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After the Criminal Justice System

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AFTER THE CRIMINAL JUSTICE SYSTEM

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Abstract: Since the 1960s, the "criminal justice system" has operated as the common label for a vast web of actors and institutions. But as critiques of mass incarceration have entered the mainstream, academics, activists, and advocates increasingly have stopped referring to the "criminal justice system." Instead, they have opted for critical labels—the "criminal legal system," the "criminal punishment system," the "prison industrial complex," and so on. What does this re-labeling accomplish? Does this change in language matter to broader efforts at criminal justice reform or abolition? Or does an emphasis on labels and language distract from substantive engagement with the injustices of contemporary criminal law?

In this Article, I examine that move to abandon the "criminal justice system" as a means of describing U.S. institutions of criminal law and its enforcement. I identify three alternative labels that are gaining traction in academic and activist circles: the "criminal legal system," the "criminal punishment system," and the "prison industrial complex." I argue that each of these new labels reflect not only a different vision of U.S. criminal law but also a different vision of what is wrong with it. My goal in this Article is not to advocate for a correct, new label. Rather, it is to explain how the different names provide a window into different ways of understanding how the United States punishes and controls individuals and communities. Identifying an alternate label (or opting to retain the "criminal justice system") should force much-needed reflection about what makes criminal institutions distinct from other institutions of governance. And such clarity should be essential to any project of reform or abolition.

This Article contributes to three literatures. First, it is a part of a larger project of unpacking how people, and particularly legal elites, talk about and understand criminal law. Second, this Article contributes to the literature that examines the boundaries of criminal law and the ways in which criminal legal institutions interact with ostensibly non-criminal ones. Third, and relatedly, this Article contributes to the critical literature on siloing in scholarship and activism. By emphasizing the fuzzy boundaries of the "criminal justice system," I hope to stress that studying and mobilizing against the injustices of the U.S. criminal legal apparatus requires grappling with a host of diverse legal doctrines and sociopolitical forces.

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INTRODUCTION

I study the criminal justice system. Or, more accurately, I study a vast web of actors and institutions that are generally described as comprising the "criminal justice system."[1] Judges call it the "criminal justice system."[2] Legislators call it the "criminal justice system."[3] The President calls it the "criminal justice system."[4] But increasingly, academics, advocates, and activists don't. Instead, they opt for the "criminal legal system," the "criminal punishment system," the "prison industrial complex," or a range of other critical labels.[5]

Why abandon the term "criminal justice system"? First, it has become difficult to argue that the system does *justice*.[6] Criminal law punishes

1. *See* Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 64–65 (2018) (tracing the history and origin of the "[i]dea of the criminal justice system").

2. *See, e.g.*, Flowers v. Mississippi, 588 U.S. __, 139 S. Ct. 2228, 2242 (2019) ("By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to . . . enhance public confidence in the fairness of the criminal justice system."); Hughes v. United States, 584 U.S. __, 138 S. Ct. 1765, 1779 (2018) (Sotomayor, J., concurring) ("The integrity and legitimacy of our criminal justice system depend upon consistency, predictability, and evenhandedness.").

3. *See, e.g.*, Press Release, Cory Booker, Senator, U.S. Senate, Booker Statement on Senate Passage of Landmark Criminal Justice Reform Bill (Dec. 18, 2018), https://www.booker.senate.gov/news/press/booker-statement-on-senate-passage-of-landmark-criminal-justice-reform-bill [https://perma.cc/M9K3-JWMP] ("Our country's criminal justice system is broken – and it has been broken for decades.").

4. *See, e.g.*, *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN FOR PRESIDENT, https://saportareport.com/wp-content/uploads/2020/12/Joe-Bidens-Criminal-Justice-Policy-Joe-Biden.pdf [https://perma.cc/F7G9-9GK5] ("As president, Joe Biden will strengthen America's commitment to justice and reform our criminal justice system.").

5. *See infra* Part II.

6. *See infra* section I.A.1.

people extremely harshly, relegating people to brutal conditions of confinement for years and decades on end.[7] The harms of criminal law and its enforcement are disproportionately suffered by the most marginalized populations in society—criminal law and punishment entrench inequality along lines of race, class, and almost every conceivable axis.[8] And the institutions of policing and criminal procedure reflect logics of social control and mass processing that appear fundamentally at odds with deeper values of fairness or justice.[9]

Second, a growing body of scholarship contends that the criminal justice system isn't actually a *system*.[10] Criminal law and its administration are creatures of politics and are heavily reliant on discretionary actors—police, prosecutors, judges, and so forth. Rather than a single system defined by a single overarching logic, the "criminal justice system" is comprised of numerous local and national institutions and actors.[11] Each of those smaller systems is the product of their own political and cultural context and is embedded in a local ecosystem. While

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7. *See generally* JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014) (describing efforts to challenge brutal conditions of confinement).

8. *See, e.g.*, TANYA MARIA GOLASH-BOZA, DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR, AND GLOBAL CAPITALISM 9–11, 20–21 (2015) (describing the cycle of mass deportation and some harms suffered by immigrant communities); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 3–5 (2016) (describing criminal policies as a vehicle for managing race-class subordinated populations); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 4–5 (2004) (same).

9. *See, e.g.*, Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 689 (2020) [hereinafter Bell, *Anti-Segregation Policing*] (arguing that policing perpetuates racial segregation); Aya Gruber, *Policing and "Bluelining,"* 58 HOUS. L. REV. 867, 873 (2021) [hereinafter Gruber, *Policing and "Bluelining"*] (same); Dorothy E. Roberts, Foreword, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 786–89 (1999) [hereinafter Roberts, *Order-Maintenance Policing*] (likening contemporary policing to Black Codes).

10. *See, e.g.*, Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward A Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1475 n.7 (2020) [hereinafter Bell et al., *Toward*] (describing literature that uses "criminal legal system"); Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 15 n.44 (2019) (critiquing scholarship that analyzes the criminal justice system as an individual system); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421–22 (2018) [hereinafter Harcourt, *Systems Fallacy*] (same); Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619, 619–20 (2018) [hereinafter Levin, *Rethinking the Boundaries*] (same); Benjamin Levin, *Criminal Law in Crisis*, U. COLO. L. REV. F. 1, 10–11 (2020) [hereinafter Levin, *Criminal Law in Crisis*] (same); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013) (same); Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 THEORETICAL CRIMINOLOGY 422, 423 (2017) (arguing against a monolithic understanding of the criminal justice system or "penal state").

11. *See infra* section I.A.2.

there might be commonalities among each of these different systems, ecosystems, or institutions, there are certainly differences that belie a claim of coherence and uniformity.[12]

Third, there may be good reason to doubt that "criminal" correctly describes the boundaries of these institutions, their effects, and their underlying logics.[13] Judges and commentators frequently have drawn a bright line between "civil" and "criminal" when it comes to collateral consequences, pretrial detention, and non-carceral forms of state supervision.[14] By focusing only on the institutions that the state has identified as "criminal," however, we risk missing many of the most sweeping forms of surveillance, social control, and even punishment.

In short, critics contend that the "criminal justice system" is a failure as a descriptive matter. And that's before we even reach the larger normative question of whether the system (which is not a single system) is even supposed to do justice, or whether its true purpose is something else. For more radical critics, that "something else" might be quite nefarious—social control, racial subordination, protecting the interests of capital and repressing labor, or advancing other logics of hierarchy and domination.[15] For other commentators or reformers, that "something else" might be desirable—advancing public safety, managing risk, or reducing the likelihood of interpersonal violence.[16]

So what should we call that which was known as the "criminal justice system?" For those of us who study, work in, are affected by, or are

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12. *See infra* section I.A.2.

13. *See generally* Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381 (2022) [hereinafter Levin, *Criminal Law Exceptionalism*] (examining and critiquing "criminal" as a category).

14. *See infra* notes 66–81 and accompanying text.

15. *See* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 3–22 (1990) [hereinafter GARLAND, PUNISHMENT AND MODERN SOCIETY]; GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 108 (Russell & Russell 1968) (1939); Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109 (2012–2013) [hereinafter McLeod, *Confronting Criminal Law's Violence*]; Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) [hereinafter Roberts, *Abolition Constitutionalism*]; 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) [hereinafter White, *Uncertain Fate*] ("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.").

16. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 166–69 (2019) (focusing on public safety as the goal of reform); Edward L. Rubin & Malcolm M. Feeley, *Criminal Justice Through Management: From Police, Prosecutors, Courts, and Prisons to a Modern Administrative Agency*, 100 OR. L. REV. 261, 314–15 (2022) (advocating for the replacement of the criminal justice system with a public safety agency).

concerned with these institutions, the choice of a replacement is not obvious. And the literature reflects a wide range of options, with activists and academics deploying different labels in efforts to capture the reality of U.S. criminal law and its administration: the "criminal legal system," the "criminal punishment system," the "prison industrial complex," and so forth.[17]

In this Article, I examine the growing critiques of the "criminal justice system" as a means of describing, imagining, and understanding a discrete universe of U.S. legal and political institutions. Additionally, I consider some alternative labels that are increasingly common in the literature. I argue that each reflects not only a different vision of U.S. criminal law, but also a different vision of what is wrong with it. Understanding how scholars and activists are conceptualizing their object of study and critique therefore strikes me as an essential component of any way forward—toward reform, transformation, or abolition.[18]

Without understanding what the "system" is, how can we understand what must be preserved, changed, or abandoned? An unduly narrow conception of the actors and institutions comprising the "criminal justice system" might allow for unduly narrow changes that fail to rectify deeper injustices. An unduly broad conception might stand in the way of much-needed reform by suggesting that no change can be accomplished without addressing massive structural forces. Or, perhaps, the narrow and the broad are both necessary, but necessary in different contexts.[19]

The challenge in labeling, I contend, speaks to a deeper challenge of articulating what makes the "criminal justice system" so important and so troubling. In this Article, I argue that the project of criminal justice reform,

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17. And each of those labels reflect different cultural contexts or political projects. *Cf.* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 123 (2021) (examining the "socially contextualized meaning of the call to defund the police"); RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 24 (2d ed. 1983) (describing a theory of language grounded in an ongoing process of "shaping and reshaping[] [meaning] in real circumstances and from profoundly different and important points of view").

18. *See* Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, *in* THE NEW CRIMINAL JUSTICE THINKING 1, 1 (Sharon Dolovich & Alexandra Natapoff eds., 2017) ("If we are to fix the current criminal system[,] . . . we need a complete and nuanced understanding of what exactly this system *is*: What social and political institutions, what laws and policies, does it encompass?" (emphasis in original)); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 2009 (2019) [hereinafter Ristroph, *Intellectual History*] ("Were we to seek a different paradigm, the first step would be to describe criminal law more accurately.")

19. *Cf.* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 318 (2018) [hereinafter Levin, *Consensus Myth*] (outlining competing approaches to "criminal justice reform" and noting that different approaches might be necessary and complementary).

transformation, or abolition necessitates a greater clarity or precision in identifying the nature of the project.[20]

On some level, the challenge in labeling highlights a foundational question of whether and how criminal institutions might be distinguished from non-criminal ones—in both purpose and operation.[21] Traditional scholarship and commentary reflect formal barriers that make it easy—at least ostensibly—to identify the boundaries of the state's criminal functions.[22] As the literature has incorporated more realism and more radicalism, however, these boundaries have become less certain or disappeared altogether. If U.S. models of public education, employment, and even healthcare reflect "carceral logics," as a growing number of commentators suggest,[23] is it fair to describe each of those institutions as a part of the "criminal justice system?" And, if not, why not?

Selecting a new name or label for whatever it is we've called the "criminal justice system" does not answer those questions.[24] Indeed, there may be good reason to be skeptical about an overemphasis on naming and language—it might serve as a distraction and invite posturing, rather than action.[25] But, I argue, articulating the reasoning behind a selection should force much-needed reflection about what makes criminal institutions distinct (or not) from other institutions of law and governance.

In describing competing labels, I hope to contribute to three bodies of literature. First, this Article is a part of a larger project of unpacking how people—and particularly legal elites—talk about and describe criminal

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20. That is less to say that any name or label can be truly precise. *See infra* Part III. Rather, it is to call for precision, clarity, and honesty in choosing a label. It matters a great deal (or, at least, so I argue) to be intentional about why we choose the language and the labels that we do. *See infra* Part III.

21. *Cf.* Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27 (2020) (outlining functions of "criminal law" that might be difficult to accomplish by other means).

22. *See generally* Ristroph, *Intellectual History*, *supra* note 18 (describing and critiquing this position).

23. *See, e.g.*, LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 111 (2020) (describing abolition as opposed "not only to physical spaces of containment but to particular logics and discourses"); Michelle Alexander, *Foreword* to MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS, at xiii (2020) ("As I was reading this book, I kept a running list of the actors who are implicated in the expanding net of mass incarceration."); Dean Spade, *Keynote Address*, 19 COLUM. J. GENDER & L. 1086, 1107–08 (2010) ("The framing of harm as a problem of bad individuals who need to be exiled is one that appears again and again, not just in our criminal punishment systems, but in schools, employment settings, organizations, neighborhoods, friend groups, activist groups, and families.").

24. *Cf.* WILLIAMS, *supra* note 17, at 24 ("I believe that to understand the complexities of the meanings of *class* contributes very little to the resolution of actual class disputes and class struggles.").

25. *See infra* Part III.

law.[26] Appreciating how legal institutions are understood strikes me as essential to any project of reforming, transforming, or abolishing those institutions. Second, this Article contributes to the literature that seeks to examine the boundaries of criminal law and the ways in which criminal legal institutions interact with ostensibly non-criminal institutions.[27] Criminal law does not operate in a vacuum, and a growing body of scholarship and activism identifies issues with the criminal system that implicate social and cultural dynamics that transcend the civil/criminal distinction. Third, and relatedly, this Article reflects a broader move to oppose siloing in legal scholarship and advocacy and therefore contributes to a trans-substantive literature on the problems with siloing or specialization.[28] By emphasizing the fuzzy boundaries of the "criminal

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26. *See, e.g.*, Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. 755 (2023) (critiquing the category of "sex crimes"); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999) (examining the uncertain meaning of "harm"); Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563 (2018) (critiquing conventional understandings of "felonies"); Levin, *Consensus Myth*, *supra* note 19 (tracing the disputed understandings of "mass incarceration" and "overcriminalization"); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021) [hereinafter Levin, *Progressive Prosecutor*] (outlining different definitions of "progressive prosecution"); Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777 (2022) [hereinafter Levin, *Criminal Justice Expertise*] (mapping alternate conceptions of "expertise" in criminal policy); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) (challenging the idea that "violent crime" is a coherent category); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 989 (2019) (critiquing the way that arrests are understood as synonymous with guilt); Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501 (2020) (critiquing the way that convictions are understood as synonymous with guilt); Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1452–53 (2021); Anna Roberts, *Criminal Terms*, 107 MINN. L. REV. 1495, 1495 (2023) [hereinafter Roberts, *Criminal Terms*] ("Core items of vocabulary used by criminal legal academics to describe the criminal system, those affected by it, and those overseeing it, convey implicit messages that bolster that system."); DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021) (teasing apart tensions in the definition of "violent crime").

27. *E.g.*, DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 25–26 (2022); ERIN HATTON, COERCED: WORK UNDER THREAT OF PUNISHMENT (2020); Eisha Jain, Response, *Understanding Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. *SEE ALSO* 161 (2017); Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 233 (2012); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1103 (2022); Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. 808 (2022); Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2648 (2021); Noah D. Zatz, *Better than Jail: Social Policy in the Shadow of Racialized Mass Incarceration*, 1 J.L. & POL. ECON. 212, 220 (2021).

28. *See, e.g.*, Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 165–66 (2007) (arguing for a capacious understanding of "work law" that transcends traditional distinctions among employment law, labor law, and employment discrimination); Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMANS. 1, 5 (2011) (reimagining "family law" as a set of institutions that transcend traditional disciplinary boundaries).

system," I hope to stress that studying and mobilizing against the injustices of U.S. criminal legal institutions requires grappling with a host of diverse legal doctrines and political forces.

My argument unfolds in three Parts. In Part I, I tee up the contemporary debate about the use of the "criminal justice system" as a label. I set forth what I take to be the three key critiques of using the "criminal justice system" to describe or understand the institutions in question: that they are not just, that they do not comprise a system, and that they encompass much that is not criminal. I also lay out some reasons why critical commentators might continue to use the label and why it might remain useful in certain contexts.

In Part II, I examine three common alternatives in turn: (1) the "criminal legal system"; (2) the "criminal punishment system"; and (3) the "prison industrial complex." To be clear, this is hardly a comprehensive list of all the possible labels for United States criminal legal institutions. Criminologists have come to use—and interrogate the use of—the "carceral state" and "penal state" as proper labels.[29] And scholars and activists are continually coming up with new ways of describing these institutions—ways that reflect different political and ideological projects.[30] However, each of these alternative labels has gained ground and provides insight into what commentators understand as the boundaries and pathologies of the criminal justice system.

In Part III, I step back to consider the stakes of, and challenges to, a project of replacing the "criminal justice system." I do not believe there is necessarily a "best" or "proper" label. Indeed, I worry that a focus on naming or renaming might distract from bigger practical and theoretical questions about how society should respond to harm and risk. Therefore, my goal in this Article is to explain how the different names or frames provide a window into different ways of understanding how the United States punishes, controls, and manages individuals and communities—and how it should. Ultimately, then, this is less a project of identifying what label to choose than it is a project of unpacking the values, assumptions, and ideologies that shape the way that harm and risk are regulated and also the ways that we imagine institutions of criminal law and punishment.[31]

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29. *See generally* Rubin & Phelps, *supra* note 10 (discussing and critiquing the use of "carceral state").

30. *Cf. id.* (tracking competing uses and understandings of "penal state" and "carceral state").

31. *Cf.* Tony Bennett, Lawrence Grossberg & Meaghan Morris, *Introduction* to NEW KEYWORDS: A REVISED VOCABULARY OF CULTURE AND SOCIETY, at xvii (Tony Bennett, Lawrence Grossberg & Meaghan Morris eds., 2005) ("[T]he point [of tracing the meaning of 'keywords' in society] was not

I. THE CRIMINAL JUSTICE SYSTEM

While the "criminal justice system" has become the commonplace name for the institutions that administer U.S. criminal law, the label is actually quite new. According to legal historian Sara Mayeux, the popularization of the phrase and the use of systems theory to describe the workings of criminal law are best traced to *The Challenge of Crime in a Free Society*, a 1967 report produced by a blue-ribbon commission appointed by President Lyndon Johnson.[32] The framing of the institutions and actors as a "system" reflected the rise of systems theory, which in turn invited models of efficient management associated with Cold War liberalism.[33] By characterizing a disparate set of actors and processes as comprising a unified "system of criminal justice," experts were able to present problems of criminal law's administration as ripe for proper management and technocratic reform.[34] Over the decades that followed, however, this ideological project receded from view, and the phrase "bec[ame] simply the default shorthand that lawyers, jurists, legal scholars, pundits, and even ordinary people used when they wanted to talk about . . . [s]ome combination of entities and actors having something to do with law enforcement."[35]

In recent years, as criminal legal institutions have sustained greater public criticism, this shorthand—like many other foundational terms[36]—has become a target of scrutiny and reexamination.[37] In this Part, I identify what I take to be the three key critiques of the "criminal justice system" as a label for the institutions of U.S. criminal law and punishment. Then, I examine how and why the label might retain some utility as a descriptive

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merely that the meanings of words change over time but that they change in relationship to changing political, social, and economic situations and needs. . . . [P]eople do struggle in their use of language to give expression to new experiences of reality." (emphasis omitted)).

32. Mayeux, *supra* note 1, at 75.

33. *See id.* at 59–61.

34. *Id.* at *64*; *see id.* at 59–61; *see also* Harcourt, *Systems Fallacy*, *supra* note 10, at 421 ("The ambition [of systems analysis] was laudable: to systematize and quantify public policy making in order to reduce costly inefficiencies and eliminate personal prejudice so that trained policy analysts could implement, rather than interfere with or distort, our political choices made through the democratic process.").

35. Mayeux, *supra* note 1, at 86.

36. *See* Lauryn P. Gouldin, *The Language of Criminal Justice Reform: Reflections on Karakatsanis'* Usual Cruelty, 55 NEW ENG. L. REV. 1, 18 (2020) ("[S]cholars are increasingly attentive to this question of who decides what labels, language, and frames are appropriate.").

37. *See, e.g.*, Levin, *Rethinking the Boundaries*, *supra* note 10, at 620 n.4 (collecting sources); Mayeux, *supra* note 1, at 56 ("Some question the wording. Activists refer instead to 'the criminal *punishment* system,' believing that 'justice' has little to do with American courts and prisons." (emphasis in original)).

matter or might still have a role to play in service of decarceration or reformist efforts.

A. A Misleading Label?

Academics, activists, and advocates increasingly critique the "criminal justice system" as a label. In this section, I outline three foundational critiques of the "criminal justice system." The first two—that the system is not "just" and that the system is not a "system"—are increasingly prevalent in the literature. The third—that the criminal justice system is not necessarily "criminal"—is less commonly articulated. That said, I think that this third critique may raise the most questions about criminal law and its relationship to other institutions of punishment and social control. In this section, I address each of these three critiques in turn.

1. Not Just

Today, accounts of "mass incarceration" and "overcriminalization" and the statistics that underlie them have become so well-established as to hardly require recitation. Once marginal, critical accounts of criminal punishment have become staples of advocacy and academic writing across the political spectrum.[38] The United States criminalizes conduct and incarcerates people at an unprecedented rate,[39] and the institutions of criminal law—from policing to prosecution and punishment—disproportionately affect marginalized communities, particularly people from race-class subordinated populations.[40] And even if you believe that harsh punishments and disparities are acceptable, there is good reason to think that the system doesn't do a good job sorting the guilty from the innocent or preventing harm to victims.[41] The "system," many of us agree, does great harm; it hardly does "justice."

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38. *See, e.g.*, Levin, *Consensus Myth*, *supra* note 19 (observing the prevalence of these critical accounts).

39. *See* Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANN. REV. L. & SOC. SCI. 433, 434 (2020).

40. *See generally* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) [hereinafter WESTERN, PUNISHMENT].

41. *See, e.g.*, LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM 19 (2023) (describing the "documented . . . failures of the criminal legal system in addressing violence"); Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 55 (2020) ("The observations in this Article about police effectiveness may be unsettling. One may not sleep soundly knowing that 97% of burglars, 88% of rapists, and over 50% of murderers get away with their crimes. Indeed, we live in a world where, much more often than not, crimes go unsolved and unaccounted for.").

Critics of the word "justice" in criminal justice identify a range of unjust features of the contemporary system: racial disparities in enforcement, police violence, wrongful convictions, coercive plea bargaining, overbroad statutes, etc. But the underlying critiques generally take one of two forms.

First, some commentators argue that the system *as currently constituted* doesn't do justice.[42] In these accounts, the system might be reformed, transformed, reconstituted, or reimagined to advance such ends—to advance norms of fairness and to instantiate collective values. But twenty-first century U.S. criminal legal institutions simply aren't just. Put differently, there might be (and perhaps at some point historically there was) a just criminal justice system.[43] Today's institutions, however, do not live up to that name or the charge of doing justice.[44] Whether as a result of rampant racial disparities in enforcement, the extreme duration of sentences, the brutalities of incarceration, the abuses of plea bargaining, or any of a host of other structural flaws, the administration of criminal law fails to advance justice.[45]

Second, a growing radical strand of scholarship and activism argues that the purpose of the system *actually isn't to do justice*. That is, "criminal justice" is a misnomer—the system isn't broken; it's working

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42. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012) (arguing that U.S. criminal legal institutions have failed in their task of doing justice); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2 (2011) (same); JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER 3, 15 (2023) (describing the shift from a "criminal justice system" to a "criminal legal system").

43. *See supra* note 42 and accompanying text. *But see* Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299, 1312–13 (2013) (reviewing BIBAS, *supra* note 42) (critiquing "nostalgi[c]" and "romantic[]" treatments of U.S. criminal law pre-1970); Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, 17 CRIM. L. & PHIL. 5, 6 (2021) [hereinafter Ristroph, *Wages of Criminal Law*] ("[M]uch work in criminal law still manifests a persistent belief that these less savory aspects of law are newly arising pathologies that may be corrected rather than endemic features of law as a human practice.").

44. *See, e.g.*, V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1457 n.12 (2019) ("I use the term 'criminal legal system' instead of 'criminal justice system' to remove the normative assumption inherent in the latter phrase. For the reasons discussed in this Article and more, it is not apparent that the criminal legal system is one of justice, and to imply as much conceals that fact."). For examples of other sources taking similar views, see *infra* note 118.

45. *See, e.g.*, BIBAS, *supra* note 42, at xx–xxv (describing the criminal system's failure to reflect and respect public understandings of what it would mean to do justice).

the way it's supposed to.[46] In these accounts, criminal legal institutions are designed as tools of subordination or repression.[47]

Which critique one adopts certainly matters from a policy or strategy standpoint—the declensionist account of a broken system invites reform, while the radical account of foundational subordination requires abolition or fundamental transformation.[48] But regardless of whether the injustice is understood as a feature or a bug, critics suggest that "justice" is hardly a core value at play in U.S. criminal institutions.[49]

2. Not a System

"[T]here is a substantial literature complaining about our 'non-system' of criminal justice," observes criminologist Malcolm M. Feeley.[50] And, indeed, a rich and growing body of sociological and legal scholarship pushes back on the notion that there is a unified system of administering criminal law in the United States.[51]

As I understand it, there are two primary critiques of using "system" to describe the web of institutions and actors. First, as a descriptive matter, many commentators stress that the "system" simply is not a system—it is too fragmented and diverse to earn that label.[52] Much of this literature highlights the way that local politics shape the administration of criminal

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46. *See, e.g.*, MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 13 (Tamara K. Nopper ed., 2021) (arguing that that the system is not designed to do justice); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425–26 (2016) (same).

47. *See, e.g.*, Rachel Herzing, Commentary, *"Tweaking Armageddon": The Potential and Limits of Conditions of Confinement Campaigns*, 41 SOC. JUST. 190, 193–94 (2014) ("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."); Roberts, *Abolition Constitutionalism*, *supra* note 15, at 7 ("[T]oday's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.").

48. *See generally* Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (tracing competing reformist and transformative approaches to criminal policy).

49. *See supra* notes 44–47 and accompanying text.

50. Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 708 (2018).

51. *See, e.g.*, VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 178 (2009) (focusing on local politics in shaping penal policy); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993) ("[T]he criminal justice 'system' is not a system at all."); PHILIP GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE 7–8 (2017) (noting the multiplicity of interests and actors in different systems and critiquing accounts that suggest "homogeneity"); Harcourt, *Systems Fallacy*, *supra* note 10 (critiquing the "criminal justice system" frame); Mayeux, *supra* note 1, at 57 (noting the diverse institutions contained within the "system" and the growing literature critiquing the label).

52. For examples of these arguments, see *supra* note 10.

law and undercut claims of a coherent logic uniting disparate jurisdictions.[53] Despite an overemphasis on the federal system in much legal scholarship and media coverage,[54] state and local criminal legal institutions make up the bulk of what we talk about when we talk about the criminal justice system.[55] Criminal law and the models of its enforcement and administration vary state to state, city to city, and county to county.[56] At best, then, we have criminal justice *systems*, not a singular criminal justice system.[57]

The second line of critique focuses on the ideological content of the "system" label. The problem isn't just that the system isn't a system. It's that systems theory (and its language) props up criminal institutions, empowering political insiders and standing in the way of sweeping reform or abolition.[58] Bernard Harcourt argues that decisions about criminal policy "involve choices . . . that are invariably normative and political in nature. They are decisions that implicate political values."[59] The language of systems theory or systems analysis, however, ostensibly shields many key questions from "the democratic political process," presenting the

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53. *See, e.g.*, LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 85–146 (2008) (exploring interest group involvement in state and local criminal policy); Rubin & Phelps, *supra* note 10, at 427 (noting local politics in shaping penal policy).

54. *Cf.* John Pfaff, *Bill Clinton Is Wrong About His Crime Bill. So Are the Protesters He Lectured,* N.Y. TIMES (Apr. 12, 2016), https://www.nytimes.com/2016/04/12/magazine/bill-clinton-is-wrong-about-his-crime-bill-so-are-the-protesters-he-lectured.html (last visited Aug. 24, 2023) (arguing that critiques of federal crime policy overstate its importance, as compared to state crime policy). It is worth noting that some commentators also contend that even the federal criminal system is not actually a system. *See* Daniel C. Richman, *Federal Sentencing in 2007: The Supreme Court Holds — the Center Doesn't*, 117 YALE L.J. 1374, 1401 (2008) ("[O]ne still needs to confront the fundamental truth about the current federal enforcement system: it is not a system at all, but in large part just an adjunct to state or, more often, local criminal justice systems.").

55. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/ZMM6-D94E].

56. *See* M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 495 n.5 (2021) ("I use the phrase 'criminal legal practices' instead of the 'criminal justice system' or 'criminal legal system' because the multiplicity of laws, courts, and practices cannot be described as a 'system' at all.").

57. *See, e.g.*, Jenny E. Carroll, *If Only I Had Known: The Challenges of Representation*, 89 FORDHAM L. REV. 2447, 2465 n.2 (2021) ("I have chosen to join other scholars who use the term 'criminal systems' as opposed to other frequently used descriptors (e.g., criminal justice system, criminal punishment system, criminal legal system). I believe this phrase accurately encapsulates the different subdivisions within the various systems of criminal law, procedure, policing, and punishment."); Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 446 n.31 (2022) ("More recently, there has been a shift to using 'criminal legal systems' in the plural because there are criminal court systems at the federal, state, and municipal levels.").

58. For a discussion of systems theory and how it relates to unifying concepts of the criminal justice system, see Harcourt, *Systems Fallacy*, *supra* note 10, at 421; Mayeux, *supra* note 1, at 58–60.

59. Harcourt, *Systems Fallacy*, *supra* note 10, at 421.

"system" as the proper province of experts and insiders.[60] According to Harcourt, "therein lies the problem: systems-analytic methods are portrayed as scientific, objective, and neutral tools, when in fact they necessarily entail normative choices about political values at every key step."[61] Similarly, Mayeux argues that "[o]nce mapped and understood, systems can be modified—they can be made more efficient, or more accurate—but only within some outer set of limits or bounds inherent in the function or nature of the system."[62]

By continuing to refer to the institutions and actors as a system, then, we risk accepting a naturalized account of criminal law and its administration. By accepting the boundaries of the system as encompassing policing, prosecution, and imprisoning, we risk accepting that this is what "justice" looks like. Imagining other methods of doing criminal law or, perhaps, other ways of dealing with risk and harm requires moving outside of those confines. To the extent one favors narrow or technocratic reform, perhaps the language of the system and the prospect of better or more efficient systemic management would be appealing. To the extent one favors more radical change or a rethinking of democratic involvement, perhaps the language becomes more constraining.[63] As Mayeux argues, "for the dismantling of mass incarceration, less system and a bit more openness to historical malleability is what is needed."[64]

3. Not Criminal

Reference to the "criminal justice system" implies not only that there actually is a system and that the system is designed to do justice,[65] but also that the system has a specific and distinct purview: criminal law. At first blush, this appears to be the least controversial aspect of the label—courts and commentators have long recognized a bright line between the civil and criminal realms.[66] Some of those distinctions are grounded in

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60. Harcourt, *Systems Fallacy*, *supra* note 10; *see also* Levin, *Criminal Justice Expertise*, *supra* note 26, at 2811–16.

61. Harcourt, *Systems Fallacy*, *supra* note 10, at 421.

62. Mayeux, *supra* note 1, at 60.

63. *Cf.* Levin, *Criminal Justice Expertise*, *supra* note 26, at 2827–37 (raising a similar argument about reliance on the language of expertise).

64. Mayeux, *supra* note 1, at 93.

65. Even if the system is not currently doing justice, doing justice is the primary and desired function of the system. *See supra* section I.A.1.

66. *See, e.g.*, United States v. Ursery, 518 U.S. 267, 278 (1996) (distinguishing civil fines from punishment); United States v. Salerno, 481 U.S. 739, 747 (1987) (distinguishing punishment from

theoretical terms; others, purely practical.[67] Legal theorists have long argued that there is something special about criminal law: unlike civil regulations or sanctions, criminal statutes speak the language of collective morality.[68] Prosecutors and judges, these commentators argue, are engaged in an inherently public enterprise of expressing the community's collective values and acting out rituals of societal condemnation.[69]

As a practical matter, commentators and judges have stressed that criminal law is distinct because of the sanctions it authorizes.[70] Even without accepting the theoretical arguments about criminal law's moral condemnatory function,[71] one might view criminal law as a distinct realm because it allows for punishments that would be unacceptable elsewhere (incarceration, execution, and other restrictions on liberty).[72] Put simply, criminal law is the space where the force inherent in governance shines through and the state's monopoly on violence is put on display.[73]

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regulation); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 9 (1996) (arguing that "the criminal label brings with it not only special restrictions but also special powers").

67. *Cf.* Ristroph, *Wages of Criminal Law*, *supra* note 43 (distinguishing among different forms of "criminal law exceptionalism"); Levin, *Criminal Law Exceptionalism*, *supra* note 13 (same).

68. *See, e.g.*, R.A. DUFF, THE REALM OF CRIMINAL LAW 18, 34, 260 (2018) (articulating a theory of criminal law as distinct because of its moral content); Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 449 (2020) ("The fact that makes criminal law a unique form of law is that it operates as a mechanism of collective condemnation. It is a body of law and legal practice that censures particular acts in the polity's name.").

69. *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 199 (2001) (describing criminal law and punishment as reflecting "a collective commitment to correcting" wrongs).

70. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 (1963) (describing what makes criminal law and punishment distinct); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 714–15 (2005) ("[I]t almost goes without saying that incarceration (or death, of course) is different in kind, rather than degree, from monetary dispossession, involving an incomparable denial of human dignity and autonomy.").

71. *See* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship*, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 145 (2011).

72. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 797–819 (1997) (discussing competing approaches to the civil/criminal distinction).

73. *See, e.g.*, STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER 304–05 (1978) (describing criminal law and its enforcement as embodiments of the "strong state"); Jonathan Simon, *Law's Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)*, 49 WAKE FOREST L. REV. 649, 650 (2014) (same); White, *Uncertain Fate*, *supra* note 15, at 802 ("[T]he logic of the contemporary criminal justice system is overtly coercive, inegalitarian, separatist, indeed fundamentally reactionary. For these reasons, the criminal justice system has been aptly described as a hard or 'right-handed' (as opposed to soft or 'left-handed') mode of controlling the lower classes.").

In the "exceptional" realm of the criminal justice system, judges recognize different rights and procedural protections for defendants.[74] In granting or protecting such rights, judges generally point to the exceptionality of criminal punishments—because criminal defendants face harsh treatment and severe stigma, they are deserving of greater protections than other targets of state action.[75] This special solicitude for defendants' rights in criminal cases operates as a sort of double-edged sword—judges have frequently identified state violence and significant restrictions on liberty as "civil" or "regulatory," rather than criminal.[76] And, in doing so, they have deprived defendants of meaningful constitutional protections when it comes to increasingly common and particularly troubling features of the modern criminal system, such as the imposition of pretrial detention or the loss of rights via "collateral consequences."[77]

Alice Ristroph has characterized this belief in a bright line between civil and criminal institutions as reflecting "criminal law exceptionalism."[78] She has argued that criminal law exceptionalism has helped to undergird the carceral state.[79] That is, treating criminal law as special shields it from the same sorts of critique and examination applied to other areas.[80]

We also might see the "criminal" aspect of the "criminal justice system" as potentially misleading for three related reasons. First, the

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74. *See, e.g.*, United States v. Ursery, 518 U.S. 267, 273 (1996) (recognizing criminal defendants' right against double jeopardy).

75. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."); Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285, 1317 (2020) (analyzing the civil/criminal distinction for purposes of due process analysis of "red flag" gun laws).

76. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 751–52 (1987) (suggesting that pretrial detention is regulatory, not punitive); Kansas v. Hendricks, 521 U.S. 346, 369 (1997) (classifying the detention of a person under a state "sexually violent predator" statute as being civil, not criminal, for purposes of due process analysis); Addington v. Texas, 441 U.S. 418, 424 (1979) (distinguishing the standard of proof required in criminal cases from the standard required in civil commitment cases); Woodby v. INS, 385 U.S. 276, 285 (1966) (recognizing a clear and convincing standard in a deportation case because the liberty interest was identified as significant, but not as significant as the one at stake in criminal cases).

77. Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1389 (2012); *see also* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 547 (2018).

78. *See* Ristroph, *Wages of Criminal Law*, *supra* note 43, at 1–2.

79. *See* Ristroph, *Intellectual History*, *supra* note 18, at 1951–54.

80. *See* Ristroph, *Wages of Criminal Law*, *supra* note 43; *see also* Levin, *Criminal Law Exceptionalism*, *supra* note 13.

formalist logic and line-drawing between civil and criminal law have produced some confounding features of modern criminal procedure. For example, if a defendant is convicted of a misdemeanor and serves six months in jail, the law tells us that they have been criminally punished. In order to receive the six-month sentence, they need to be found guilty beyond a reasonable doubt and (at least theoretically) have access to a range of constitutional and statutory protections afforded to criminal defendants. By contrast, if the same defendant is held pretrial in the exact same cell, in the exact same jail, for six months, the Supreme Court tells us that they have not been punished.[81] They have been incarcerated pursuant to a regulatory process designed to ensure public safety. Put differently, the formal barriers between "criminal" and "civil" obscure the troubling similarities between the two realms—especially in terms of the material effect on people's lives.

Second, the criminal/civil distinction might undersell the important ways that criminal institutions interact with and relate to non-criminal ones.[82] For example, any discussion of mass incarceration and its role as a driver of inequality should include some engagement with questions of housing, employment, and social services. Contemporary U.S. society perpetuates a vicious cycle through which a lack of resources (housing, employment, healthcare, education, etc.) increases the likelihood of arrest—either because people are more likely to commit crimes of need or poverty, or because poor and marginalized populations tend to be policed most heavily.[83] At the same time, court involvement (arrest, prosecution, conviction, supervision, etc.) makes it harder to obtain resources or access services.[84] Put differently, then, the "criminal justice system" (or whatever we are going to call it) implicates not only the criminal courtroom, the police, and the laws that allow for arrest, it also implicates how resources are distributed in society and whether or to what extent people have access to a social safety net.

Third, the criminal/civil distinction creates problems for commentators who adopt more sweeping critiques. Many objectionable aspects of U.S. criminal law are features shared with other institutions: some form of social control, some degree of punitiveness, some tendency towards the

81. *See Salerno*, 481 U.S. at 751–52 (holding that pretrial detention is not punishment).

82. *Cf.* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 297 (Alan Sheridan trans., Penguin Books 2d ed. 1995) (1975) (identifying institutions "which, well beyond the frontiers of criminal law, constitute[] what one might call the carceral archipelago").

83. *See generally* WESTERN, PUNISHMENT, *supra* note 40.

84. *See generally* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (examining labor market obstacles for people with criminal records); BRUCE WESTERN, HOMEWARD: LIFE IN THE YEAR AFTER PRISON (2018) (exploring the challenges associated with reentry).

subordination of marginalized populations.[85] Because the "criminal" label excludes these other forms of oppression, it may not be broad enough to accurately capture what's going on—or what's wrong with the "criminal justice system."[86] By focusing only on institutions classified as criminal, we might neglect the "shadow carceral state" and the ways "in which [the] expansion of punitive power occurs through the blending of civil, administrative, and criminal legal authority."[87] The "criminal" designation might be misleading in suggesting that those features or logics of the criminal system are tied to its "criminalness," as opposed to being reflections of broader societal pathologies.[88]

B. An Imperfect Label Worth Keeping?

Certainly, some readers may not find each of the three critiques traced above convincing. But even if each of the critiques of the "criminal justice system" is compelling, it does not necessarily follow that the label should be abandoned—or abandoned in all contexts.[89] Opting for an alternate label in a courtroom or a legislative hearing, for example, might have benefits, but it also might have real costs (alienating skeptical listeners, etc.).[90] The inquiry might be less whether the label is proper than whether it stands the greatest likelihood of helping to achieve the desired outcome. Indeed, for some advocates, activists, and people interacting with these institutions, there might be a significant benefit to retaining the label—or, at least, to retaining it in certain situations.

First, to the extent that the institutions of criminal law, policing, and incarceration remain, there might be a rhetorical value in being able to deploy the language of "justice."[91] This language has a sort of basic resonance that might transcend the cruel formalities of law and its enforcement. As an advocate asking for lenience for a defendant, as an

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85. *See* Levin, *Criminal Law Exceptionalism*¸ *supra* note 13 (making this claim).

86. *See, e.g.*, Beckett & Murakawa, *supra* note 27, at 222 ("[O]vert get-tough policies and rhetoric are supplemented and extended by a range of seemingly small policy innovations and complex institutional adaptations, including the creation of civil 'alternatives' to criminal sanctions, coercive efforts to recoup criminal justice expenditures, and heightened immigration enforcement."); Levin, *Criminal Law Exceptionalism*, *supra* note 13 (examining the applicability of criminal law critiques to non-criminal alternatives).

87. Beckett & Murakawa, *supra* note 27, at 222.

88. *Id.* at 222–23.

89. *Cf.* Eaglin, *supra* note 17, at 124 (noting that calls to "defund the police" have a "particular, contextualized meaning" that is responsive to particular social and political circumstances).

90. *See* Roberts, *Criminal Terms*, *supra* note 26, at 1555.

91. Indeed, as Doug Husak argues, one challenge for "criminal law skeptics" is that the "public demands *justice*," and criminal punishment is how people tend to understand that justice has been done. Husak, *supra* note 21, at 52 (emphasis in original); *id.* at 51–54.

activist urging de-policing or decriminalization, as a policymaker seeking to soften the blows of criminal law, or as an academic seeking to imagine a fair system of punishment, it might be helpful to be able to appeal to some higher values.[92] I remain unconvinced that there were some halcyon days where the "criminal justice system" was just. Yet, as an advocate, I certainly might want to frame an argument in terms of shared first principles: the system is meant to do justice, and a given outcome doesn't advance the interests of justice.[93] There is rhetorical power in arguing that the function of criminal legal institutions should be to do justice, even when law and justice diverge.[94] And, from a reformist perspective, it is worth thinking about how institutions of criminal law and punishment might be reshaped to advance justice. To the extent that people look to criminal institutions to "do justice,"[95] how might those institutions be reimagined to live up to their name?

Second, with all its faults, the "criminal" label has real legal significance. Defendants are entitled to an attorney in (some) criminal

92. In a sense, the question of whether and how to deploy the language of justice resembles historical and ongoing debates on the left about rights discourse. In the 1970s and 1980s, scholars associated with the critical legal studies movement argued that the language of rights was fundamentally conservative—limiting the political imagination, inviting individualism, legitimating existing institutions, and hampering political movements. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (critiquing antidiscrimination law as legitimating a racially unjust system); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies, in* LEFT LEGALISM/LEFT CRITIQUE 178, 178–79 (Wendy Brown & Janet Halley eds., 2002) (describing the critique of rights); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1537–38 (1983) (suggesting that evolutions in family law perpetuate the inequities of the market economy). In contrast, scholars associated with Critical Race Theory often voiced at least a qualified support for rights discourse as a vehicle for vindicating the interests of subordinated communities. *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305 (1987) ("Even if rights and rights-talk paralyze us and induce a false sense of security, as [critical legal studies] scholars maintain, might they not have a comparable effect on public officials, such as the police? Rights do, at times, give pause to those who would otherwise oppress us; without the law's sanction, these individuals would be more likely to express racist sentiments on the job. It is condescending and misguided to assume that the enervating effect of rights talk is experienced by the victims and not the perpetrators of racial mistreatment."); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 410 (1987) ("What is needed, therefore, is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of each others' rights-valuation.").

93. *See infra* notes 121–131 and accompanying text.

94. *See, e.g.*, Kimpel, *supra* note 57, at 446 n.31 ("In some ways, I prefer the term 'criminal justice system' because the system we aspire to should seek to do justice.").

95. *See* Husak, *supra* note 21, at 51–54.

prosecutions;[96] civil litigants, however, are not entitled to attorneys.[97] Defendants in criminal cases (at least technically) have the benefit of the "beyond a reasonable doubt" standard and a host of procedural protections that are unavailable in the civil realm.[98] And, despite theoretical arguments to the contrary, criminal law does authorize exceptional (and exceptionally brutal) forms of state violence.[99] That is, one could reject theoretical arguments about criminal law's exceptionality, while still recognizing what we might think of as a thin form of criminal law exceptionalism. Put differently, we might conclude that the criminal/civil distinction is incoherent and does too much work in courts, legislatures, law schools, and public discourse.[100] But as long as there are criminal courtrooms, criminal statutes, and rules of criminal procedure, we need to be able to grapple with those specific institutions on their own terms.[101]

Third, there are reasons beyond simple path dependence why the language of a "system" might retain some appeal. A person who has been arrested and prosecuted in both Colorado and New York certainly understands that the two states are different. That person has faced different judges and different prosecutors in different courthouses, and those actors have used different language in applying different rules. But it hardly should be surprising that the defendant might perceive both cases as a part of the same *thing*—the same system. The dynamic and the fundamental threats to liberty are the same in kind, if not the exact same as a matter of statute or political context.[102] And a defendant's experience or understanding of the harm done by these institutions might well be the

96. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) ("[T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

97. *See* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 32–34 (1981).

98. Of course, the rise of plea bargaining and the vanishingly small percentage of cases that go to trial, coupled with decades of rights-restricting Supreme Court decisions, mean that many of these rights exist only in theory for most criminal defendants. *See generally* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

99. *See, e.g.*, Ristroph, *Intellectual History*, *supra* note 18, at 1954 ("Burdens exceptionalism can be exaggerated, but there is nonetheless good reason to see criminal law's impositions of physical force and social stigma as distinctive." (emphasis omitted)).

100. *See, e.g.*, Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 9 (2005) (arguing that the Supreme Court's efforts to determine when cases are criminal and raise elevated procedural protections as producing a "series of self-contradictory decisions as incoherent as any in the Court's jurisprudence").

101. *See* Roberts, *Criminal Terms*, *supra* note 26, at 1555.

102. Or, to borrow from the literature on philosophy of language, these institutions and practices bear a "family resemblance[]," which allows (or causes) us to identify them with the same name. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 36 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe, P.M.S. Hacker & Joachim Schulte trans., 4th ed. 2009).

same, regardless of jurisdiction.[103] Indeed, it's that insight that I see as driving many radical critics' retention of the language of a "system" (in the "criminal punishment system") or "complex" (in the "prison industrial complex")—if you see all of the institutions as serving the same underlying purpose or doing the same harm, then the language of unity and cohesion makes sense.[104] Moreover, framing the institutions as comprising a system might allow for broader critique and reform.

None of this is to say that the "criminal justice system" was necessarily the right label all along or is still the best label to choose. But recognizing the work that each word might do individually or that the three might do collectively helps to show the malleability of language and the importance of understanding questions of criminal policy (and its attendant language) in context. Or, put simply, this analysis might help explain why critical academics, advocates, and activists still might deploy the language of the "criminal justice system."[105]

II. RETHINKING THE "CRIMINAL JUSTICE SYSTEM"

Increasingly, the critiques articulated in the previous Part are gaining ground in writing and thinking about U.S. criminal policy. As a result, there appears to be a growing movement afoot in certain corners to retire the "criminal justice system" as a label for the criminal legal apparatus.[106] Or, perhaps more accurately, different commentators increasingly use different names to characterize the institutions that comprise the criminal justice system.[107]

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103. *Cf.* Williams, *supra* note 92, at 403–06 (emphasizing individuals' subjective experience of legal institutions).

104. *See infra* notes 157–159, 178–181 and accompanying text.

105. *Cf.* Aziz Rana, The Constitutional Bind: Romance, Resistance, and Empire in American Identity (unpublished manuscript) (on file with author) (examining the use of constitutional argument and constitutional rhetoric by radical social movements); Bell et al., *Toward*, *supra* note 10, at 1528 (arguing for a vision of "demosprudence" that "does not repudiate rights claims but instead sees rights and courts as flawed and incomplete aspects of legal architecture that would nevertheless be unwise to ignore in practical movements for power redistribution and justice").

106. *See, e.g.*, Mayeux, *supra* note 1, at 56 (noting this movement); Roberts, *Criminal Terms*, *supra* note 26, at 1555 ("One noticeable shift in academic language is the increasing tendency to avoid the phrase 'criminal justice system.'").

107. *See* Mayeux, *supra* note 1, at 56 ("Some question the wording. Activists refer instead to 'the criminal *punishment* system,' believing that 'justice' has little to do with American courts and prisons. Lawyers prefer to put themselves in the center—'the criminal legal system'—while academics strive for more concise variations—simply 'the criminal system.'" (footnotes omitted)).

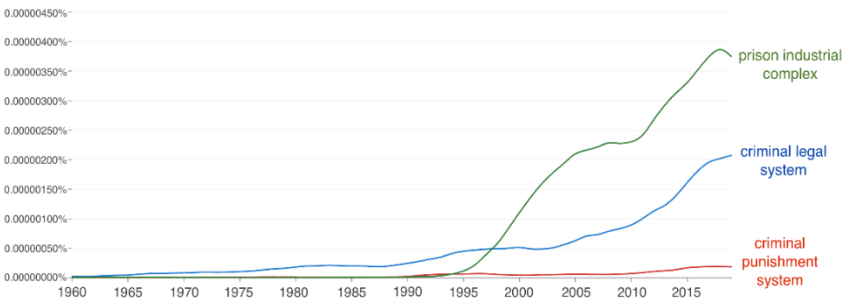

Figure 1: Alternative Labels from 1960 to 2019[108]

In this Part, I examine three of those labels: the "criminal legal system," the "criminal punishment system," and the "prison industrial complex." As noted at the outset, this list is hardly exhaustive, but it includes what I see as some of the most popular options appearing in legal academic writing, activist discourse, and policy advocacy work.[109] My goal in describing these labels is not to identify the right, best, or correct name to replace the "criminal justice system." As discussed in Part III, I think there's good reason to question whether one label can accurately capture all of the actors and institutions implicated by contemporary debates about criminal policy. Even if it could, it's not at all clear that the same label would make sense in all contexts or when deployed for all objectives.[110] And there may be real costs to fixating on labels, rather than the institutions, actors, and impulses that those labels describe.[111] But understanding the ideas that words convey and the ideological projects they might serve strikes me as a critically important project—and a critically important component of understanding how and why such words might be deployed.[112]

In this Part, my goal is to describe each label and what it might say about a project of both understanding and also reforming or transforming

108. Google Ngram of "Criminal Legal System," "Criminal Punishment System," "Prison Industrial Complex," GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/ (search "criminal legal system, criminal punishment system, prison industrial complex"; then narrow date range to "1960–2019"; set "corpus" to "English 2019"; choose smoothing "3") (last visited Aug. 24, 2023). Many thanks to Ayla Kadah for formatting assistance.

109. One notable exception here is the "carceral state." For an excellent discussion of the phrase and its many competing uses and definitions, see generally Rubin & Phelps, *supra* note 10.

110. *Cf.* Roberts, *Criminal Terms*, *supra* note 26, at 1555 (arguing that certain problematic, inaccurate, or objectionable "criminal terms" might be necessary in certain contexts either as terms of art or as a means of effectively communicating with different audiences).

111. *See infra* Part III.

112. *See infra* Part III.

a set of institutions. I outline the promises and limitations of each label as a vehicle for understanding institutions and phenomena. To what extent is each label underinclusive or overinclusive, omitting key players in the "system" or sweeping in a seemingly limitless universe of institutions? What does each label tell us about the so-called "system's" defining features? And what does each label tell us about whether or to what extent the institutions of the criminal justice system should be reformed, abolished, or preserved?

A. The Criminal Legal System

The "criminal legal system" appears to have gained ground as the preferred alternative to the "criminal justice system" in many mainstream liberal and progressive circles. The phrase has become ubiquitous, not only among lawyers and legal academics,[113] but also in other elite policy and advocacy communities.[114] It has appeared 101 times in judicial opinions since 2020, despite appearing a mere 57 times between 1953 and 2019.[115]

The National Association of Criminal Defense Lawyers (NACDL) now refers to "the criminal legal system" in its mission statement. And NACDL's longtime Executive Director Norman Reimer has explained that linguistic turn as reflecting a realization about the injustice of the system:

> [S]ociety is . . . fallible. It has spawned a criminal legal system that is so flawed that we have stopped calling it a criminal justice system. It is an engine of oppression that denigrates the humanity and the dignity of the individual. It emphasizes harshness and vengeance over compassion. It focuses on revenge instead of redemption.[116]

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113. *Cf.* Mayeux, *supra* note 1, at 56 ("Lawyers prefer to put themselves in the center—'the criminal legal system.'" (emphasis omitted)).

114. *See, e.g.*, BRENNAN CTR. JUST., *Punitive Excess*, https://www.brennancenter.org/series/punitive-excess [https://perma.cc/TP4R-6TWK] ("America's criminal legal system is unduly harsh. Experts explain how we got here and solutions that will benefit everyone.").

115. A Westlaw search conducted by the author on July 7, 2022, indicated that the phrase "criminal legal system" appeared in 158 judicial opinions (state and federal), with 57 of those uses occurring prior to 2020 (on file with author).

116. Norman L. Reimer, *The Tradition of Passionate Advocacy*, 45 CHAMPION 59, 60 (2021).

The "criminal legal system" offers a convenient shorthand for rejecting any normative or descriptive nods to justice as a meaningful concept in the administration of criminal law.[117]

Over the past few years, it has become common for legal academics to drop a footnote explaining their decision to swap out "justice" for "legal" when describing the system.[118] Interestingly though, many of the explanations tend to focus on why the authors rejected the "criminal justice system," not why they selected the "criminal legal system" instead.[119] But I think the law/justice distinction is doing much of the work, albeit implicitly.

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117. *See, e.g.*, James Forman, Jr., *Confronting Mass Incarceration: Lecture from the 2018-2019 Jorde Symposium*, 107 CALIF. L. REV. 1955, 1955–56 (2019) ("I used to call it . . . the criminal justice system, but more and more I've started to call it the 'criminal legal system' because, like a lot of people, I'm starting to wonder if there's even enough justice in the system to earn the title 'criminal *justice* system.'"); Katheryn Russell-Brown, *The Soul Savers: A 21st Century Homage to Derrick Bell's* Space Traders *or Should Black People Leave America?*, 26 MICH. J. RACE & L. 49, 52 (2020) ("What had been known for nearly a century as the 'criminal justice system,' was now called the 'criminal-legal system.' There was no longer any pretense that 'justice' lay at the heart of the system."); Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. RICH. L. REV. 409, 417–18 (2022) ("Many refrain from using the term 'criminal justice system' due to its failure to do justice, using instead the more descriptive 'criminal legal system' language.").

118. *See, e.g.*, V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1457 n.12 (2019) ("I use the term 'criminal legal system' instead of 'criminal justice system' to remove the normative assumption inherent in the latter phrase. For the reasons discussed in this Article and more, it is not apparent that the criminal legal system is one of justice, and to imply as much conceals that fact."); Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569, 1575 n.38 (2020) ("I generally use the term 'criminal legal system' instead of the more conventional 'criminal justice system,' because there is hardly any justice in our criminal system."); Victoria Hay, Comment, *Educational Requirements as Barriers to Release for Incarcerated People with Cognitive Disabilities*, 5 COLUM. HUM. RTS. L. REV. ONLINE 225, 228 n.8 (2021) ("The author has elected to use the term 'criminal legal system' instead of 'criminal justice system' in order to reflect the unjust nature of the current system."); Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. REV. 249, 260 (2017) ("[T]he term 'criminal legal system' will be used to refer to what is often denominated the criminal 'justice' system, in order to highlight the lack of justice therein."); Romie Griesmer, *Inside-Out: Bringing Law Students* Face-to-Face *with Injustice*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 23, 24 n.7 (2021) ("I choose to refer to our set of criminal laws, institutions, and policies as "criminal system" rather than "criminal justice system" or "criminal legal system" because the latter imply that the current system promotes justice."); Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651, 656 n.33 (2016) ("Throughout this paper, I will refer to the 'criminal justice system' as the 'criminal legal system.' I prefer this phrasing in order to challenge the presumption that the system is 'just.'").

119. *But see* Kimpel, *supra* note 57, at 446 n.31 ("I also think that in its current iteration, the criminal system is also often not operating legally. In some ways, I prefer the term 'criminal justice system' because the system we aspire to should seek to do justice, not merely to operationalize laws, but I will conform to the current convention in this Article. More recently, there has been a shift to using 'criminal legal systems' in the plural because there are criminal court systems at the federal, state, and municipal levels, but for simplicity's sake I will use the singular throughout.").

By replacing "justice" with "legal," the "criminal legal system" as a phrase disclaims any suggestion that the system either *is doing* or is *designed to do* justice.[120] Instead, this label implies a sort of formal content to the administration of criminal law. Criminal courts are doing *criminal law*, not *criminal justice*. And those tasks are not—or at least need not be—the same.

As with many labels, the "criminal legal system" might be deployed in service of different ideological or political worldviews. Notably, in this context, the split might depend on whether criminal law and criminal justice are understood as potentially overlapping projects (i.e., some criminal law is just, but some isn't) or are understood as fundamentally incompatible (i.e., criminal law is unjust).[121]

For example, prior to recall, public defender-turned-reformist and San Francisco District Attorney Chesa Boudin argued that prosecutors could "driv[e] changes in the criminal legal system, . . . putting that word 'justice' back in the criminal justice system" by "focusing on issues of race, class, and decarceration."[122] Relatedly, Jeffrey Bellin argues that U.S. criminal policy in the latter half of the twentieth century reflects the rise of the "criminal legal system" at the expense of the "criminal justice system."[123] In his account, the criminal apparatus contains

> two distinct systems: (1) a criminal justice system where the public seeks justice in response to crimes like murder and rape and (2) a criminal legal system where the government enforces a variety of laws ostensibly to achieve certain policy goals, like reducing drug abuse or gun violence or illegal immigration.[124]

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120. To be clear, though, the descriptive and normative positions are distinct. That is, there's a critical difference between understanding the system as fundamentally unjust, unjust by design, and understanding the system as failing to live up to its goal of doing justice. *See supra* section I.A.1. The former position implies that criminal justice was always a misnomer; the latter implies that a criminal justice system *could* exist.

121. *See supra* note 120. Such a tension might reflect recurring conflicts between abolitionist and reformist approaches to criminal law and its administration. *See, e.g.*, Thomas Mathiesen, THE POLITICS OF ABOLITION REVISITED 231–32 (2015) (exploring this tension); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1207–08 (2015) (same); Mariame Kaba with Rachel Herzing, *Transforming Punishment: What Is Accountability Without Punishment?*, *in* WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 132, 134 (Tamara K. Nopper ed., 2021) ("[P]rinciples matter. One may advocate for radical reform of surveillance, policing, sentencing, and imprisonment without defining oneself as a prison abolitionist."); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1783–87 (2020) (describing the tension between abolition and reform).

122. Chesa Boudin, *Prosecutors, Power, and Justice: Building an Anti-Racist Prosecutorial System*, 73 RUTGERS U. L. REV. 1325, 1326 (2021).

123. *See* BELLIN, *supra* note 42, at 3–4, 15.

124. *Id.* at 3.

Viewed through this lens, "the criminal legal system is the enemy of the criminal justice system. A true justice system can be preserved, and flourish, as the criminal legal system recedes."[125]

Bellin doesn't argue that criminal punishment is unnecessary or undesirable.[126] Instead, he characterizes the criminal legal system as a sort of perversion of the idea of justice and an illustration of a sloppy and dangerous overreliance on criminal law.[127] To that end, Bellin identifies the criminal legal system as the set of institutions furthest from what he sees as the socially valuable components of prosecution—"pretrial detention, the war on drugs, parole and probation revocations, repeat offending laws, and so on."[128] And notably, in this telling, the role of criminal law in driving racial hierarchy is reflected most clearly in the institutions of the criminal legal system, not the institutions of the criminal justice system.[129]

Contrary to Bellin's characterization of two competing systems, many more radical commentators suggest that the criminal *justice* system is simply a criminal *legal* system—that the institutions are there to perform a mechanical function (the management of marginalized populations, the mass processing of arrestees, the punishment of defendants), not to advance lofty goals.[130] To a certain extent, such a characterization might cut more broadly than a critique of criminal legal institutions. An argument that law and justice aren't synonymous, or that following legal rules isn't the same as doing justice, strikes me both as correct, and also correct when applied in a host of non-criminal contexts.[131] Put differently, a critique of the law/justice distinction might have particular purchase in

125. *Id.* at 188.

126. *Id.* (arguing that "criminal courts" may "be viewed narrowly, as an extreme form of governmental intrusion reserved for the most heinous offenses from which society cannot move forward without an official reckoning and some form of formal justice").

127. *Id.* at 106–07.

128. *Id.* at 175.

129. *See id.* at 81 ("When we look at the entire landscape, we are viewing two intertwined, but distinct systems, one where racism likely plays a significant role and another where it is less salient.").

130. *See, e.g.*, Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1001 (2021) ("[O]ur criminal legal system is out of control, racist, ineffective, and unworkable."); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 787 (2021) ("[I]t is our criminal legal system itself that, by definition, yields forms of domination and violence."); Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1550 (2022) ("The criminal legal system is . . . a tool of stratification by race, gender, and class within our unequal society. It maintains and legitimizes unequal and exploitative power relationships.").

131. On the law/morality distinction, see JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979) and H.L.A. HART, THE CONCEPT OF LAW (1961).

the criminal context, but this critique is hardly new or hardly confined to criminal legal institutions.

More importantly, however, the "criminal legal system" as a label appears underinclusive. Or, at least, it suggests that the scope of study, intervention, or critique is relatively narrow—a set of *legal* rules, actors, and institutions. In certain contexts, of course, that characterization might be accurate.[132] If I am describing criminal statutes or the procedural rules in effect in criminal court, I certainly am identifying criminal *legal* institutions. For those of us concerned about social control, the harm done to people by the "criminal justice system," and the way that punishment is conceived and operationalized, law is only one piece of the puzzle.[133] Granted, it is an important piece—the formal language and organs of state power that authorize and constrain state and private violence.[134] But looking at law doesn't give us a full picture of how people are punished, marginalized, surveilled, and controlled.

By way of example, consider collateral consequences. Activists, academics, and policymakers have come to pay increasing attention to the harms that people suffer because of their criminal records.[135] Many collateral consequences are the creation of statute—disenfranchisement, mandatory deportation orders, loss of access to public housing, bans on gun ownership, or employment in certain sectors.[136] But these "formal" collateral consequences are not the only type of exclusion that people with criminal records face.[137] Instead, people with criminal records encounter "many informal collateral consequences of conviction, arising outside formal operation of law."[138] "[T]hey are informal in origin, arising

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132. *See infra* Part III.

133. *See* Beckett & Murakawa, *supra* note 27, at 223 ("By neglecting the adaptations and practices we highlight here, and the dynamics that give rise to them, punishment and society scholars may overlook important features of contemporary carceral state power. . . . [M]any of these scholars limit their analyses to the legal sanctions imposed by criminal courts upon criminal conviction.").

134. *Cf.* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.").

135. *See, e.g.*, JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015) (describing the significant harms people suffer as a result of their criminal records); PAGER, *supra* note 84 (examining the way that criminal records and racial discrimination interact in labor markets).

136. Notably, however, these statutes are not technically "criminal."

137. *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1106 (2013) (distinguishing between "formal" and "informal" collateral consequences); *see also* David Garland, *Penality and the Penal State*, 51 CRIMINOLOGY 475, 479 (2013) (distinguishing between "de facto social consequences of conviction" and "de jure legal consequences that extend and intensify the sanction in multiple ways").

138. Logan, *supra* note 137, at 1106.

independently of specific legal authority, and concern the gamut of negative social, economic, medical, and psychological consequences of conviction."[139] These consequences "significantly affect[] the lives of convicted individuals" and "rang[e] from social stigma to diminished housing and employment opportunities . . . [and] very often . . . have a spill-over effect on friends and family."[140] The absence of formal legal authorization makes these consequences no less harmful and disruptive to the people who must live with them.[141] If anything, their extra-legality might pose even more problems.[142] Difficult as it may be to track and address the harms done by formal collateral consequences, informal collateral consequences present an even greater challenge because they are so nebulous.[143] And, while patterns of social exclusion might be traced accurately to something *legal* (e.g., an arrest or conviction), the law is just one piece of the puzzle or the first link in the chain.

An accurate account of the harms done by the criminal system requires not only looking beyond the formal content of criminal laws (collateral consequences are generally civil),[144] but also examining dynamics and institutions that fall outside of the legal system(s). The "criminal legal system" as a label might invite a necessary grappling with the absence of justice. And, particularly for lawyers and legal academics, it might invite a reckoning with the ways in which the ostensible neutrality of law and its mechanical functioning cloak deeper injustices.[145] But the label also risks

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139. *Id.* at 1104.

140. *Id.* at 1106.

141. *See id.*; *see also* Reuben Jonathan Miller & Forrest Stuart, *Carceral Citizenship: Race, Rights and Responsibility in the Age of Mass Supervision*, 21 THEORETICAL CRIMINOLOGY 532, 538–41 (2017).

142. *Cf.* Beckett & Murakawa, *supra* note 27, at 222 ("The shadow carceral state also operates in opaque, entangling ways, ensnaring an ever-larger share of the population through civil injunctions, legal financial obligations, and violations of administrative law.").

143. *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1103 (2015) (noting the collateral consequences of misdemeanors and the way that they are less obvious than other criminal justice related harms, but are "increasingly influential"); Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 203–06 (2017) (describing informal collateral consequences and the difficulty of factoring them into sentencing decisions); Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2273–76 (2018) (describing the challenges of dealing with informal collateral consequences in the employment context).

144. *See, e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1806–07 (2012) (describing judicial treatments of collateral consequences as "nonpunitive").

145. *See, e.g.*, Roberts, *Criminal Terms*, *supra* note 26, at 1551–52 (discussing the politics of language in the criminal context). It's worth noting that attorneys and academics increasingly are calling for such a reckoning. *See, e.g.*, Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020) (arguing the traditional criminal law courses reinforce the punitive

understating the ways in which the law is socially embedded and the ways in which punitive impulses shape human interactions outside of the purview of the law.

B. The Criminal Punishment System

Unlike the "criminal legal system," which increasingly is used in more mainstream circles, the "criminal punishment system" appears almost exclusively in activist or critical scholarly commentary.[146] And it does not appear as often.[147] The "criminal legal system" replaces justice with law, implying that formalism and technicalities have replaced justice as the driving force in the administration of criminal law.[148] The "criminal punishment system" takes us a step further, implying not just that the system is amoral (or immoral), but that its primary function is punitive. The system might not sort the guilty from the innocent, and it might not even treat the guilty fairly.[149] What the system does—this label implies—is punish.[150]

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status quo and are in need of reexamination); Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413, 413–14 (2021) (same); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J. F. 848, 852 (2019) (critiquing the belief in a neutral "rule of law" in the criminal context).

146. *See, e.g.*, Mayeux, *supra* note 1, at 56 ("Activists refer instead to 'the criminal *punishment* system,' believing that 'justice' has little to do with American courts and prisons." (emphasis in original)).

147. As one measure of the critical temperature, or as one way of gauging the Overton window, it is worth noting that the American Civil Liberties Union now refers to "the criminal punishment system" in at least some of its official materials. *See ACLU Criminal Law Reform Project*, ACLU (Oct. 24, 2012), https://www.aclu.org/other/aclu-criminal-law-reform-project [https://perma.cc/YGX9-KH88] ("To reduce the number of people entering the criminal punishment system, [the Criminal Law Reform Project] focuses on preventing over-incarceration and over-criminalization at the 'front end' of that system. We fulfill our mission through strategic litigation and advocacy that promotes reform and challenges racism within the criminal punishment system.").

148. *See* BELLIN, *supra* note 42, at 3–4, 15.

149. *See* Roberts, *Abolition Constitutionalism*, *supra* note 15, at 34 ("By marking people for involvement in 'misdemeanorland,' forcing them to engage in burdensome procedural hassles, and requiring them to engage in disciplinary activities, this gargantuan branch of the criminal punishment system exerts social control over the city's black communities, with no real regard for residents' culpability for crime." (footnote omitted)).

150. As with any label, however, the meaning or intended significance isn't fixed. For example, I have located four judicial opinions that use the "criminal punishment system." Bostelman v. People, 162 P.3d 686, 692 (Colo. 2007) ("When comparing the legislature's establishment of a juvenile justice system, which differs fundamentally from the adult justice system, our conclusion is that the legislature meant for exposure to the criminal punishment system to be applicable."); United States v. Janczewski, 560 F. Supp. 3d 1064, 1066 (E.D. Mich. 2021) ("Despite these outcomes, and indeed, despite significant evidence that incarceration is an ineffective means of combatting drug abuse, the federal criminal punishment system continues to treat addiction and its consequences as moral failures that can be deterred through sanction, rather than issues of public health." (footnote omitted));

In introducing the "criminal punishment system" as one of their preferred labels, abolitionist organizers Rachel Foran, Mariame Kaba, and Katy Naples-Mitchell explain that

> people, media, and institutions refer to the "criminal justice system" when discussing the government actors charged with policing, prosecution, and punishment, including incarceration, for violations of criminal law. Like many others pursuing abolition of the prison industrial complex, . . . we instead generally use the term "criminal punishment system." Some instead use phrases like "criminal injustice system" to capture the same idea. Others may use "criminal legal system," which similarly describes the mechanism of the system (passage and enforcement of criminal laws) without imbuing it with an undeserved positive connotation that distracts from its real-world objectives and consequences. All of these terminology choices recognize that the phrase "criminal justice" cloaks the system with false legitimacy by framing it as "just" or "justice oriented."[151]

That is, Foran, Kaba, and Naples-Mitchell do not suggest that there is only one way to describe or understand the institutions of punishment and injustice.[152] But they do suggest an overarching ideological project that unites these institutions and actors—the drive to punish, subordinate, and

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Simmonds v. INS, 326 F.3d 351, 358 (2d Cir. 2003) ("Given . . . the availability of parole, . . . our assumption [is] that parole is a regular part of the criminal punishment system in New York."); State v. Gatewood, 452 P.3d 1046, 1050 (Or. Ct. App. 2019) ("In rejecting that argument, we observed that [the Oregon statute] defines 'victim' broadly for the purpose of 'maximiz[ing] the participatory rights of those affected by criminal conduct' at various stages of the criminal punishment system."). Nothing about the use or context, however, implies that the authoring judge or justice intends to invoke a systemic critique. Indeed, it's not clear what motivated the use of the phrase in each case, and—in each case—the phrase was used only once. In one of the four (*Bostelman*), the "criminal punishment system" appears to be used as a means of distinguishing adult criminal law from the "juvenile justice system," which is purportedly designed to rehabilitate, not to punish. *See Bostelman*, 162 P.3d at 692. In two of the four (*Simmonds* and *Gatewood*), I am hard-pressed to come up with any explanation for why the phrase is used. Denying a habeas petition, *see Simmonds*, 326 F.3d at 361, hardly seems like the work of a judge sympathetic to an abolitionist project. *Cf.* Daniel Farbman, *Judicial Solidarity?*, 33 YALE J.L. & HUMAN. 1, 55–58 (2022) (grappling with the question of whether judges could ever act in solidarity with abolition or any other radical movement). In only one of the four (*Janczewski*) do I see even a hint that the usage might imply that the system is focused on punishment at the expense of a more desirable goal (here, public health and rehabilitation). *Janczewski*, 560 F. Supp. 3d at 1066.

151. Rachel Foran, Mariame Kaba & Katy Naples-Mitchell, *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. C.R. & C.L. 496, 497 n.2 (2021) (citations omitted).

152. And that, in and of itself, strikes me as an important move. In Mayeux's genealogy of the "criminal justice system," one of the recurring themes is the false clarity and manageability implied by the language of systems theory. *See generally* Mayeux, *supra* note 1. The possibility that the institutions are susceptible to different interpretive frames strikes me as reflecting an important recognition that questions of institutional design, management, or abolition are complicated and messy—hardly the space of clarity or "science" implied by the language of systems theory.

marginalize already-marginalized populations.[153] Criminal institutions, as seen through an abolitionist lens, exist to control and to harm, entrenching and creating axes of inequality.[154] And that vision shapes and informs many uses of the "criminal punishment system."[155]

Interestingly, the "criminal punishment system" retains the language of systems theory, but does so in service of a very different ideological project than Cold War liberalism or scientific management.[156] Where critics of the criminal justice system as a system argue that it lacks coherence,[157] many uses of the "criminal punishment system" rest on claims of a coherent logic—just one that is objectionable. Rather than reflecting a concern for justice, public safety, or traditional purposes of punishment, the system's overarching rationale is simply its brutality and oppressiveness.[158] For example, in calling for the abolition of the "criminal punishment system" and the "carceral punishment system," Dorothy Roberts argues that "we can see the extreme cruelty and degradation that characterize today's penitentiaries, police forces, and executions as the inevitable result of a racially subordinating *system*."[159]

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153. *See* Foran et al., *supra* note 151, at 505.

154. *See, e.g.*, *id.* (describing criminal institutions as unjust and oppressive); Roberts, *Abolition Constitutionalism*, *supra* note 15, at 85 ("[T]he criminal punishment system has functioned since the slavery era to keep black people in a subordinated political status."); Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson's "Masculinity As Prison,"* 3 CALIF. L. REV. CIR. 182, 187 (2012) ("The contemporary criminal punishment system developed from this adaptation of slavery to create a somewhat different racially targeted form of control and exploitation. The continuation of those tactics can be seen in the prison system's contemporary operations.").

155. *See* Foran et al., *supra* note 151, at 497 n.2 (collecting sources).

156. *See supra* notes 32–35 and accompanying text.

157. *See supra* section I.A.2.

158. *See, e.g.*, Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953, 1961 (2022) ("The criminal punishment system shortens people's lives and inflicts psychological and emotional pain."); Roberts, *Abolition Constitutionalism*, *supra* note 15, at 7 ("[T]he expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime."); *Five Tips for Talking About Criminal Punishment to Help End Mass Incarceration*, AM. FRIENDS SERV. COMM. (May 31, 2018), www.afsc.org/blogs/media-uncovered/five-tips-talking-about-criminal-punishment-to-help-end-mass-incarceration [https://perma.cc/D4V2-HEXQ] ("Instead, we talk about the 'criminal punishment system' or the 'criminal legal system' because the system as it exists is focused on punishment—not justice."); Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 358 (2009) ("[T]he criminal punishment system itself is a rampant source of gendered violence.").

159. Roberts, *Abolition Constitutionalism*, *supra* note 15, at 19 (emphasis added); *see also* Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 43 (2021) ("Regardless of what the criminal punishment system in the United States purports to do, or try to do, there is tremendous evidence that it operates as an apparatus for controlling and managing marginalized social groups.").

The "criminal punishment system," then, invites a reckoning with the brutal realities of prisons, policing, and institutions of punishment. Rather than conjuring up abstract questions of justice, the language foregrounds the harms done in the name of the polity. In this respect, the label fits neatly into the radical discourse in which it is frequently deployed.[160] And, notably, the phrase has begun to find its way into literature and court filings produced by less-radical advocates and organizations.[161]

Like the "criminal legal system," however, the label has its descriptive limits. First, "punishment" is only one type of harm produced by criminal institutions.[162] That is, critics identify a host of harms done by criminal institutions—exclusion, surveillance, and marginalization, to name a few. And not all of those harms are identified as "punishment" or treated (by judges and commentators) as reflecting punitive intent.[163] It is different to argue that institutions are either punitive in effect or punitive in intent. Focusing only on intent and formal punishment might obscure one of the cruel realities of criminal institutions—that even institutions and state actions designed to be helpful or humane, rather than punitive, can still do tremendous harm.[164]

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160. Just because most commentators who use the phrase tend to deploy it in service of radical critiques, it is not inevitable that the criminal punishment system is a radical or abolitionist label. Looking to Bellin's characterization of the "criminal legal system" by way of comparison, *see supra* notes 123–129 and accompanying text, one might argue that the contemporary system is a punishment system but that it could become (or could have been historically) a justice system. That is, abolitionist accounts tend to rely on claims that the system is meant to punish, not to do justice (i.e., it is a punishment system descriptively and normatively), but reformers might deploy the same language in service of a reformist project (i.e., it is a punishment system as a descriptive matter, but it could be reformed or transformed to do justice).

161. *See supra* note 147; *see also, e.g.*, Brief for Amicus Curiae Roderick & Solange MacArthur Justice Center at 1, United States v. Sensing, No. 21-60662, 2022 WL 717290 (5th Cir. Mar. 2, 2022) ("As part of the Mississippi community, [the Roderick & Solange MacArthur Justice Center] has a long history of pursuing and supporting litigation aimed at highlighting injustices experienced by Mississippians ensnared in our criminal punishment system.").

162. *See* Garland, *supra* note 137, at 476 n.2 (critiquing the use of the word "punishment" in sociological literature on "penality" because punishment "suggests that the phenomenon in question is primarily 'retributive' or 'punitive' in character, thereby misrepresenting penal measures that are oriented to other goals such as control, correction, compensation, etc.").

163. *See, e.g.*, Hudson v. United States, 522 U.S. 93, 99 (1997) (articulating the standard for defining criminal punishment); United States v. Ursery, 518 U.S. 267, 277–78 (1996) (addressing legislative intent, rather than simply the effect, in defining punishment); United States v. Ward, 448 U.S. 242, 248 (1980) (same).

164. Indeed, this insight is a central component of abolitionist opposition to reform—the road to hell is paved with good intentions, and reforms that do not fundamentally challenge the legitimacy of punishment ultimately come to re-entrench harmful institutions and do more harm to marginalized groups. *See, e.g.*, Gruber, *Policing and "Bluelining," supra* note 9, at 890 ("Policing has never really been about crime. And yet, well-meaning scholars and reformers have expended enormous amounts of intellectual and political capital on trying to 'fix' the institution so that it can *finally* fulfill its

Second, the "criminal punishment system" retains the "criminal" qualifier. Again, that certainly can be a helpful, important, and accurate qualifier.[165] But to the extent a radical anti-punitive project concerns itself with a broader constellation of punitive institutions or institutions of social control (schools, hospitals, workplaces, etc.),[166] the "criminal" modifier/qualifier limits the field of view or at least risks mischaracterizing the nature of the critiques.[167]

C. The Prison Industrial Complex

If we were mapping labels according to their explicit ideological content, the "prison industrial complex" would occupy one pole.[168] As a means of describing that which is or was the criminal justice system, the "prison industrial complex" (often shortened to "PIC") appears frequently in the work of abolitionists and radical activists.[169] And its rise in popular usage has been traced to a 1998 conference of Critical Resistance, one of the foundational groups in U.S. abolitionist thought and organizing.[170]

In describing their project, Critical Resistance identifies their goal as abolition not just of prisons or police, but of the "prison industrial complex."[171] Critical Resistance defines the "prison industrial complex" as

> a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems.

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community crime-fighting function in a fair manner."); Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1240 (2022) (noting the danger posed by "well-meaning but criminal-solution-reliant progressives"); Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 665 (2017) (reviewing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015)).

165. *See supra* notes 96–101 and accompanying text.

166. *See* sources cited *supra* note 27.

167. *See generally* Levin, *Criminal Law Exceptionalism*, *supra* note 13 (arguing that common critiques of criminal legal institutions actually apply to a host of non-criminal institutions).

168. As discussed throughout, this characterization is not meant to suggest that any label is neutral or devoid of ideological content. Rather, it is to say that the ideological content might require greater excavation in some contexts (and that some labels might offer more indeterminate meanings).

169. *E.g.*, Kaba with Herzing, *supra* note 121, at 133; Mike Davis, *Hell Factories in the Field*, NATION, Feb. 20, 1995, at 229.

170. *See* Ruth Wilson Gilmore & Craig Gilmore, *Restating the Obvious*, *in* INDEFENSIBLE SPACE: THE ARCHITECTURE OF THE NATIONAL INSECURITY STATE 141, 150 (Michael Sorkin ed., 2008).

171. *See What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, https://criticalresistance.org/mission-vision/not-so-common-language/ [https://perma.cc/PU5Z-AAS4].

> 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. This power is also maintained by earning huge profits for private companies that deal with prisons and police forces; helping earn political gains for "tough on crime" politicians; increasing the influence of prison guard and police unions; and eliminating social and political dissent by oppressed communities that make demands for self-determination and reorganization of power in the US.[172]

The "prison industrial complex," then, is framed and understood as capacious—encompassing different actors with different agendas whose combined functions "create[] a vicious cycle of punishment which only further impoverishes those whose impoverishment is supposedly 'solved' by imprisonment."[173]

References to the "prison industrial complex" conjure up discussions of the "military industrial complex."[174] In his farewell address in 1961, President Dwight Eisenhower warned that "[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."[175] And over the following decades, the "military industrial complex" entered the vernacular, particularly among critics of U.S. militarism, as a means of describing the intertwined interests of big business and foreign policy hawks.[176]

The parallel (or, at least, the allusion) drawn by the "prison industrial complex" isn't accidental.[177] According to abolitionist scholar and activist

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172. *Id.* (emphasis omitted).

173. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex [https://perma.cc/RV8W-LRED].

174. *See* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 952 (2004) (highlighting this relationship).

175. President Dwight D. Eisenhower, Farewell Address (1961), available at https://www.archives.gov/milestone-documents/president-dwight-d-eisenhowers-farewell-address [https://perma.cc/K54L-CGQA].

176. *See* JAMES LEDBETTER, UNWARRANTED INFLUENCE: DWIGHT D. EISENHOWER AND THE MILITARY INDUSTRIAL COMPLEX 6–12 (2011).

177. *See* Gilmore & Gilmore, *supra* note 170, at 150 (noting that "[t]he phrase . . . [is] intended to resonate with rather than simply mimic 'the military industrial complex'").

Angela Y. Davis, there is a close and important link between public/private interests in war and public/private interests in punishment:

> All this work [of managing prisons and incarcerated people], which used to be the primary province of government, is now also performed by private corporations, whose links to government in the field of what is euphemistically called "corrections" resonate dangerously with the military industrial complex. The dividends that accrue from investment in the punishment industry, like those that accrue from investment in weapons production, only amount to social destruction. Taking into account the structural similarities and profitability of business-government linkages in the realms of military production and public punishment, the expanding penal system can now be characterized as a "prison industrial complex."[178]

Such a critical view pushes past the private prison to highlight the role that ostensibly "private" actors and interests play in the quintessentially "public" function of criminal punishment.[179]

Referring to the "prison industrial complex" signals a departure from the language of neutrality and—like the "criminal punishment system"—lays bare the ideological project that the writer or speaker sees as central to the U.S. criminal apparatus. Notably, almost all the mentions of the "prison industrial complex" I have found in judicial opinions come from judges' references to the pleadings of incarcerated litigants who suggest

178. Davis, *supra* note 173.

179. *Cf.* Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112 (2001) ("[A] rigorous jurisprudential critique of the private prison shows that the private prison tends to distort dramatically the relationship between state and society in the criminal context, and does so in a way that contradicts the most central of liberal legal precepts: the rule of law. Such a rule of law critique of the private prison sees in that institution a key development: the simultaneous expansion and diffusion of state sovereignty, accompanied by the thorough merger, or interpenetration, of public and private realms."); Laura I Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C.R.-C.L. L. REV. 1, 2 (2020) ("Individuals under privatized correctional supervision are all too frequently trapped in a chaotic treatment-industrial complex."); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509, 550 (2014) (highlighting "the fallacy of the distinction between markets, private action, and financial interests on the one hand and an idealized criminal justice system on the other").

the fundamental illegitimacy of their incarceration.[180] And judges—predictably—tend to be skeptical at best of such characterizations.[181]

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180. *E.g.*, Jones-El v. Pollard, No. 07-C-0504, 2010 WL 446057, at *7 (E.D. Wis. Feb. 2, 2010), *aff'd sub nom.* Van den Bosch v. Raemisch, 658 F.3d 778 (7th Cir. 2011); Hope v. Trump, No. RDB-19-842, 2019 WL 4447319, at *1 (D. Md. Sept. 17, 2019) ("Plaintiff alleges: the 'American prison-industrial complex is built on Nazi and white suprem[ac]ist ideologies' which have 'worsened since President Trump took office.'" (citation omitted)); Rivera v. Santa Rosa Corr. Inst., No. 08cv373/LAC/MD, 2008 WL 4372875, at *2 (N.D. Fla. Sept. 23, 2008) ("Plaintiff further contends, among other things, that the defendants enforce torture policy as subterfuge to fraudulently conceal the anti-competitive behavior of the prison industrial complex." (quotation marks omitted)); Rivera v. Neb. Dep't of Corr., No. 06cv662, 2006 WL 3095670, at *1 (D. Neb. Oct. 30, 2006) ("[T]he plaintiff seeks $7 trillion and other relief from the Governor of Nebraska, a U.S [sic] Senator from Nebraska, a Nebraska member of the U.S. House of Representatives and the Nebraska Department of Correctional Services, all of whom are alleged to be part of a state-to-state voter disenfranchisement election fraud operation involving a network of public corporations known as the Prison Industrial Complex." (quotation marks omitted)); Alkebu-Lan v. Dickinson, No. 11-cv-0291 LKK KJN P., 2013 WL 3490655, at *2 (E.D. Cal. July 10, 2013) ("Plaintiff asks the court to 'terminate Defendants' and to 'rule an injunction to end all CDCR unions and for the federal government to take control of all CDCR prisons and California's prison industrial complex.'" (citation omitted)); Salaam v. Dep't of Corr., No. A-4097-09T3, 2012 WL 876799, at *1 (N.J. Super. Ct. App. Div. Mar. 16, 2012); Farid v. Goord, 200 F. Supp. 2d 220, 242 (W.D.N.Y. 2002) ("The Three–Fifths article [authored by the plaintiff] draws parallels between the Military Industrial Complex of yesteryear and the Prison Industrial Complex of today."); State v. Scott, No. 2012 KA 1740, 2013 WL 1803600, at *1 (La. Ct. App. Apr. 29, 2013) ("Referencing the growth of Louisiana's 'prison industrial complex,' the facts of the case, and his criminal history, the defendant argues that his life sentence makes no meaningful contribution to acceptable goals of punishment."); State v. Baham, No. 2013 KA 0694, 2013 WL 6858349, at *6 (La. Ct. App. Dec. 27, 2013) ("The defendant further contends that the instant case is a worthy example of one of the primary reasons for the escalating growth of Louisiana's prison-industrial complex."); Wheat v. California, No. C 11-2026, 2013 WL 450370, at *6 (N.D. Cal. Feb. 5, 2013) ("[The Plaintiffs] generally accuse 'juridically linked' Defendants . . . of operating a 'parole revocation mill' to sustain California's 'burgeoning prison-industrial complex.'" (citation omitted)); Johnson v. Raemisch, 557 F. Supp. 2d 964, 969 (W.D. Wis. 2008).

181. *See, e.g.*, Illum'maati v. Bailey, No. 20-cv-00546, 2020 WL 6585875, at *1 n.1 (M.D. Tenn. Nov. 10, 2020) ("Petitioner refers to his facility as the Trousdale Turner Prison Industrial Complex; however, there is no such facility."); Rivera v. Perdue, No. CV408-116, 2008 WL 2695812, at *2 (S.D. Ga. July 9, 2008) ("Plaintiff *fancifully* alleges that the defendants are involved in a national conspiracy to divert agricultural/farming materials from the 'prison industrial complex' to Afghanistan for use in the cultivation of the opium poppy." (emphasis added)); Williams v. Willingboro Twp., No. 20-1114 (RBK) (JS), 2020 WL 6281607, at *4 (D. N.J. Oct. 26, 2020) ("Plaintiff includes numerous paragraphs on subjects such as historical slavery, descent from Israel, the prison industrial complex."); People *ex rel*. Russo v. Manzo, Nos. A133873, A135242, 2014 WL 2816662, at *5 (Cal. Ct. App. June 23, 2014) (describing an "opening brief [that] is replete with what can only be described as rants" in part because of repeated references to the "prison-industrial complex"); Rivera v. McNeil, No. 10-cv-00097-MP-WCS, 2010 WL 1408359, at *1 (N.D. Fla. Apr. 2, 2010) ("Because Mr. Rivera dedicates most of his objection to his complaints about the United States Courts and their alleged complicity with the State of Florida and the Prison-Industrial Complex, this Court must look to the record to determine the merit of Mr. Rivera's petition."); Valdez v. Corizon, Inc., No. 11-cv-00484, 2014 WL 1874875, at *19–20 (N.D. Ind. May 8, 2014) ("This unsupported and general accusation apparently aimed at the whole (pejoratively so-called) prison industrial complex doesn't get the Estate past summary judgment."); Mogan v. Johnson, No. 18-cv-00276-JLS (SHK), 2018 WL 6185970, at *2 (C.D. Cal. May 25, 2018) ("The Complaint mostly

The "prison industrial complex" has some descriptive advantages as a label for U.S. institutions of punishment and control. First, by dramatically expanding the frame, the "prison industrial complex" avoids many of the pitfalls of the "criminal justice system," "criminal legal system," and "criminal punishment system." It invites—or perhaps even necessitates—a broader view of how the United States punishes, excludes, and controls. The "prison industrial complex" might transcend both the confines of law as well as the processes of punishment. Second, and relatedly, the "prison industrial complex" does important work in breaking down the public/private distinction. The "prison industrial complex" as a frame helps to highlight the place that private actors and private interests occupy in advancing "public" ends. [182]

Like any label, however, the "prison industrial complex" has its limitations.[183] Where the various "system" characterizations risk under-inclusivity,[184] the "prison industrial complex" risks over-inclusivity. Reading the work of abolitionist thinkers leads to an important question:[185] who or what *isn't* a part of the PIC?

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includes irrelevant information detailing events and incidents such as . . . conspiracy theories involving a prison industrial complex."). *But see* All. for Glob. Just. v. District of Columbia, No. 01-811 (PLF/JMF), 2006 WL 2425340, at *1 (D.D.C. Aug. 22, 2006) (recommending certification of a class of "[a]ll persons who were detained and arrested on April 15, 2000, near the area of 20th Street, N.W. and I and K Streets, N.W. in connection with the protest against the Prison Industrial Complex during the IMF/World Bank demonstrations"); United States v. Carthorne, 726 F.3d 503, 523 (4th Cir. 2013) (Davis, J., concurring in part and dissenting in part) ("For years now, all over the civilized world, judges, legal experts, social scientists, lawyers, and international human rights and social justice communities have been baffled by the 'prison-industrial complex' that the United States has come to maintain."); State v. Jackson, 92 So. 3d 1243, 1249–50 (La. Ct. App. 2012) (Thibodeaux, C.J., dissenting) ("This case is a worthy example of one of the primary reasons behind the escalating growth of Louisiana's prison industrial complex. Louisiana's 'lock-em-up and throw away the key' philosophy has spawned an incarceration industry unlike any other state or country.").

182. *Cf.* White, *supra* note 179, at 112 (discussing the public versus private prison debate).

183. While I focus on the scope of the "complex" here, it is worth noting that other critics of U.S. penal institutions argue that the "prison industrial complex" mischaracterizes the political economy of criminal punishment. *See* Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 97 (2001) ("This emerging *government of poverty* wedding the 'invisible hand' of the deregulated labor market to the 'iron fist' of an intrusive and omnipresent punitive apparatus is anchored, not by a 'prison industrial complex', as political opponents of the policy of mass incarceration maintain, but by a *carceral-assistential complex* which carries out its mission to surveil, train and neutralize the populations recalcitrant or superfluous to the new economic and racial regime according to a gendered division of labor, the men being handled by its penal wing while (their) women and children are managed by a revamped welfare-workfare system designed to buttress casual employment." (citation omitted)).

184. *See supra* notes 132–145, 157–167 and accompanying text.

185. *See supra* notes 168–178 and accompanying text.

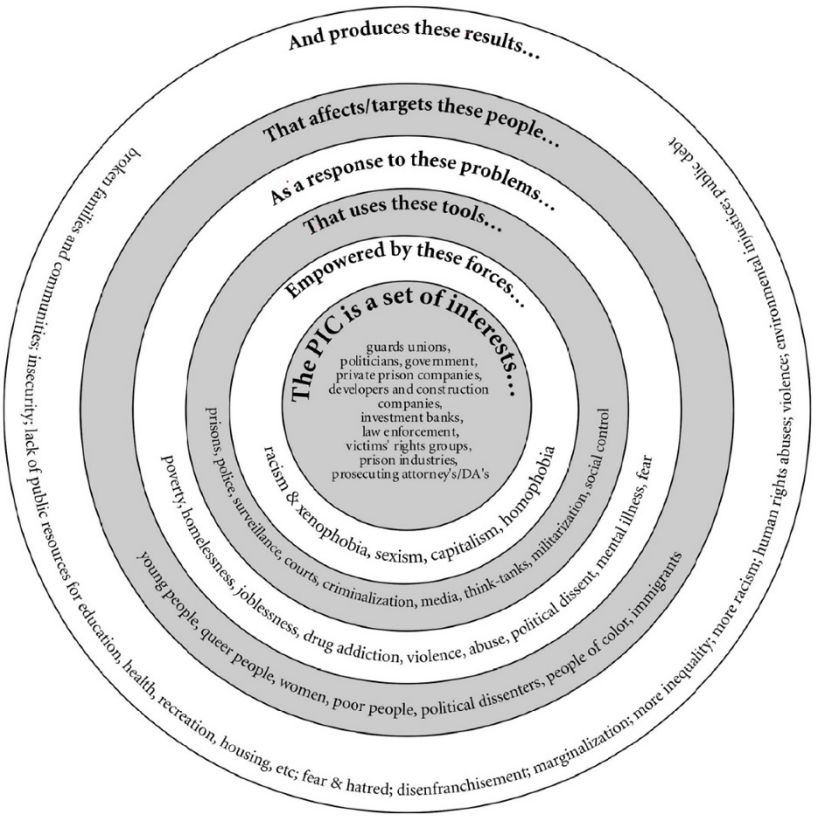

Figure 2: The Prison Industrial Complex[186]

Figure 2 reproduces a chart created by Critical Resistance that, on my read, demonstrates just how massive and boundless the PIC is. The PIC encompasses not only companies that profit off of prison construction, commissaries, or phone services, but also broader forces of capitalism and the actors (politicians, business owners, voters, etc.) who keep capitalism afloat.[187] Likewise, the PIC rests not only on criminal statutes that proscribe conduct and authorize punishment, but also on fear and hatred and other logics of exclusion and subordination (racism, sexism, xenophobia, and homophobia, etc.).[188] The state may be a focal point of many critics,[189] but the "prison industrial complex" refers as well to "the

186. *The Prison Industrial Complex* (illustration), *in What is the PIC? What is Abolition?*, *supra* note 171.

187. *See id.*

188. *See id.*

189. *See* Gilmore & Gilmore, *supra* note 170, at 150–51.

elaborate set of relationships, institutions, buildings, laws, urban and rural places, personnel, equipment, finances, dependencies, technocrats, opportunists, and intellectuals in the public, private and not-for-profit sectors."[190]

I find this account helpful in its breadth. But I also think it's important to recognize how challenging such an understanding of the PIC is and how it complicates any project that seeks to address criminal institutions as distinct or distinctly in need of reform, transformation, or abolition.[191] This may not be a problem in and of itself.[192] Perhaps taking radical critiques of criminal institutions seriously necessitates applying such radical critiques to *all* institutions.[193] The logic of abolition has no real limits.[194] "It would be an understatement to say that abolition is an ambitious and long-term project. . . . [T]o create an abolitionist society, abolitionists have to change one thing: everything."[195]

Such a line of argument, however, would lead to a conclusion that all features of contemporary life are implicated in the PIC, from the core elements of the "criminal justice system" to you and me and our daily activities. That understanding of a boundless criminal apparatus would suggest that an anti-carceral, abolitionist, or even a reformist project requires addressing institutions way beyond the scope of liberal legalist concerns about police and prisons.[196] That characterization seems right to

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190. *Id.* at 150.

191. *See* Levine, *supra* note 164, at 1241–45 (critiquing abolitionist opposition to non-criminal forms of punishment and exclusion, arguing that it is "possible that an abolitionist message suffers when its message, 'prison and jails are exceptionally dehumanizing,' lacks clarity").

192. *See* AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 133 (1984) ("There is no such thing as a single-issue struggle because we do not live single-issue lives.").

193. *Id.* at 130–31.

194. *Cf.* Alexander, *supra* note 23, at xiii ("I kept a running list of the actors who are implicated in the expanding net of mass incarceration. Lawmakers, judges, prosecutors, parole officers, and police officers leap immediately to mind. But what about those we usually trust to serve us and keep us safe, including social workers, emergency room doctors, and landlords . . . ? What about teachers? Pastors who work with police departments to create gang databases? School counselors? Psychiatrists?"); STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION 2 (1985) (articulating a capacious understanding of "social control" and considering whether "teachers in schools, warders in prisons, psychiatrists in clinics, social workers in welfare agencies, parents in families, policemen on the streets, and even bosses in the factories are all, after all, busy doing the 'same' thing").

195. Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 609 (2021) (paraphrasing Ruth Wilson Gilmore).

196. *See, e.g.*, GOTTSCHALK, *supra* note 164, at 258–82 (examining the relationship between opposition to mass incarceration and other political projects); Jonathan Simon, *Rise of the Carceral State*, 74 SOC. RSCH. 471, 499–500 (2007) ("If the carceral state is much more than a state that builds and fills prisons as part of its performance of government, it will take more than an antiprison movement to reverse it.").

me in many ways.[197] And that characterization should help to make sense of why abolition (at least in its contemporary U.S. incarnation)[198] tends to be one component of other revolutionary political projects—either socialist or anarchist.[199] But if my broad reading is not too broad, the "prison industrial complex" does not actually have boundaries or limits. And that observation leaves us with big questions: If the "prison industrial complex" is everything, then why label it at all? If the "prison industrial complex" just becomes a shorthand for the dominant political economy or for structures of subordination across lines of race and class, is that shorthand useful? What does it add to common labels that do not exceptionalize prisons or criminal punishment (capitalism, racial capitalism, etc.)?[200] And if the PIC encompasses personal feelings and impulses, is it really an "industrial complex" at all?

III. AFTER THE "CRIMINAL JUSTICE SYSTEM"

The labels discussed in the previous Part each challenge or complicate foundational assumptions about the "criminal justice system." As I have argued, each has its advantages, but also significant limitations—both in how accurately it describes a set of actors and institutions and in what it tells us about how we as a society should deal with those actors and institutions. Examining these competing labels doesn't necessarily yield a winner—in large part because selecting a label depends on our normative priors as well as what function we want that label to serve. Is the goal the greatest degree of descriptive accuracy or theoretical precision? Is the goal to mobilize lawmakers, voters, or members of the polity? Or is the goal to

197. *See* Beckett & Murakawa, *supra* note 27, at 223 ("[A] comprehensive understanding of the nature, operation, and effects of carceral state power requires attention to subterranean politics and covert institutional innovations that, along with more overt policy developments, shape penal practices and outcomes.").

198. *See generally* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020) (distinguishing U.S. abolition from other abolitionist movements and theories).

199. *See, e.g.*, Anthony J. Nocella II, Mark Seis & Jeff Shantz, *The Rise of Anarchist Criminology*, *Introduction* to CONTEMPORARY ANARCHIST CRIMINOLOGY: AGAINST AUTHORITARIANISM AND PUNISHMENT 1, 1–8 (Anthony J. Nocella II, Mark Seis & Jeff Shantz eds., 2018) (articulating an anarchist approach to abolition); JORDAN T. CAMP, INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE 147 (2016) (describing the idea of "abolition democracy" as an alternative to capitalism); Akbar, *supra* note 121, at 1844 (discussing socialist and anarchist approaches to abolition).

200. *Cf.* Levin, *Criminal Law Exceptionalism*, *supra* note 13, at 1445 ("For those committed to dismantling structural racism, fighting authoritarian institutions, ending capitalism, or opposing dominant features of U.S. political economy, criminal law might not be exceptional. But it might offer a powerful illustration of all that's wrong or objectionable about contemporary society." (footnotes omitted)).

win a motion, a case, or a legislative debate? That is, it's not clear to me that we can (or should) divorce a discussion of labels from a discussion of their motivations.

In this final Part, I step back to argue that the process of selecting or evaluating a label should be more significant than the label itself. I argue that there is not a one-size-fits-all label that can capture the necessary critiques, descriptive efforts, and positive political projects. And much of the important work of the shift away from the "criminal justice system" (to the extent that shift continues) should come in articulating why that label was a problem to begin with. I argue that there's a value to recognizing the messiness and potential unboundedness of the actors and institutions that have been known as the "criminal justice system." Finally, I emphasize the importance of surfacing the ideology that informs any label, critique an overemphasis on nomenclature, and highlight the illusion of clarity that a single label might offer.

A. The "Criminal System" and the Benefits of Uncertainty

By this point, it should come as little surprise that I'm not ready to endorse a "correct" label for the institutions commonly known as the "criminal justice system." There isn't one. To the extent I have a preferred label, however, it's probably one that I didn't discuss in the previous Part: the "criminal system."[201] While I use or have used each of the other options described above,[202] the "criminal system" is the phrase that I frequently find myself gravitating towards in my teaching and writing. As I hope is clear by this point in the Article, the "criminal system" has two major limitations as a label: it retains the "criminal" qualifier, and it continues to misidentify the set of actors and institutions as a "system." If you accept the critiques outlined in Part I, it's an inaccurate label.

So, why use it? I actually use the phrase largely because of how little it offers. The "criminal system" is ambiguous and provides us very limited guidance as to its content or its function. Is the criminal system private or public? Is the criminal system a set of legal institutions and actors, or does it also encompass social and cultural forces that are not explicitly "law?" Is the criminal system cruel but well-meaning or designed to be brutal and repressive? The label doesn't answer any of these questions. There is no clear normative statement—it offers neither the aspirational promise of a "justice system," nor the explicit critique of the "prison industrial

201. In this respect, I join Sharon Dolovich, Alexandra Natapoff, and others I read as using the phrase "criminal system" in a way that deliberately implies uncertainty and ambiguity in the actual composition and purpose of that system. *See* Dolovich & Natapoff, *supra* note 18.

202. And, depending on the context or desired effect, I still do use "the criminal justice system."

complex." As a descriptive matter, it is nebulous at best. To be honest, that's why I like it.[203]

One of the many weaknesses of U.S. criminal legal scholarship, advocacy, and policymaking is their false promises of clarity. For example, criminal law scholars offer distinctions between *malum in se* offenses (the ones that are bad in and of themselves) and *malum prohibitum* offenses (the ones that are bad only because they are criminal). There's a frequent naturalization of criminal laws and criminal punishments, as though this area of law is exceptional and almost pre-political—the province of community will and moral condemnation.[204] This line of thinking suggests that criminal law is different or distinct from other areas of law.[205] Judges and commentators imagine that they can draw bright lines between criminal punishment and civil regulations.[206] And reformers often imagine that decriminalization and a shift away from criminal institutions would alleviate the pain and injustice of the carceral state.[207] Even critical accounts often accept, without explanation, that criminal law and its enforcement are exceptionally objectionable.[208]

That false clarity has many risks. Not only are bright lines and a clearly delineated "criminal justice system" inaccurate descriptively, but they also limit our vocabulary and imagination when it comes to dealing with risk and harm. Indeed, that's one of the core concerns about systems

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203. *Cf.* Gilmore & Gilmore, *supra* note 170, at 150 (noting the "meaningful breadth" of the phrase "prison industrial complex" and arguing that a narrowing of the concept in many contexts has limited the political utility of the label).

204. *See supra* notes 66–80 and accompanying text; *see also* VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 67 (2019) (citing Michael Davis, *The Relative Independence of Punishment Theory*, 7 LAW & PHIL. 321, 329–30 (1989)) (critiquing arguments that criminal law is "structured by an internal logic of its own, rather than as a broader political enterprise"); Eric J. Miller, *The End of the Criminal Law?*, NEW RAMBLER REV. (Oct. 15, 2020) (reviewing VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE (2019)), https://newramblerreview.com/book-reviews/law/the-end-of-the-criminal-law [https://perma.cc/PG3H-DNW9].

205. *See supra* Part I.A.3

206. *See supra* Part I.A.3.

207. *See, e.g.*, Andrea L. Dennis, *Decriminalizing Childhood*, 45 FORDHAM URB. L.J. 1, 44 (2017) ("Decriminalization presents a promising solution to protect youth from the negative effects of the juvenile justice complex while also advancing public interests."); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 320–21 (2014) (describing public support for marijuana decriminalization). *But see* Natapoff, *supra* note 143, at 1116 ("History might then recall today's decriminalization as yet another example of a well-meaning reform that somehow managed to widen the criminal net and exacerbate social inequality.").

208. *See generally* Levin, *Criminal Law Exceptionalism*, *supra* note 13 (critiquing this position).

analysis: it restricts the scope of critique and the nature of the conversation about what is possible or impossible.[209]

Precision is important—critics need to understand what we are criticizing.[210] Yet it isn't easy (and shouldn't be) to put four walls around objectionable ideologies or modes of governance. There's a limit to how precise any label can be. But that doesn't mean that we (scholars, critics, people who care about these issues) can't aspire to describe our objects of critique accurately or strive to be clear about *why* we might choose to describe them the way that we do.[211] Put differently, a label can only do so much; the process of describing, understanding, and defining what that label means can do much more.

In calling for a "comprehensive understanding of the nature, operation, and effects of carceral state power," Katherine Beckett and Naomi Murakawa argue that a critical, anti-carceral project "requires a comprehensive definition of the penal state, one that is independent of official claims about what is and is not punishment and legal technicalities that distinguish 'civil' incarceration and 'administrative' criminal justice sanctions from 'real' criminal punishment."[212] That is, whatever we choose to label these institutions and actors,[213] it's "importan[t] . . . [to] adopt[] a broad and institutionally robust definition . . . that recognizes the full range of policies and agencies that employ penal power."[214] Similarly, Sharon Dolovich and Alexandra Natapoff argue that "we need a complete and nuanced understanding of what exactly this system *is*: What social and political institutions, what laws and policies, does it encompass?"[215]

And, consistent with this position, intentionally broad labels have proliferated in sociological and criminological literature.[216] Indeed, David Garland identifies "penality" as a desirable term precisely because of its near boundlessness:

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209. *See supra* notes 58–64 and accompanying text.

210. *See supra* text accompanying note 20.

211. *Cf.* WILLIAMS, *supra* note 17, at 21 ("What can really be contributed [by interrogating the meaning of words] is not resolution but perhaps, at times, just that extra edge of consciousness.").

212. Beckett & Murakawa, *supra* note 27, at 223.

213. Beckett and Murakawa, like many punishment and society scholars, opt for "the carceral state." *Id.*; *see also* Rubin & Phelps, *supra* note 10, at 423–24; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 6 (2006). Of course, like any of the labels discussed in this Article, the "carceral state" has many possible definitions, uses, and connotations. *See, e.g.*, Rubin & Phelps, *supra* note 10, at 423–24 (examining the use and meaning of "carceral state"); Garland, *supra* note 137, at 495 ("The literature on U.S. punishment already makes reference to the 'carceral state,' 'the punitive state,' 'the prison state,' and occasionally the 'penal state.' But most of these usages invoke the term in a gestural, rhetorical way.").

214. Beckett & Murakawa, *supra* note 27, at 223.

215. Dolovich & Natapoff, *supra* note 18.

216. *See supra* note 213 and accompanying text.

> "Penality" has come to be the standard term used to refer to the subject matter of the sociology of punishment. It refers to the whole of the penal complex, including its laws, sanctions, institutions, and practices and its discourses, symbols, rituals, and performances. As a generic term it usefully avoids the connotations of terms such as "penal system" (which tend to stress institutional practices but not their representations, and to imply a systematicity that often is absent) or else "punishment" (which suggests that the phenomenon in question is primarily "retributive" or 'punitive' in character, thereby misrepresenting penal measures that are oriented to other goals such as control, correction, compensation, etc.).[217]

"Penality" certainly isn't a perfect label. Neither is the "criminal system." But I take Beckett and Murakawa's exhortation as an invitation to be careful and transparent not only in *how* we are choosing labels, but also *why* we are choosing labels. Capacious definitions certainly might have their limitations.[218] But they might have benefits in speaking to broader projects of change, critique, and re-examination. The words might not delineate clear boundaries, but that's the point. The boundaries aren't clear.

B. Labels and their Limits

Ultimately, then, any label has its limitations as a matter of describing institutions and actors, and there's reason to think that different labels might have different meanings and different force in different contexts.[219] The "criminal justice system" is no different.

Perhaps, as critics suggest, the "criminal justice system" as a label or conceptual frame has helped to conceal injustice and contested political questions—making them seem settled, commonplace, and uncontroversial.[220] But even if it has, deciding on a better label for a set of unjust practices can't answer the hard questions that need to be answered. Do we as a society want a unified system? What would a properly functioning system look like? Is there such thing as a properly functioning criminal justice system? And, if so, what ends—and whose

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217. Garland, *supra* note 137, at 476 n.2.

218. *See supra* section II.C.

219. *See* WILLIAMS, *supra* note 17 (arguing for a theory of meaning as contingent and context-dependent); STUART HALL, *Richard Hoggart*, The Uses of Literacy, *and the Cultural Turn*, *in* 1 ESSENTIAL ESSAYS, VOLUME 1: FOUNDATIONS OF CULTURAL STUDIES 35, 39 (David Morley ed., 2019) (arguing that "[r]eading . . . is always a cultural practice" in that each reader or audience member brings their own cultural context to a word or text).

220. *See supra* section I.A.

interests—would it serve? Is the goal to do justice, to punish, or to advance public safety? Are those goals the same or distinguishable?

I don't believe there's any label that could do the work of answering those questions. Words matter. (Or, at least, as a lawyer and law professor, I think that they do.) Yet there's always a limit to what they can do for us as a descriptive or normative matter. Ultimately, the tough questions always will be tough questions regardless of how we describe the problems. Answering those questions will depend on our personal politics, ideologies, and understandings of how best to achieve social change and how society should address risk and harm.

There's also a real danger to overstating the significance or impact of re-branding the "criminal justice system." If only addressing the harms caused by decades of punitive politics were as easy as changing the words that we use. Of course, it's not. Rethinking the labels and words that we use has many benefits and may well be an important component of a larger project of reform, transformation, or abolition.[221] Language certainly plays a role in shaping and restricting imagination and can't help but inform how different actors, audiences, and communities understand institutions.[222] Expanding or changing vocabulary may do real work in shifting the Overton window in terms of "acceptable" discourse in academic, advocacy, and policy spheres (or simply in conversations with friends, family, or neighbors).[223] Even if every person who uses a phrase isn't aware of its meaning or its genealogy, changes in language might still add to incremental changes in attitude, preferences, or imagination over time.[224]

But there are reasons to be skeptical of an over-emphasis on nomenclature. Labels—when divorced from context or from their intended political project—easily can be coopted, de-fanged, or used to paper over deep disagreements. The language of radicalism and reform is ripe for cooptation. Just because a speaker or a movement adopts a label as a part of a specific project doesn't mean that the meaning or message

221. *See* sources cited *supra* note 26.

222. *See* WILLIAMS, *supra* note 17, at 15 ("Certain other uses seemed to me to open up issues and problems . . . of which we all needed to be very much more conscious.").

223. *See generally* Eaglin, *supra* note 17 (explaining the significance of the language of "defunding the police" in movement politics).

224. *Cf.* Bruce Burgett & Glenn Hendler, *Keywords*, *Introduction* to KEYWORDS FOR AMERICAN CULTURAL STUDIES 3 (Bruce Burgett & Glenn Hendler eds., 2007) ("[V]ocabularies . . . treat knowledge not as a product of research that can be validated only in established disciplines and by credentialing institutions, but as a process that is responsive to the diverse constituencies that use and revise the meanings of the keywords that govern our understandings of the present, the future, and the past.").

of that label is now fixed.[225] Once a particular phrase or label drifts into the vernacular, it is "in play" for all speakers or thinkers.[226] Just as radical commentators might have repurposed the language of systems theory in service of institutional critique,[227] there is nothing precluding other commentators from using purportedly radical labels or deploying them for very different ends.[228]

Even if they are not explicitly coopted in service of an alternate political project, labels and language also can be de-fanged. Once popularized, the language of radical critique often becomes incorporated into the vernacular.[229] For example, over the past two and a half decades, "mass incarceration" has gone from a radical label invoking the xenophobic violence of Japanese internment during the Second World War to a common phrase that is ubiquitous in center-left scholarship and commentary.[230]

It might be harder to imagine this sort of process occurring to a phrase like the "prison industrial complex" because of its explicit radical framing.[231] But abolitionist scholars Ruth Wilson Gilmore and Craig Gilmore actually have argued that commentators have "hollow[ed] out . . . the term."[232] Therefore, the "prison industrial complex" label "has not fulfilled its potential to help people theorize adequately how the PIC shapes political and social life for everyone. As a result, it has yet to become a broadly useful tool in mobilizing opposition to the complex's continued expansion."[233]

Similarly, I suspect this process is already happening with the "criminal legal system"—if I'm correct in my assessment, it's becoming a common

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225. *See* 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).

226. *See id.*

227. *See supra* text accompanying notes 157–159.

228. *Cf. generally* Ernesto Laclau, *Ideology and Post-Marxism*, 11 J. POL. IDEOLOGIES 103 (2006) (outlining the theory of "empty signifiers").

229. *Cf.* Sylvia Wynter, *On How We Mistook the Map for the Territory, and Re-Imprisoned Ourselves in Our Unbearable Wrongness of Being, of* Désêtre*: Black Studies Toward the Human Project*, *in* NOT ONLY THE MASTER'S TOOLS: AFRICAN-AMERICAN STUDIES IN THEORY AND PRACTICE 107, 108 (Lewis R. Gordon & Jane Anna Gordon eds., 2006) ("The emergence of the Black Studies Movement in its original thrust, before its later cooption into the mainstream of the very order of knowledge whose 'truth' in 'some abstract sense' it had arisen to contest, was inseparable from the parallel emergence of the Black Aesthetic and Black Arts Movements and the central reinforcing relationship that had come to exist between them.").

230. *See generally* Levin, *Consensus Myth*, *supra* note 19 (tracking this development).

231. *See supra* notes 169–181 and accompanying text.

232. Gilmore & Gilmore, *supra* note 170, at 150.

233. *Id.*

characterization that might be delivered without any explicit political or ideological motivation. Speakers and writers might use it not because they accept the critique, but just because they understand that's the language they're *supposed to* use.

Changing language can be an important component of social change, but there is a danger in overemphasizing the work that language and labels can do. These sorts of shifts can become a way of signaling politics without actually taking concrete action or advancing those politics—a low-cost option to show that one is on the "right side" of a given issue or cause (without necessarily examining why it's the "right side" or why one is on that side in the first place).

All of which leads to a place where a highly politicized change in language can easily lose its meaning, or, at the very least, its punch. As critics of greenwashing and pinkwashing have noted, powerful actors often come to appropriate radical language or activist talking points in service of fundamentally conservative projects.[234] Just as the language of "justice" might have legitimated an unjust system, so too might the stylized language of protest and radicalism legitimate projects that are in no way radical—or that are not even responsive to the problem.[235]

In the summer of 2020, as protestors across the nation decried the racist violence of U.S. policing, wealthy corporate actors adopted similar language, implying that they, too, sought to dismantle "structural racism," despite indications to the contrary.[236] Similarly, as critiques of mass incarceration have become hallmarks of progressive discourse, there's a

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234. *See, e.g.*, Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1, 5 (2012) ("Once recognized as modern, the state's treatment of homosexuals offers cover for other sorts of human rights shortcomings. So long as a state treats its homosexuals well, the international community will look the other way when it comes to a range of other human rights abuses."); Naomi Klein, *The Hypocrisy Behind the Big Business Climate Change Battle*, GUARDIAN (Sept. 13, 2014), https://www.theguardian.com/environment/2014/sep/13/greenwashing-sticky-business-naomi-klein [https://perma.cc/5Y86-WNRM] (describing the greenwashing phenomenon).

235. By legitimation, I refer to the Gramscian concept. *E.g.*, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 246–47 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 11th prtg. 1971); LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 127, 141–45 (Ben Brewster trans., 1971); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 236 n.1 (1997); 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).

236. *See, e.g.*, Toni Gilpin, *Corporations Are Claiming "Black Lives Matter." That Would Be News to Their Workers*, JACOBIN (June 14, 2020), https://jacobin.com/2020/06/black-lives-matter-corporations-unions [https://perma.cc/TAL4-S4EB] (critiquing corporations for feigning commitment to racial justice). *Cf. generally* OLÚFẸ́MI O. TÁÍWÒ, ELITE CAPTURE (2022) (critiquing elite-dominated identity politics that advance the interests of capital).

risk that they lose meaning. Rather than reflections of movement goals or shared commitments, they might become talking points or empty signifiers.[237] Words initially deployed in service of radical critique simply can become words that signal some degree of social consciousness, right-thinkingness, or membership in an ingroup. The alternative labels discussed in Part II are products of specific movements and specific political projects. Divorced from those movements and projects, they are just words—labels without content that can provide cover to or be mobilized in service of the same punitive politics that brought us to the contemporary moment of popular critique.[238] Ultimately, when a judge uses the "criminal punishment system" in an opinion denying a habeas petition,[239] it is worth asking how much work the label is doing.

CONCLUSION

The shift away from the "criminal justice system" reflects a growing awareness of the injustices of policing, prosecution, and punishment in the United States. Maybe we could choose a new name or other names for this set of actors and institutions. But whatever name(s) we choose, we (the imagined community of people who care about the violence and injustice of U.S. criminal law and its enforcement) still need to hash out first-principles disagreements about what the institutions are supposed to do, what they're doing wrong, whether they could be reformed, or what non-criminal institutions could take their place.

In this Article, I have argued that the fundamental task isn't choosing the right label. It's figuring out what the label is for and what we want the label (and the institutions it describes) to do. Those answers may vary dramatically. As an ideological matter, the abolitionist, the reformer, the agnostic, and the defender of the status quo might understand their objects of study, critique, and activism very differently. And as a matter of strategy, a label might do very different work in a courtroom, a legislative hearing, a classroom, a community center, or an academic journal. Determining what comes after the "criminal justice system," then, requires an honest engagement with the nature of each of our projects—who is our imagined audience, and what are our ultimate goals?

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237. *See* ERNESTO LACLAU, EMANCIPATION(S) 36–46 (1996) (describing the concept of an "empty signifier").

238. *Cf.* Levin, *Progressive Prosecutor*, *supra* note 26, at 1418 ("[I]f the progressive prosecutor brand has allowed or is allowing some group of prosecutors to advance their careers and yet sidestep growing critiques of mass incarceration, we should be certain that the brand or classification is a meaningful one. Otherwise, are we simply witnessing a rebranding of tough-on-crime politics to appease an increasingly anti-carceral electorate?").

239. Simmonds v. INS, 326 F.3d 351, 358 (2d Cir. 2003).