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Redistributing Justice

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REDISTRIBUTING JUSTICE

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This Article surfaces an obstacle to decarceration hiding in plain sight: progressives' continued support for the carceral system. Despite increasingly prevalent critiques of criminal law from progressives, there hardly is a consensus on the left in opposition to the carceral state. Many left-leaning academics and activists who may critique the criminal system writ large remain enthusiastic about criminal law in certain areas—often areas where defendants are imagined as powerful and victims as particularly vulnerable.

In this Article, we offer a novel theory for what animates the seemingly conflicted attitude among progressives toward criminal punishment—the hope that the criminal system can be used to redistribute power and privilege. We examine this redistributive theory of punishment via a series of case studies: police violence, economic crimes, hate crimes, and crimes of gender subordination. It is tempting to view these cases as one-off exceptions to a general opposition to criminal punishment. Instead, we argue that they reflect a vision of criminal law as a tool of redistribution—a vehicle for redistributing power from privileged defendants to marginalized victims.

Ultimately, we critique this redistributive model of criminal law. We argue that the criminal system can't redistribute in the egalitarian ways that some commentators imagine. Even if criminal law somehow could advance some of the redistributive ends that proponents suggest, though, our criminal system would remain objectionable. The oppressive and inhumane aspects of the carceral state still would be oppressive and inhumane even if the identity of the defendants or the politics associated with the institutions shifted.

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INTRODUCTION

We are living in a moment of reckoning for U.S. criminal policy. In recent years, as police brutality has gone viral and the drug war has been exposed as ineffective and racist, many progressive politicians,[1] academics,[2]

[1] *See, e.g.*, Nathalie Baptiste, *Democrats Say They Want to End Mass Incarceration. There's No Way They'll Do What's Needed to Get There.*, MOTHER JONES (Sept. 20, 2019), https://www.motherjones.com/crime-justice/2019/09/democrats-say-they-want-to-end-mass-incarceration-why-dont-they-address-the-real-solution [https://perma.cc/SF3L-CABP].

[2] See , e.g., Jamelia Morgan, Responding to Abolition Anxieties: A Roadmap for Legal Analysis, 120 MICH. L. REV. 1199 (2022); I. India Thusi, Policing Is Not a Good, 110 GEO. L. J. Online (2022); Kate Levine, Police Prosecutions and Punitive Instincts, 98 WASH. U.L. REV. 997 (2021); Jocelyn Simonson, Police Reform through a Power Lens, 130 YALE L. J. 778 (2021); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020); Dorothy E. Roberts, Foreword: Abolition Constitutionalism, 133 HARV. L. REV. 1 (2019); Amna Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. LAW REV. 405 (2018); Benjamin Levin, The Consensus Myth in Criminal Justice Reform, 117 MICH. L. REV. 259, 293 (2018); Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 U.C.L.A. L. REV. 1156 (2015), and others. The recent literature on abolition has begun to draw criticism from prominent legal scholars. See, e.g., Rachel Barkow, Promise or Peril?: The Political Path of Prison Abolition in America, 58 WAKE FOREST L. REV. (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4232267; Daniel C. Richman, The (Immediate Future of Prosecution), FORDHAM URBAN L. J. (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4378890.

organizations,[3] organizers,[4] and voters[5] have aligned themselves with moves toward decarceration or police and prison abolition. Increasingly, many progressive commentators criticize mass incarceration and treat criminal legal institutions as objectionable responses to social problems.[6] Nevertheless, these anti-carceral commitments often have their limits. Despite the prevalence of increasingly radical rhetoric on the left, many progressives continue to make exceptions and favor criminal solutions when presented with particularly sympathetic victims or particularly unsympathetic defendants.[7]

In this Article, we aim to describe and explain why many on the political left (broadly conceived) who generally favor decarceration selectively turn to the carceral state to solve social problems.[8] This kind of selective reliance on the carceral system is widespread in today's progressive movements,[9] and it has not been addressed adequately by the current scholarly literature. We believe that confronting this reliance on criminal law is essential to any movement that aims to take widespread decarceration or abolition of the carceral state seriously. Critics must grapple with what social movements and commentators on the left continue to find promising about criminal law.

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[3] Marty Johnson, *ACLU Pressing Biden to Stick to Promise of Decarceration with New Ad Buy*, Hill (Jan. 28, 2021, 9:00 AM), https://thehill.com/homenews/news/536238-aclu-pressing-biden-to-stick-to-promise-of-decarceration-with-new-ad-buy [https://perma.cc/H7UN-DR4G].

[4] *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73, STAN. L. REV. 821, 821 (2021) ("The Ferguson and Baltimore rebellions, combined with organizing by the Movement for Black Lives (M4BL) and a growing constellation of abolitionist organizations, have made anti-Blackness, white supremacy, and police violence core issues on the liberal-to-left spectrum and redefined the terms of policy debate."); Mariame Kabe, *Yes, We Mean Literally Abolish the Police,* N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/6GCY-QEQS].

[5] *See, e.g.*, Sarah Figgatt, *Progressive Criminal Justice Ballot Initiatives Won Big in the 2020 Election*, CAP (Nov. 19, 2020), https://www.americanprogress.org/article/progressive-criminal-justice-ballot-initiatives-won-big-2020-election[https://perma.cc/WL2T-WST8] (noting numerous decarceral ballot initiatives that passed in 2020).

[6] *See* Aya Gruber, *The Critique of Carceral Feminism*, 34 YALE J.L. & FEMINISM 55, 59 (2023) ("For all their differences, the radical institutional and moderate mass-incarceration critiques both frequently feature a cast of conservative villains who progressives would abhor even if mass incarceration never existed: corporate exploiters, unscrupulous prosecutors, and moral majoritarians. Moderate critics focus on more recent actors like Lee Atwater and Ronald Reagan, while radical institutionalist critics often highlight the bad actors of antiquity, including Jim Crow racists and anti-labor industrialists.").

[7] *See infra* notes 23-27 and accompanying text.

[8] Of course, it's tricky to define "the left," just as it is to define "progressives," "liberals" or any other ideological camp or label. We acknowledge some imprecision and slippage in our usage throughout—these definitional questions are very important, but they also require more space than this Article affords. Throughout, our use of labeling relies on our sense of how commentators and organizations are *perceived* or how they *perceive of themselves*.

[9] *See* GRUBER, *supra* note 2 at 169 (arguing that young feminists will "carry a mattress [symbolizing a desire for a male sexual assaulter to be incarcerated] one day and raise a fist at a Black Lives Matter protest the next.").

Our claim is that critical accounts tend to miss the possible explanatory power of distribution (or redistribution) as a way of understanding why otherwise-decarceral progressive activists might favor criminalization in certain situations.[10] Viewed in this light, criminal legal institutions might be justified as a vehicle for redistributing power and resources to marginalized victims and away from defendants based on wealth, race, gender, sexuality, or other privileged societal positions.

A redistributive justification for criminalization or punishment suggests that criminal law is desirable because it will create—or strengthen—the right social arrangement.[11] For progressives, that means criminal law would be a social good when it benefits marginalized defendants and harms powerful defendants or defendants advancing regressive ends.[12] Criminal law and punishment might be worth supporting if they *distribute* the right way.[13]

To be clear, we aren't arguing that this is a good justification or that we would support criminal punishment because of its redistributive potential. We wouldn't, and we don't.[14] Rather, our suggestion is that understanding pro-criminalization arguments as reflecting a redistributionist logic should help us make sense of apparent contradictions in academic and public discourse.

We are not the first to suggest that progressives have a role in the making and maintaining of the carceral state. Indeed, several authors in the past decade have addressed this as an historic phenomenon.[15] Nor is this the first piece of scholarship to highlight critically the individual carceral issues—police violence, economic crime, hate crime, and gender-subordinating crime—we describe in this Article.[16] What we hope to contribute is a theory for *why* so many

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[10] In this respect, we hope to contribute to a larger conversation about the role of distributive arguments in legal thought and practice. *See* Paulo Barrozo, *Critical Legal Thought: The Case for A Jurisprudence of Distribution*, 92 U. COLO. L. REV. 1043, 1052 (2021).

[11] *See* Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1161 (2018) (articulating an "antisubordination theory of criminal justice"). *Cf.* Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 225 (2020) (comparing contemporary "progressive punitivsm" to Maoist approaches to criminal law).

[12] *See infra* Part I.

[13] See infra Part I.

[14] See generally infra Part III.

[15] *See, e.g.,* GRUBER, *supra* note 2 (carceral feminism throughout U.S. history); JAMES FORMAN, JR. LOCKING UP OUR OWN (2017) (contribution of Black community to War on Drugs); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME (2016) (Lyndon Johnson's war on poverty provided language and ideology for war on crime); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT (2014) (liberals contribution to explosion of the penal system in late twentieth century).

[16] On police brutality, *see, e.g.,* DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 270 (2022) (discussing progressive desire to sees brutal police incarcerated); Levine, *Police Prosecutions*, *supra* note 2; Aviram, *supra* note 11, at 224 (also discussing hate crime and economic crime); Kate Levine, *Police Suspects*, 16 COLUM. L. REV. 1197 (2016); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016). On economic

progressives still cling to criminal law despite all of the evidence that we as a society have over-relied on police and prisons for far too long.[17] For scholars and activists committed to dismantling the carceral state, it is essential to grapple with these difficult areas and to recognize what does (or doesn't) make them difficult.

We do not seek to suggest how progressives might solve social problems like systemic racism, gender subordination, or income inequality through non-carceral means. It remains to be seen whether the rich and increasing literature describing alternatives to the carceral state can ameliorate the pain and fury generated by crimes against marginalized people.[18] Instead, our project here is to surface and theorize the continued progressive commitment to criminal law, and to suggest that it is should be recognized as a significant barrier to decarceral projects.[19] If progressives and decarcerationists are to be allies, they must see the fault lines in their alliance.

Further, we argue that the criminal system can't do the redistributive work that some commentators imagine. Not only do we doubt that incarcerating brutal police officers will stop police brutality, but we also doubt that it will empower communities harmed by the police. Similarly, we doubt that incarcerating employers who steal their workers' wages will redistribute wealth or remedy economic inequality.[20] Indeed, these carceral responses often serve to legitimate structural inequality by *appearing* to redistribute justice without doing anything about the larger systemic inequities that remain.[21] Perhaps even more troubling, these redistributive attempts actually may lead to more policing, prosecution, and punishment for the same marginalized communities that progressives hope to help.[22]

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crime, *see* Pedro Gerson, *Less is More?: Accountability for White-Collar Offenses Through an Abolitionist Framework*, 2 STETSON BUS. L. REV. 145 (2022); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 548–57 (2019); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429 (2021). On hate crimes, *see e.g.,* Kate Levine *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225 (2022); Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CAL. L. REV. 489, 504 (2022). On gender-subordinating crime, *see e.g.,* Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. 755, 824–25 (2023); I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449 (2021).

[17] To be clear, though, we also don't contend that redistribution is the only justification offered by progressives. Indeed, many scholars and activists appear to justify their selective preference for criminal law in terms of retribution, expressivism, or deterrence. *E.g.*, Tuerkheimer, *supra* note 11; *see also* note 29, *infra*, and accompanying text.

[18] *See, e.g.,* Monica C. Bell, Katherine Beckett, Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291 (2021); Allegra McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1622 (2019); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 11 (2019).

[19] *See infra* Part I.

[20] *See infra* Part III.

[21] *See infra* Part III.B.3.

[22] *See infra* Part III.A.

Our argument unfolds in three Parts. In Part I, we trace the limits of anti-carceral arguments and highlight the ways in which opposition to mass incarceration and overcriminalization often is heavily circumscribed—exceptions and carve-outs abound. We describe a unifying theme in many of these progressive criminalization projects—a focus on redistribution. We examine competing conceptions of what redistribution means in this context (*e.g.*, power-shifting, resources reallocation, signaling social inclusion and valuation). In Part II, we offer a series of case studies to illustrate how progressive and left academics, activists, and law-makers have justified punitive policies on redistributive grounds. Specifically, we examine the cases of police violence, economic crimes, hate crimes, and crimes of gender subordination. Finally in Part III, we step back and offer a critical take on redistributive arguments for criminal law. We argue that many redistributive arguments for criminal law rest on speculative empirical claims that lack real-world support. Further, we contend that the criminal system can't redistribute in the egalitarian ways that some commentators imagine—criminal legal institutions are fundamentally regressive and tied to subordination. And, even if they somehow could advance some of the redistributive ends that proponents suggest, our carceral system would remain objectionable. That is, the oppressive and inhumane aspects of the carceral state still would be oppressive and inhumane even if the identity of the defendants or the politics associated with the institutions shifted.

I. REDISTRIBUTIVE CRIMINAL LAW

Despite increasingly prevalent critiques of criminal law on the left, there is hardly a consensus in opposition to criminalization and punishment. Indeed, even many of the most vocal critics of the criminal system remain enthusiastic about criminalization, prosecution, and punishment in certain areas. As Doug Husak argues,

> Even those members of the public who tend to agree that the criminal justice system punishes too many persons with too much severity can be heard to complain when leniency is afforded to certain kinds of offenders. The best candidates to illustrate this phenomenon depend on one's political ideology. Among liberals, justice is said to be denied when police are not punished for using excessive force against unarmed minorities, when prosecutors are reluctant to indict white collar criminals, or when sexual offenders escape their just deserts. . . . In these cases and others, the public demands justice—by which I gather they mean some form of punishment. [23]

[23] Douglas Husak, The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law, 23 NEW CRIM. L. REV. 27, 51-52 (2020).

Particularly in left and progressive circles, then, we often see "carve outs"[24] or "exceptional"[25] treatments of certain defendants or classes of crime. Mass incarceration represents injustice on a grand scale, commentators argue. But that doesn't stop continued, often discrete, advocacy for criminal legal responses to the actions of powerful defendants or harms associated with subordination across lines of gender, race, sexuality, ability, and class.

It's tempting to view these carve outs as one-off exceptions to a general opposition to criminal punishment—a random assortment of areas in which anti-carceral commitments give way, or where principle falls in the face of inconsistency (or even hypocrisy). But, such a view misses much.[26] It takes for granted that these "exceptional" cases actually are exceptions to a general rule. And it allows us to leave important questions unanswered: How deep do anti-carceral commitments go? How should academics and activists navigate potential tensions between abolition and progressivism or other left political projects?

Failing to take seriously the theme or through-line that unites these areas of "carceral progressivism" allows for a limited vision of our anti-carceral moment. And, importantly, it obscures the fraught and contingent relationship between left/progressive politics and anti-carceral commitments. That is, these carve-outs may reflect hypocrisy much less than a specific vision of the criminal system—one that exists to advance certain left or progressive ends.[27]

In this Part, therefore, we identify a specific style of argument and unifying theme among many of these carve outs or progressive exceptions—an attempt to redistribute from relatively powerful defendants to weaker/marginalized victims.[28] Certainly, there are carve outs and progressive criminalization projects that don't reflect this approach or might be justified better in other terms.[29] But we see this redistributive frame as an approach with a lot of purchase, particularly in many contemporary left-leaning circles.

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[24] *See, e.g.*, GRUBER, *supra* note 2, at 6 (describing these areas of progressive support for criminal law as "carve outs"); Aya Gruber, *#metoo and Mass Incarceration*, 17 OHIO ST. J. CRIM. L. 275, 279 (2020) (same).

[25] *See* Levin, *Mens Rea Reform, supra* note 16, at 548–57 (identifying this phenomenon as "carceral exceptionalism").

[26] See Ely Aharonson, "Pro-Minority" Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique, 13 NEW CRIM. L. REV. 286, 288 (2010) ("Relatively little systematic work has been undertaken to probe the underlying ideas and common institutional features shared among these criminalization regimes.").

[27] To be clear, hypocrisy or inconsistency certainly also might be at work in some cases.

[28] What exactly it is that criminal law distributes (power? resources? Social status?) isn't always clear or consistent across different movements. *See generally* Part II, *infra*.

[29] For example, some progressive carve-outs might reflect a simple faith in criminal law's deterrent effect. Proponents of harsh "white-collar" enforcement sometimes argue that those defendants are uniquely inclined to engage in cost-benefit analysis that responds to criminal enforcement. *See, e.g.*, Terri Gerstein & David Seligman, *A Response to "Rethinking Wage Theft Criminalization"*, ON LABOR (Apr. 20, 2018), https://onlabor.org/a-response-to-rethinking-

A. A Theory of Redistribution

Conventional accounts of criminal law assert that punishment is justified by a handful of "traditional" theories—deterrence, incapacitation, rehabilitation, and retributivism.[30] For decades, as prison populations expanded and racial disparities in enforcement grew harder to ignore, many "legal and academic commentators . . . continued their long engagement in jurisprudential debates about the purposes of punishment."[31] Such traditional accounts "speak the language of morality, of rational actors, or of impersonal, ostensibly apolitical institutional design. In short, they are a poor fit for structural accounts of criminal law as a political creature, an engine of social control, or a tool of redistribution and oppression."[32] Critical accounts, therefore, increasingly contend that these justifications hardly explain the U.S. carceral state. Instead, critics argue that criminalization and criminal punishment reflect much more nefarious logics—social control, cruelty, and the desire to protect the powerful and subordinate socially marginalized groups.[33]

But, pointing to social control and subordination as the core logics of criminal law leaves an important question unanswered: Why do left and progressive activists and advocates committed to egalitarian social projects still favor criminal law in some cases? How do people who often see criminal law as unjustified come to justify criminal solutions to social problems? A totalizing critique of criminal law might make sense if one were to reject criminal law and punishment in all instances. But, how can we make sense of the continued,

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wage-theft-criminalization/; Melissa Sanchez & Matt Keifer, *Wage Theft Victims Have Little Chance of Recouping Pay in Illinois*, CHI. REP. (Aug. 9, 2017), https://www.chicagoreporter.com/wage-theft-victims-have-little-chance-of-recouping-pay-in-illinois/ ("One of the most celebrated aspects of the reforms elevated repeat offenses to felonies, a change that advocates hoped would be a deterrent."); SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 161 (Alfred Blumstein & David Farrington eds., 2002).

[30] *See* Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1204 (2012).

[31] Id.

[32] Levin, *Wage Theft*, *supra* note 16 at 1476.

[33] *See, e.g.*, LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 1–3 (2020); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 3-22 (1990); GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 108 (Russell & Russell 1968) (1939); Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 125 (2021); Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109 (2013); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 786 (2005) ("Behind the façade of justifications, the criminal justice system is an institution of social control oriented to the management of dysfunctions inherent in capitalist society—unemployment, poverty, and the like—that, if left unchecked, tend to produce untenable levels of social disorder and deviance.").

selective preference for criminal law among academics and activists who deploy such critiques?[34] Our claim is that the continued allure of criminal law demonstrates that critical accounts need to grapple with what social movements and commentators on the left find promising about criminal law.

Understanding criminal law and criminal legal institutions as in some way distributive isn't unprecedented.[35] For example, Aya Gruber has argued that U.S. criminal legal institutions can be understood not in traditional retributive or consequentialist terms, but as reflecting distribution on a sort of pain/pleasure axis:

> The distributive theory of criminal law holds that an offender ought to be punished, not because he is culpable or because punishment increases net security, but because punishment appropriately distributes pleasure and pain between the offender and victim. Criminal laws are accordingly distributive when they mete out punishment for the purpose of ensuring victim welfare.[36]

Viewed through this lens, distribution operates as a foundational logic of criminal law and punishment.[37] And, other scholars have suggested that criminal law should serve to make victims whole or shift *something* from defendants to victims.[38] Indeed, some version of this claim underpins expressive theories of

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[34] There's something to be said here, as well, about the mismatch between radical rhetoric and radical commitments. Or, put differently, it's worth recognizing that as radical critiques and language become more popular, the likelihood that they will be coopted or deployed by people unthinkingly increases. As opposing mass incarceration has entered the pantheon of socially acceptable progressive views or beliefs, it becomes quite probable that people using anti-carceral language aren't doing so as a result of some well-considered political project, but just because it's understood as the right thing to do. *See, e.g.*, Ruth Wilson Gilmore & Craig Gilmore, *Restating the Obvious*, *in* INDEFENSIBLE SPACE: THE ARCHITECTURE OF THE NATIONAL INSECURITY STATE 141, 150 (Michael Sorkin, ed. 2008); Benjamin Levin, *After the Criminal Justice System*, WASH. L. REV. (forthcoming 2023).

[35] *See, e.g.*, PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 2–7 (2008) (arguing for "distributive principles" as important to the design of criminal legal institutions); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 1–2 (2010) (arguing that criminal law operates to distribute pleasure and pain).

[36] Gruber, *A Distributive Theory, supra* note 35 at 1–2. As Gruber goes on to note, even though this distributive approach pervades the criminal system, it's not at all clear "whether current victim-based laws actually meet their purported distributive goals. Although touting victim-centered reforms serves prosecutors' and policymakers' interests, it is another question altogether whether such reforms actually improve victims' lives." *Id.* at 73.

[37] This move differs from a focus on distribution that treats criminal law as justified on non-distributive terms and implicates distributive questions only in resolving how much to punish individual defendants. *Cf.* Robinson, *supra* note 35, at 2 ("This book assumes that one can justify the *institution* of punishment and examines how one might justify one or another *distribution* of punishment." (emphasis in original)).

[38] *See, e.g.*, Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 111, 112, 148 (2004) (arguing for the inclusion of a more restorative

punishment that focus on how punishment signals society's valuation of victims and defendants.[39]

Unlike Gruber, our focus isn't necessarily on pleasure and pain. But, we see her articulation of a "distributive theory of criminal law" as helpful to understanding contemporary progressive claims about criminal law as redistributive. The emphasis on how criminal law distributes reflects a broader realist and critical orientation that recognizes that law *is* its effects—what matters is how the law operates on the ground (as opposed to what the law is on the books or in theory).[40] Assessing legal rules and institutions is not simply a matter of formal logic or precise readings; it is a question of determining who benefits or who suffers as a result of each arrangement, decision, or interpretation. Therefore, in examining redistributive arguments for criminal law, we borrow from a broader set of critical literatures that deploy "distributional analysis" as a framework for assessing the desirability of legal rules or policies.[41]

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process focused on victims); Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 896–97 (2019).

[39] This vision finds perhaps its clearest articulation in the work of legal philosopher Jean Hampton. *E.g.*, Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CAN. J.L. & JURIS. 23, 36-41 (1998); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661-85 (1992). *Cf.* Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 218 n. 56 (2003) (describing Hampton as the "leading proponent of [this] expressive theory of punishment"); Stephen P. Garvey, *Punishment As Atonement*, 46 UCLA L. REV. 1801, 1837 (1999) ("This theory, which I follow Jean Hampton in calling the 'annulment' theory, sees punishment as the institutional means by which the organized community condemns wrongdoing and vindicates the value of those members whom other members have wronged." (footnote omitted)). Hampton argues that punishment "is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity." Hampton, *Correcting Harms*, *supra* note 39, at 1686. "It is because these [criminal] actions 'say' something that diminishes the victims' value that we wish to inflict punishment that says something in return in order to insist on the victim's true (equal) value, and deny the wrongdoer's claim to elevation." Hampton, *Punishment, Feminism, and Political Identity*, *supra* note 39, at 39. *Cf.* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 849–52 (2001) (describing and critiquing these arguments in the context of intimate partner violence).

[40] *See, e.g.*, LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 3 (1986) (describing this concept of legal realism); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 1–4 (1995) (same).

[41] *See, e.g.*, Janet Halley, Prabha Kotiswaran, Rachel Rebouché, & Hila Shamir, *Preface* to GOVERNANCE FEMINISM: NOTES FROM THE FIELD, at xvii (2019); Jorge L. Esquirol, *Legal Latin Americanism*, 16 YALE HUM. RTS. & DEV. L.J. 145, 161–62 (2013); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213 (2015); Levin, *Wage Theft*, *supra* note 16, at 1477.

At its most basic level, distributional analysis asks "who wins and who loses."[42] Doing a distributional analysis of a proposed law reform "involves meticulous and deliberate contemplation of the many interests affected by the existing criminal law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time."[43] Instead of pointing to grand theories of how criminal punishment should (or shouldn't) work, distributional analysis invites us to "treat[] law as simply another way of doing politics and cuts through metaphysical, culturalist, economicist, and other mystifications of the law and legal discourse."[44]

A redistributive frame for criminal law resonates with calls for criminal law to serve anti-subordination goals. For example, Deborah Tuerkheimer has argued "the state should incarcerate only when and to the extent necessary to vindicate identifiable antisubordination norms."[45] On this view, "an antisubordination approach to criminal justice requires special commitment to the redress of violence suffered by subordinated populations. This is because violence against socially disempowered victims furthers their subordination."[46] By refocusing its prosecutorial attentions, the state "can mitigate the subordinating effects of the crime" and "demonstrate its commitment to equality."[47]

A redistributive theory of criminal law similarly resonates with Jocelyn Simonson's recent work on "power-shifting" as a framework for assessing criminal policy.[48] Drawing from social "movement[s'] focus on power shifting in the governance of the police," Simonson has advocated for the use of a "power lens" in assessing criminal policy.[49] The power lens does similar work to a distributive analysis—it asks whether a given policy empowers a marginalized

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[42] Esquirol, *supra* note 41, at 162.

[43] Gruber, *When Theory Met Practice*, *supra* note 41, at 3213. *Cf.* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000) ("I argue that every domestic violence intervention strategy should be subjected to a material resources test. This means that in every area of anti-domestic violence law and policy, whether it be determining funding priorities, analyzing appropriate criminal law or arrest policies, developing city ordinances or drafting administrative rules, priority should be given to those laws and policies which improve women's access to material resources.").

[44] Esquirol, *supra* note 41, at 162.

[45] Tuerkheimer, *supra* note 11, at 1162.

[46] *Id.* at 1163.

[47] Id.; see also Hampton, Punishment, Feminism, and Political Identity, supra note 39, at 39; Alessandro Corda, The Transformational Function of the Criminal Law: In Search of Operational Boundaries, 23 NEW CRIM. L. REV. 584, 634–35 (2020) ("[W]hile criminalization and punishment usually tend to be instruments of preservation of widely shared beliefs and societal norms, at the same time they can also exercise, from a normative standpoint, a function of innovation—either by promoting the establishment of brand new norms or by nurturing norms, attitudes, values, and beliefs that have already emerged but are not yet fully entrenched within the societal body.").

[48] *See generally* Simonson, *supra* note 2.

[49] *Id.* at 787.

or subordinated group.[50] If a policy distributes power to a marginalized community it might be desirable or defensible. If a policy entrenches the status quo or preserves existing hierarchies, we should be skeptical. Viewed through this lens, the redistribution or reallocation of power via criminal legal institutions could be understood "as reparations, as a method of antisubordination, or as facilitating contestation necessary for democracy."[51]

Notably, although Simonson is a committed abolitionist herself,[52] she argues that left critics should be focused less on substantive outcomes (*e.g.*, whether a policy leads to more police or fewer; more convictions or fewer) than on how those outcomes build or diminish political power.[53] While a focus on power shifting has been a hallmark of grassroots abolitionist organizing and activists associated with the Movement for Black Lives,[54] that doesn't mean that this approach necessarily would advance decarceral ends.[55] Indeed, Simonson is careful to note that "there is no guarantee that a power-shifting arrangement in policing would on its own lead to any particular outcomes."[56] (And some anti-carceral critics have expressed skepticism about power-shifting precisely because of its capacity to expand, rather than shrink, the carceral state.)[57]

Our claim in this Article, then, builds on Simonson's observation about the indeterminacy of power-shifting. We argue that left and progressive commentators who are otherwise critical of the carceral state have come to embrace criminal law when it is imagined as a vehicle for shifting power. In left discourse, the objectionable corners of the criminal system are framed as regressive—spaces of subordination and marginalization. That's one way of understanding the growing attention paid to "managerial justice" and the mass processing of misdemeanor defendants—it's an area where criminal law appears

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[50] See Id.

[51] *Id.* at 788.

[52] *See* JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 179-84 (2023) (describing Simonson's personal journey to becoming a carceral state abolitionist).

[53] *See* Simonson*, supra* note 2,at 789.

[54] *See* The BREATHE Act, MOVEMENT FOR BLACK LIVES (July 2020), https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf.

[55] See Simonson*, supra* note 2,at 789.

[56] Id. As Simonson notes, "[c]ommunity control of the police, for instance, might very well lead a particular police district to more police patrols, more arrests, more stops-and-frisks, and an increase in other tactics that are seen as 'tough on crime.'" Id. at 790. Cf. John Rappaport, Some Doubts About "Democratizing" Criminal Justice, 87 U. Chi. L. Rev. 711, 759 (2020) (collecting studies that show popular support for punitive policies).

[57] *See, e.g.*, Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2827 (2022) (raising questions about this approach); Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J. FORUM 798, 805 (2021) ("It would be a categorical mistake to equate the pursuit of an equitable process of crime policymaking—even as it relates to race-class subordinated communities—with the pursuit of equitable crime policy.").

to operate as an explicit vehicle for controlling marginalized populations.[58] There, criminal law's distributive project runs counter to left and progressive goals, as it dehumanizes and disempowers the already disempowered.

But, the corners of the criminal system that retain some (or even great) allure for left and progressive commentators are understood in different terms. Here, pro-criminalization and pro-prosecutorial policies and their advocates speak the language of power-shifting. Criminalization, prosecution, and punishment are framed as a vehicle for redistribution and a means of achieving equality in an unequal society.[59]

Or, put differently, our suggestion is that many left and progressive commentators don't actually see criminal legal institutions as fundamentally objectionable. Rather, they understand those institutions as objectionable when they are deployed in service of particular regressive ends.[60] By recalibrating those institutions or resituating them in an alternate political economy, redistributive advocates contend that criminal law could be a necessary—or even desirable—component of good governance and a just society.

B. The Structure of Redistributive Arguments

To the extent that left and progressive arguments for criminal legal solutions speak in redistributive terms, they require us to do a distributional analysis.[61] Or, using Simonson's language, they require us to ask whether criminal legal institutions shift power.[62] Does criminal law actually distribute the way that its proponents believe that it will? Would a new criminal statute or a decision to prosecute redound to the benefit of and shift power to marginalized communities?[63] Or would criminal solutions to social problems serve to

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[58] *See, e.g.*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 60–98 (2018); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 3–18 (2018).

[59] *See infra* Part II.

[60] *Cf.* Tuerkheimer, *supra* note 11, at 1162-63 ("Just as it demands movement toward less incarceration, an antisubordination approach to criminal justice requires special commitment to the redress of violence suffered by subordinated populations.").

[61] *Cf.* Coker, *supra* note 43, at 1009 (arguing that proponents of criminal responses to intimate partner violence should perform a "material resources test" to determine if these approaches actually shift material resources to victims—particularly poor women of color); Corda, *supra* note 47, at 612 ("Unlike a purely symbolic use of the criminal law—not supported by any concrete form of state action aimed at achieving the goal stated on paper—a legitimate and permissible transformational employment of this branch of the law must be inherently outcome-oriented and directed at achieving tangible effects.").

[62] And also *to whom* they shift power.

[63] *See infra* Part II (tracking these arguments).

entrench the injustices of the criminal system, empowering police prosecutors and other "criminal justice" actors?[64]

There are many ways that criminal law does or could distribute. But, contemporary progressive, pro-prosecutorial redistributive claims often sound in one of two registers: (1) that criminal law will have desirable distributive consequences (*i.e.*, that marginalized communities and/or victims will receive some benefit from a prosecution or new criminal statute); or (2) that the only way to address current social inequities is to expose more powerful defendants to the same institutional violence that marginalized or subordinated defendants face. In this Article, we primarily focus on the first set of arguments, but we think it's worth taking a moment to unpack both moves.

The first style of redistributive argument rests on a straightforward claim about distributive consequences: Criminalizing certain conduct or prosecuting a particular defendant (or class of defendants) will benefit a marginalized victim or set of victims. How this benefit will accrue or how individuals and communities will benefit is not always entirely clear.[65] And what is to be redistributed varies—sometimes, advocates appear to imagine a redistribution of power or social standing, while at other times advocates actually appear to imagine that criminal law might directly shift material conditions by redistributing wealth or access to resources.[66] But regardless, the rhetoric of redistribution, power-shifting, and antisubordination is common.[67] The redistributive cases for criminal punishment tend to rely on an imagined dynamic in which the defendant is (relatively) powerful and the victim is (relatively) powerless or subordinated. Criminal law, then, serves as an equalizer.

To be clear, that distributive case for criminal law is highly speculative and contingent. How do we know that defendants charged with a given crime actually will be powerful?[68] And, why should we think that criminal law will effectively distribute whatever it is that it's supposed to distribute?[69] But, this mode of argument is still less speculative than the second set of redistributive arguments for criminal punishment.

The second model suggests that exposing more powerful defendants to the violence and cruelty of the carceral state will redound to the benefit of marginalized defendants (particularly race/class subordinated defendants) via a sort of trickle-down logic. If the rich and powerful are subjected to intrusive policing and harsh sentences, the argument goes, they may come to appreciate

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[64] *See infra* Part III.A.

[65] *Cf.* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2087 (2017) ("[I]ncreasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups."); Levin, *Wage Theft*, *supra* note 16, at 173-74 (same).

[66] *See infra* Part III.

[67] *See infra* Part II.

[68] *See infra* Part III.A.

[69] See id.

the injustice of the criminal system.[70] And, once they appreciate the injustice (and walk a mile in the shoes of the poor, the marginalized, and the subordinated), they will be more likely to favor criminal reform.[71] Where wealthy, white voters might be likely to support harsh criminal policies when the imagined defendants are poor and Black, those voters might change their tune when they see themselves as potential defendants.[72]

The classic version of this claim involves drug policing and prosecution. Affluent white college students use illegal drugs just like poor Black teenagers, the argument goes, but the latter group is heavily policed and punished for their actions, while the former breaks the law with impunity. On this telling, the War on Drugs persisted for decades in large part because of the *underenforcement* of crimes committed by affluent white people. If police had treated college campuses and affluent suburbs the same way they treated "inner cities" and poor communities of color, public outcry would have put an end to punitive politics.[73]

In slightly cruder terms, this argument operates as the inverse of the much-quoted aphorism about crime policy that "a conservative is a liberal who has been mugged."[74] Instead, some progressives seem to argue that a progressive might be a conservative who has been arrested, prosecuted, or incarcerated—

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[70] *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 783 (2006).

[71] *See, e.g.*, *id.*; Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1103-04 (2015) ("By making it harder to punish, the Blackstone principle concentrates criminal punishment on a more discrete group of people. And it makes the group of people being punished less politically attractive, because it ensures that a higher percentage of them will be guilty (or at least seen as guilty). We should thus expect the Blackstone principle to increase political tolerance for harsh treatment of convicted criminals.").

[72] "Borrowing from social cognition theory, legal scholars have argued that many policy decisions are shaped by the 'fundamental attribution error'—a tendency to view our own bad conduct as 'mistakes' caused by situational factors, while we view others' bad conduct as blameworthy and the result of some dispositional flaw. . . . [T]here is good evidence to suggest that people might still have a difficult time identifying with other defendants. And, similarly, other issues of identity (race, class, gender, sexuality, etc.) might continue to make certain defendants less sympathetic and might allow for an identification of certain defendants as more deserving of punishment, less remorseful, etc." Levin, *Mens Rea Reform*, *supra* note 16, at 543 n. 251 (citing Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 25 (2004); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1565 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1205 (1995)).

[73] *See, e.g.*, David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 467 (2001); André Douglas Pond Cummings, *Reforming Policing,* 10 DREXEL L. REV. 573, 624-25 (2018); Keturah James & Ayana Jordan, *The Opioid Crisis in Black Communities*, 46 J.L. MED. & ETHICS 404, 412 (2018); Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 695 (2016).

[74] *See, e.g.*, Kate Stith-Cabranes, *Fear of Discretion*, 1 GREEN BAG 2d 209, 211 (1998) (describing "one of Mayor Ed Koch's favorite sayings . . . that a conservative is a liberal who has been mugged"); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 845 (1997).

treated like the race-class marginalized people who fill jails and courtrooms every day.[75] Because of their race, class, or relative social standing, many people might not have been exposed to the harsh realities of the criminal system. And, because of their identity and experiences, they might be comfortable viewing criminal legal institutions as just and the targets of state violence as deserving.[76] Exposure to the injustice of the system—the argument goes—would yield a reconceptualization of the system and a drive to reform it. The traditional conservative move suggests that—if victimized—we all would turn to punishment. The contemporary progressive move suggests the opposite: if arrested or prosecuted, we all would become sympathetic to other criminal defendants.

In this Article, we are less concerned with this latter set of arguments about identification with defendants than we are about the first class of arguments—that criminal law will directly redistribute power and resources in ways that will benefit progressive ends. The identification-style arguments are important in our contemporary political moment.[77] But, we see them as less in need of unpacking here because they tell us less about specific classes of crime than they do about generic approaches to law enforcement. That is, the defendant-identification or empathy-based approach might operate as a blanket call for aggressive enforcement of all criminal laws, whereas redistribution-via-prosecution arguments focus on specific classes of crimes and defendants as justified (where other ones are not).

As we will argue in Part III, we remain skeptical at best of these redistributive arguments. Instead of imagining criminal legal institutions as possible sites of achieving egalitarian ends, we see the criminal system as fundamentally objectionable—inextricable from troubling punitive impulses and logics of subordination. But, before we unpack those arguments, we turn to a series of case studies to illustrate how academics, advocates, and activists frame pro-punitive policies in redistributive terms.

II. CASE STUDIES IN REDISTRIBUTIVE PUNISHMENT

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[75] *See, e.g.*, TOM WOLFE, THE BONFIRE OF THE VANITIES 556 (1987) (suggesting that a liberal is "a conservative who has been arrested"); Jeremiah W. Nixon, *Remarks on Racial Profiling in Missouri*, 22 ST. LOUIS U. PUB. L. REV. 53, 56 (2003) ("It has been said that a liberal is a conservative who has just been arrested, and a conservative is a liberal who has just been mugged."); Craig S. Lerner, *Legislators As the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 603–04 (2004) ("[I]f a conservative is a liberal who's been mugged, then a liberal would seem to be a conservative who's been indicted." (footnote omitted)).

[76] *See supra* note 72.

[77] *See* Levin, *Mens Rea Reform*, *supra* note 16, at 543 n. 251 (discussing the prevalence of such claims about identification with criminal defendants).

Despite a long-running narrative that conservatives are tough on crime and liberals are more concerned about mass incarceration, there are numerous areas where progressives remain committed to the carceral state.[78] In this Part, we highlight a handful of contexts where the progressive turn to criminal law and punitive politics is explicitly framed in redistributive terms: police violence, economic crimes, hate crimes, and offenses of gender subordination. These are areas where progressives have identified serious, structural problems and have turned to criminal law to redress harm to marginalized communities. In some contexts, academics and activists call for more enforcement of existing laws; in others, they call for new criminalization projects. Put differently, "the problem [according to activists and scholars] often runs deeper than merely lax enforcement—many of these crimes are simply not socially understood as crimes or legally coded as such."[79] Our claim isn't that this enthusiasm for criminal solutions is new. Instead, we highlight recent case studies in each area to emphasize that punitive sentiments coexist with contemporary progressive critiques of the criminal system. Similarly, we don't mean to understate the work of scholars and activists who prefer *non-carceral* approaches to these problems (e.g., abolitionists opposed to prosecuting police, Black socialist feminists who fought punitive approaches to intimate partner violence, etc.).[80] Rather, our goal in this Part is to outline a series of common areas where many progressives continue to favor criminal solutions to social problems.

A. Police Crime

When police commit acts of violence, the progressive commitment to decarceration often takes a hiatus.[81] It is not hard to understand the pain and

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[78] *See, e.g.*, Forman, Jr; *supra* note 15; GRUBER, *supra* note 2; JUSTIN MARCEAU, BEYOND CAGES: ANIMAL PROTECTION AND CRIMINAL PUNISHMENT (2019); MURAKAWA, *supra* note 15; JUDAH SCHEPT, PROGRESSIVE PUNISHMENT: JOB LOSS, JAIL GROWTH, AND THE NEOLIBERAL LOGIC OF CARCERAL EXPANSION (2015); Aviram, *supra* note 11, at 224; Ely Aharonson, *"Pro-Minority" Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique*, 13 NEW CRIM. L. REV. 286 (2010).

[79] Aviram, *supra* note 11, at 224.

[80] Indeed, this work is foundational to our ultimate critiques of carceral progressivism. *See infra* Part III.

[81] Melanie D. Wilson, *The Common Prosecutor*, 53 LOY. U. CHI. L.J. 325, 362 (2022) ("[A]necdotal evidence is building that all prosecutors are beginning to take police brutality more seriously and that the progressives are leading the way."); Levine, *Police Prosecutions, supra* note 2, at 1001 ((showing the many ways in which progressives have pushed for increased criminalization of police brutality). Indeed, even leading abolitionist scholars appear to support the prosecution and incarceration of police officers who commit brutal acts against certain citizens. *Compare* Berkley Talks*, Paul Butler on How Prison Abolition Would Make Us All Safer*, BERKELEY NEWS (Jan. 17, 2020) https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler [https://perma.cc/D7NS-SHV5] ("I'll make three points. One is that we need abolition to solve the problem of mass incarceration. Reform is not going to work. Second, there are alternatives to incarceration that can provide any of the crime control benefits we think prison does now.

outrage that high-salience police killings occasion—particularly when those killings reflect historical patterns of violent racial subordination. As Devon Carbado argues:

> Surviving, or living through, police interactions is part of Black people's social reality. That experience produces what I will call "police encounter afterlives," remembrances of the potentiality of death those encounters portend, remembrances of our survival through submission, resistance, or escape. Patricia Williams might think of this survival as an instance of "spirit murder,"[281] a form of killing whose violence presupposes an afterlife of further racial injury.[82]

This "spirit murder" is reproduced for those who have had their own terrifying encounters with police each time a new video of police brutality is distributed, each time a new narrative of violence is told.[83] Thus, perhaps it is no wonder that people want to see these powerful state agents punished brutally for their actions.

This desire for charges and punishment is voiced in numerous contexts—not only in protests, but also in scholarly texts, in political messages, and in progressive organizational messaging. Not only do progressives and progressive organizations frequently clamor for prosecution and incarceration of individual police officers,[84] but some decry *dozens of years* of incarceration as

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Third, to be truly transformative, abolition has to be more than just tearing down the prison walls. We have to build something up, too."); *with* Paul Butler, *The Most Important Trial of Police Officers for Killing a Black Man Has Not Happened Yet*, WASH. POST (Apr. 29, 2021, 5:14 PM), https://www.washingtonpost.com/opinions/2021/04/29/next-trial-killing-george-floyd-will-be-real-test [https://perma.cc/P7KG-RCNY] (writing approvingly of the accomplice charges against the three officers who stood by while Derek Chauvin killed George Floyd) ("In my view, this is a case where any conviction and punishment—even a short prison sentence — would be better than none.").

82 Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. REV. 2, 67–68 (2022)

83 And, Carbado notes, there is the further trauma of knowing that these videos are part of an almost fetishistic interest in violence against Black people that has shaped U.S. culture. ("consider the mass circulation of videos depicting the killing or brutalization of Black people. (How many of them have you seen?) Those images and videos operate not just as iconography; they are, in a very peculiar way, iconic. 'Black bodies in pain for public consumption have been an American national spectacle for centuries.'")

84 *See, e.g.*, Press Release, ACLU of Kentucky, ACLU Statement on DOJ Charges of Police in the Killing of Breonna Taylor (Aug. 4, 2022, 2:45 PM) https://www.aclu.org/press-releases/aclu-statement-doj-charges-police-killing-breonna-taylor [https://perma.cc/J4QL-24XQ] ("The Department of Justice's announcement of charges against four law enforcement officers involved in Breonna Taylor's death is a critical step in holding police accountable when they kill those they are sworn to protect, violate our constitutional rights, and inflict lasting trauma upon our communities. The charges announced today – lying to get a warrant, lying about Ms. Taylor's connection to drugs (thereby invoking racist stereotypes), lying to federal investigators, and shooting, endangering, and killing people – are alarming in their own right. And they lay bare the urgent need to eradicate the racism and violence endemic in our policing systems.").

"too light" and "not justice."[85] Some commentators also are not satisfied with the prosecution of the officers committed the violence—desire similarly punitive outcomes for officers who were at the scene.[86] The murder of George Floyd in 2020 provides an excellent case study for these reactions.

Minneapolis Police confronted Floyd after a convenience store employee accused him of purchasing something with a counterfeit $20 bill.[87] Within 17 minutes Floyd was dead, pinned under the knee of Derek Chauvin, one of the responding officers.[88] A video showed the killing and captured Floyd calling out for his mother.[89] The killing occasioned significant public outcry, sparking nationwide protests.[90]

Chauvin was convicted of State murder and manslaughter charges[91] and federal civil rights violations.[92] While progressive organizations hailed these sentences as "justice"[93] and "victory,"[94] some felt that 22 ½ years in prison was not enough for Chauvin's crime.[95] While Floyd's killing was a particularly high-

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[85] Levine, *supra* note 2, at 1000–02.

[86] *LDF Issues Statement on the Federal Convictions of Three Former Police Officers Involved in the Murder of George Floyd*, LEGAL DEFENSE FUND (Feb. 24, 2022), https://www.naacpldf.org/press-release/ldf-issues-statement-on-the-federal-convictions-osf-three-former-police-officers-involved-in-the-murder-of-george-floyd [https://perma.cc/M4HZ-N9VR] (statement by LDF celebrating "accountability" for the three officers who enabled, supported, and undeterred [Chauvin]").

[87] Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody* (Jan. 24, 2022), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/9KU4-SCC6].

[88] Id.

[89] Diana Spaulding, *When George Floyd Called out for His Mama, Mothers Everywhere Answered* (June 4, 2020), https://www.mother.ly/black-lives-matter/george-floyd-called-for-mothers-everywhere [https://perma.cc/8MNC-39D5] (noting that footage captured Floyd calling out for his mother before he fell unconscious).

[90] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/BZ5W-MPQU] (protests following the killing may have been the largest in history).

[91]Bill Chappell, *Derek Chauvin is Sentenced to 22 ½ Years for George Floyd's Murder*, NPR (June 25, 2021, 6:02 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder [https://perma.cc/BV72-M8AE].

[92] Press Release, Former Minneapolis Police Officer Derek Chauvin Sentenced to More Than 20 Years in Prison for Depriving George Floyd and a Minor Victim of Their Constitutional Rights (July 7, 2022), https://www.justice.gov/opa/pr/former-minneapolis-police-officer-derek-chauvin-sentenced-more-20-years-prison-depriving [https://perma.cc/Z8WW-8CY2] (Chauvin was sentenced to 252 months to run concurrently with his state sentence).

[93] *See* Levine, *Progressive Love Affair*, *supra* note 16 at 1235–36.

[94] Id.

[95] *Id. See also,* Paul Butler, *This is What Derk=ek Chauvin's Sentence Should* Be (arguing for 18 years in prion but noting that "[s]ome Black Lives Matter activists, and probably Floyd's family, hope Chauvin receives the 40-year maximum that Minnesota law establishes for Murder 2. (Chauvin

salience act of brutality, the reactions from progressives were hardly unprecedented; other police killings have spawned similar punitive outcries over the past several years—from lamenting prosecutorial decisions not to charge,[96] to decrying sentences as too light.[97]

For some activists and academics, it often is not enough to achieve long sentences for those officers who commit acts of violence against civilians. Progressive scholars have called for criminal punishment for officers who were at the scene of the crime and did not intervene.[98] This reaction once again is exemplified by the killing of George Floyd. Not only was Chauvin prosecuted, so too were the three rookie officers who were on the scene at the time and failed to stop Chauvin. These officers were convicted of civil rights violations federally, [99] and were charged and pled guilty[100] or were convicted after trial[101] as accomplices to Chauvin's manslaughter charge.

Although vicarious liability in other contexts is often critiqued as leading to long sentences for less blameworthy conduct,[102] these convictions were met with approval by criminal justice progressives. Much like progressive organizations and politicians, many law professors, who oppose criminalization in general, endorse prosecution and conviction for police where they do not for

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was also convicted of third-degree murder and second-degree manslaughter but, under state law, his sentence is based only on the most severe offense.), WSJ (Jun. 24, 2021), https://www.washingtonpost.com/opinions/2021/06/24/this-is-what-derek-chauvins-sentence-should-be/Cf. Guyora Binder & Ekow N. Yankah, *Police Killings As Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 228 (2022) (lamenting the felony murder charge in this case because it does not express firmly enough the intent Chauvin exhibited).

[96] Levine, Police Prosecutions, *supra* note 2.

[96] Id.

[97] Levine, *Progressive Love Affair, supra* note 16, at 1236–37 ("But as the city, state, and country focused its attention and resources on the prosecution of Chauvin and the other officers involved in Floyd's killing, the mainstream[57] force behind the defund movement all but died. The city council that had promised to dismantle the police quietly scuttled that assurance in favor of a ballot referendum that was defeated in November 2021. . . . Since the Chauvin conviction, there has been scant focus on systemic solutions to police brutality in Minneapolis. This is particularly true as far as government or national media attention is concerned.").

[98] *See* Butler, *supra* note 81.

[99] Press Release, Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd (Feb. 24, 2022), https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death [https://perma.cc/J6F6-LHHD].

[100]Holly Bailey, *Last of Ex-Officers Implicated in Floyd's Killing Found Guilty on State Charge*, WASH. POST (May 2, 2023, 9:56 AM), https://www.washingtonpost.com/nation/2023/05/02/tou-thao-george-floyd [https://perma.cc/8RLC-FBH7] ("Kueng and Lane [two of the three officers] . . . pleaded guilty to aiding and abetting manslaughter charges in state court, avoiding a trial.").

[101]Amanda Holpuch, *Ex-Officer Guilty of Abetting Manslaughter in George Floyd's Killing*, N.Y. TIMES (May 2, 2023), https://www.nytimes.com/2023/05/02/us/tou-thao-verdict-george-floyd-death.html [https://perma.cc/R9EW-CCCE].

[102] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005).

other people. Paul Butler, a scholar who has advocated widely for prison abolition,[103] called the charges against these men "the most important" charges against police officers and hoped for "conviction and punishment."[104]

For other scholars, existing criminal statutes failed in their inability to criminalize officers who didn't intervene to stop their coworkers. For example, Zachary Kaufman has suggested enlarging criminal codes to create a separate crime for non-intervening police officers.[105] Kaufman acknowledges that the Minnesota accomplice law was sufficient to convict the three bystander officers in Floyd's killing, but he argues that these convictions on the state and federal level do not "obviate the need for more—and more effective—avenues of passive-police [criminal] accountability."[106] In proposing new legislation, he argues that it would apply only to police and thus would not "exacerbate[e] the problem of mass incarceration."[107] This claim is central to many progressives' selective punitive projects—a justification that their target is the real villain and that their punitive proposal will not increase criminalization more broadly.[108]

Notably, Kaufman uses the power-shifting rationale explicitly, framing his policy proposal as directly responsive to police officers' grossly disproportionate use of lethal force against people of color.[109] It is certainly possible that Kaufman views criminalization as desirable in other contexts,[110] but in this case, his argument sounds in the register of redistribution, appealing

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[103] *Abolition, and a Mule*, ROGERS WILLIAMS UNIV. SCH. OF L., https://law.rwu.edu/events/abolition-and-mule [https://perma.cc/A7G5-VJC9] (last visited July 30, 2023); Dorothy Wickenden, *What Would a World Without Prisons Be Like?*, NEW YORKER (Jan. 27, 2020), https://www.newyorker.com/podcast/political-scene/what-would-a-world-without-prisons-be-like [https://perma.cc/TH6M-PAXG]; Email from Marc Miller, Letter of the Law, to University of Arizona James E. Rogers College of Law students (Feb. 1, 2023), https://lotl.arizona.edu/feb012023.htm [https://perma.cc/DGG7-PKUN].

[104] *See*, Butler, *The Most Important Trial, supra* note 81.

[105] Zachary D. Kaufman, *Police Policing Police*, 91 GEO. WASH. L. REV. 353 (2023)

[106] *Id.* at 360. Bloated criminal codes have long been one of the acknowledged drivers of mass incarceration. *Cf.* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 293 (2018) (noting the frequency of this argument and arguing that we need a baseline comparison).

[107] *Id.* at 401.

[108] *See infra* Part III.A.2.

[109] Kaufman, *supra* note 105, at 356–57 ("Police have killed at least 2,219 Black Americans since 2015--more than three times the rate of White Americans, despite Black Americans representing less than a fifth of the White population in the United States. Similarly, Native Americans and Hispanic Americans are disproportionately slain by officers. Fatality rates among *unarmed* minorities are especially high as compared with their White counterparts. Commentators have characterized this slew of deaths as evidence of "systemic racism," a "public health emergency" for minorities, and even part of a broader "Crime[] against Humanity" against Black people in the United States.").

[110] Kaufman has proposed criminalization for bystanders in other contexts. *See* Zachary D. Kaufman, *Digital Age Samaritans*, 62 B.C. L. REV. 1117, 1118 (2021); Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1318 (2019)

to the sentiments of progressives who see a need to take power away from police via criminal punishment.

In many ways, police prosecutions are the most visible example of an imagined redistributive criminal system. Indeed, it is essentially impossible to run as a progressive district attorney without using the prosecution of police officers as a major part of one's platform.[111] Alvin Bragg, now famous for his prosecution of Donald Trump, touted his work prosecuting police with the Attorney General offices in his successful bid for Manhattan District Attorney.[112] Others, such as Wesley Bell, the St. Louis County Prosecuting Attorney, ran a campaign that successfully unseated incumbent Robert McCulloh after eight terms by "[making] the campaign a referendum on the events of Ferguson four years ago, when McCulloch gained national prominence —and infamy—for his handling of grand jury investigation into the fatal police shooting of Ferguson teenager Michael Brown, which ended in [no charges] against the officer."[113]

None of this is to say that left or progressive commentators consistently abandon anti-carceral commitments when it comes to police. For example, the Movement for Black Lives, has made divestment from the carceral state a hallmark of its proposed federal legislation, the BREATHE Act.[114] But, this kind of programmatic divestment from the carceral system is often drowned out by louder calls from those with big platforms.

While police may appear to be an easy and isolated target for progressive punitivism, the several other case studies discussed in this Part will show that

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111 *See* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1439 (2021).

112 *See, e.g.,* Jonah E. Bromwich, *Why Police Accountability is Personal for this Manhattan D.A. Candidate*, N.Y. TIMES (May 12, 2021) https://www.nytimes.com/2021/05/12/nyregion/alvin-bragg-manhattan-district-attorney.html [https://perma.cc/N2AW-VPWP] ("[P]olice accountability . . . [is] at the center of his campaign to lead one of the most important district attorney's offices in the country.").

113 Danny Wicentowski, *Wesley Bell's Win Surprised Everyone—Except His Campaign,* RIVERFRONT TIMES (Aug. 8, 2018, 9:42 AM), https://www.riverfronttimes.com/news/wesley-bells-win-surprised-everyone-except-his-campaign-22642547 [https://perma.cc/8Q37-7JZZ]. The grand jury's decision not to charge Wilson, and similar nonindictments in other cases have also spurred academics to suggest changing the grand jury procedures for (only) police, or even abolishing the grand jury all together in cases of police violence. *See* Roger A. Fairfax, Jr., Essay, *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 826 (2015) ("As a result of widespread outrage in the wake of ... high-profile cases, politicians, pundits, scholars, and lawyers alike have renewed calls for an end to the grand jury in the United States."); Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 424; Claire P. Donohue, Essay, *Article 32 Hearings: A Road Map for Grand Jury Reform*, 59 HOW. L.J. 469, 478-79 (2016). California has taken those suggestions to heart, abolishing the grand jury for police shootings. Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES (Aug. 13, 2015), https://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases [perma.cc/XRE6-6JS6].

114 *See* The Breathe Act, *supra* note 54.

the arguments about and criminal law solutions proposed to deal with police brutality are repeated in several other contexts.

B. Economic Crime

Intuitively, financial and economic crimes might be one of the more straightforward fits for a redistributive frame. "White-collar" crime has long been an area where scholars and commentators have focused on inequality and the perceived impunity of the powerful.[115] We live in a country defined by growing economic inequality. Wages have stagnated, worker power has declined, and political and legal institutions that once kept capital *somewhat* in check have fallen by the wayside. Decades of neoliberal economic policy have led to an upward redistribution of wealth.[116] In turn, those policies have spawned a backlash from the left—from Occupy Wall Street, to the rise of the Democratic Socialists of America, and growing enthusiasm for politicians who explicitly speak in terms of economic inequality and the need for redistribution.[117] Against this backdrop, many progressives and leftists have turned to criminal law as a means of disciplining capital, responding to the immorality (or, at least, amorality) of the marketplace, and curbing the perceived lawlessness of the wealthy.[118]

Criminal law—with its heightened penalties and moralistic language—operates as the apotheosis of state financial regulation.[119] The hope for liberal and left proponents of the criminal apparatus is that it might be repurposed to engage in a project of redistributing power and privilege not just through

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[115] *See* Aviram, *supra* note 11, at 219.

[116] *See, e.g.*, WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 213 (2015); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 16-19 (2005).

[117] *See, e.g.*, Astra Taylor & Jonathan Smucker, *Occupy Wall Street Changed Everything*, N.Y. Magazine, Sept. 27, 2021, https://nymag.com/intelligencer/2021/09/occupy-wall-street-changed-everything.html; Emily Stewart, *We Are (Still) the 99 Percent.* VOX, Apr. 30, 2019, https://www.vox.com/the-highlight/2019/4/23/18284303/occupy-wall-street-bernie-sanders-dsa-socialism (tracing the rise of the DSA and the popularity of Senator Bernie Sanders to the Occupy moment); Ross Barkan, In New York City, Occupy Wall Street Got the Last Laugh, Jacobin, Sept. 21, 2021, https://jacobin.com/2021/09/occupy-wall-street-new-york-city-dsa-bloomberg-cuomo (looking at politics in New York as a case study of the "broad revival of the Left in the United States").

[118] *See generally* Levin, *Mens Rea Reform*, *supra* note 16, at 528-40 (describing this approach).

[119] On this view of criminal law as an extension of other regulatory approaches (rather than a distinct entity), *see, e.g.*, VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE (2019); Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, CRIM. L. & PHIL. (Oct. 12, 2021); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381 (2022). On criminal law as a distinct entity, *see e.g.*, R.A. DUFF, THE REALM OF CRIMINAL LAW (2018).

financial regulation but also through criminal punishment.[120] If the real economic crimes are being committed by the rich against the poor, the answer needn't be doing away with criminal law or punishment; rather, the goal should be altering the political economy such that the *real* crimes are prosecuted. Whether support for aggressive criminal enforcement of economic and white-collar crime comes from a progressive or more radical left perspective, it tends to reflect a view that criminal law is a necessary means of addressing inequality and that criminal law can do important work in recalibrating the balance of power in society. To see that move in action, it's worth considering three examples: liberal and left opposition to mens rea reform, support for wage theft criminalization, and calls for large-scale financial crime prosecutions.

Progressive lawmakers have opposed a number of criminal justice reform bills—particularly so-called "mens rea reform" statutes—because of the possibility that they might aide defendants charged with white-collar crimes.[121] Currently, many criminal statutes don't include clear mental state requirements; these reform bills would require the prosecution to prove that defendants acted purposely or knowingly (and in some cases that they were purposely or knowingly breaking the law).[122] Illinois Senator Dick Durbin has claimed that such statutes (which would benefit defendants of all classes charged with a host of different crimes)[123] "should be called the White Collar Criminal Immunity Act."[124] In the words of former President Barack Obama, criminal justice reform was a laudable goal, but legislation that might impede prosecution of financial crime could "undermine public safety and harm progressive goals."[125] And, progressive calls for economic regulation in the wake of the 2008 Financial Crisis were often framed in terms of *criminal* impunity—why had no financial executive

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120 *Cf.* Aviram, *supra* note 11, 225 (discussing Maoist approaches to criminal punishment grounded in remedying capitalist oppression); Michel Foucault, *On Popular Justice: A Discussion with Maoists*, *in* KNOWLEDGE/POWER: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, 1, 30 (Colin Gordon, Leo Marshall, John Mepham, and Kater Soper, eds. 1980) (same).

121 *See, e.g.*, C.J. Ciaramella, *The Senate Will Try Again On Sentencing Reform This Year*, REASON (Oct. 4, 2017), http://reason.com/blog/2017/10/04/the-senate-will-try-again-on-sentencing; Mike Debonis, *The Issue That Could Keep Congress From Passing Criminal Justice Reform*, WASH. POST. (Jan. 20, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/?utm_term=.3592d664b67c; Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill Both Parties Backed*, N.Y. TIMES, Sept. 16, 2016, at A8.

122 *See, e.g.*, Mens Rea Reform Act of 2017, S. 1902, 115th Cong. (2017); Stopping Over-Criminalization Act of 2015, H.R. 3401, 114th Cong. (2015); H.R. 4002; S. 2289. For an extensive discussion of these bills, *see* Levin, *Mens Rea Reform*, *supra* note 16, at 509-17.

123 *See* Michael Serota, Strict Liability Abolition, 98 N.Y.U. L. Rev. 112, 163-69 (2023).

124 Matt Ford, *Could a Controversial Bill Sink Criminal-Justice Reform in Congress?*, THE ATLANTIC (Oct. 26, 2017), https://www.theatlantic.com/politics/archive/2017/10/will-congress-reform-criminal-intent/544014.

125 Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 866 n. 89 (2017).

gone to prison when so many working class people suffered?[126] The problem wasn't capitalism; it was the failure to prosecute people who hadn't played by capitalism's rules. "White-collar" criminals have gotten rich at the expense of society, the argument goes, and the state should intervene to redistribute the wealth and power that they have unjustly earned.[127] And, this insistence that the state shouldn't need to meet its burden of proving a culpable mental state effectively scuttled multiple efforts at bipartisan "criminal justice reform" legislation.[128]

Similarly, over the last two decades, activists, academics, and policymakers have keyed on the problem of wage theft—bosses' failure to pay workers the wages they are owed.[129] While some of this activism has focused on civil enforcement or vehicles of worker empowerment (*e.g.*, via unionization or worker centers), much of the work on wage theft has prioritized criminalization and prosecution as the desired vehicle for remedying the problem.[130] Advocates have called for new criminal statutes and increased criminal penalties—turning misdemeanors into felonies and seeking to increase possible jail or prison time have been frequent targets.[131] So-called "progressive prosecutors" and left-

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[126] *See, e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES xvi (2017); JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME 131-34 (2020).

[127] In contrast, socialists, Marxists, and other more radical left activists and commentators might understand the state in its most desirable form as a more explicit vehicle of redistribution. Marx's classic writing on "the theft of wood" argues not that there's something wrong with criminalization and punishment as such, but rather that criminalization and punishment in a capitalist society reflects (and constructs) class oppression. *See* Karl Marx, *Debates on the Law of Thefts of Wood*, reprinted in 1 KARL MARX & FREDERICK ENGELS, COLLECTED WORKS 233, 233 (Jack Cohen et al. eds., 1975). Criminal law in this account allowed property owners and members of the capitalist class to steal resources, while defining as "theft" the taking of property by the lower classes. *See id.* Criminal law in this account allowed property owners and members of the capitalist class to steal resources, while defining as "theft" the taking of property by the lower classes. *See, e.g.*, PETER LINEBAUGH, STOP, THIEF!: THE COMMONS, ENCLOSURES, AND RESISTANCE 1-10 (2014); PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840); Karl Marx, *Crime and Primitive Accumulation*, *in* CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 45, 47 (David F. Greenberg ed., 1981); Peter Linebaugh, *Karl Marx, the Theft of Wood, and Working Class Composition*, *in* CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 76 (David F. Greenberg ed., 1981); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 789 (2005).

[128] *See generally* Levin, *Mens Rea Reform and Its Discontents*, *supra* note 16 (describing this dynamic); Benjamin Levin, *Decarceration and Default Mental States*, 53 ARIZ. ST. L. J. 747 (2021) (same).

[129] *See generally* KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID AND WHAT WE CAN DO ABOUT IT (2011) (describing the problem of wage theft).

[130] *See generally* Levin, *Wage Theft Criminalization*, *supra* note 16 (describing this preference).

[131] The move to seek significant carceral penalties is particularly significant for two reasons. First, in a moment of skepticism about incarceration for even "violent" crimes, the turn to greater incarceration here is striking. *See* Ben Levin, *Rethinking Wage Theft Criminalization*,

leaning DA candidates—from Tiffany Cabán in Queens, to Larry Krasner in Philadelphia, and Chesa Boudin in San Francisco—have created special wage theft units or made prosecuting bad bosses a key component of their platforms.[132]

According to advocates, criminalizing wage theft and aggressively prosecuting bosses "should help send a strong message to employers about the importance of following workplace laws. They should also send a strong message to hard working people that work is a thing of value and that intentionally stealing it is theft."[133] And, criminalization proponents frame their advocacy explicitly as redistribution. According to workers' rights attorneys David Seligman and Terri Gerstein, "the threat of serious criminal sanction running . . . against the person who's abused his position of power . . . helps to correct that power imbalance . . . ."[134] That is, employment relationships—particularly in low-wage sectors—are defined by inequality. Bosses hold all the cards and are essentially free to exploit workers. Prosecution and criminal punishment might help level the playing field and operate as a thumb on the scale in favor of otherwise powerless workers.

Prosecuting wage theft, according to criminalization supporters, is easily distinguishable from the objectionable corners of the criminal system. As Gerstein and Seligman argue, "we don't think that bringing the criminal law to bear on predatory employers who take advantage of vulnerable workers exacerbates the injustices of our criminal justice system."[135] As one Chicago worker center staffer explains his support for criminal law in this area, prison abolitionists "are right to protest the deeply unjust incarceration of poor people and people of color, particularly for nonviolent crimes. . . . However, I am yet

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ONLABOR, Apr. 13, 2018, https://onlabor.org/rethinking-wage-theft-criminalization/. Second, the actual activism and advocacy for such carceral sentences stand in tension with claims from some on the left that the language of "theft" is more symbolic than literal—that activists want to see workers empowered, not employers incarcerated. *See* Eric Tucker, *When Wage Theft Was A Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master*, 54 OSGOODE HALL L.J. 933, 934 (2017) ("[W]hile the rhetoric of wage theft invokes the language of the criminal law, reformers typically stop short of calling for the imposition of criminal sanctions. . . .").

132 *See* , e.g., Juliana Feliciano Reyes, Philly DA's Office Launches a Unit To Prosecute Employers for Crimes Against Workers, PHILA. INQUIRER (Oct. 8, 2019), https://www .inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution -wage-theft-20191008.html; Oren Schweitzer, *Tiffany Cabán, a Socialist in the District Attorney's Office*, JACOBIN (June 26, 2019), https://jacobinmag.com/2019/06/tiffany-caban-socialist -district-attorney-queens-election.

133 Terri Gerstein, Opinion, *More States Should Follow New Colorado Policy on Wage Theft*, THE HILL (May 30, 2019, 4:00 PM), https://thehill.com/opinion/finance/446199-more-states-should-follow-new-colorado-policy-on-wage-theft#.XPA6eXbSElA.

134 Terri Gerstein & David Seligman, *A Response to "Rethinking Wage Theft Criminalization"*, ON LABOR (Apr. 20, 2018), https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization/.

135 Gerstein & Seligman, *supra* note 134.

to be convinced that we should give a free pass to white-collar criminals, especially business owners who systematically exploit workers."[136] And, as Cabán (a former public defender) describes the dynamic, "I represent people who are accused of stealing from their employers when in fact their employers are . . . stealing their wages."[137] According to Cabán, prosecutions of the real thieves (*i.e.*, the bosses) should be "prioritized."[138]

The structural issues with the criminal system (*e.g.*, unfettered prosecutorial discretion, harsh and dehumanizing punishment) don't seem to worry progressives here. Where elsewhere critics rightly note that prosecutorial and law enforcement discretion tend to lead to the punishment of people from marginalized communities, those critiques are rarely heard here.[139] Instead, activists and advocates imagine those same flawed criminal legal institutions as anti-subordination tools capable of empowering low-wage workers.[140] At the very least, carceral state critics suggest, if police and prosecutors really took harm seriously, they would focus on wage theft.[141]

The preference for criminal law as the tool of choice to address large-scale financial crime reflects a similar impulse. Much has been written about the U.S. preference for white-collar criminal statutes over civil regulation.[142] There certainly might be different explanations for this preference, but prosecuting some imagined class of bankers or executives remains very popular with many liberal, left, and progressive commentators. On the tenth anniversary of the 2008 financial crisis, Senator Elizabeth Warren introduced the "Ending Too Big to Jail Act" as a direct response to concerns that the finance industry's

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136 César F. Rosado Marzán, *Wage Theft As Crime: An Institutional View*, 20 J. L. SOCIETY 300, 308–09 (2020) (quoting an email from a worker center staffer).

137 *Tiffany Cabán Knows Who the Bad Guys Are* (Interview with Ella Mahony), JACOBIN, May 23, 2019, https://jacobin.com/2019/05/tiffany-caban-queens-district-attorney-election.

138 Id.

139 *But see* Alan Bogg & Mark Freedland, A Framework for Discussion, in CRIMINALITY AT WORK 3-4 (Alan Bogg, Jennifer Collins, Mark Freedland & Jonathan Herring, eds. 2020); Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 UC IRVINE L. REV. 655, 664-68 (2014); Levin, *Wage Theft Criminalization*, *supra* note 11.

140 *But cf.* César F. Rosado Marzán, *Wage Theft As Crime: An Institutional View*, 20 J. L. SOCIETY 300, 301 (2020) ("This essay argues for criminalizing wage theft, but urges a significant caveat: the right institutional framework must exist before worker advocates entrust the police and prosecutors to investigate and prosecute this workplace crime.").

141 *See, e.g.*, Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J. FORUM 848, 886, 898 (2019) ("'Law enforcement' could infiltrate boarding-school campuses to bust underage drinking and tobacco use or set up sting operations to fight widespread wage theft by employers. The choices that the bureaucracy makes involve direct tradeoffs, for example, from black families to corporate executives or from drug sellers to sexual abusers.").

142 *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 7-10, 47, 80-82 (2003); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 581 (2012); Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657 (2011).

irresponsibility hadn't led to prison sentences.[143] "When Wall Street CEOs break the law, they should go to jail like anyone else. The fraud on Wall Street won't stop until executives know they will be hauled out in handcuffs for cheating their customers and clients," announced Senator Warren in a press release.[144]

Similarly, Occupy the SEC (a group of former financial industry workers turned activists) argued that:

> The Great Recession of 2008 is a telling example of federal prosecutors' inability to punish corporate wrongdoing. Malfeasance on Wall Street produced a financial crisis that extinguished nearly 40% of family wealth from 2007 to 2010, pushing the household net worth back to 1992 levels. Despite these appalling statistics, not even ONE executive at a major Wall Street bank was criminally charged for playing a role in the 2008 global financial collapse. Everyday Americans were forced to pay the price for rampant speculation, mismanagement and fraud on Wall Street.[145]

Paying that price in much of the commentary and advocacy doesn't mean fines for bankers, greater oversight, or even the nationalization of the financial sector; it means prison.

C. Hate Crimes

The criminalization of violence targeted at marginalized communities has long enjoyed support in many progressive circles.[146] Supporters have argued

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[143] *See* On Tenth Anniversary of Financial Crisis, Warren Unveils Comprehensive Legislation to Hold Wall Street Executives Criminally Accountable, Mar. 14, 2018, https://www.warren.senate.gov/newsroom/press-releases/on-tenth-anniversary-of-financial-crisis-warren-unveils-comprehensive-legislation-to-hold-wall-street-executives-criminally-accountable.

[144] *Id.* Senator Warren, one of the most vocal supporters of increased financial oversight frequently has supported criminal law as the right response to the behavior of "Wall Street." *See, e.g.*, Peter J. Henning, *Elizabeth Warren Wants to Make It Easier to Prosecute Executives*, N.Y. TIMES, Apr. 22, 2019, https://www.nytimes.com/2019/04/22/business/dealbook/elizabeth-warren-finance-executives.html; Bridget Bowman, *Elizabeth Warren Releases Report Showing How Corporate Criminals Get Off Easy*, ROLL CALL (Jan. 29, 2016), http://www.rollcall.com/news/home/warren-releases-rigged-justice-report.

PETITION, *Join Occupy the SEC in Urging the Congress to Oppose H.R.A 4002*, https://www.petition2congress.com/ctas/join-occupy-sec-in-urging-congress-to-oppose-hr4002-criminal-code.

[146] *See, e.g.*, JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME (2002); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2380 (1989) (advocating the criminalization of hate speech); Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. S 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689 (1986); Sinnar, *Hate Crimes supra* note 16, at 509 ("Supported by civil rights groups but constrained by prevailing law-and-order

that crimes based on hatred for a particular race, gender, sexuality or other social identity are worse than crimes without such animus because of the longstanding harms of bigotry and exclusion.[147] Each crime victimizes an entire community and does harm that is amplified by a history of subordination.

As Shirin Sinnar notes, hate crimes are defined differently by different jurisdictions but widely understood in one of two ways:

> [One definition] used by the FBI to collect national hate crime statistics, defines a hate crime as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." While that definition focuses on the defendant's motive, other definitions focus on the intentional selection of victims on account of their identity. For instance, many state law definitions of hate crimes require the targeting of a person or group because of their membership in a legally protected group, while varying as to the range of status groups protected.[148]

It is the second definition—the idea that a person who targets a particular identity group should be liable for a sentence enhancement or specialized prosecution—that sparks progressive support for hate crime legislation and prosecution. Hate crime prosecution is seen as restoring or affirming value to a group that has been historically marginalized. Indeed, to some, not pursuing hate crime prosecution is a remarginalization. As Deborah Tuerkheimer writes: "the underenforcement of hate crime laws compounds the subordinating effects of the violence. An unpunished hate crime expresses a devaluation of the victim—not only by the perpetrator, but also by the state."[149]

Some recent hate crime legislation has resulted from particularly brutal, high-salience crimes. Similarly, progressives writing or advocating in the LGBTQIA space also turn to criminal law to ensure that queer and trans people are not marginalized or harmed based on bigotry. In this Section, we describe several such movements by progressives to make generalized hate crime laws more punitive in order to right perceived wrongs against marginalized groups or to apply the law more severely against those accused of racially motivated crimes. In particular, we look at the movement to enact hate crime legislation in Georgia following the racially motivated killing of Ahmaud Arbery and the multi-pronged criminalization effort aimed at hate crimes against AAPI people.

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politics, the hate crimes frame elevated attention to racist violence but construed it as a problem of biased private individuals and prioritized criminal law solutions.").

147 *See supra* note 146 (collecting sources).

148 Sinnar, *Hate Crimes, supra* note 16, at 504.

149 Tuerkheimer, *supra* note 11, at 1160; Janice Nadler, *Ordinary People and the Rationalization of Wrongdoing*, 118 MICH. L. REV. 1205, 1230 (2020) (same). *Cf.* Hampton, *Punishment, Feminism, and Political Identity*, *supra* note 39, at 39 (making this broader claim about the expressive function of punishment).

In February 2020, Ahmaud Arbery was jogging in a Georgia neighborhood called Saltillo Shores when three white men chased him in a pickup truck before shooting and killing him.[150] Arbery was unarmed and not involved in any altercation with the men.[151] In other words, there was little evidence that the killing could be justified by anything other than racism against Arbery. All three men were convicted of and received life sentences for murder in Georgia.[152] They also were convicted of federal hate crimes.[153]

But many civil rights organizations[154] and progressive academics[155] alike believed that a state murder conviction was not enough, or did not express the correct sense of outrage for the racially motivated killing. Thus, they pushed for a state hate crime bill, to ensure that such killings were not treated as ordinary murders.[156] Before this killing, Georgia was one of only four states that did not have such a bill.[157] The stated goal of progressives linking this new law to the Arbery case was to ensure that historically dominant groups would be punished for crimes they committed out of hatred for marginalized groups. The ACLU and the NAACP actually withdrew their support for the eventual law because the legislature added "first responders" to the list of potential hate-crime victims.[158] In other words, progressives balked at the idea that people already seen as powerful (*i.e.*, police officers) might be treated as hate crime victims.

The Arbery case is hardly unique as an illustration of progressives' desire to respond to racist violence with more punishment. Recently, there has been a push to protect AAPI people through the use of the carceral state. Perhaps spurred by racist rhetoric from Donald Trump[159] and other right-wing

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150 Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html [https://perma.cc/B4VH-BHNX].

151 Id.

152 Id.

153 Id.

154 The ACLU and NAACP of Georgia both supported the bill initially but withdrew support after "first responders" were added to the list of potential hate crime victims. Support Flips After Police Added to Georgia Hate Crime Bill, WABE (June 22, 2020), https://www.wab e.org/support-flips-after-police-added-to-georgia-hate-crimes-bill/ [perma.cc/4TW5-WX7J].

155 Ekow N. Yankah, *Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement*, 53 ARIZ. ST. L.J. 681, 682–83 (2021) (approving the passage of the Georgia Hate Crime statute but lamenting that it only encompasses intentional rather than "reckless racism").

156 H.B. 426, 155th Gen. Assemb., Reg. Sess. (Ga. 2020).

157 Angela Barajas, Dianne Gallagher & Erica Henry, *Georgia Governor Signs Hate Crime Bill Spurred by Outrage over Ahmaud Arbery's Killing*, CNN (June 26, 2020, 3:07 PM), https://www.cnn.com/2020/06/26/us/georgia-hate-crime-bill/index.html [https://perma.cc/PQJ8-2HPF].

158 Id.

159 *See, e.g.*, Colby Itkowitz, *Trump Again Uses Racially Insensitive Term to Describe Coronavirus*, WASH. POST (June 23, 2020, 8:05 PM), https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html [https://perma.cc/XY93-Q87U]; Adam Gabbatt, *Republicans Face*

politicians blaming the Covid-19 pandemic on China and Chinese people, reported crimes against AAPI people surged.[160] In response, the federal government passed the "Covid19 Hate Crimes Act,"[161] which President Biden signed into law on May 20, 2021.[162] The Act provides funding to streamline prosecutions of crimes against Asian Americans, particularly crimes related to Covid 19.[163] This legislation was supported by the American Civil Liberties Union, which said that the new bill would "bring[] us one step closer to addressing white supremacist violence."[164] The bill received support from progressive politicians and national progressive groups despite opposition by many local and grassroots AAPI organizations.[165]

At the state level, groups are also pushing to enhance hate crime legislation based on crimes against AAPI people. In New York, the Asian American Bar Association's ("AABA") stated mission sounds in progressive themes: the "collaboration in the pursuit of social justice."[166] Recently, the AABA advocated for hate crime legislation in a report called "The Endless Tide."[167] The report chronicles crimes against Asian Americans since the start

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Backlash over Racist Labeling of Coronavirus, GUARDIAN (Mar. 10, 2020, 1:02 PM), https://www.theguardian.com/world/2020/mar/10/republicans-face-backlash-racist-labeling-coronavirus-china-wuhan [https://perma.cc/H6YM-97RM].

160 The Associated Press, *More Than 9,0000 Anti-Asian Incidents Have Been Reported Since the Pandemic Began*, NPR (Aug. 12, 2021 6:02 PM), https://www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi [https://perma.cc/V9H5-6CS7] (more than 9000 crimes against AAPI people reported in the year after Covid began). *See also* Shirin Sinnar, *Conundrums, supra* note 160, at 806 ("By all accounts, hate crimes and harassment targeting Asian Americans have soared during the pandemic. Hate crime statistics are notoriously unreliable, in part because many victims do not report hate crimes to law enforcement.[8] Nonetheless, many sources of data suggest a rise that seems unlikely to result simply from increased attention or reporting. ").

161 COVID-19 Hate Crimes Act, Pub. L. No. 117-13, 135 Stat. 265 (2021) (codified in scattered sections of 34 U.S.C.).

162 Barbara Sprunt, *Here's What the New Hate Crimes Law Aims to Do as Attacks on Asian Americans Rise*, NPR (May 20, 2021, 4:32 PM), https://www.npr.org/2021/05/20/998599775/biden-to-sign-the-covid-19-hate-crimes-bill-as-anti-asian-american-attacks-rise [https://perma.cc/46NQ-28CU].

163 Id.

164 Press Release, ACLU Comment on COVID-19 Hate Crimes Act Being Signed into Law, ACLU (May 20, 2021, 3:00 PM), https://www.aclu.org/press-releases/aclu-comment-covid-19-hate-crimes-act-being-signed-law [perma.cc/2639-NBD3].

165 Sinnar, *Conundrums*, *supra* note 160, at 809–10 ("Over 100 local-level Asian and LGBTQ groups objected to the Covid-19 Hate Crimes Act for what they viewed as centering law enforcement solutions.").

166 *About AABANY*, ASIAN AM. BAR ASS'N N.Y., https://www.aabany.org/page/A1 [https://perma.cc/Q3TM-QTFJ].

167 *CUNY AAARI Presents Endless Tide:The Continuing Struggle to Overcome Anti-Asian Hate in New York*, ASIAN AM. BAR ASS'N N.Y., https://www.aabany.org/events/event_details.asp?legacy=1&id=1646057#:~:text=AABANY's%20new%20report%2C%20%E2%80%9CEndless%20Tide,incidents%20in%20New%20York%20City [https://perma.cc/K482-YF8E].

of the pandemic and calls for legislation to amend New York's hate crime legislation to "remove two unduly restrictive requirements and to re-categorize the crime of Aggravated Harassment":

> The requirement that race be a motivating factor in the crime "in whole or in substantial part" should be revised to "in whole or in part" to permit more latitude where a defendant may have targeted a victim based on multiple or shifting motivations. In addition, the restriction of hate crime enhancements to an arbitrary list of offenses should be eliminated. Furthermore, the crime of Aggravated Harassment includes acts targeting persons because of their race, ethnicity, and other protected characteristics. These crimes should be re-categorized under the hate crimes statute.[168]

To ensure that crimes against AAPI people were sufficiently punished, the AABA also supported retrenching on more general criminal procedure laws. New York had passed legislation that ended money bail for many categories of arrestees before trial.[169] The AABA asked that the state reimpose stricter bail requirements and supported new proposed legislation to "permit[] bail determination for serious felonies to consider factors such as criminal history, mak[e] repeat offenses bail eligible, mak[e] hate crime offenses subject to arrest, and mak[e] gun-related offenses bail eligible."[170] The group urged even more restrictive bail conditions advocating that "[b]ail determinations should consider public safety and whether a person charged poses a danger to the community."[171] That is, people too poor to pay bail became collateral damage in the effort to address anti-AAPI racism via criminal law.[172]

In Atlanta, the killing of several AAPI people in 2021 prompted "progressive" Fulton County District Attorney Fani Willis to reverse her campaign promise never to seek the death penalty.[173] Less than a year after her election, Willis sought the death penalty for a man charged with killing eight

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[168]Id.

[169] Beth Fertig, *Major Jail Reform Is Coming to NY Next Month—Here's What to Expect*, GOTHAMIST (Dec. 11, 2019), https://gothamist.com/news/bail-reform-explained-nyc [https://perma.cc/7D8U-3K3C].

[170] *AAARI, supra* note 167.

[171] Id.

[172] *See e.g.*, Li Zhou, *Hate Crime Laws Won't Actually Prevent Anti-Asian Hate Crimes*, VOX (June 15, 2021, 8:00 AM), https://www.vox.com/2021/6/15/22480152/hate-crime-law-congress-prevent-anti-asian-hate-crimes [https://perma.cc/E24L-V8Y3] (arguing that the focus of anti-AAPI hate crime legislation on policing fails to get at the "root cause" of such racism).
Bill Rankin, Fulton DA, Two Challengers Commit to Not Seeking the Death Penalty, Atlanta J.-Const. (May 28, 2020), https://www.ajc.com/news/local/fulton-two-challengers-commit-not-seeking-the-death-penalty/7sfZRVL5ngc3eRf9Xo2MgJ/.

people, many of Asian descent, at spas in the Atlanta area.[174] Willis justified her decision in terms of empowering marginalized groups and signaling that the community valued members of the AAPI community. She stated that she would bring such charges to show victims "it does not matter your ethnicity, it does not matter what side of the tracks you come from, it does not matter your wealth, you will be treated as an individual with value."[175]

D. Crimes of Gender Subordination

Much ink has been spilled addressing the use of criminal law to address gender subordination.[176] Under the banner of feminism, many progressive movements have encouraged the use of the carceral system to respond to nonconsensual sex and intimate partner violence.[177] The current carceral feminist movement appears particularly focused on incarceration as a form of power redistribution—to put men who abuse or harass women in prison in order to empower women more generally.[178] Men who abuse or harass women are seen (perhaps accurately) as above the law whether because their crimes are not reported or because the legal system is ill-equipped to deal with intimate violence.[179] Instead of seeing the terrible fit between criminalization and intimate partner violence,[180] however, many progressives continue to advocate the use of the carceral system to right these wrongs.[181]

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174 Nicholas Bogel-Burroughs, *Atlanta Spa Shootings Were Hate Crimes, Prosecutor Says*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/11/us/atlanta-spa-shootings-hate-crimes.html [perma.cc/D5AF-2V3A].

175 Id.

176 *E.g.*, ELIZABETH M. SCHNEIDER, BATTERED WOMEN: FEMINIST LAWMAKING AND THE STRUGGLE FOR EQUALITY (2000); Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 128-51 (2007); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); Aya Gruber, *The Critique of Carceral Feminism*, 34 YALE J.L. & FEMINISM 55 (2023).

177 *See, e.g.*, JUDITH LEVINE & ERICA MINERS, THE FEMINIST AND THE SEX OFFENDER: CONFRONTING SEXUAL HARM, ENDING STATE VIOLENCE (2020).

178 This position is often traced to the structural "dominance" or "anti-subordination" feminism of Catherine MacKinnon and other second-wave feminists. *See* GRUBER, *supra* note 2, at 123-42.

179 *See, e.g.,* Margo Kaplan, *Rape Beyond Crime,* 66 DUKE L.J. 1045, 1062–63 (2017) *("*Although reforming the criminal law of rape is necessary, this single step is decidedly insufficient. The words of statutes themselves are unlikely to effect real change in the reporting, prosecution, or prevention of rape without significant change to the underlying culture in which those statutes are interpreted and applied. Social norms about sex, consent, and gender roles encourage an adversarial approach to sex and consent and perpetuate myths about rape. Whatever the text of the law, it is highly likely that these social norms will continue to thwart its practical effect.").

180 *See, e.g.*, BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012).

181 In this respect, we agree with Hadar Aviram that "carceral feminism shares important characteristics with other progressive movements deploying criminal justice for progressive

A few examples from the past several years serve to make the point. The first is the case of Brock Turner, perhaps better known as the "Stanford Rapist," whose relatively light sentence after a conviction for sexual assault of an unconscious woman led not only to mass public condemnation but also to the recall of the judge who passed down this sentence. The second is the successful movement to criminalize "revenge porn" or the dissemination of intimate images without the consent of the sender. The final example is the movement to expand the definition of domestic violence to criminalize "coercive control."

In 2015, "'Turner, a popular student athlete at Stanford," was seen "'"thrusting"' on an apparently unconscious woman behind a dumpster."[182] He was convicted of sexually assaulting the woman, Chanel Miller. As Aya Gruber argues, Turner "represents millennial feminists' archetype of a bogeyman. . . . his bad behavior was . . . a product of wealth, race, and male privilege."[183] Judge Aaron Persky sentenced Turner to six months in prison and a lifetime on the sex offender registry.[184] Given the possibility of the statutory 14-year sentence, however, feminist groups were outraged at this perceived leniency.[185]

Stanford Law School Professor, Michele Dauber, whose daughter was a friend of Miller's, called her statement at Turner's sentencing "the manifesto of the Me Too movement."[186] Dauber led a successful and nationally publicized campaign to recall Persky. Her movement won the support of "unions and prominent feminists, including Kirsten Gillibrand, Lena Dunham and Anita Hill."[187] "[A]t least ten prospective jurors" who were to be seated for an unrelated trial before then-Judge Persky refused to serve because of his sentencing in Turner's case.[188]

Dauber argued that the recall campaign was not only about protecting women from the "lenient" judge. As she explained, "the fact that Turner's victim was an Asian-American woman of color [made the recall] even more important,

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ends—including those that advance the interests of people of color." Aviram, *supra* note 11, at 207-08.

182 GRUBER, *supra* note 2, at 178

183 *Id.*

184 *Id.* at 180.

185 Julia Ioffe, *When the Punishment Feels Like a Crime*, HUFF POST (June 1, 2018), https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber [https://perma.cc/RL2E-AP7J].

186 Id.

187 Id.

188 Andrew Cohen, *Should Jurors Refuse to Serve with the Judge in the Brock Turner Case?*, MARSHALL PROJECT (June 13, 2016, 6:20 PM) https://www.themarshallproject.org/2016/06/13/mutiny-in-the-jury-box [https://perma.cc/WYW5-AUUL]; Tracey Kaplan, *Brock Turner Case Fallout: Prospective Jurors Refuse to Serve Under Judge*, EAST BAY TIMES (Aug. 15, 2016, 9:15 AM), https://web.archive.org/web/20160915220316/https:/www.eastbaytimes.com/2016/06/09/brock-turner-case-fallout-prospective-jurors-refuse-to-serve-under-judge [https://perma.cc/6DUM-D767] (One juror stated "I'm so upset, I can't be here" [referring to the Turner sentence]).

given that research indicates survivors of color may be less likely to be believed."[189] In other words, some recall proponents imagined their campaign as reflecting not only a mission of gendered power redistribution but also a broader intersectional power-shifting project.[190]

While cases like Turner's deal with the meting out of incarceration based on well-established sexual assault laws, progressive scholars and lawmakers also advocate for new criminal laws in various areas where gender subordination or intimate partner violence is suspected. One area is "revenge porn," where a person (stereotypically a male) uses an intimate image sent to him by his (stereotypically female) partner to harm her after a perceived slight, such as a breakup.[191] He does this by disseminating the image publicly or sending it to a large group in order to shame the sender.

Criminalizing revenge porn is an area where progressive scholars and activists have been immensely successful at instituting their agenda.[192] While "before 2013 only three states" had statutes criminalizing such activity, [a]s of [2023], forty-eight states have enacted criminal statutes banning some version of revenge porn."[193] Those in favor of new criminal laws for revenge porn see it as the only way to punish those who use their possession of intimate material to shame their victims, leaving these (mostly) women[194] powerless to control their own likeness:

> Disclosing sexually explicit images without permission can have lasting and destructive consequences. Victims often internalize

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189 Jeannie Suk Gersen, *Revisiting the Brock Turner Case*, NEW YORKER (Mar. 29, 2023), https://www.newyorker.com/news/our-columnists/revisiting-the-brock-turner-case [https://perma.cc/54SQ-NJEW].

190 *But see infra* Part III.A.ii (tracking the harms done to defendants of color as a result of the recall.).

191 Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. Rev. 345, 346 (2014) (defining revenge porn as coterminous with "nonconsensual pornography," which involves the distribution of sexually graphic images of individuals without their consent, including images originally obtained without consent (e.g., hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent, usually within the context of a private or confidential relationship).

192 *Id.* at 349 ("In this Article we make the case for the direct criminalization of nonconsensual pornography."); Andrew Gilden, *The Queer Limits of Revenge Porn Laws*, 64 B.C. L. REV. 801, 819 (2023) ("Professor Franks . . . advised numerous state legislatures that considered revenge porn statutes and, via the Cyber Civil Rights Initiative (CCRI), published a model criminal statute containing several express exemptions from liability.").

193 Gilden, *supra* note 192, at 819.

194 Citron & Franks, *supra* note 191, at 354 ("Revenge porn is a form of cyber harassment and cyber stalking whose victims are predominantly female.[52] The U.S. National Violence Against Women Survey reports that 60% of cyber stalking victims are women.[53] For over a decade, Working to Halt Online Abuse ("WHOA") has collected information from cyber harassment victims. Of the 3,787 individuals reporting cyber harassment to WHOA from 2000 to 2012, 72.5% were female, 22.5% were male, and 5% were unknown.").

> socially imposed shame and humiliation every time they see them and every time they think that others are viewing them.[195]

Indeed, revenge porn is seen as tantamount to a sexual assault crime in that it is "degrading and humiliating for the victim's dignity."[196]

The prominent scholars who have successfully pushed for criminalization of revenge porn have argued that criminal law is necessary to do the work of gender justice and to protect privacy and autonomy.[197] Danielle Keats Citron and Mary Anne Franks argue that "[a] criminal law solution is essential. . .."[198] In response to the anticipated critique that their newly proposed criminal laws would unnecessarily enlarge the criminal codes, Citron and Franks respond that:

> Only the shallowest of thinkers would suggest that the question whether nonconsensual pornography should be criminalized-indeed, whether any conduct should be criminalized-should turn on something as contingent and arbitrary as the number of existing laws..[199]

This is, in a way, a refreshing acknowledgement that the commentators are not concerned with any increase in the number of those incarcerated, so long as prison is also the place for those who harm victims through revenge porn.[200]

Finally, there is the recent movement to expand the definition of domestic violence to include the concept of "coercion."[201] Feminists have long argued that domestic violence is not only physical. That intuition is reflected in "battered person syndrome" cases where no specific act of violence precipitates the killing, but rather a long pattern of abuse instills fear, leading an abused defendant to believe they are in imminent danger.[202]

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195 Citron & Franks, *supra* note 191, at 364.

196 *Id.* at 363

197 *See, e.g.*, *See* Bobby Chesney & Danielle Keats Citron*, Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1801 (2019)(proposing criminal liability as one way to punish the creation of "deepfakes"); Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 897 (2019) (responding to the argument that criminal laws harm the most vulnerable people by stating that "arguing that we should not enact [criminalization of] harmful speech because historical speech restrictions often targeted minority voices is like saying we should not criminalize rape because the criminal law has long been used to subjugate women.").

198 Citron & Franks, *supra* note 191, at 361. The problem with this kind of statement for decarceration is clear—if the criminal law is for the "judgment proof" or the person who cannot afford to pay civil penalties, then it is for the poor.

199 *Id.* at 362.

200 Citron and Franks gesture to a concern about mass incarceration but it is not a priority: "While we share general concerns about overcriminalization and overincarceration, rejecting the criminalization of serious harms is not the way to address those concerns." *Id.*

201 Gilden, *supra* note 192, at 818.

202 Abigail Finkelman, *Kill or Be Killed: Why New York's Justification Defense Is Not Enough for the Reasonable Battered Woman, and How to Fix It*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 267, 284 (2019) ("When BPS is raised, where it is allowed to be raised, an expert testifies about the effects

Recent years, though, have seen a strong push to make nonviolent abuse criminal in and of itself. In 2023, New Jersey expanded the definition of domestic violence in its penal code by adding the term "coercive control" to the language of the statute, which had otherwise reserved criminal condemnation for an act of physical violence. Coercive control:

> [M]eans a pattern of behavior against a person protected under this act that in purpose or effect unreasonably interferes with a person's free will and personal liberty. "Coercive control" includes, but is not limited to, unreasonably engaging in any of the following:
>
> (a) isolating the person from friends, relatives, or other sources of support;
>
> (b) Depriving the person of basic necessities;
>
> (c) Controlling, regulating or monitoring the person's movements, communications, daily behavior, finances, economic resources or access to services;
>
> (d) Compelling the person by force, threat or intimidation, including, but not limited to, threats based on actual or suspected immigration status, to (i) engage in conduct from which such person has a right to abstain, or (ii) abstain from conduct that such person has a right to pursue;
>
> (e) Name-calling, degradation, and demeaning the person frequently;
>
> (f) Threatening to harm or kill the individual or a child or relative of the individual;
>
> (g) Threatening to public information or make reports to the police or to the authorities;
>
> (h) Damaging property or household goods; or
>
> (i) Forcing the person to take part in criminal activity or child abuse.[203]

And, New Jersey isn't alone—at least three other states have seen similar unsuccessful legislative efforts in recent years.[204]

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of sustained battering on a victim's psyche, including "learned helplessness," a "high tolerance for cognitive inconsistency," a "sense that alternatives are not available," and an ability to "'rate' the tolerability or survivability of their partner's violence."[93] It is then argued that, due to these effects, battered women should not be held to the classic "reasonable man" standard (the objective standard), and that there should be a "reasonable battered woman" standard (the subjective standard) instead.[94] The expert will explain that, due to past abuse, the battered woman's perception of the situation was warped, to an extent that she genuinely perceives danger-- even when the reasonable man would not.").

[203] H.B. A1475, 220th Gen. Assemb., Reg. Sess. (N.J. 2023).

[204] *See* Courtney K. Cross, *Coercive Control and the Limits of Criminal Law*, 56 UC DAVIS L. REV. 195,224 ("New York, South Carolina, and Washington each introduced bills that would

As the language of the New Jersey statute demonstrates, the addition of coercion opens up a wide swath of behavior that can now be criminalized. This kind of broad discretion to prosecute intimate abuse is exactly what its progressive proponents want. As one expert in the field and the founder of one of the first battered women's shelters put it, coercive control is "oppressive behavior grounded in gender-based privilege."[205] Indeed, enlarging the criminal code for domestic violence to include mental as well as physical coercion has long been a project of carceral feminists.[206] Scholars have advocated for protecting victims of domestic violence through criminalizing nonphysical coercion, from proposing a similar expansion to New Jersey's new law, to arguing that the US should criminalizing coercion as a form of fraud, to suggesting a crime of domestic battery that includes behavior "that result[s] in substantial power or control."[207]

In this Part, we have outlined several contexts in which progressives seek to deploy criminal legal institutions as tools of redistribution. Much of this work is siloed—in other words a carceral feminist may not believe that employee theft should be criminally punished.[208] She may also believe generally that the criminal legal system must be reduced, even substantially. Yet in the aggregate, these redistributive projects (and the many others we do not detail here) might well strengthen the carceral state and exacerbate inequality. This is the issue we turn to in the next Part.

III. THE LIMITS OF PUNITIVE REDISTRIBUTION

As outlined in the previous Part, progressive lawmakers, activists, and academics have justified the turn to criminal legal institutions in distributive (or redistributive) terms. In this Part, we critique that turn and the framing of criminal law as a potential engine of redistribution. First, we argue that criminal legal institutions simply can't achieve the redistributive ends that proponents suggest. We contend that a distributive case for criminalization requires empirical support for claims about positive distributive consequences—support that is sorely lacking. Further, we argue that the institutions of the punitive state are inherently regressive and are antithetical to the egalitarian vision articulated by many of the commentators who have embraced redistributive carceral

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criminalize coercive control" but as of this writing none of these bills have passed the legislature.)

[205] Patricia Fersch, *Domestic Violence:Coercion and Control Equates to a Loss of Liberty, Sense of Self and Dignity for Women,* FORBES (Mar. 19, 2021), https://www.forbes.com/sites/patriciafersch/2021/03/19/domestic-violence-coercion-and-control-equates-to-a-loss-of-liberty-sense-of-self-and-dignity-for-women/?sh=643d1a3c5b65

[206] GRUBER, *supra* note 2, at 124-28 ("Dominance feminism" and consensual sex as coercion).

[207] Cross, *supra* note 204, at 217-219 (collecting sources).

[208] *Cf.* Aharonson, supra note 26 (noting commonalities across different "pro-minority criminalization" projects); Aviram, *supra* note 11, at 207-08 (same).

projects. Second, we claim that even if criminal law could do some of the redistributive work that proponents claim, the turn to criminal law still wouldn't be justified. Criminal law would do more harm than good, or, at the very least, scholars and activists committed to more radical visions of social change should be unwilling to accept the evils of state violence that any criminalization project entails, even in the name of redistribution.

A. Distributive Objections

If we take distributive arguments for criminalization on their own terms, there are two major follow-up questions: First, does the distributive reality match proponents' distributive arguments? And second, even it does, are there distributive harms elsewhere? That is, can punitive or pro-prosecutorial policies in one area be confined to that area, or do they risk migrating and having negative consequences elsewhere?

1. Law on the Ground v. Law in the Cultural Imagination

To the extent that many progressives support criminal law for redistributive ends, progressives need to answer an empirical question: Does criminal law actually distribute in the way that they imagine?

Looking to the examples discussed in Part II, our tentative answer is "no." We lack extensive studies mapping—say—who is prosecuted for wage theft or which defendants receive harsher sentences for hate crimes. But, the anecdotal evidence that we have (and the actual studies, in some cases) seem to indicate a troubling mismatch between progressive rhetoric and the realities of criminal enforcement. That mismatch hardly should be surprising: race-class subordinated populations tend to be policed more heavily than whiter and wealthier populations,[209] and studies have shown that minoritized defendants tend to face harsher charges and sentences.[210] So, it's likely that a new criminal statute or program of ramped-up enforcement would reflect similar dynamics.

Of course, the left and progressive advocates discussed in Part II don't see themselves as advocating for further criminalization of marginalized communities—just the opposite.[211] Their imagined defendants represent the rich, the powerful, or the socially dominant. The imagined wage thief or rapist might be white, wealthy, and privileged. And pro-punitive advocacy frequently

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[209] *See, e.g.*, Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 689 (2020).

[210] *See*, e.g., Allen J. Beck & Alfred Blumstein, Racial Disproportionality in US State Prisons: Accounting for the Effects of Racial and Ethnic Differences in Criminal Involvement, Arrests, Sentencing, and Time Served, 34 J. QUANTITATIVE CRIMINOLOGY 853 (2018); Sonja B. Starr & M. Marit Rehavi, Racial Disparity in Federal Criminal Sentences, 122 J. POL. ECON. 1320, 1323 (2014).

[211] *See, e.g.*, Gerstein & Seligman, *supra* note 134; Tuerkheimer, *supra* note 11, at 1162-64.

embraces or relies on that image.[212] But, there is no guarantee that the cultural framing of a given law will reflect how the law operates on the ground.[213] Why should we think that the people who actually are prosecuted or punished actually will be white, wealthy, or powerful?[214]

For example, a 2000 report from the FBI on "white collar crime" enforcement stated that three times more "economic crimes" were committed at convenience stores (129,749) than at banks (38,364).[215] The mean amount stolen or counterfeited in "white-collar incidents" was $9,254.75, the median was $210, and the mode was $100.[216] That is, advocacy geared at white-collar crime enforcement appears just as likely to lead to more check fraud prosecutions as it is to mean a focus on executives at the nation's biggest banks.[217] And, a rough survey of wage theft prosecutions appears to yield a focus on small, immigrant-run businesses or middle managers, rather than the executives of multinational corporations.[218]

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[212] *Cf.* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2037 (2022) ("Animating much of our thinking about criminal law and policy in recent decades is 'the story of an imagined monstrous other—a monster who is not quite human like the rest of us. . . .'" (quoting DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 11 (2019))).

[213] This potential mismatch should be a cause for concern—or at least introspection and further study—in many ideologically loaded areas of criminal policy. *See, e.g.*, Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. Rev. 961, 1021 (2014) (raising this concern in the context of stand-your-ground laws); Aya Gruber, *Leniency As A Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571, 1584 (2013) (same); Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273, 333 (2015) (raising this concern in the context of the provocation defense); Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2193 (2016) (raising this concern in the context of criminal gun regulation) David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1023 (2020) (same); Ekow N. Yankah, *Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness As Hate Crime Enhancement*, 53 ARIZ. ST. L.J. 681, 704 (2021) (hate crimes); Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 545 (2010) (raising this concern in the context of debates about duty to retreat).

[214] In this respect, we suggest that there might well be a disconnect between a redistributive theory of criminal law and an actual redistributive application of criminal law. *Cf.* Chad Flanders, *Can Retributivism Be Progressive?: A Reply to Professor Gray and Jonathan Huber*, 70 MD. L. REV. 166, 174 (2010) ("I wanted us, qua philosophers of punishment, to think twice about theorizing without considering the real world effects of our theories. Some theories are too abstract. Even worse, some theories are abstract and potentially harmful.").

[215] Cynthia Barnett, Fed. Bureau of Investigation, The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data 3 (2000), http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs_wcc.pdf [https://perma.cc/9NJ4-3CZK].

[216] *Id.* at 4; *see also* Levin, *Wage Theft Criminalization*, *supra* note 16, at 1483-84 ("[T]he scale of the incidents and what they included (low-level property crimes, check fraud, etc.) fails to jibe with the dominant cultural (and legal) imagination of "white-collar crime.").

[217] For a rare and incisive critique from the left of white-collar crime as a regulatory model, *see* Pedro Gerson, *Less is More?: Accountability for White-Collar Offenses Through an Abolitionist Framework*, 2 STETSON BUS. L. REV. 145 (2022).

[218] *See* Levin, *Wage Theft supra* note 16, at 1481-88.

Similarly, while many incidents of police violence lead to no criminal charges or convictions, a number of recent high-profile cases that have led to charges, convictions, and prison sentences have involved officers of color—Peter Liang in New York,[219] Mohammed Noor in Minnesota,[220] Nouman Raja in Florida,[221] Tou Thao in Minnesota,[222] and Demetrius Haley, Desmond Mills Jr., Emmitt Martin III, Justin Smith, and Tadarrius Bean in Tennessee.[223] That's not to minimize the harm caused by these officers or to suggest that each case was similar. But given the critiques of policing as a tool of white supremacy and the rarity of criminal charges against police officers, it is striking that police prosecutions appear to reflect—at least in part—the criminal system's broader racial disparities.[224]

Studies also demonstrate that ostensibly antiracist criminal statutes, like the hate-crime enhancements proposed by progressives in Georgia or the AABNY in New York, often yield unexpected outcomes.[225] "[C]ases of violence between ethnic minority groups in gang-related conflict or low-level graffiti offenses are among the most vigorous uses of hate crime prosecutions."[226] In the early 2000s, sixty-three percent of the people charged under South Carolina's anti-lynching law—explicitly passed to respond to respond to the state's history of anti-Black violence—were Black.[227]

A growing literature on the costs of "carceral feminism" similarly demonstrates that criminal laws enacted to protect women often harm women or are applied in ways that disproportionately harm other marginalized

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[219] See Levine, Police Prosecutions, supra note 2, at 1036-40; Gabriel J. Chin, The Problematic Prosecution of an Asian American Police Officer: Notes from A Participant in People v. Peter Liang, 51 GA. L. REV. 1023, 1024 (2017).

[220] *See* Levine, *Police Prosecutions, supra* note 2, at 1040-43.

[221] *See Id.* at 1043-46.

[222]Steve Karnowski, *Ex-Officer Thao Convicted of Aiding George Floyd's Killing*, AP NEWS (May 2, 2023, 1:32 PM), https://apnews.com/article/george-floyd-minneapolis-officer-tou-thao-841814b3f2d4258b79f3ae408ba11fac [https://perma.cc/8C7D-SBBK].

[223] *See* Travis Caldwell & Ray Sanchez, *5 Former Memphis Police Officers Charged in Tyre Nichols' Death Plead Not Guilty*, CNN, Feb. 17, 2023, https://www.cnn.com/2023/02/17/us/tyre-nichols-memphis-police-arraignment/index.html.

[224] *See* Levine, *Police Prosecutions, supra* note 2, at 1034-36.

[225] *See supra* Part II.C.

[226] Yankah, *supra* note 213, at 704 (citing to Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & POL'Y 1, 23 (1994), and James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 19 (1997)); *see also* Dean Spade, *Keynote Address: Trans Law & Politics on A Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 357 (2009) ("[H]ate crimes laws strengthen and legitimize the criminal punishment system, a system that targets the very people that these laws are supposedly passed to protect. The criminal punishment system has the same biases (racism, sexism, homophobia, transphobia, ableism, xenophobia) that advocates of these laws want to eliminate.").

[227] *See* JOEY L. MOGUL, ANDREA J. RITCHIE, AND KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 127 (2011).

communities, such as race-class subordinated populations and queer people.[228] From ""mandatory arrest" policies in the intimate-partner violence context, to the expansion of criminal liability for rape, and the rise of the sex offender registry, the use of criminal law to respond to gender subordination has expanded the reach of the carceral state—with predictable distributive consequences.[229]

While the results of these studies might be shocking in light of the rhetoric discussed in Part II, they shouldn't be surprising to anyone familiar with the workings of the U.S. criminal system. Any turn to criminal legal institutions ultimately involves ceding power to those institutions—and the people who run them. So, progressives who turn to criminal law to advance progressive ends are relying on the same prosecutors, judges, and police officers who are responsible for the day-to-day functioning of the criminal system.[230] To the extent that these institutions and actors are responsible for entrenching inequality and for the injustices of the criminal system elsewhere, then why wouldn't they be responsible for similarly troubling outcomes here?[231] That is, the politics and logics of criminal law's administration needn't (and likely do not) change with the politics of the activist or advocate who supports a punitive bill or individual prosecution. There's no reason to assume that police, prosecutors, correctional officers, etc. will share the same values and priorities as progressive activists.

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[228] *See, e.g.*, LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 29 (2018); GRUBER, THE FEMINIST WAR ON CRIME, *supra* note 2, at87].

[229] *See, e.g.*, Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. Rev. 1418, 1454–55 (2012) ("[A]s many women of color predicted, mandatory arrest policies appear to have done little to protect women of color against domestic violence. Indeed, some studies seem to suggest that the policies have inadvertently increased the risks of serious injury or death for some victims of domestic violence, including a heightened risk of mortality for Black women in particular. Beyond the heightened risk of death, research suggests that women of color are more likely to be arrested themselves for behavior that may be consistent with self-defense but interpreted through the lens of stereotypes as overly aggressive." (footnotes omitted)); Goodmark, *supra* note 228; Gruber, THE FEMINIST WAR ON CRIME, *supra* note 2, at87,145]; JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 45 (2009).

[230] One response to this concern might be to bring in different prosecutors to handle these types of cases. For example, César F. Rosado Marzán has argued for this approach in the wage theft context—traditional line-level ADAs shouldn't prosecute abusive bosses; instead attorneys more attuned to the labor movement and worker advocacy should take charge. *See* Marzán, *supra* note 136, at 304-13. We are sympathetic to this impulse and Marzán's effort to think beyond traditional criminal legal institutions. That said, eliminating one problematic set of actors can't begin to address widespread institutional problems and pathologies—what about the sentencing judges, the wardens, and the prisons themselves? *See* Benjamin Levin, *Victims' Rights Revisited*, 13 CAL. L. REV. ONLINE 30, 33-34 (2022).

[231] *See* Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379, 386 (2016).

Further, using Simonson's "power-shifting" frame,[232] we are skeptical that carceral progressivism actually lives up to its promise of shifting power to marginalized groups. Pushing for more policing, prosecutions, and punishment directly empowers the state—and, specifically, the state's criminal apparatus.[233] Perhaps, marginalized communities or relatively powerless defendants might benefit in some cases as well.[234] Take, for example, wage theft cases in which the state is able to collect fines from a boss and distribute that money to workers.[235] But, that benefit is vicarious or at least contingent. It depends on the actions of police and prosecutors.[236] Any shift in power is mediated by criminal justice actors.[237] They accrue power—at the expense of defendants.[238] These state actors might empower marginalized communities. Or, they might not.[239] To the extent they do, though, any benefit to marginalized communities depends upon the carceral state growing and amassing further power.

Or, perhaps our intuitions are wrong, and the anecdotal evidence that we have isn't actually representative. Perhaps, criminal legal institutions *could*

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232 *See supra* notes 48-57 and accompanying text.

233 *See* Bell, *Police Reform and the Dismantling of Legal Estrangement*, *supra* note 65, at 2087; Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977); Coker, *Crime Control and Feminist Law Reform*, *supra* note 39, at 860 ("[I]n developing anti-domestic violence strategies, we must attend to the coercive power of the state. . . .").

234 "Relatively powerless" is also a slippery concept. That is, a poor person who—while armed with a gun—robs a rich person might have more "power" in the moment because of the gun, even if the rich person enjoys more power as a structural matter. So, should a power-focused approach to criminal law favor the rich victim (they wield less power in the moment) or the poor defendant (who wields less power in society)? *Cf.* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 54 (2020) "[M]inimal criminal law would also include a normative model composed by criminal law and criminal procedure principles that would make minimal criminal law the law of the weakest against the law of the strongest. It would always protect the weakest: the injured party during the offense, the defendant during the criminal process, and the prisoner during the execution of the prison sentence." (citing Luigi Ferrajoli, *Il diritto penale minimo*, 3 DEI DELITTI E DELLE PENE 493, 511–12 (1985).Or, to put the problem in broader terms: many people—regardless of how power they are on a macro scale—might wield a relative power advantage in the context of interpersonal violence. So, even if power-shifting were an attractive theory for assessing criminal policy, power is a tricky enough concept that many criminal policy decisions could be justified in power-shifting terms. *Cf.* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 193 (1999) (making a similar argument about the use of the "harm principle" in decisions about what conduct to criminalize).

235 *See, e.g.*, Molly Crane-Newman, *NYC Workers Stiffed by Employers Have New Way to Recoup Stolen Wages*, N.Y. DAILY NEWS, Feb. 16, 2023, https://www.nydailynews.com/new-york/nyc-crime/ny-worker-protections-stolen-wages-20230217-c77cg7vlrvht7o6efmpd2exu5m-story.html (discussing efforts use the Manhattan DA's office as a vehicle for refunding stolen wages).

236 *Cf.* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1583-1608 (2020) (examining the role of prosecutors in mediating victims' interests).

237 *See* Levin, *Victims' Rights Revisited*, *supra* note 230, at 34.

238 See Id.

239 On this question, *see* Capers, *supra* note 236, at 1579-80.

shift power in the way that progressive advocates imagine. Perhaps the defendants arrested, incarcerated, and punished harshly would be avatars of white supremacy, heteropatriarchy, and capitalist subordination. What we argue here, though, is that those outcomes would be unexpected and at odds with what we know about the way that U.S. criminal legal institutions generally function. Put differently, the redistributive case for progressive criminalization rests on empirical claims.[240] And, those empirical claims strike us as very unlikely to be true.

Therefore, we argue that the burden of proof should fall on academics, activists, and policymakers who remain enthusiastic about using criminal law to advance progressive ends. It should be incumbent on those calling for more punishment to explain why criminal law *in this area* would work differently than criminal law *in other areas*.[241]

2. Trickle-Down Criminal Injustice

Even if the people charged with "crimes of power" were less likely to come from race-class subordinated communities, and even if marginalized victims might benefit in some of these cases, that still would leave a larger distributive question: Does amping up punitive policies in one area harm marginalized communities in other areas? That is, if we adopt a broader view for our distributional analysis, does empowering the carceral state in one area that progressives like (prosecuting police, hate crimes, white-collar crime, etc.) lead to a strengthened carceral state in other areas where progressives are less enthusiastic (drug crime, misdemeanor prosecutions, etc.)? Do punitive politics directed at powerful defendants "trickle down" to harm less powerful defendants?

Unlike the distributive questions raised in the previous section, this larger question is harder to answer empirically. It wouldn't be enough to track the race, class, and identity of defendants in hate crime or police prosecutions.[242] We would need to determine if—say—support for a new hate crime statute had legitimated criminal legal solutions to other social problems,[243] or if advocating

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[240] *But cf.* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415 (1999) (arguing that ostensibly utilitarian and data-driven arguments often provide cover for what are fundamentally moral or ideological claims).

[241] *Cf.* TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION 149-49 (2022) ("[T]hose who defend the practice of imprisonment must justify it by showing that prisons prevent or reduce crime.").

[242] Those are the sorts of data that would be necessary to answer the questions in the previous Section.

[243] By legitimation, we refer to the Gramscian concept. S*ee, e.g.*, Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 127 (Ben Brewster trans., 1971); SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans.,

for weak procedural protections in police prosecutions would harm non-police defendants.[244] Drawing such causal relationships would be difficult, as would designing a study to assess the ripple-effects of each pro-punitive advocacy effort.[245]

Nevertheless, we are skeptical at best that punitive impulses and policies can be cabined. Arguments don't belong exclusively to the activists who use them. They can be deployed by people with very different politics and goals.[246] Claiming that prison is the right or the best solution to one social problem invites the question of why it wouldn't be just as desirable in another area. Arguing that punishment and justice are synonymous in one context implies that they are in other contexts. And, claiming that criminal institutions can empower victims in one class of cases suggests that victims can—and should—look to criminal law as a source of power in other cases.[247]

Our observation finds support in critical scholarship and activism that emphasizes the unintended consequences of strengthening the carceral state.[248] Turning to brutal and repressive institutions tends to redound to the detriment of non-dominant social groups.[249] Our observation also finds support in certain liberal or rights-based approaches to law: In order to preserve all of our rights, the argument goes, we need to protect the rights of people we don't like. This, of course, has long been a refrain of civil libertarians who emphasize the importance of helping unpopular defendants or protecting unpopular speech.[250] (The American Civil Liberties Union representing Nazis who marched in Skokie, Illinois is perhaps the classic example.)[251]

Either logic holds for the current societal punitive turn: Empowering or expanding the carceral state poses significant risks for the population at large—and particularly for marginalized communities. In a system marked by

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1971); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429-32 (1995).

[244] *See generally,* Levine, *Police Suspects, supra* note 16; Levine, *How We Prosecute*, *supra* note 16.

[245] Indeed, this observation has led some to critique the concept of legitimation altogether. *See generally* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (1983).

[246] *Cf.* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1252 (2010) (tracing anti-abortion judges' use of trauma rhetoric initially deployed by reproductive rights advocates).

[247] *Cf.* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 124-28 (1988) ("I am proposing that retributive punishment is the defeat of the wrongdoer at the hands of the victim (either directly or indirectly through an agent of the victim's, e.g., the state) that symbolizes the correct relative value of wrongdoer and victim.").

[248] *See, e.g.*, *supra* note 41 (collecting sources); Spade, *supra* note 226; Mogul, Ritchie, & Whitlock, *supra* note 227.

[249] *See, e.g.*, Spade, *supra* note 226; Mogul, Ritchie, & Whitlock, *supra* note 227.

[250] *See generally* ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979) (describing the ACLU's work on this case).

[251] *See, e.g.*, Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

discretion, giving new tools and more power to police and prosecutors in one area means that police and prosecutors have more power—full stop. Accepting and advancing pro-punitive arguments here not only serves to legitimate criminal law, but also helps to provide a blueprint for future efforts at criminalization and punishment.[252] Put simply, punishment and punitive politics might well trickle down, harming the relatively powerless, not just the relatively powerful.

Again, whether and to what extent harsh policies trickle down are empirical questions. Given the enormous stakes and social costs of the turn to criminal law, we think it's important to try to answer those questions and to grapple with the very real (and—in our opinion—quite likely) possibility that progressive pro-criminalization advocates are wrong. While we lack comprehensive evidence that punitive policies aimed at one class of defendants harm all defendants, one recent study in the wake of the Brock Turner case provides some troubling support for this claim.[253]

In a 2022 study, political scientists Sanford Gordon and Sidak Yntiso tracked California county court sentencing patterns around the time of Judge Aaron Persky's recall election.[254] Gordon and Yntiso examined the claim that the highly publicized recall discouraged judicial leniency and encouraged judges to adopt a "tough on crime" posture.[255] Looking to sentencing data for six counties, Gordon and Yntiso observed "large, instantaneous increases in judicial punitiveness following the announcement of the recall campaign. . . ."[256] Sentences in increased roughly 30%, and Gordon and Yntiso found that the recall announcement could have been responsible for between 88 and 403 additional years in prison time doled out during the forty-five day window in question.[257] Those increases were "most readily apparent in sentencing for nonsexual violent crime."[258] Despite recall supporters' focus on Turner's race and attempts to distance the recall from discussions of racialized mass incarceration, the harsher sentences harmed defendants across racial lines.[259] The harsher sentences "neither mitigated nor exacerbated any long-term

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[252] This concern has led some commentators to argue that the right way to address inequality in criminal administration is to treat everyone better (i.e., treat marginalized defendants more like powerful defendants) rather than treating powerful defendants worse. *See, e.g.*, Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1383 (2018); Levin, *Mens Rea Reform and Its Discontents*, *supra* note 16, at 540-48; Levine, *How We Prosecute Police*, *supra* note 2.

[253] *See* Sanford C. Gordon & Sidak Yntiso, Incentive Effects of Recall Elections: Evidence from Criminal Sentencing in California Courts, 84 J. OF POLITICS 1947 (2022).

[254] *See Id.* at 1947-48.

[255] See generally Id.

[256] *Id.* at 1960.

[257] *Id.* at 1959.

[258] *Id.* at 1960.

[259] *See Id.* at 1957-58.

discriminatory treatment in sentencing."[260] And, as Gordon and Yntiso explained:

> recall campaign critics . . . anticipated a disproportionate racial burden even in the absence of any immediate change in discriminatory treatment by judges. Specifically, these critics emphasized how the overrepresentation of Black citizens in courts and prisons implies that even a race-neutral increase in overall severity will place a disproportionate burden on minority communities. Our findings are consistent with this interpretation.[261]

An advocacy campaign focused on the perceived privilege of an affluent, straight, cis-gender, white male defendant actually had sweeping consequences.[262] Perhaps it raised awareness about sexual violence and advanced the goals of activists.[263] But it also had unintended consequences for people who looked nothing like Brock Turner.[264]

Of course, this is only one study focused on a single case. Nevertheless, the findings are sobering. And they should invite greater introspection from progressives who believe that unintended consequences are minor or that punitive impulses can be cabined easily.

B. Decarceration Beyond Distribution

As should be clear, we are skeptical at best that criminal law does—or could—achieve the redistributive ends that progressives favor. But even if criminal law distributed (or redistributed) in the ways that progressives imagine, would that mean that more criminal law, more criminal prosecutions, and more criminal punishment would be desirable? We think not.

The contemporary turn to "criminal law skepticism" in the United States generally reflects a focus on distributive consequences—on the criminal system as a driver of inequality. Critical accounts tend to emphasize the historical relationship between criminal legal institutions and chattel slavery, capital's

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[260] *Id.* at 1958.

[261] Id.

[262] *See, e.g.*, THE RECALL REFRAMED (Rebecca Richman Cohen, dir. 2023); Alex N. Press, *When a Fight Against Sexual Assault Bolstered Mass Incarceration*, JACOBIN, Mar. 26, 2023, https://jacobin.com/2023/03/the-recall-reframed-documentary-review-brock-turner-sexual-assault-carceral-feminism/.

[263] *See, e.g.*, Julie Zigoris, *This Judge's Recall Was a Win for #MeToo but a Setback For Prison Reform, New Documentary Argues*, THE SAN FRANCISCO STANDARD, Mar. 4, 2023, https://sfstandard.com/arts-culture/this-judges-recall-was-a-win-for-metoo-but-a-setback-for-prison-reform-new-documentary-argues/.

[264] *See, e.g.*, Gordon & Yntiso, *supra* note 264; Aya Gruber, Opinion, *Was Recalling Brock Turner's Judge Justice?*, MSNBC, Mar. 19, 2023, https://www.msnbc.com/opinion/msnbc-opinion/judge-sentenced-brock-turner-was-recalled-california-not-justice-rcna75515.

oppression of labor, settler colonialism, and other forms of subordination.[265] Activist and academic accounts rely on narratives of criminal law as an engine of inequality, reflecting prejudice and entrenching the power of socially dominant groups at the expense of marginalized communities.[266] Criminal law and its administration might be objectionable for a host of reasons, but contemporary U.S. movements (both inside and outside the academy) frequently ground their claims in the language of distributive justice—the system enacts institutionalized violence against society's most marginalized.[267]

To the extent that an abolitionist, minimalist, or anti-carceral project focuses exclusively on distributive concerns, then the questions raised in the previous sections take on tremendous significance. The relevant inquiry when presented with a new piece of criminal legislation or an alteration to the criminal process is *how it will distribute*.[268] Of course, there may be a range of important follow-up questions—does criminal law work to advance the desired ends (reducing risk, remedying harm, advancing public safety, etc.)? Are criminal law and criminal punishments necessary to achieve the desired ends? And, what are the appropriate or acceptable distributive consequences? But, the litmus test for criminal policy depends on who will suffer and who will benefit.

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[265] *See, e.g.*, BEN-MOSHE, *supra* note 33; DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); Shelby, *supra* note 241, at 18-52 (tracing the origins of contemporary U.S. abolition to specific strands of the Black radical tradition); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1818 (2020); Roberts, *Abolition Constitutionalism*, *supra* note 33; Allegra. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1622 (2019); Dylan Rodríguez, *Abolition As Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1580 (2019); *Part One: End the Occupation*, The Red Nation 12 (2020), http://therednation.org/wp-content/uploads/2020/04/Red-Deal_Part-I_End-The-Occupation-1.pdf.

[266] *See, e.g.*, Rachel Herzing, Commentary, *"Tweaking Armageddon": The Potential and Limits of Conditions of Confinement Campaigns*, 41 SOC. JUST. 190, 193–94 (2015) ("Far from being broken . . . the prison-industrial complex is actually efficient at fulfilling its designed objectives—to control, cage, and disappear specific segments of the population."); Critical Resistance, *What is the PIC? What is Abolition?*, https://criticalresistance.org/mission-vision/not-so-common-language/ (Last Accessed June 30, 2022) ("Through its reach and impact, the PIC helps and maintains the authority of people who get their power through racial, economic and other privileges. There are many ways this power is collected and maintained through the PIC, including creating mass media images that keep alive stereotypes of people of color, poor people, queer people, immigrants, youth, and other oppressed communities as criminal, delinquent, or deviant."); End the War on Black People, The Movement for Black Lives, http://web.archive.org/web/20200316230511/https://policy.m4bl.org/end-war-on-Black-people/ (last visited)("Until we achieve a world where cages are no longer used against our people we demand an immediate change in conditions and an end to all jails, detention centers, youth facilities and prisons as we know them.").

[267] *See, e.g.*, MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 13 (Tamara K. Nopper ed., 2021); Akbar, *supra* note 265, 1821-22.

[268] *See supra* Part I.

Distributive justice is important in a society marked by widespread (and growing) inequality. That's why we see the sort of careful distributional analysis discussed above as such a valuable component of any project of dismantling the carceral state.

That said, it's not at all clear to us that distributive justice must be the sole focus of a project of abolition, penal minimalism, decarceration, or institutional transformation.[269] As Máximo Langer observes, "[n]on-American penal abolitionists have presented a different range of social theories that have varied from author to author and that have included Marxism, humanist phenomenology, localism combined with a position against professionals and their expertise, and Christian thought and categories."[270] Indeed, some commentators have argued that "abolitionists need to turn not only to social, but also to moral theory to make explicit and improve the quality of their own moral judgements and to discuss whether a just society includes punishment."[271]

If certain forms of state violence, social control, and subordination are fundamentally objectionable in and of themselves, then their unequal application isn't exclusively what makes them bad.[272] If prisons should be abolished because it is wrong for the state to put members of the polity in cages, then the case for abolition doesn't depend on finding that the state disproportionately cages members of marginalized or disfavored groups. If penal institutions should be dramatically reduced rather than abolished (to employ a minimalist frame), we should be wary of embracing those institutions as a desired approach to *any* social problem.

In this section, we hardly hope to lay out a comprehensive theory of what makes criminalization and carceral punishment objectionable. But, we hope to articulate several reasons why criminal solutions to social problems might be troubling—even absent clear evidence of criminal law's negative distributive consequences.[273]

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[269] On different movements for and understandings of abolition, *see* Langer, *supra* note 234.

[270] *Id.* at 50 (footnotes omitted); *see also* VINCENZO RUGGIERO, PENAL ABOLITIONISM 105-27 (2010); THOMAS MATHIESEN, THE POLITICS OF ABOLITION REVISITED 31-36 (2016) (describing an "abolitionist stance").

[271] Langer, *supra* note 234, at 50; *see also* ERIN I KELLY, THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY (2018); WILLEM DE HAAN, THE POLITICS OF REDRESS: CRIME, PUNISHMENT AND PENAL ABOLITION (1990).

[272] *See, e.g.*, Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, THE APPEAL (Oct. 7, 2019), https://theappeal.org/amber-guyger-botham-jean/; MICHAEL J. ZIMMERMAN, THE IMMORALITY OF PUNISHMENT (2011) (arguing that state-driven punishment is immoral in and of itself).

[273] To be clear, these are issues that criminalization proponents of *all* political stripes must confront. Here, however, we direct our concerns to progressives and leftists both because they are the focus of our discussion overall and also because this Article is meant to function as a piece of internal critique. We are concerned deeply about right-wing tough-on-crime politics, but we focus here on academics and activists whose politics generally fall closer to our own in an effort to excavate why we might part ways with them on certain questions of criminal policy.

1. The Brutality of Criminal Punishment

The distributive concerns articulated above can be understood in consequentialist terms—criminal law actually can't accomplish what its proponents want it to. But, not all concerns about criminal legal solutions to social problems are consequentialist.[274] Indeed, perhaps the most basic concern about progressives' turn to criminal punishment is that criminal punishment is awful. It is dehumanizing and imposes great harms on defendants, their families, and their communities.[275]

Arguing that conduct should be criminalized or that a person should be incarcerated isn't an academic exercise. And, whatever one's idealized vision of criminal punishment might look like, we know that jails and prisons are sites of violence and degradation. A growing literature focuses on the brutal conditions of jails and prisons.[276] And, activists, academics, and policymakers focus on the broad-reaching challenges associated with having a criminal record.[277] In short, the administration of criminal law is defined by the imposition of significant harm on people accused or convicted of crimes. Those harms have become a source of significant criticism for progressive and left commentators. So, why should those harms be acceptable if they are visited against the "right" defendants?

To use a crude analogy, if you oppose the death penalty because you think it is wrong for the state to kill a person (or to kill a person as punishment for a crime), then that rule should hold for all defendants—regardless of how

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[274] *Cf.* Youngjae Lee, Review, *What Is Philosophy of Criminal Law?*, 8 CRIM. L. & PHIL. 671, 683 (2014) ("In most debates concerning individual rights, deontological and consequentialist arguments assume familiar positions. Deontological arguments speak in favor of stringent to absolute protection of rights against consequentialist considerations, and consequentialist arguments, in favor of sacrificing such rights in order to produce the best outcome.").

[275] On punishment as degrading or dehumanizing, *see* Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609 (2006).

[276] *See, e.g.*, ABOLISHING CARCERAL SOCIETY 6 (Abolition Collective ed., 2018); KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 179-82 (2016); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 109-33 (2014); Raymond Luc Levasseur, *Trouble Coming Every Day: ADX—The First Year 1996*, in THE NEW ABOLITIONISTS: (NEO) SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS 45, 47-48 (Joy James ed., 2005); Corey Devon Arthur, *I've Been Strip-Frisked over 1,000 Times in Prison. I Consider It Sexual Assault*, MARSHALL PROJECT (Feb. 4, 2021, 10:00 PM), https://www.themarshallproject.org/2021/02/04/i-ve-been-strip-frisked-over-1-000-times-in-prison-i-consider-it-sexual-assault; Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 915 (2009); Frampton, *supra* note 212, at 2046 (collecting sources); I. India Thusi, *Girls, Assaulted*, 116 NW. U. L. REV. 911 (2022).

[277] *See, e.g.*, DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 9-28 (2009); BRUCE WESTERN, HOMEWARD: LIFE IN THE YEAR AFTER PRISON: LIFE IN THE YEAR AFTER PRISON 26-46 (2018).

egregious their conduct.[278] You shouldn't be content with a system of capital punishment, regardless of the defendants executed or the process that they receive.[279] On the other hand, if you oppose the death penalty because you believe that it is imposed in a way that reflects racial bias, then your problem isn't with the death penalty; it is with societal and/or structural racism. It is conceivable that you might accept—or even approve of—certain capital punishment schemes. Perhaps the death penalty would be acceptable if it were opposed in a race-neutral way. Or perhaps, the death penalty, as an institution long associated in the United States with racial inequality, would be acceptable if it were used in an explicitly anti-racist manner (e.g., as punishment for killing members of a racial or ethnic minority group).[280]

To be clear, the first position and the second are dramatically different—the first treats the death penalty as fundamentally troubling. The second treats the death penalty as troubling in its application, but sees the institution as redeemable (and perhaps even desirable).

For left and progressive critics of the carceral state, we think it is essential to grapple with this distinction—with what's actually so objectionable about criminal legal institutions. As explained above, we don't believe that criminal punishment could distribute in the way that some progressives imagine or could function as an egalitarian institution.[281] But to the extent that a project of abolition or decarceration isn't consequentialist and instead is grounded to a first-principle objection to incarceration or certain forms of criminal punishment, then redistributive/progressive criminal law should be just as indefensible as regressive criminal law.[282]

2. The Inevitability of Exclusion

Even if criminalization and pro-prosecutorial policies didn't have the troubling distributive consequences discussed above, there is reason to worry

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[278] For a much more extensive discussion of the distinction between consequentialist and deontological objections to the death penalty, *see* Carol Steiker, *The Death Penalty and Deontology* in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 441 (John Deigh & David Dolinko, eds. 2011).

[279] *See* Gruber, *Equal Protection Under the Carceral State*, *supra* note 252, at 1356 ("To an abolitionist, the idea of applying barbaric and uncivilized capital punishment based on the racial makeup of a case is particularly repugnant, even if to remedy systemic disparities.").

[280] *See* Randall L. Kennedy, McClesky v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1438 (1988) (describing a potential "affirmative action" approach to the death penalty).

[281] *See supra* Part III.B.1.

[282] *Cf.* Epps, supra note 272 ("If you champion abolition for certain people and situations but not others, then yours is not a call for abolition but for sentencing reform. If your strategy to end mass incarceration is putting more white collar criminals in prison and freeing folks caged only on petty drug offenses, then you don't want fewer people in prison, you just want different people in prison.").

about how criminal law creates in-groups and out-groups. A long line of penal theory identifies social cohesion as one of the benefits of criminal punishment: By designating a given act as criminal and by punishing the person who has committed the act, a community reinforces its values and solidifies what it means to be a part of the polity.[283] Viewed critically, though, this "social cohesion" function of criminal law means that punishment always works to exclude, to marginalize, and to create an outgroup.[284] The community bonds at the expense of the individual who is excluded and identified as deviant or transgressive.

So, regardless of the governing ideology that shapes a system of criminal law (capitalist or socialist, racist or egalitarian, etc.), criminal law would be engaged in a project of defining—and punishing—an outgroup.[285] Certainly, that project of exclusion, marginalization, and punishment is particularly troubling when it reinforces historical patterns of subordination.[286] That's one reason that distributive critiques of the U.S. criminal system are so compelling. Even absent that unjust distributive dynamic, though, there's reason to worry about such an exclusionary institution and the way that it might invite subordination and the creation of disempowered and disenfranchised minority.[287]

Framed slightly differently, we might conclude that criminal legal institutions inevitably will have distributive consequences that benefit majorities or socially dominant groups and harm marginalized or disfavored populations—

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[283] *See, e.g.*, EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 62-63 (W.D. Halls trans., Free Press 1984) (1893); Bell, *Police Reform and the Dismantling of Legal Estrangement*, *supra* note 65, at 2083-84; Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 349 (1998).

[284] And perhaps also policing. *See, e.g.*, Bell, *Anti-Segregation Policing, supra* note 209.

[285] *See* DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRUGGLES 255-56 (Quid Pro Books 2018) (1985). Criminologist David Garland argues that political economy does not "determine penal outcomes but rather . . . penal outcomes are consciously negotiated within the limits that economic, political, and ideological structures impose." *Id.* at vi. Therefore, "[t]hose who wish to see new forms of penal regulation that accord with the values of social equality, democracy, and welfare cannot expect such forms to develop automatically or in the train of any general move towards socialism." *Id.* at 255. *Cf.* Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 321–22 (2002) ("Because punishment is part of a system of institutional authority, it is not amenable to a simple moral analysis. The legitimacy of punishment is bound up with the legitimacy of the norm it enforces and of the institutions promulgating the norm, imposing the punishment, and inflicting it.").

[286] *See* Jeffrey Fagan & Tracey L. Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities, 6 OHIO ST. J. CRIM. L. 173, 229 (2008).

[287] *Cf.* Bernard E. Harcourt, *Matrioshka Dolls*, in TRACEY MEARES & DAN KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 81 (Joshua Cohen & Joel Rogers, eds. 1999) (arguing that the presence of sub-minority populations within minority populations makes for a slippery concept of "community" and that minority control of policing might still yield to subordination of those sub-minorities); Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J. FORUM 798, 810 (2021) (same).

some set of powerful actors will be engaged in disciplining an individual or community with less social capital. So, looking to criminal law as a vehicle for advancing equality and creating a more egalitarian society would be a mistake.[288]

3. Individualizing Structural Problems

One feature of the case studies discussed in Part II is that they reflect a concern about some larger structural or institutional failure: state violence against marginalized communities; capital's exploitation of labor; socially dominant groups using violence to subordinate minority populations; and, sexually dominant groups using violence to subordinate queer people to enforce heteropatriarchy.[289] These are massive social problems. Indeed, liberal, progressive, and left support for criminal legal interventions in these areas reflect a belief that there are massive structural issues in need of drastic measures.[290]

But, criminal law doesn't necessarily speak the language of structural change. Criminal legal institutions generally operate on the transactional or retail, rather than systemic or wholesale level.[291] Individual defendants are prosecuted and punished for individual acts of (alleged) law breaking. And, criminal legal institutions speak in an individualist language. That's one reason that criminal law is often critiqued from the left—it easily serves neoliberal ends by shifting the focus from structural problems and social programs to individual wrongdoing.[292] Therefore, there's good reason to worry about whether an

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288 *Cf.* Harcourt, *Reflecting on the Subject*, *supra* note 283, at 389 ("[T]he categories of the disorderly and law abiders, of order and disorder, limit our horizon. When we attempt to think about reducing violent crime--about, in effect, transforming society—we need to question these categories and, if we find them limiting, offer alternative understandings that lead to more innovative policies.").

289 *See supra* Part II.

290 *See Id.*

291 *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2051 (2016); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk As A Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164 (2015) (critiquing the focus on the transactional model in constitutional challenges to Terry stops)); Daphna Renan, *The Fourth Amendment As Administrative Governance*, 68 STAN. L. REV. 1039, 1042 (2016) (critiquing the "transactional" model of Fourth Amendment analysis). *But cf.* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1301 (2004) ("[T]he current sentencing regime that generated the enormous prison population is far from individualized. Indeed, the prison explosion is largely attributable to sentencing changes that made punishment less individualized.").

292 *See, e.g.*, BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 203 (2011); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–2 (2016); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 41 (2009); Nicola Lacey, *Differentiating Among Penal States*, 61 BRIT. J. SOC. 778, 779 (2010) ("The 'neoliberal' impetus to economic deregulation, welfare state retraction, and

individual prosecution could achieve the broader structural goals that progressive advocates have in mind when they call for addressing inequality along lines of gender, race, class, ability, etc.[293] And, the institutional design of the criminal system means that an assignment of criminal liability all too easily does the exact opposite—scapegoating an individual and suggesting that problems involve bad apples rather than rotten barrels or blighted orchards.[294]

4. Criminal Law as the One-Size-Fits-All Answer

Putting the prior concerns together, we worry that criminal law in all its brutality is an extreme response to social problems. One of the troubling aspects of the progressive criminalization projects discussed in Part II is that they reflect a willingness to default to the most restrictive or brutal means imaginable. Even if prosecutions and prisons worked to deter bad actors and to accomplish broader distributive goals,[295] they also impose tremendous costs on individuals and communities.

We don't mean that the answer to major theoretical and practical questions about criminalization is to turn to some sort of formalist or mechanical proportionality analysis. But, one troubling feature of the progressive embrace of criminal law is that it often seems to dispense with considerations of proportionality. There's a strand of argument that suggests that there is a big problem, so criminal punishment is the right response. Rather than arriving at criminalization after an exhaustive search for other solutions,[296] commentators appear to accept the logic of reflexive criminalization/criminal punishment: wrong has been done or harm has been caused, so criminal law must be the right response.[297]

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individualization of responsibility ... has, paradoxically, gone hand in hand with the burgeoning of state powers, state pro-activity, and state spending in the costly and intrusive business of punishment.").

[293] *See, e.g.*, Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250, 251 (2021) ("Rather than catalyze change in American values, however, these war-on-crime approaches create a distracting sideshow that diverts public scrutiny away from matters of the most urgent concern. Carceral animal law consumes resources and scarce public attention. It is not a symbolic or incremental victory for animals—it is legal escapism."); Corda, *supra* note 47, at 612 ("[P]enal legislation cannot successfully promote social change acting as a solitary trailblazer and should not be delegated tasks beyond its abilities.").

[294] *See, e.g.*, Levine, *Police Prosecutions, supra* note 2; Akbar, *supra* note 265, at 1821-22.

[295] And, to be clear, we do not believe that they do.

[296] Cf. Mike C. Materni, *The 100-Plus-Year-Old Case for A Minimalist Criminal Law (Sketch of A General Theory of Substantive Criminal Law)*, 18 NEW CRIM. L. REV. 331, 347 (2015) (describing the "classical" principle of "extrema ratio," which "establishes that the criminal law should be the option of the last resort—that the government is legitimized to use the criminal sanction only as a matter of necessity") (emphasis in original).

[297] *Cf.* Levin, *Mens Rea Reform*, *supra* note 16, at 534-40 (critiquing the use of criminal law as a sort of regulatory default).

In each of the cases discussed in Part II, we agree that the problems are tremendous and the harms to individuals, communities, and society at large are massive. But, that hardly means that the only way, or the *best way* to respond to those problems is by looking to police, prosecutors, and prisons.[298] To return to the death penalty analogy, capital punishment certainly would ensure that a defendant could no longer cause harm; yet that hardly means that the death penalty is the right or only option for preventing an individual from causing harm in the future.[299] Unless one were comfortable executing an awful lot of people, it would be important to consider alternatives.[300]

For over half a century, commentators with different ideological commitments have critiqued overcriminalization and the common impulse in the United States to treat criminal law as the regulatory tool of choice—the right way to respond to a pressing problem.[301] Using "criminalization and cages as catchall solutions to social problems" isn't inevitable,[302] but it has become the common institutional and advocacy vocabulary in the United States.[303] We share the concerns about this model of governance and think that—regardless of how criminal law distributes—it should be incumbent upon criminalization proponents to explain why the state must resort to its most restrictive and violent set of tools to respond to a given social problem.[304]

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[298] *Cf.* DOUGLAS N. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 186 (2008) ("A minimalist theory of criminalization . . . precludes punitive sanctions when a less extensive alternative is available.").

[299] *Cf.* Shelby, *supra* note 241, at 181 ("I doubt that there are legitimate means that would prevent all serious crime.").

[300] *Cf.* Allegra M. McLeod, *supra* note 33, at 132 (describing "unfinished alternatives" to criminal punishment). Of course, it's possible that one might find such alternatives unsatisfactory. *Cf.* Husak, *supra* note 23 (arguing that criminal law skeptics have failed to explain what institutions could replace criminal law).

[301] *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 17 (2007); Husak, *supra* note 298, at 4-11; Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541, 541 (2005).

[302] RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 2 (2007).

[303] *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 80-82 (2003); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577 (2012); Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 238 (2018) ("Many of these statutes represented cheap political reactions to singular events or scandals of the day."); Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 672 (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

[304] *Cf.* Langer, *supra* note 234, at 76 ("Under the conception of minimal criminal law that I envision, this conception of justice and way of looking at harmful situations should also be adopted as a last resort, only when other conceptions of justice and ways to look at these harmful situations would not suffice to adequately address them.").

IV. CONCLUSION

Recent years have seen a welcome rise in anti-carceral sentiment among progressives and leftists. In this Article, we have examined the limits of progressive opposition to criminal law—places where academics and activists support prosecution and punishment as vehicles for advancing progressive ends. While it is tempting to treat these exceptions or carve-outs as evidence of hypocrisy, we have argued that they may reflect a particular vision of criminal law as a tool of redistribution. We remain concerned about that vision. There is little evidence that criminal legal institutions can achieve the redistributive ends that progressives desire. Instead, we fear that redistributive criminal law will backfire, harming marginalized communities and entrenching the carceral state.

Ultimately, then, we argue that progressive criminalization supporters should bear the burden of proving that criminal law *distributes* in the way that they imagine—that pro-prosecutorial politics actually redound to the benefit of marginalized communities. Even if criminal law somehow can accomplish this redistributive task, though, we remain skeptical of a turn to criminal legal institutions and argue that a purely redistributive vision misses some of the fundamental problems with a project of governing through crime. For those of us worried about the brutality of the carceral state, we argue that it's important to resist—or at least interrogate—our own punitive impulses when we encounter defendants we don't like or harms we see as inexcusable.