⁵⁷ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–96 (2015); *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Indiana v. Edwards*, 554 U.S. 164, 176 (2008). For an extensive, critical account of the Court's reliance on dignity in recent decisions, see generally Litman, *supra* note 56, at 1252–58.

⁵⁸ 563 U.S. 493 (2011).

⁵⁹ See generally JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014). See also *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

⁶⁰ See Valverde, *supra* note 16, at 330.

⁶¹ *Id.*

⁶² *Id.* at 337.

provides a breath of fresh air and offers a different frame for the conversation. Her intellectual history initially feels slightly jarring—a departure both temporally and methodologically from the rest of the book. But it ends up working perfectly as a frame both for the essays in the volume and also for what the volume omits.⁶³

There are perhaps two different ways to read Valverde’s essay as framing discussions of the new criminal justice thinking: (1) we should be more open to different disciplinary or methodological approaches (*i.e.*, a cramped understanding of “criminology” and “social science” led to the marginalization of the miserologists);⁶⁴ or (2) we should be more open to voices outside of the academy (*i.e.*, the miserologists lacked the trappings and authorities of “expertise” and therefore have been forgotten and neglected by academics).⁶⁵ This Part examines those two frames in turn.

A. *Thinking Outside the Methodological Box*

The pro-interdisciplinarity frame is probably the most straightforward way to read the essay as a lens for the rest of the volume. The miserologists, particularly Hugo and Émile Zola, brought an entirely different set of tools to their analysis or treatment of crime and social subordination.⁶⁶ So, we might view the closing essay as reflecting a more open-minded take on which fields and which approaches should be a part of the “new criminal justice thinking.” Such a frame fits naturally with a volume that reflects different literatures, different methods, and different approaches to what might ostensibly be similar research questions.

Several of the essays explicitly advocate for a specific methodology as a means of confronting otherwise under-examined features of the system. Aviram argues for the application of “systems theory” as a means of moving beyond the limitations of the “legal model” and the “sociological-empirical approach” to addressing the law of the prison.⁶⁷ Aviram contends that “systems theory complements doctrinal analysis and socio-legal critique by showing how the very nature of constitutional communications limits their usefulness for criminal justice reform.”⁶⁸ Mona Lynch calls for a “*social psychology of criminal procedure*” that

⁶³ I mean “omits” in the most generous sense of the word. A book, by its very definition, is a bounded enterprise. I would have been pleased to find more writing on collateral consequences, more historical work, and at least one contribution by a non-professor author in the volume, but these ultimately are personal preferences. As noted at the outset of this Review, the literature on the criminal system, much less the literature that might be dubbed “new,” is massive, spanning disciplines and genres. It is difficult, if not impossible, to imagine a collection that could have been truly representative and could have captured the wealth of critiques and voices that define the contemporary discourse. As sins go, sins of omission in such a context seem quite venial indeed.

⁶⁴ See Valverde, *supra* note 16, at 331–32.

⁶⁵ *See id.*

⁶⁶ *See id.* at 330–31.

⁶⁷ *See* Aviram, *supra* note 50, at 155.

⁶⁸ *Id.*

would “develop a more theoretically and empirically grounded model of individuals as nested in organizational contexts.”⁶⁹ Lynch argues that this approach will help “address[] how American criminal law is made and put into action” and “emphasize the process and flow of criminal justice, as propelled by system actors, rather than just the outputs.”⁷⁰ In her response to Lynch, Priscilla Ocen endorses the social psychological approach, but offers Critical Race Theory as a methodological partner that might work in tandem with Lynch’s proposed approach.⁷¹ Meanwhile, Kohler-Hausmann’s response to Lynch essentially argues that “the organizational sociologist and the legal scholar should be friends.”⁷² Kohler-Hausmann contends that organizational sociology allows for a critically important “conceptual shift: moving from conceptualizing formal organizational rules and structure as providing immediate and clear directives for action to conceptualizing them as tools or plans that must always be made sense of and implemented in concrete action settings.”⁷³

As a heavily interdisciplinary field, the study of criminal justice benefits from these and other insights. While the book focuses largely on sociological insights, it is worth noting the impact of historians,⁷⁴ anthropologists,⁷⁵ political scientists,⁷⁶ and a range of other scholars on the growing critical literature.⁷⁷ Like the authors

⁶⁹ Mona Lynch, *The Situated Actor and the Production of Punishment: Toward an Empirical Social Psychology of Criminal Procedure*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 199, 201.

⁷⁰ *Id.*

⁷¹ See Priscilla Ocen, *Beyond Ferguson: Integrating Critical Race Theory and the “Social Psychology of Criminal Procedure,”* in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 9, at 226, 228.

⁷² Kohler-Hausmann, *supra* note 31, at 246.

⁷³ *Id.* at 248.

⁷⁴ See, e.g., MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S* (2005); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101 (2006); Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15 (2016).

⁷⁵ See, e.g., *CRIME’S POWER: ANTHROPOLOGISTS AND THE ETHNOGRAPHY OF CRIME* (Philip C. Parnell & Stephanie C. Kane eds., 2003); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 132 (2011); Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 481 (2013); Jean Comaroff, *Anthropology and Crime: An Interview with Jean Comaroff*, 33 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 133 (2010); Jennifer Devroye, *The Rise and Fall of the American Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7, 14 (2010).

⁷⁶ See, e.g., GOTTSCHALK, *supra* note 7; Amy E. Lerman & Vesla M. Weaver, *Staying Out of Sight? Concentrated Policing and Local Political Action*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 202 (2014); Vesla M. Weaver et al., *Detaining Democracy? Criminal Justice and American Civic Life*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 6 (2014).

⁷⁷ See, e.g., RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 85–86 (2007); CALEB SMITH, *THE PRISON AND THE AMERICAN IMAGINATION* (2009).

in *The New Criminal Justice Thinking*, scholars from a range of disciplines have come to critique the U.S. system of mass incarceration with its historically unprecedented prison populations and its outsized impact on marginalized communities.

In some sense, the expansive vision of the criminal system discussed in Part I necessitates such a multi-faceted approach. Imagining law as some sort of neutral science governed by unambiguous statutes and apolitical judges might allow for a single methodological approach, perhaps a doctrinal approach rooted in a hermetically sealed vision of the legal system. But, law does not and cannot operate in a vacuum. It is, by necessity imbedded in society, reliant on individual actors and their values, and heavily contingent.⁷⁸ In his seminal work on the promise of “critical legal histories,” Robert Gordon argued that scholars should attempt to offer “thickly described accounts of how law has been imbricated in and has helped to structure the most routine practices of social life.”⁷⁹ By describing the essays as “criminal justice thinking,” Dolovich and Natapoff do not signal a type of study. Rather, they signal an object of study, albeit, an amorphous and uncertain one. Juxtaposing these essays, then, represents a step in the right direction towards Gordon’s goal.

It is worth noting, though, that a sort of *intradisciplinary* scholarship might be missing from this account. That is, if we believe that the criminal system is a big socio-legal phenomenon that affects housing, employment, family law, etc., then it is important to recognize the role of (or potential for) scholars from a range of fields within the legal academy in adding to these unbounded critiques.⁸⁰ Put simply, the siloing of legal areas is a major obstacle to a necessarily holistic and sweeping critique, not to mention a more expansive vision of what reform could look like.⁸¹ Barkow’s essay and, to a lesser extent, Kerr’s, suggest a move towards this intradisciplinarity. But criminal law scholars should not only look outwards, seeking insights from colleagues in other departments. They also should consider what lessons can be learned from other legal disciplines, areas that have had and are having their own reckonings with questions of distributive justice, state power, and punitive impulses.

⁷⁸ See, e.g., JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 1–4 (1983); GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 8–13 (1999); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984); Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. FORUM 379, 387 (2016).

⁷⁹ Gordon, *supra* note 78, at 125.

⁸⁰ See, e.g., Dennis, *supra* note 21, at 288; Zatz, *supra* note 23, at 929.

⁸¹ See, e.g., Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 166–69 (2007); Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 5 (2011); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 756–57 (2010); Benjamin Levin, *Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry*, 53 B.C. L. REV. 821, 875 (2012).

B. *Thinking Outside the Institutional Box*

From an academic's perspective, one of the exciting things about the current moment in "criminal justice reform" is the significant role that academics have played in public discourse and in shaping and shifting conversation. From Michelle Alexander's *The New Jim Crow*,⁸² to books by James Forman, Jr.,⁸³ John Pfaff,⁸⁴ and Heather Thompson,⁸⁵ work by academics is cited broadly outside of the academy and is used to illustrate and support structural critiques.⁸⁶ Similarly, critiques that have percolated in the academy have gained prominence in policy circles and even in mainstream media. At the same time, the current moment in criminal justice reform has been defined by widespread public engagement, by increasing coverage in a range of (traditional and new) media outlets, and by activism and bottom-up social movements.

Valverde's essay implicitly raises the question of what (or who) we might be missing in our discussions of the criminal system. That is, who are today's miserologists? While *The New Criminal Justice Thinking* includes a range of

⁸² See generally ALEXANDER, *supra* note 7. Perhaps more than any contemporary academic work on the criminal system, *The New Jim Crow* captured the public's imagination and had measurable effects on policy makers' decisions. See *id.* at ix (Cornel West describing the book as "the secular bible for a new social movement in early twenty-first-century America"); FORMAN, *supra* note 34, at 220 (describing the D.C. City Council's hearings on marijuana decriminalization and recounting that "various witnesses [at hearings] cit[ed] *The New Jim Crow* and one city council member explain[ed] that the book had 'compelled me to be heavily engaged in the conversation.'"); GOTTSCHALK, *supra* note 7, at 3 ("[T]he contributions of Alexander's *The New Jim Crow* cannot be underestimated. No other book has been so vital in making the problem of the carceral state starkly visible to the wider public and in rallying members of disadvantaged communities and other groups to take on the project of dismantling it.").

⁸³ See FORMAN, *supra* note 34.

⁸⁴ See PFAFF, *supra* note 7.

⁸⁵ HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY* (2016).

⁸⁶ See, e.g., Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1534–36 (2016) (describing *The New Jim Crow* as "a modern classic" and observing that "*The New Jim Crow* makes a notable contribution to public discourse, shedding light on how society became trapped in the current web of overzealous punishment and then pointing the way out."); Adam Gopnik, *Learning from the Slaughter in Attica*, NEW YORKER (Aug. 29, 2016), <https://www.newyorker.com/magazine/2016/08/29/learning-from-the-slaughter-in-attica> [<https://perma.cc/466M-QLJN>]; Chase Madar, *Hard Time: Two Books Explore the Roots of the Criminal-Justice Crisis*, BOOKFORUM (Sept. 2017), http://www.bookforum.com/inprint/024_03/18449 [<https://perma.cc/9LHQ-T6S5>]; Khalil Gibran Muhammad, *Power and Punishment: Two New Books About Race and Crime*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/books/review/locking-up-our-own-james-forman-jr-colony-in-nation-chris-hayes.html> [<https://perma.cc/T6GH-NLYZ>]; Mark Oppenheimer, *'Blood in the Water,' a Gripping Account of the Attica Prison Uprising*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/books/blood-in-the-water-a-gripping-account-of-the-attica-prison-uprising.html> [<https://perma.cc/9UA4-YNDK>].

voices, some voices are (by necessity) left out. Yet, it is worth wondering which voices might have been excluded, or what voices might have an outsized role in the discourse. Notably, Valverde stresses that “miserology was almost completely an extra-university phenomenon”⁸⁷ Like the pre-Marxian “utopian socialists,” miserologists were dismissed because they did not produce the “superior form of knowledge” associated with “university-based” study.⁸⁸ “[T]he conventional history of criminology reenacts this questionable binary opposition separating science (university-based science) from social reform whenever ‘the origins’ of criminology are traced.”⁸⁹

Valverde’s essay resonates with a body of legal scholarship and movement activism that seeks to elevate or amplify the voices of individuals and communities most affected by the system. Ocen, in her essay on critical race theory, speaks to a “commitment to centering voices from the margins so as to fundamentally shift perceptions of social institutions.”⁹⁰ She “argue[s] for the explicit inclusion of external actors, such as community activists, who are often unaccounted for . . . despite their important role in driving institutional action.”⁹¹ Elsewhere, Anna Akbar similarly argues that legal scholars should “imagine with social movements,” adopting or at least taking seriously more radical and totalizing critiques that might have gained ground among marginalized populations.⁹² Central to Akbar’s “radical imagination of law” is the idea that scholars should be willing to look to language, arguments, and approaches that might not fit squarely within accepted narratives or methods.⁹³ Akbar—like Allegra McLeod⁹⁴—suggests that a part of this project might involve legal academics taking abolitionism seriously.⁹⁵ Appreciating the kinds of radical critiques that have driven the Movement for Black Lives and other activists means not treating current modes of policing, punishment, or criminal adjudication as fixed points.⁹⁶ Rather, these approaches might require a totalizing reappraisal of the system, its commitments, and its place in a broader political economy.⁹⁷

⁸⁷ Valverde, *supra* note 16, at 331. She states that this point “cannot be emphasized enough.” *Id.*

⁸⁸ *Id.* at 332.

⁸⁹ *Id.*

⁹⁰ Ocen, *supra* note 71, at 228.

⁹¹ *Id.*

⁹² Akbar, *Toward a Radical Imagination of Law*, *supra* note 20, at 7–8, 21.

⁹³ *See generally id.* at 7–8.

⁹⁴ *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015). *See also* ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 22–39 (2003); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 11 (rev. ed. 2015).

⁹⁵ *See* Akbar, *Toward a Radical Imagination of Law*, *supra* note 20, at 57–72.

⁹⁶ *See id.*

⁹⁷ *See id.* While Akbar frames this intervention in more radical terms and grounds it in the language of social movement activists, it is worth noting that other scholars have recognized the ways

I hardly mean this analysis as a criticism of the scholarly project or a suggestion that university-affiliated scholars, armed with a specific methodological toolkit and subject-matter expertise, have little to add. Rather, I mean to suggest that—taking Valverde’s essay as a frame—we might imagine a more fluid line between the criminal justice thinking in the academy and the criminal justice thinking in courtrooms, community centers, and other spaces outside of universities. That thinking might emphasize different priorities or advocate for different types of solutions than the ones familiar to some scholars. Or, we might be more willing to embrace interventions from different corners of the academy or from approaches that, at first blush, might appear foreign or unfamiliar. The centering of outsider voices might take different forms—from ethnographies and interviews,⁹⁸ to the study of sources other than cases, statutes, and “official” documents.⁹⁹

Of course, we might be concerned about too fluid a line or about an uncritical embrace of any voices or thinking about the system. Different writing has different audiences and different arguments have different goals. The nuance that defines the essays of *The New Criminal Justice Thinking* would be a poor fit in a work of legal advocacy or in a document exhorting activists to join a movement. And that nuance is critically important to check, sharpen, or shift critiques and narratives that might take hold in public discourse. It certainly is possible that popular accounts or emotionally resonant events could yield a flawed “Standard Story” that misstates facts or misdirects attention.¹⁰⁰ That said, perhaps we might

in which the study of criminal law and the criminal system cannot be divorced from a reckoning with structural flaws baked into the U.S. political economy. Douglas Husak has argued that “a comprehensive theory of criminalization require[s] nothing less than a theory of the state.” HUSAK, *supra* note 22, at 120. Bernard Harcourt, Nicola Lacey, Loïc Wacquant, David Garland, and a range of other scholars have leveled critiques of the criminal system as a pathological feature of neoliberalism, capitalism, or the U.S.’s particular political economy. BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 40–44 (2011); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 170–73 (2008); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 1–3 (2009). These critiques raise important questions not only normatively, but also descriptively: how have scholars justified these institutions or how has conventional thinking about criminal justice been embedded in the same ideologies and political economies that yielded this moment of crisis? One way of reading Akbar, alongside Ocen and against the backdrop of Valverde, is that looking outside of the academy or elite social spaces might be a helpful first step in addressing these deeper questions.

⁹⁸ See generally Bell, *supra* note 55 (using interviews to shed light on perceptions of police among heavily policed people of color).

⁹⁹ See generally Akbar, *Toward a Radical Imagination of Law*, *supra* note 20, at 2 (comparing documents produced by the Movement for Black Lives to documents from the Ferguson Report prepared by the Department of Justice). Indeed, it is worth noting that many of these approaches are (in one form or other) well-established academic methodologies in their own right, even if they are minority approaches in U.S. law schools. That is, they represent a mode or modes of scholarly treatment, rather than a rejection of scholarly treatment.

¹⁰⁰ See PFAFF, *supra* note 7, at 8.

read Valverde as a cautionary tale: regardless of discipline, training, or method, we might be tempted to reenact the “questionable binary” that would elevate one form of critique or study over another. Maybe that binary has its place. But Valverde’s essay should serve as a warning and a reminder that “criminal justice thinking” can take many forms. We neglect those forms and those voices at our peril.

IV. CONCLUSION

Recognizing the unbounded nature of the criminal system is deeply unsettling and presents challenges for commentators with diverse disciplinary, methodological, ideological, and political commitments. But this boundlessness also invites an unbounded set of critiques—a boundless critical literature committed to rethinking the values, assumptions, and institutions that have yielded our current moment of mass incarceration. Elsewhere, I have critiqued the failure to recognize and respect differences among those voices—just because many scholars agree that the system is broken doesn’t mean they agree about what the system should do or how to fix it.¹⁰¹ And, those disagreements—whether first-order or more fine-grained—are critically important to the reconstructive process. Despite its essay/response format, *The New Criminal Justice Thinking* does not tee up those disagreements. At times, the fault lines begin to show, but for the most part, the book operates more as a vehicle for putting arguments and analyses on the table, rather than for duking it out over the course and meaning of criminal justice reform. Some of those fights are already underway, and, to the extent they aren’t, they will arise inevitably. In the meantime, it is a tremendous service to the rest of us—regardless of our vision of “criminal,” of “justice,” and of “reform”—to be able to go to a single place to hear from the scholars who have helped lay the groundwork for the current moment of struggle and of possibility. The question remains “what is to be done?”

¹⁰¹ See Levin, *supra* note 6.