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## Criminal Law Exceptionalism

Benjamin Levin

Washington University in St. Louis School of Law, [benl@wustl.edu](mailto:benl@wustl.edu)

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## CRIMINAL LAW EXCEPTIONALISM

*Benjamin Levin\**

*For over half a century, U.S. prison populations have ballooned, and criminal codes have expanded. In recent years, a growing awareness of mass incarceration and the harms of criminal law across lines of race and class has led to a backlash of anti-carceral commentary and social movement energy. Academics and activists have adopted a critical posture, offering not only small-bore reforms, but full-fledged arguments for the abolition of prisons, police, and criminal legal institutions. Where criminal law was once embraced by commentators as a catchall solution to social problems, increasingly it is being rejected, or at least questioned. Instead of a space of moral clarity, the “criminal justice system” is frequently identified by critical scholars and activists as a space of racial subordination, widespread inequality, and rampant institutional violence.*

*In this Article, I applaud that critical turn. But, I argue that, when taken seriously, contemporary critiques of the criminal system raise foundational questions about power and governance—issues that should transcend the civil/criminal divide and, in some cases, even the distinction between state and private action. What if the problem with the criminal system isn’t exclusively its criminal-ness, but rather is the way in which it is embedded in and reflective of a set of problematic beliefs about how society should be structured and how people should be governed? What if the problems with criminal law are illustrative rather than exceptional? Ultimately, I argue that the current moment*

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*should invite a de-exceptionalization of criminal law and a broader reckoning with the distributive consequences and punitive impulses that define the criminal system's functioning—and, in turn, define so many other features of U.S. political economy beyond criminal law and its administration.*

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#### INTRODUCTION

When I teach criminal law to first-year students, we continually return to the same question: Why is the problem that we are discussing one that requires a criminal legal solution? We read cases in which people have done great harm or subjected others to grave danger. There are clearly problems. And, regardless of politics or ideological commitments, my students generally agree that these are problems in need of solutions. Criminal law casebooks (like judges and politicians) often ask *how severely* each defendant should be punished for causing harm or creating risk, or *how blameworthy* the conduct in question is, but those questions gloss over the threshold decision: Why is the problem at issue one that requires a criminal legal solution rather than some other sort of political,

institutional, or regulatory response?<sup>1</sup> The failure to ask that question has helped drive decades of ballooning criminal codes and helped ensure that police, cages, and surveillance have become the dominant solutions to social problems.<sup>2</sup>

Recent years have seen a deep reckoning with this question as more scholars and activists have adopted a critical stance towards the very foundations of criminal law and punishment.<sup>3</sup> Critiques of mass incarceration have gained ground across the political spectrum,<sup>4</sup> and the language of abolition has entered the mainstream.<sup>5</sup> In short, the embrace of criminal law as the solution to social problems is becoming much less

<sup>1</sup> See generally Alice Ristroph, *The Curriculum of the Carceral State*, 120 *Colum. L. Rev.* 1631 (2020) [hereinafter Ristroph, *Carceral State*] (characterizing substantive criminal law classes as reflecting an uncritical, formalist vision of criminal law).

<sup>2</sup> See, e.g., Jeffrie G. Murphy, “In the Penal Colony” and Why I Am Now Reluctant to Teach Criminal Law, 33 *Crim. Just. Ethics* 72, 76 (2014); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 *Harv. L. Rev. F.* 200, 211 (2021); Ristroph, *Carceral State*, supra note 1.

<sup>3</sup> See, e.g., *End the War on Black People*, *The Movement for Black Lives*, <http://web.archive.org/web/20200316230511/https://policy.m4bl.org/end-war-on-Black-people/> [<https://perma.cc/U455-Y35M>] (last visited Aug. 5, 2022) (“Until we achieve a world where cages are no longer used against our people we demand an immediate change in conditions and an end to all jails, detention centers, youth facilities and prisons as we know them.”); 1 *The Red Nation*, *The Red Deal: Indigenous Action to Save Our Earth* 12 (2020), [http://therednation.org/wp-content/uploads/2020/04/Red-Deal\\_Part-I\\_End-The-Occupation-1.pdf](http://therednation.org/wp-content/uploads/2020/04/Red-Deal_Part-I_End-The-Occupation-1.pdf) [<https://perma.cc/62AR-83YE>] (“What Creates Crisis Cannot Solve It . . . . We draw from Black abolitionist traditions to call for divestment away from the caging, criminalizing, and harming of human beings . . . .”); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 *Calif. L. Rev.* 1781 (2020) [hereinafter Akbar, *Abolitionist Horizon*]; Aya Gruber, *Policing and “Bluelining”*, 58 *Hous. L. Rev.* 867, 933 (2021) [hereinafter Gruber, “Bluelining”] (“[A]bolitionist ideology . . . is currently experiencing a renaissance in progressive scholarly circles.”); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 *B.U. L. Rev.* 245 (2017); Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 *New Crim. L. Rev.* 27 (2020) (identifying and critiquing a trend of “criminal law skepticism”); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 *Harv. L. Rev.* 1684 (2019); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 *Harv. L. Rev.* 2010 (2022); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 *Wash. U. L. Rev.* 997 (2021); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 *Harv. L. Rev.* 1613, 1622 (2019) [hereinafter McLeod, *Abolition Democracy*]; Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 *Nw. U. L. Rev.* 1597, 1604–05 (2017).

<sup>4</sup> How much agreement there actually is on what is wrong with the system, though, remains an open question. See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 *Mich. L. Rev.* 259 (2018) [hereinafter Levin, *Consensus Myth*] (arguing that the “consensus” on “criminal justice reform” is largely illusory). See also *infra* Section III.D (examining these critiques).

<sup>5</sup> See *infra* Section I.B.

reflexive.<sup>6</sup> But such a development invites its own threshold question—the question that follows every classroom or political discussion of cases involving great harm or risk of harm: *If not criminal law, what else?*<sup>7</sup>

Of course, that’s the million-dollar question. And, in this Article, I don’t purport to answer it.<sup>8</sup> From abolitionist activists to scholars of restorative justice and regulatory compliance, others strive to imagine alternative responses to risk, harm, and wrongdoing. The development of alternative state regulatory regimes, community-based interventions, and other different approaches are increasingly receiving much-needed attention in the literature and in practice.

In this Article, I ask a different question—one that is implicated by this search for alternatives: *What makes criminal law distinct from the alternatives?* At first blush, the answer may appear obvious, and the question not worth asking—criminal law stands as the most apparent and unrestrained form of state violence, so of course it is not only different, but also worse than all other alternatives.<sup>9</sup> Criminalization exposes people to the violence and indignities of policing, the prospect of imprisonment and the loss of liberty, and even the death penalty. The most basic freedoms are at stake. But I wonder whether the assumption that criminal law is clearly different from, and unambiguously worse than, other institutional responses to harm and risk implicitly rests on another

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<sup>6</sup> To be clear, this turn is hardly unprecedented, and fundamental structural critiques of criminalization and the criminal system certainly are not new. See, e.g., Angela Y. Davis, *Are Prisons Obsolete?* (2003); Eugene V. Debs, *Walls & Bars* (Charles H. Kerr & Co. 1973) (1927); Thomas Mathiesen, *The Politics of Abolition Revisited*, at xv-xvi (2015) (explaining the need to republish the 1974 abolitionist text in light of contemporary trends in penal policy and activism); Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 *Harv. L. Rev. F.* 42 (2020) (tracking diverse strands of abolitionist thought internationally).

<sup>7</sup> There are numerous accounts of what might constitute that “something else.” See, e.g., R.A. Duff, *The Realm of Criminal Law* 280–92 (2018); Fay Honey Knopp et al., *Instead of Prisons: A Handbook for Abolitionists* (1976).

<sup>8</sup> And there’s no reason to think that there is a single answer—one way of understanding the metastasization of criminal law and punishment is the allure of a one-size-fits-all regulatory response. See Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* 2 (2007) (describing a dominant model of governance in which “criminalization and cages [function] as catchall solutions to social problems”).

<sup>9</sup> See *infra* Section I.A; see also F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 *Va. L. Rev.* 281, 300 (2021) (collecting sources); Donald Dripps, *The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction*, 7 *J. Contemp. Legal Issues* 199, 204 (1996) (arguing that criminal law is distinct from other areas of law in that it “connects the power of inflicting pain with the authority of moral judgment”).

assumption: that the violence, social control, selective enforcement, and subordination that define the carceral state are exclusive to (or dramatically worse in the context of) the criminal system.<sup>10</sup>

Put differently, what if the problem with the criminal system is not exclusively its *criminal-ness*, but rather is the way in which it is embedded in and reflective of a set of problematic beliefs about how society should be structured and how people should be governed?<sup>11</sup> What if the problem is the state itself or, at least, a set of power relations that define the U.S. political economy? What if criminal law is illustrative rather than exceptional?<sup>12</sup>

In this Article, I contend that increasingly widespread critiques of mass incarceration and mass criminalization appear to reflect significant concerns about social control, punitiveness, and distributive injustice. I argue that, when taken seriously, those concerns in turn speak to overarching issues of power and governance—issues that should transcend the civil/criminal divide and, in some cases, even the distinction between state and private action.<sup>13</sup> If, as contemporary critical accounts increasingly suggest, the problems of criminal law are not simply the long-recognized flaws of its administration (brutal conditions of confinement, weak protections for defendants' rights, the violence of policing, etc.) but instead are problems of power relations, domination, hierarchy, and deep-seated societal punitiveness, then I am skeptical that it makes sense to understand criminal law and its pathologies as clearly distinguishable from any imagined alternatives.<sup>14</sup>

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<sup>10</sup> Cf. Sandra G. Mayson, *The Concept of Criminal Law*, 14 *Crim. L. & Phil.* 447, 448 (2020) (“[N]otwithstanding the centrality of the question, there appears to be no clear consensus among either scholars or reformers about what differentiates criminal law from every other kind of law.”).

<sup>11</sup> See Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 *Conn. L. Rev.* 605, 609 (2021) (“It would be an understatement to say that abolition is an ambitious and long-term project. Leading abolitionist theorist Ruth Wilson Gilmore captures this ambition in her famous quote, which, to paraphrase, is that to create an abolitionist society, abolitionists have to change one thing: everything.”).

<sup>12</sup> Cf. Jonathan Simon, *Rise of the Carceral State*, 74 *Soc. Rsch.* 471, 482–96 (2007) [hereinafter *Carceral State*] (arguing that prisons historically have operated as reflections of dominant governance models).

<sup>13</sup> See Mariame Kaba, *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* 5 (Tamara K. Nopper ed., 2021) (“The [prison industrial complex] is linked in its logics and operation with all other systems . . .”).

<sup>14</sup> Cf. Mayson, *supra* note 10, at 461 (“A regulatory regime of coercive prevention would have an equally disparate impact on marginalized groups . . .”).

This Article, then, contributes to a growing literature that frames the “criminal system” and its injustices as implicating legal, political, and institutional dynamics beyond the boundaries of substantive criminal codes and rules of criminal procedure.<sup>15</sup> This literature seeks to move past a focus only on “mass incarceration,” the “carceral state,” and the most egregious forms of state violence and degrading punishment to examine

<sup>15</sup> See, e.g., 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?”); Kaba, *supra* note 13, at 5; Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World* 25–26 (2022) [hereinafter Roberts, *Torn Apart*]; Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479, 1490 (2016) (“Mass criminalization also enables police contact with African-Americans through the diffusion of criminal justice officials, norms, and strategies into the structure and organization of the welfare state.”); Barbara A. Fedders, *The End of School Policing*, 109 *Calif. L. Rev.* 1443 (2021); Eisha Jain, *Understanding Immigrant Protective Policies in Criminal Justice*, 95 *Tex. L. Rev.* 161 (2017); see also Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 *Ohio St. L.J.* 1045, 1046 (2020) (examining the harms that stem from “managing access to public space using criminal laws”); Dorothy Roberts, *Opinion, Abolishing Policing Also Means Abolishing Family Regulation*, *Imprint* (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/7CLU-TWH3>] (“[P]roposals [to defund the police] ignore how the misnamed ‘child welfare’ system, like the misnamed ‘criminal justice’ system, is designed to regulate and punish black and other marginalized people.”); Heather Schoenfeld, *A Research Agenda on Reform: Penal Policy and Politics Across the States*, 664 *Annals Am. Acad. Pol. & Soc. Sci.* 155, 157–58 (2016) (describing the current model of criminalized governance as “incorporat[ing] punitive responses to poverty, employment rights, and even young children’s behavior”); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 *Seattle U. L. Rev.* 927, 929 (2016) (calling for an examination into the connection between the modern practice of offering work as an alternative to incarceration and peonage as used in the Jim Crow South).

Increasingly prevalent arguments that the administration of criminal law can’t or shouldn’t be thought of as a “system” reflect this hesitancy about seeing a bounded, unified set of actors and institutions. See, e.g., Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward A Demosprudence of Poverty*, 69 *Duke L.J.* 1473, 1475–76 n.7 (2020) [hereinafter Bell et al., *Demosprudence of Poverty*]; Trevor George Gardner, *Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism*, 119 *Colum. L. Rev.* 1, 15 n.44 (2019); 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); Sara Mayeux, *The Idea of “The Criminal Justice System”*, 45 *Am. J. Crim. L.* 55, 65 (2018); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 *Mich. L. Rev.* 1087, 1089 (2013).

more pervasive punitive logics and institutions of subordination and control.<sup>16</sup>

The move to see punitive logics embedded in a host of U.S. institutions, from housing policy to employment law, strikes me as important in and of itself.<sup>17</sup> And, part of my intention here is to advance that move.<sup>18</sup> But, I also hope to highlight a tension that complicates many left and progressive critiques of the criminal system and the carceral state: a skepticism about the state and sources of authority when it comes to criminal institutions, but a faith in or enthusiasm for the state and sources of authority when they are acting in civil, regulatory, or non-criminal capacities.<sup>19</sup> In this Article, I ask whether such faith is justified and how left critics of the penal state can reconcile their concerns with arguments for an expanded welfare state, greater corporate social responsibility, and non-criminal disciplinary structures.<sup>20</sup> In this respect, this Article is also a piece of my larger project of interrogating the fraught relationship between progressivism—in both its contemporary and historical incarnations—and carceral politics.<sup>21</sup>

One way of understanding many libertarian critiques of overcriminalization and arguments for criminal justice reform is that they

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<sup>16</sup> Indeed, some commentators question whether the language of “mass incarceration” or the “carceral state” is misleading in its under-inclusivity. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1804 (2012) (“[F]ocusing exclusively on ‘mass incarceration’ obscures the reality that most convicted persons are not sentenced to prison.” (footnote omitted)); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 Wis. L. Rev. 321, 325 (arguing that the problem of “mass incarceration” is “better characterized as one of mass criminalization”).

<sup>17</sup> Cf. Michel Foucault, *Discipline and Punish* 297 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (arguing that society contains a host of ostensibly non-penal institutions, “which, well beyond the frontiers of criminal law, constitute[] what one might call the carceral archipelago”).

<sup>18</sup> See *infra* note 114 and accompanying text.

<sup>19</sup> In this Article, I use “criminal system” or “criminal legal system” advisedly, mindful of increasingly prevalent academic arguments that the administration of criminal law hardly constitutes a “system.” See *supra* note 15 (collecting sources).

<sup>20</sup> Here and throughout, I am aware that “the left” contains multitudes and that there always is a risk of potentially mis-ascribing positions or flattening out nuance when referring to such a large (and ill-defined) political category. Indeed, one of my goals in this Article is to help tease out different strands in the left anti-carceral coalition to highlight the way in which different postures toward institutions of criminal law might reveal different postures towards the state, and vice versa.

<sup>21</sup> See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 Minn. L. Rev. 1415 (2021); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. Crim. L. & Criminology 491 (2019); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. Davis L. Rev. 1429 (2021).



reflect a basic hostility to state power—criminalization is objectionable because government regulation is objectionable; incarceration is objectionable because it represents an extremely wasteful government spending program.<sup>22</sup> But, for left critics (myself included), how do we reconcile claims about the state and U.S. political economy as engines of subordination and oppression with calls for *more* civil regulatory regimes and *more* government programs?<sup>23</sup> And how do critics of capitalism and structural inequality reconcile those deep-seated commitments with support (tenuous as it may be at times) for schools, employers, and other powerful non-state actors who operate as disciplinary authorities and might ensure “accountability” for harm and wrongdoing?

I worry about the possible risk of embracing *criminal law exceptionalism*—an acceptance of oppressive state and private institutions as long as they appear to be far enough removed from police, cages, and the ostentatious cruelty of the criminal system.<sup>24</sup> And, I worry that “far enough” may at times rest on overly formalist distinctions between civil and criminal or between public and private, rather than the

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<sup>22</sup> See, e.g., George F. Will, Opinion, Eric Garner, Criminalized to Death, Wash. Post (Dec. 10, 2014), [https://www.washingtonpost.com/opinions/george-will-eric-garner-criminalized-to-death/2014/12/10/9ac70090-7fd4-11e4-9f38-95a187e4c1f7\\_story.html](https://www.washingtonpost.com/opinions/george-will-eric-garner-criminalized-to-death/2014/12/10/9ac70090-7fd4-11e4-9f38-95a187e4c1f7_story.html) [<https://perma.cc/TY73-3PPQ>]; Donald A. Dripps, Why *Gideon* Failed: Politics and Feedback Loops in the Reform of Criminal Justice, 70 Wash. & Lee L. Rev. 883, 919 (2013) (“An important strand of contemporary conservative thought indeed sees the modern criminal justice system as big government with its usual defects.”); Jonathan Simon, Law’s Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall), 49 Wake Forest L. Rev. 649, 670 (2014) [hereinafter Simon, Law’s Violence] (“The carceral state, it turns out, can also be criticized as a form of big government.”).

<sup>23</sup> In focusing on left critics of the carceral state, I don’t mean to suggest that there aren’t significant tensions and contradictions on the right when it comes to criminal policies. Indeed, the support for criminal law among purportedly “anti-regulatory” commentators and lawmakers has been a hallmark of U.S. neoliberalism. See, e.g., Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 40–41 (2011) [hereinafter Harcourt, Illusion of Free Markets]. And right-leaning anti-criminalization politics have received much-deserved skeptical treatments. See, e.g., Marie Gottschalk, Caught: The Prison State and the Lockdown of American Politics 7–8 (2015); Levin, Consensus Myth, *supra* note 4.

<sup>24</sup> On different possible understandings of “criminal law exceptionalism,” see generally Alice Ristroph, The Wages of Criminal Law Exceptionalism, *Crim. L. & Phil.* (Oct. 12, 2021) [hereinafter Ristroph, Wages of Criminal Law Exceptionalism], <https://link.springer.com/article/10.1007/s11572-021-09613-5> [<https://perma.cc/7T3H-VY4K>]. This Article owes a great debt to Ristroph’s characterization and critiques of traditional criminal law exceptionalism. See *infra* Section I.A.

animating principles and ideologies of punishment, control, and exclusion.<sup>25</sup>

Ultimately, then, I argue that the current moment should invite a *de-exceptionalization* of criminal law and a broader reckoning with the distributive consequences and punitive impulses that define the criminal system's functioning—and, in turn, define so many other features of U.S. political economy beyond criminal law and its administration. To be clear, that's a reckoning that is underway in some corners.<sup>26</sup> I take contemporary critical scholarship and activist accounts as an invitation to ask how to avoid replicating the evils of the criminal system in other models of regulation and governance.<sup>27</sup> To the extent that commentators wish to retain the criminal/civil distinction or some version of criminal law exceptionalism, though, I ask how we might rationalize such a move. What makes criminal law and its attendant institutions *different*, and how robust are those distinctions as a basis for further advocacy, scholarship, and policymaking?

In addressing these questions and the challenging terrain of the civil/criminal distinction, my argument proceeds in three Parts. In Part I, I address the concepts of criminal law exceptionalism and criminal law skepticism. I examine the long-standing treatment of criminal law as exceptional before introducing the increasingly skeptical literature on the desirability of criminal legal institutions as a response to social problems. I situate this literature alongside arguments for a “positive” abolitionist project and for more forms of non-criminal governance and authority. In Part II, I offer three specific case studies of criminal law exceptionalism—areas where some critics of the criminal system have embraced non-criminal alternatives that, I argue, might risk replicating or reinforcing some of the objectionable features of criminal law and its administration: (1) the continued enthusiasm for state civil and administrative approaches to social problems; (2) critiques of delegation to administrative “experts” in the criminal law realm from commentators who remain supportive of such delegations in non-criminal contexts; and (3) calls for employers, schools, and other non-criminal institutions to exercise disciplinary authority as a means of remedying harm and ensuring “accountability.” Finally, in Part III, I pivot to ask whether and to what extent the exceptions

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<sup>25</sup> At the very least, I think it's important to flesh out how we should go about assessing “far enough.”

<sup>26</sup> See *infra* Section III.D.

<sup>27</sup> See *infra* Section III.D.

drawn in the previous Part are defensible or desirable. What vision of the state and the criminal system's ills allows for such an exceptionalist project? And how sweeping or radical a project would one need to embrace in order to reject criminal law exceptionalism and to reject non-criminal forms of discipline and punishment?

#### I. FROM EXCEPTIONALISM TO SKEPTICISM (TO EXCEPTIONALISM?)

Criminal law historically has been treated as exceptional by judges, scholars, and commentators. In this Part, I introduce competing versions of criminal law exceptionalism. First, I describe what I take to be the conventional exceptionalist account: that criminal law, as a realm defined by morality and theoretically coherent purposes of punishment, is somehow distinct from other areas of law that are messy, possibly incoherent, and best understood as the products of an imperfect political process. Next, I argue that an ascendant criminal law skepticism has challenged these assumptions by highlighting the flawed logics that underpin them. In other words, critics have *de-exceptionalized* criminal law by stripping it of the mysticism and moral language that have allowed it to flourish or, perhaps, fester. Finally, I argue that this (welcome and necessary) skeptical turn might invite a new sort of criminal law exceptionalism: rather than holding criminal law on a pedestal as distinct and superior when compared to other legal institutions, contemporary critical commentators risk *re-exceptionalizing* criminal law. Instead of framing criminal law as exceptional in its superior logic, they risk exceptionalizing criminal law as uniquely deserving of criticism, as uniquely defined by discriminatory and punitive impulses, and as uniquely associated with a sort of abusive and objectionable method of social control.

##### *A. Criminal Law Exceptionalism*

“Criminal justice is a special sort of law—at least it is supposed to be.”<sup>28</sup> Wade through scholarly accounts, and this characterization appears again and again. “The stigma and hard treatment that flow from criminal culpability are unmatched by even the most serious forms of civil liability. No other body of law has the power to declare an otherwise-free person a

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<sup>28</sup> Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *Fordham Urb. L.J.* 1043, 1081 (2013).

convict and thereafter deprive him of his liberty (and even his life).”<sup>29</sup> “While we lack agreement about what precisely should constitute a crime, or the proper way to punish, the ongoing dispute reflects an underlying consensus that criminal justice is different in kind from other legal edicts and forms of governmental control.”<sup>30</sup> Or, phrased sweepingly, “The law of crime is special. Like an isolated . . . community somehow passed over by the changes all around it, the criminal law has managed to hang onto ancient patterns of thought and behavior.”<sup>31</sup>

Put simply, criminal law frequently has been treated as a distinct body of law, and the criminal system has been treated as encompassing a set of actors and institutions distinct from other instruments of governance. Borrowing from criminal law theorist Alice Ristroph, I see it as helpful to tease out this exceptionalism into three categories: (1) “burdens exceptionalism”; (2) “subject-matter exceptionalism”; and (3) “operational exceptionalism.”<sup>32</sup>

### *1. Burdens Exceptionalism*

Burdens exceptionalism “refers to claims that criminal law imposes unique burdens categorically distinct from the burdens imposed by other forms of law.”<sup>33</sup> In many ways, this version of exceptionalism is most straightforward and most easily defensible.<sup>34</sup> Granted, all legal rules and institutions carry with them an implicit threat of force—from parking tickets to contract disputes, the presence and possibility of *enforcement* might require the involvement of actors empowered to resort to force or

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<sup>29</sup> Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”, 66 *Stan. L. Rev.* 987, 996 (2014) (footnote omitted).

<sup>30</sup> Natapoff, *supra* note 28, at 1082.

<sup>31</sup> Louis Michael Seidman, Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State, 7 *J. Contemp. Legal Issues* 97, 97 (1996).

<sup>32</sup> Ristroph, Wages of Criminal Law Exceptionalism, *supra* note 24, at 1–2; see also Alice Ristroph, An Intellectual History of Mass Incarceration, 60 *B.C. L. Rev.* 1949, 1953 n.10 (2019) [hereinafter Ristroph, *Intellectual History*] (explaining the need to connect claims of “exceptionalism” to specific principles). In describing each type of exceptionalism, I cite to authors and arguments alongside each other that fall into the same type, but still might differ dramatically. My intention is not to suggest that there are clear camps with uniform ideological commitments. Rather, my goal is to show that a wide range of thinkers share certain intellectual and ideological impulses.

<sup>33</sup> Ristroph, Wages of Criminal Law Exceptionalism, *supra* note 24, at 1.

<sup>34</sup> See *infra* notes 245–48 and accompanying text.

do harm to individuals.<sup>35</sup> (Indeed, this critical observation helped underpin the rise of legal realism and the recognition that even “private law” was always “public” because it implicated state enforcement.)<sup>36</sup> But it certainly is true that not every rule or decision leads directly to a person being held against her will in a cage or subjected to physical violence. Only a specific class of rules, decisions, and institutions can impose those uniquely harmful and dehumanizing burdens: criminal law.

Criminal law scholars frequently rely on burdens exceptionalism in defining criminal law and distinguishing it from other sanctions or regulatory regimes.<sup>37</sup> Additionally, burdens exceptionalism stands as a common feature of judicial treatments of the criminal system.<sup>38</sup> Because criminal defendants are subject to the most extreme forms of state violence and the most extreme deprivations of liberty, the argument goes, they should be afforded greater procedural protections than other litigants.<sup>39</sup>

## 2. *Subject-Matter Exceptionalism*

Subject-matter exceptionalism “refers to claims that criminal law addresses a discrete category of activity or conduct.”<sup>40</sup> This position reflects a “traditional understanding[] of the criminal law” in which the field is “structured by an internal logic of its own, rather than as a broader

<sup>35</sup> See, e.g., Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 213 (2005) (“The police power should be appreciated in its comprehensiveness as a mode of governance, rather than as a particular variety of governmental regulation.”); 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.”).

<sup>36</sup> See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 19 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 471–72 (1923); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *Legal Stud. F.* 327, 329–30 (1991).

<sup>37</sup> See, e.g., Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 *Geo. L.J.* 775, 797–819 (1997).

<sup>38</sup> See, e.g., *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O’Connor, J., concurring); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963); *United States v. Ursery*, 518 U.S. 267, 273 (1996); *Austin v. United States*, 509 U.S. 602, 619 (1993).

<sup>39</sup> See, e.g., William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 *J. Contemp. Legal Issues* 1, 9 (1996) (“[T]he criminal label brings with it not only special restrictions but also special powers. . . .”); Jenny Roberts, *Gundy and the Civil-Criminal Divide*, 17 *Ohio St. J. Crim. L.* 207, 209 (2019).

<sup>40</sup> Ristroph, *Wages of Criminal Law Exceptionalism*, *supra* note 24, at 1–2.

political enterprise.”<sup>41</sup> Subject-matter exceptionalism might suggest that the line between tort and crime is clear or that conduct that is criminalized differs from conduct that might be regulated civilly or not regulated at all.<sup>42</sup> Some accounts of criminal law, for example, suggest that we can discern “principles that identify the types of conduct that are the permissible objects of criminalization by reference to a shared moral property.”<sup>43</sup> Similarly, the common claim in the literature that there is a “core” realm of criminal law composed of *malum in se* crimes (e.g., murder, rape, or arson) implies that there is something special and especially odious about the conduct deemed worthy of criminal punishment.<sup>44</sup> Such a view is consistent with arguments that criminal law stands as a “unique form of law” because “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.”<sup>45</sup> And, unlike other areas of law, “the criminal law exemplifies private interpersonal morality.”<sup>46</sup>

Indeed, the substantial academic literature and policy advocacy surrounding the problem of overcriminalization generally reflect an understanding of criminal law grounded in subject-matter exceptionalism. Most accounts of overcriminalization hardly suggest that criminalization

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<sup>41</sup> Vincent Chiao, *Criminal Law in the Age of the Administrative State* 67 (2019) (citing Michael Davis, *The Relative Independence of Punishment Theory*, 7 *L. & Phil.* 321, 329–30 (1989)).

<sup>42</sup> But cf. W. Robert Thomas, *Making Sense of Corporate Criminals: A Tentative Taxonomy*, 17 *Geo. J.L. & Pub. Pol’y* 775, 777 (2019) (“[E]conomic theories of corporate criminal law reject the idea that criminal law is unique from other civil or regulatory regimes; rather, a corporation’s moral status has no more bearing for criminal law than for any other enforcement regime.”).

<sup>43</sup> Chiao, *supra* note 41, at 144; see also Victor Tadros, *Criminalization and Regulation*, in *The Boundaries of the Criminal Law* 163, 163 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2010) (“The most familiar way to approach this question [of the proper scope of criminal law] is to consider what moral constraints there might be on the decision whether to criminalize some conduct.”).

<sup>44</sup> See, e.g., George P. Fletcher, *Rethinking Criminal Law* 233–34 (2000); Alice Ristroph, *Farewell to the Felony*, 53 *Harv. C.R.-C.L. L. Rev.* 563, 617 (2018); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 512 (2001) [hereinafter Stuntz, *Pathological Politics*] (“Begin with the proposition that criminal law is not one field but two. The first consists of a few core crimes, the sort that are used to compile the FBI’s crime index—murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else.” (footnote omitted)).

<sup>45</sup> Mayson, *supra* note 10, at 449; see also Duff, *supra* note 7, at 18, 34, 260 (articulating this vision of criminal law); cf. Chiao, *supra* note 41, at 67–68 (describing and critiquing this “understanding of the criminal law as occupying a morally distinctive role within the broader political morality”).

<sup>46</sup> Chiao, *supra* note 41, at 136.

and criminal punishment are never justified.<sup>47</sup> Rather, commentators and policymakers contend that criminal law has overflowed its banks, crowding out alternative regulatory approaches and leaving a system in which the periphery dwarfs the core.<sup>48</sup> Criminal justice reform, filtered through the lens of subject-matter exceptionalism, requires recalibrating and returning the penal sanction to its proper place—the realm of core, uncontestable, and almost pre-political bad acts.<sup>49</sup>

### 3. *Operational Exceptionalism*

Finally, operational exceptionalism refers to “claims that criminal law operates in ways meaningfully different from other forms of law—with greater precision in statutes or other relevant texts . . . or with more rigorous limits on enforcement discretion.”<sup>50</sup> Operational exceptionalism reflects a “modernist” conception of criminal punishment in which the criminal system “is a specialized differentiated one, formally independent of other normative systems, and increasingly distinct from other forms of legal regulation.”<sup>51</sup>

Some of these claims rest on structural or historical analysis of how criminal laws are made. For example, commentators contend, based on the text itself and Supreme Court precedent, that “the Constitution . . . impose[s] different structural requirements on criminal

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<sup>47</sup> See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 *Am. U. L. Rev.* 703, 714 (2005) (“[T]he criminal sanction should be reserved for specific behaviors and mental states that are so wrongful and harmful to their direct victims or the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict.”).

<sup>48</sup> See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 *Am. U. L. Rev.* 747, 781 (2005); Mayson, *supra* note 10, at 462 (“Clarifying the concept of criminal law, furthermore, highlights the fact that many facets of the current system that motivate reform are not features of the criminal law *per se*. They are perversions of it. Our statutes are rife with ‘crimes’ that cannot plausibly be described as consensus public wrongs.”).

<sup>49</sup> Of course, such a vision leaves little space for discussing what constitutes that core and how any crime can be natural, pre-political, or wrong absent social construction. See, e.g., Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 *Harv. C.R.-C.L. L. Rev.* 105, 164 (2013) (critiquing claims that criminal law reflects a preexisting, apolitical moral ordering).

<sup>50</sup> Ristroph, *Wages of Criminal Law Exceptionalism*, *supra* note 24, at 2.

<sup>51</sup> David Garland, *Penal Modernism and Postmodernism*, in *Punishment and Social Control* 45, 48 (Thomas G. Blomberg & Stanley Cohen eds., 2003).

laws than on non-criminal laws.”<sup>52</sup> In support of this claim, they point to judicial declarations of the importance of reserving the criminal-law-making function to the legislature, as opposed to the courts.<sup>53</sup> Adopting a slightly different posture, Bill Stuntz famously argued that “[c]riminal law is . . . not law at all, but a veil that hides a system that allocates criminal punishment discretionarily.”<sup>54</sup> According to Stuntz and others, criminal law—unlike other legal regimes—relies on prosecutors, police, and other line-level actors, rather than legislators and even judges.<sup>55</sup> Despite different specific accounts, though, operational exceptionalism suggests that criminal law is special or distinct from other legal institutions not just because of the burdens it imposes, or the type of conduct proscribed, but because of how legal actors go about implementing and enforcing legal rules.<sup>56</sup>

<sup>52</sup> Hessick & Hessick, *supra* note 9, at 301; see also Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 *Stan. L. Rev.* 989, 1012 (2006) (“The case for what might be called criminal law exceptionalism starts with the text and structure of the Constitution itself.”).

<sup>53</sup> See Hessick & Hessick, *supra* note 9, at 301–02 (first citing *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); then citing *Jones v. Thomas*, 491 U.S. 376, 381 (1989); and then citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

<sup>54</sup> Stuntz, *Pathological Politics*, *supra* note 44, at 599. It’s worth noting that Stuntz’s form of operational exceptionalism still differs from most other forms of operational exceptionalism, which “encompass[] the claim that criminal law both requires and provides a degree of determinacy and predictability that is lacking in other areas of law.” Ristroph, *Intellectual History*, *supra* note 32, at 1954.

<sup>55</sup> See, e.g., Stuntz, *Pathological Politics*, *supra* note 44, at 599. Of course, such a position rests on an assumption that there are “normal” fields that reflect clear “rule of law values” and rely on discernable rules, rather than one-off discretion. And such an assumption runs headlong into a realist conception of law as the accumulated decisions and actions of judges, police, and line-level bureaucrats rather than the formal doctrine laid out in statutes. See, e.g., K.N. Llewellyn, *The Bramble Bush* 3 (7th prtng. 1981) (“*What these officials do about disputes is, to my mind, the law itself.*”); Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 461 (1897); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1708 (1976); Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *The New Criminal Justice Thinking*, *supra* note 15, at 246, 257 (“Laws don’t apply themselves; someone somewhere must do things and make choices.”).

<sup>56</sup> It is worth noting that operational exceptionalism (like the other exceptionalisms described and critiqued in this Article) might not reflect a binary view of the world or legal institutions. Stronger forms of exceptionalism certainly might be grounded in an understanding that criminal law and its administration are different in kind from other legal institutions. That is, some commentators might accept that there is a bright line between criminal law on the one hand and non-criminal law on the other hand. But other exceptionalist accounts might suggest that criminal law stands at one end of a spectrum. For example, one certainly might concede that all laws rely on discretionary actors for enforcement but still believe that the degree of discretion involved in the criminal sphere is so much greater that



*B. Criminal Law Skepticism*

Where criminal law exceptionalism provided a theoretical through line for much of the scholarship and policymaking over the latter half of the twentieth century,<sup>57</sup> it has come under attack in recent years. Decades after “mass incarceration” entered the legal academic lexicon,<sup>58</sup> there has been a markedly critical turn in writing about U.S. criminal law.<sup>59</sup> Stated concerns about racial disparities in enforcement, the ubiquity of plea bargaining, police violence, and the expansive scope of substantive criminal law have become common in popular and academic accounts of the criminal system. And, in recent years, the Overton window appears to be shifting even further. The language of abolition has entered the mainstream,<sup>60</sup> and the summer 2020 uprisings saw activists calling for lawmakers to defund police and lawmakers engaging—at least superficially—with such demands.<sup>61</sup>

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it’s fair to treat criminal law as distinct. Generally speaking, I find this position much more defensible than a binary one, and—to a certain extent—I do not disagree. Unless one were prepared to embrace a sort of unbounded relativism, it would be difficult to argue that there aren’t meaningful differences.

In focusing on more binary treatments, I do not mean to set up a strawman. As the sources cited in this Part indicate, the language of exceptionalism abounds, and such language generally implies a line between exceptional and non-exceptional. Further, in the context of case law and judicial decision-making, it’s important to note how much work the civil/criminal distinction does in the allocation of procedural protections. 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, 751–52 (1987) (distinguishing punitive, post-conviction incarceration from “regulatory” pretrial detention).

<sup>57</sup> See generally Ristroph, *Intellectual History*, supra note 32 (identifying criminal law exceptionalism as a driver of the policies and ideologies that underlie mass incarceration).

<sup>58</sup> See Levin, *Consensus Myth*, supra note 4, at 274–76 (tracing the rise in references to “mass incarceration” since the 1990s).

<sup>59</sup> See Michelle Alexander, *Foreword to Maya Schenwar & Victoria Law, Prison by Any Other Name: The Harmful Consequences of Popular Reforms*, at ix, ix–x (2020).

<sup>60</sup> See, e.g., Kim Kelly, *Opinion, What the Prison-Abolition Movement Wants*, *Teen Vogue* (Dec. 26, 2019), <https://www.teenvogue.com/story/what-is-prison-abolition-movement> [<https://perma.cc/78NH-AJJY>]; Rachel Kushner, *Is Prison Necessary?* *Ruth Wilson Gilmore Might Change Your Mind*, *N.Y. Times* (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/9SUJ-BC98>].

<sup>61</sup> See, e.g., Jessica M. Eaglin, *To “Defund” the Police*, 73 *Stan. L. Rev. Online* 120, 122 (2021) [hereinafter Eaglin, *To “Defund” the Police*] (“[P]olitical protests erupted across the United States during the summer of 2020. The slogan that emerged from the protests was simple: ‘Defund the police.’” (footnotes omitted)); Ruairi Arrieta-Kenna, *The Deep Roots—and New Offshoots—of ‘Abolish the Police,’ Politico* (June 12, 2020), <https://www.politico.com/news/magazine/2020/06/12/abolish-defund-police-explainer-316185> [<https://perma.cc/X5B5-HY6X>]; Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, *N.Y.*

To be clear, the prevalence of critiques certainly doesn't imply that all critics agree about what's wrong with the system or what should be done to reform, transform, or replace it.<sup>62</sup> (Or, that there are not steadfast defenders of the status quo and advocates for more or harsher punishment.)<sup>63</sup> But, it is worth noting that the language and depths of the critiques—if not the ideological or political commitments of the critics—have generally shifted. The problems identified appear to be increasingly structural in nature, and the critiques articulated are deep and cutting enough to imply that there is something fundamentally wrong with the criminal system as an institution.

As Doug Husak observes in the context of legal theory,

An increasing number of commentators embrace a wide variety of positions that lack a unifying theme—apart from their adherence to a loosely defined thesis I call “criminal law skepticism.” The legal theorists I have in mind do not simply urge caution or a more judicious use of the criminal law to address social problems. . . . Instead, the thrust of criminal law skepticism is more sweeping and radical; it presents reasons to doubt that the criminal law as it is constituted at present should continue to survive at all. If the criminal law is indeed “broken,” or a “lost cause,” as some commentators allege, no simple fix is possible.<sup>64</sup>

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Times (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/MTV7-UCLN>].

<sup>62</sup> See, e.g., Levin, *Consensus Myth*, *supra* note 4 (critiquing the claim that there is a “consensus” opposition to mass incarceration); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 *Vand. L. Rev.* 1055, 1095 (2015) [hereinafter Natapoff, *Misdemeanor Decriminalization*] (arguing that some forms of decriminalization “make[] it easier to label people as criminals”); Noah D. Zatz, *Better Than Jail: Social Policy in the Shadow of Racialized Mass Incarceration*, 1 *J.L. & Pol. Econ.* 212, 220 (2021) (“Mass incarceration faces pressures ranging from fundamental opposition to human caging as a governance technique to technocratic doubts that its direct and indirect financial costs are worth it.”).

<sup>63</sup> See, e.g., J. Harvie Wilkinson, III, *In Defense of American Criminal Justice*, 67 *Vand. L. Rev.* 1099, 1100 (2014) (“The critics claim that major aspects of American criminal justice work to the detriment of defendants, when actually the reverse is often true. It is time for a more balanced view of our criminal process, which in fact gets a lot of things right.”); Fola Akinnibi, *Biden Scorns ‘Defund the Police’ as Cities Rush to Spend on Cops*, *Bloomberg News* (Mar. 2, 2022), <https://www.bloomberg.com/news/articles/2022-03-02/biden-calls-to-fund-the-police-in-state-of-the-union> [<https://perma.cc/7U9X-QDV3>] (“President Joe Biden implored local governments to fund police departments during his State of the Union address on Tuesday. Major cities, though, had already gotten the message.”).

<sup>64</sup> Husak, *supra* note 3, at 29–30 (footnotes omitted).

This vision (or, more accurately, these visions) of a fundamentally unjust “criminal justice system” requires a reckoning with first-principles questions about what criminal legal institutions are for, and whether they are worth preserving.<sup>65</sup> Criminal law skepticism of many different flavors invites or necessitates a reappraisal of the theories and logics of punishment that long underpinned exceptionalist treatments of criminal law. But skepticism also strikes me as more than a project of high theory.

If criminal law exceptionalism (at least as an academic or intellectual project) can be understood as the result of an “explicit effort to claim dignity and nobility for criminal law after decades in which it had been viewed as a grimy and unprincipled field,”<sup>66</sup> then the turn to criminal law skepticism might reflect a return to an earlier understanding of criminal law as “grimy and unprincipled.” Indeed, criminal law scholars increasingly have begun to focus on the granular and brutal minutia of criminal law’s administration, looking less to justifications offered by academics or policymakers than to the lived realities of the system. For example, recent years have seen more attention paid to the importance of misdemeanors and low-level criminal courts—sites of “managerial justice” and social control of marginalized populations, rather than of the Rule of Law or higher principles.<sup>67</sup> Similarly, the integration of sociological and ethnographic methods into the criminal legal academy has invited a shift away from exceptionalist or idealized theories of what the criminal law *ought to be* to thick descriptions of what the criminal law *is*.<sup>68</sup>

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<sup>65</sup> Cf. Dorothy E. Roberts, Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 6 (2019) [hereinafter Roberts, Abolition Constitutionalism] (“It is hard to pin down what prison abolition means. Activists engaged in the movement have resisted closed definitions of prison abolitionism . . . .” (internal quotation marks omitted)).

<sup>66</sup> Ristroph, Intellectual History, *supra* note 32, at 1999.

<sup>67</sup> See, e.g., Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing (2019); Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal (2018); Eisha Jain, Proportionality and Other Misdemeanor Myths, 98 B.U. L. Rev. 953, 957 (2018); Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. Davis L. Rev. 277, 280–81 (2011) (“Contrary to popular belief, however, the vast majority of criminal cases in the United States are not felonies. They are misdemeanors: ‘minor’ dramas played out in much higher numbers every day in lower courts across the country.” (footnote omitted)).

<sup>68</sup> See, e.g., Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2097 (2017); Monica C. Bell, Safety, Friendship, and Dreams, 54 Harv. C.R.-C.L. L. Rev. 703, 712 (2019) [hereinafter Bell, Safety, Friendship, and Dreams]; Issa Kohler-Hausmann, Managerial Justice and Mass Misdemeanors, 66 Stan. L. Rev. 611, 624 (2014)

In other words, a shift away from formalist accounts of criminal law, and from a fetishization of doctrine and the ostensible moral clarity of the Model Penal Code, is helping to reorient the center of gravity in the study of and discourse surrounding the criminal system. Taking the injustices of the criminal system seriously, then, means homing in on the actual effects of criminal law and its day-to-day operation—the brutality of incarceration, the assembly line of pretrial pleas, and the institutional dehumanization of people with criminal records—rather than the intellectual puzzles of constructing the *right* rule or the brain twisters of how to assign or assess culpability in hard cases.<sup>69</sup>

And, this critical impulse hasn't only defined trends in contemporary scholarship; it also has led to a reassessment of legal pedagogy and the teaching of criminal law and procedure courses. As the late legal philosopher Jeffrie Murphy observed in the final days of his career, reflecting on his resistance to teaching criminal law, "I have come to think that our body of substantive criminal law influenced by the Model Penal Code is a rather beautiful little boat floating on a sea of excrement, and I am no longer comfortable sailing in that little boat while ignoring the excrement."<sup>70</sup> Legal academics increasingly have sought ways to reorient their teaching to reflect the administration of criminal law and its racial and class disparities.<sup>71</sup> For example, Amna Akbar and Jocelyn Simonson have called on law professors to: "[i]ntroduce abolition" in the first-year

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("There is near consensus that felony courts, and in particular federal felony courts, do not operate according to 'the idealized model of adversary justice described in the textbooks.'") (footnote omitted); Priscilla Ocen, *Beyond Ferguson: Integrating Critical Race Theory and the "Social Psychology of Criminal Procedure,"* in *The New Criminal Justice Thinking*, supra note 15, at 226, 226–28.

<sup>69</sup> Cf. Michael T. Cahill, *Criminal Law's "Mediating Rules": Balancing, Harmonization, or Accident?*, 93 Va. L. Rev. Online 199, 199 (2007) (critiquing the "tendency of theoretical work in criminal law . . . to focus on . . . questions about the proper justification, scope, and amount of punishment in the abstract, while giving significantly less consideration to the various institutional and procedural aspects of any concrete system of imposing such punishment").

<sup>70</sup> Murphy, supra note 2, at 76.

<sup>71</sup> See, e.g., Amna Akbar, *Teaching Penal Abolition*, LPE Project: L. & Pol. Econ. Blog (July 15, 2019), <https://lpeproject.org/blog/teaching-abolition> [<https://perma.cc/K2GC-HYPJ>]; Shaun Ossei-Owusu, *Criminal Legal Education*, 58 Am. Crim. L. Rev. 413, 414 (2021); Ristroph, *Carceral State*, supra note 1, at 1638–39; Jonathan Simon, *Teaching Criminal Law in an Era of Governing Through Crime*, 48 St. Louis U. L.J. 1313, 1335 (2004); Jocelyn Simonson & Amna Akbar, *Rethinking Criminal Law*, LPE Project: L. & Pol. Econ. Blog (Oct. 24, 2018), <https://lpeproject.org/blog/rethinking-criminal-law> [<https://perma.cc/9HCK-KEEA>]; No. 2: *Criminal Law, Guerrilla Guides to L. Teaching* (Aug. 29, 2016), <https://guerrillaguides.wordpress.com/2016/08/29/crimlaw> [<https://perma.cc/BVX4-WGAA>].

curriculum; encourage students to “[s]tudy the historical connections between mass incarceration” and “chattel slavery, Jim Crow, and convict leasing”; “[s]tudy the political connections between the decline of the social welfare state and the rise of mass incarceration”; “[s]tudy the relationship between crime and poverty”; and “[s]tudy the idea that criminal law is a tool of social control.”<sup>72</sup> In this frame, criminal law is seen as a site of injustice and embedded in ideological projects of subordination and marginalization rather than one of cohesion or “shared community norms.”<sup>73</sup>

Part of this move in scholarship, teaching, commentary, and activism is the rejection of suggestions that criminal law’s problems are aberrations from a sound underlying logic or compelling underlying mission. Certainly, many critics of the criminal system adopt a declensionist account that focuses on worsening inequalities and problems exacerbated over time.<sup>74</sup> And, in so doing, they have left open the possibility of a functional, good, or desirable criminal system.<sup>75</sup> But an ascendant strand of scholarship and activism rejects that suggestion that there were “good old days” and instead contends that mass incarceration represents the apotheosis of U.S. criminal law and its attendant logics. As Ristroph argues,

To characterize overcriminalization, or uneven enforcement, or racial disparities as pathological is an effort to distinguish these phenomena from our conceptions of normal, healthy criminal law. . . . [C]risis implies a state of exception. The label of crisis, applied to the present,

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<sup>72</sup> Simonson & Akbar, *supra* note 71.

<sup>73</sup> See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *L. & Contemp. Probs.* 401, 404–05 (1958); Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 *B.U. L. Rev.* 731, 779 (2003) (“Criminal law embodies and expresses the community’s norms, so a breach of those values will subject violators to moral condemnation and stigma.” (footnote omitted)); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453, 474 (1997) (“Our criminal law is, for us, the place we express our shared beliefs of what is truly condemnable.”).

<sup>74</sup> See, e.g., William J. Stuntz, *The Collapse of American Criminal Justice 2* (2011) (arguing that criminal law increasingly has become reliant on prosecutorial discretion and increasingly has reflected or reinforced racial inequities).

<sup>75</sup> See Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 *Harv. L. Rev.* 1299, 1312–13 (2013) (reviewing Stephanos Bibas, *The Machinery of Criminal Justice* (2012)) (critiquing “nostalgic[]” and “romantic[]” accounts of criminal law’s history); Ristroph, *Wages of Criminal Law Exceptionalism*, *supra* note 24, at 6 (“[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.”).

conjures a lost past when criminal law was not in crisis. It suggests that we could yet make criminal law great again.<sup>76</sup>

And, as scholars and activists increasingly have claimed, criminal law never was so great. It always was beset by many of the pathologies identified in recent years, and the foundational projects of criminalization, policing, and punishment always have been inextricable from social control and subordination. To the extent that criminal law reflected shared logics or common projects, they hardly were consistent with “theories of punishment” often identified in the literature. Instead, they often reflected troubling impulses in society—demands to see suffering or to enact vengeance (or something like it)—enmeshed in interwoven projects of subordination across lines of race, class, social marginality, and perceived “deviance.”<sup>77</sup> The modern criminal system isn’t broken; it’s working the way it was supposed to.<sup>78</sup> Or, as abolitionist organizer Rachel Herzing argues, “[f]ar 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.”<sup>79</sup> In this account, the logic of the criminal law isn’t reflected in the “traditional” justifications of punishment (deterrence, incapacitation, rehabilitation or retributivism); the system is rooted in subordination, social control, and brutality.<sup>80</sup> Put simply, the cruelty of the system isn’t a bug; it’s a feature.

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<sup>76</sup> Ristroph, *Intellectual History*, supra note 32, at 1951–52 (footnote omitted).

<sup>77</sup> See, e.g., Roberts, *Abolition Constitutionalism*, supra note 65, at 7 (“[T]oday’s carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.” (footnote omitted)).

<sup>78</sup> See Kaba, supra note 13, at 13; see also Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1426 (2016) (“The Court has sanctioned racially unjust criminal justice practices, creating a system where racially unjust police conduct is both lawful and how the system is supposed to work.”); Syrus Ware, Joan Ruzsa & Giselle Dias, *It Can’t be Fixed Because It’s Not Broken: Racism and Disability in the Prison Industrial Complex*, in *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* 163, 163–84 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014) (arguing that criminal legal institutions are designed to reinforce logics of racism and ableism).

<sup>79</sup> Rachel Herzing, *Commentary*, “Tweaking Armageddon”: The Potential and Limits of Conditions of Confinement Campaigns, 41 *Soc. Just.* 190, 193–94 (2015).

<sup>80</sup> Cf. 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*] (“Conventional accounts of the criminal justice system tend to obscure its social control agenda behind the idea that its origins and functions lie with the prevention and punishment of crime or even the humanitarian reform of offenders.”); Nicole Kaufman, Joshua Kaiser & Cesraéa Rumpf, *Beyond Punishment: The Penal State’s Interventionist, Covert, and Negligent*

*C. Criminal Law Exceptionalism Redux*

The turn to criminal law skepticism—whether framed as abolition, as criminal law minimalism, or simply as reflecting some unbranded or unnamed hostility to the carceral project—is a welcome development. For too long, U.S. criminal legal scholarship and discussions of criminal legal policy have largely accepted cages, policing, and punitive institutions as necessary, inevitable, or at least defensible. Questioning the necessity, inevitability, and desirability of criminalization and punishment should be a component of any serious engagement with the study or practice of criminal law. And the skeptical turn already has done important work in inviting and normalizing such questioning. That said, despite my enthusiasm for this turn, I think it’s important to recognize the risks, unintended consequences, and theoretical challenges associated with such a tack.<sup>81</sup> Specifically, in this Article, I am concerned with one such risk or cost: the possibility of reinscribing a new sort of criminal law exceptionalism.

To be clear, this is a different criminal law exceptionalism than the one recognized by previous scholars and critiqued by Ristroph.<sup>82</sup> Instead of an exceptionalism that treats criminal law as a pre-political moral force, this exceptionalism frames criminal law as uniquely problematic. While the traditional forms of criminal law exceptionalism are generally “uncritical,”<sup>83</sup> newer, critical treatments of the criminal system often suggest a new, critical exceptionalism.<sup>84</sup> That is, in some contemporary

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Modalities of Control, 43 L. & Soc. Inquiry 468, 469 (2018) (“Rather than asking how the penal state *punishes*, we ask how it *controls*; this redirected focus facilitates a more nuanced understanding of how the penal state operates in intentional and unintentional ways.” (footnote omitted)).

<sup>81</sup> Cf. Benjamin Levin, What’s Wrong with Police Unions?, 120 Colum. L. Rev. 1333, 1397–400 (2020) (examining possible unintended consequences of arguments associated with police abolition).

<sup>82</sup> See Ristroph, Intellectual History, *supra* note 32, at 1951–52. As I hope is clear, I share Ristroph’s critiques of traditional criminal law exceptionalism, but I see those critiques as similarly applicable to critical criminal law exceptionalism.

<sup>83</sup> See *id.* at 1953 n.10 (“Given that the term exceptionalism is most often used by those critical of the supposed exception, it is notable that ‘criminal law exceptionalism’ is not a widely used term. The few usages of the phrase I have found are uncritical.”).

<sup>84</sup> To be clear, there certainly are exceptionalist accounts that are not panegyrics to contemporary criminal legal institutions, but instead argue that there is an exceptional project that must be performed better. See, e.g., Mayson, *supra* note 10, at 449 (“Criminal law is not just useful to a liberal republic; it is vital. The challenge for reform is to forge a future in which our legal institution of collective censure promotes both accountability and forgiveness,

accounts, the institutions of criminal law often stand as—or are treated as—exceptional in their objectionableness.

Certainly, treating institutions of criminal punishment as particularly concerning is hardly new. And, for a range of reasons discussed throughout this Article, criminal legal institutions might indeed be worth focusing on or elevating for critique, reform, or abolition. But, is criminal law really so different? The criminal system and its component institutions reflect certain models of governing, managing, and responding to political and social problems.<sup>85</sup> And, those models aren't necessarily unique to criminal law; they reflect different ideologies, pathologies and logics that are in turn embedded in U.S. political economy and legal culture.<sup>86</sup>

For example, I find compelling claims that surveillance and actuarial methods illustrate criminal law's construction of a race-class subordinate population.<sup>87</sup> But, it's less clear that these tools and logics of control are endemic to criminal legal institutions. Even if "[p]enology may have once been an incubator for general social technologies" and modes of managing social problems, "[m]uch of what is new [in contemporary criminal policy] is the movement of administrative techniques from the world [of] insurance, financial management, and even retailing" into a field that had resisted some of those interventions earlier in the twentieth century.<sup>88</sup>

In a sense, my concerns about the possible costs of a new, skeptical criminal law exceptionalism resonate with the critical literature on alternatives to incarceration.<sup>89</sup> For example, despite widespread support in academic and policy circles for "problem-solving" courts and

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condemns acts without condemning people, and works to mitigate inequality rather than to drive it.").

<sup>85</sup> See Alexander, *supra* note 59, at x.

<sup>86</sup> Cf. Garland, *supra* note 51, at 67–68 ("Foucault singled out the prison and made a scandal of the fact that this institution is always in crisis and always undergoing reform. But he might more accurately have noted that all modern institutions share this characteristic, be they schools, or hospitals, or even government itself.").

<sup>87</sup> See, e.g., Ruha Benjamin, Introduction: Discriminatory Design, Liberating Imagination, *in* *Captivating Technology: Race, Carceral Technoscience, and Liberatory Imagination in Everyday Life* 1, 3 (Ruha Benjamin ed., 2019); Dorothy E. Roberts, Digitizing the Carceral State, 132 *Harv. L. Rev.* 1695, 1723 (2019) (reviewing Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (2018)).

<sup>88</sup> Jonathan Simon & Malcolm M. Feeley, The Form and Limits of the New Penology, *in* *Punishment and Social Control*, *supra* note 51, at 75, 79.

<sup>89</sup> See generally Schenwar & Law, *supra* note 59 (arguing that many alternatives to incarceration replicate the harms of incarceration).



diversion, critical commentators have argued that these “reforms” might do great harm.<sup>90</sup> They risk net-widening—drawing more individuals into the ambit of the criminal system—by de-emphasizing the severity of criminal sanctions or the punitive functions of criminal legal institutions.<sup>91</sup> And, rather than shrinking the footprint of the criminal system, these reforms potentially expand it; instead of calling for more social services *outside* of the criminal system, they implicitly or explicitly call for greater investment in criminal institutions (courts, police, jails, probation) as vehicles for the delivery of social services.<sup>92</sup> In the parlance of abolitionist theory and praxis, these alternatives to incarceration operate as “reformist reforms”—ostensible improvements to the status quo that further entrench societal reliance on criminal legal institutions.<sup>93</sup>

Like the critics of criminal (but non-carceral) alternatives to incarceration, I fear that new policy solutions will reflect the same

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<sup>90</sup> See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 *UCLA L. Rev.* 783, 835 (2008); Jessica M. Eaglin, *Against Neorehabilitation*, 66 *SMU L. Rev.* 189, 225–26 (2013) (“[N]eorehabilitation will not guide states away from the overreliance on incarceration; rather, the theory maintains the current goal of total incapacitation, though in a different rhetorical form.”); Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 *Fla. L. Rev.* 1333, 1333 (2016); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *Geo. L.J.* 1587, 1591 (2012) (“[I]n their currently predominant institutional forms, specialized criminal courts threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration.”).

<sup>91</sup> See, e.g., James Austin & Barry Krisberg, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, 18 *J. Rsch. Crime & Delinq.* 165, 167 (1981); McLeod, *supra* note 90, at 1614–15; Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 *Ohio St. L.J.* 1479, 1560 (2004); Natapoff, *Misdemeanor Decriminalization*, *supra* note 62, at 1095; Zatz, *supra* note 62, at 221; cf. Gilmore, *supra* note 8, at 242 (calling for “changes that . . . unravel rather than widen the net of social control through criminalization”).

<sup>92</sup> See, e.g., Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 *U.C. Davis L. Rev.* 1573, 1628 (2021); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 *Am. Crim. L. Rev.* 595, 597 (2016) [hereinafter Eaglin, *Drug Court*] (“[T]he drug court paradigm encourages treatment-oriented criminal justice interventions. Though facially benign, such reforms expand the scope of state control over the lives of those entangled in the justice system.”); Barbara Fedders, *Opioid Policing*, 94 *Ind. L.J.* 389, 440 (2019) (describing this dynamic in the context of policing the “opioid crisis”).

<sup>93</sup> See, e.g., Mathiesen, *supra* note 6, at 231–32; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* 91–93 (2015); Mariame Kaba, *Opinion, Police “Reforms” You Should Always Oppose*, *Truthout* (Dec. 7, 2014), <https://truthout.org/articles/police-reforms-you-should-always-oppose/> [<https://perma.cc/HYU2-DJMC>]; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. Rev.* 1156, 1207 (2015) [hereinafter McLeod, *Grounded Justice*].

punitive logics and power imbalances that define the carceral state.<sup>94</sup> But, in this Article, I take those concerns a step further than their common articulation in the legal academic literature. My argument is not just that alternatives to incarceration *within* the criminal system remain problematic, but that alternatives *to criminal law itself* might be problematic, objectionable, or concerning for similar reasons. If the issues identified with the criminal system transcend criminal legal institutions, why should we think that decriminalizing, replacing police with social workers, or shifting away from the formal institutions of the carceral state will resolve those issues?<sup>95</sup> As abolitionist activists associated with Interrupting Criminalization have argued, if there is a shift away from policing, “[w]e need to be careful not to just transfer policing functions, practices, and technologies to different people and places.”<sup>96</sup>

In the 1960s, the deinstitutionalization of people dealing with mental illness was seen as a victory that recognized common humanity and rejected a system of abuse and segregation. Yet deinstitutionalization was not without its problems.<sup>97</sup> Indeed, some accounts suggest that deinstitutionalization operated as a sort of precursor to mass incarceration, with one “total institution” of exclusion swapped for another.<sup>98</sup> As Liat Ben-Moshe suggests though, this relationship between mass incarceration and deinstitutionalization wasn’t inevitable; rather, deinstitutionalization occurred in a social and political context that

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<sup>94</sup> Cf. Jonathan Simon, Review, *Is Mass Incarceration History?*, 95 *Tex. L. Rev.* 1077, 1097–98 (2017) (discussing the danger of surveillance as an alternative to incarceration).

<sup>95</sup> Perhaps this concern reflects what Duncan Kennedy describes as “paranoid structuralism”—a belief that all legal and political structures will continue to replicate a flawed dominant ideology. See Duncan Kennedy, *A Semiotics of Critique*, 22 *Cardozo L. Rev.* 1147, 1169–75 (2001). But see Schenwar & Law, *supra* note 59, at 197–98 (articulating an abolitionist approach that rejects the inevitability of punitiveness).

<sup>96</sup> *The Demand is Still #DefundthePolice*, *Interrupting Criminalization* 8 (2021), <https://www.interruptingcriminalization.com/defundpolice-update> [<https://perma.cc/M6BN-2ZCY>] (download PDF).

<sup>97</sup> See, e.g., Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 *Ohio St. J. Crim. L.* 53, 85–88 (2011) [hereinafter Harcourt, *Mass Incarceration*]; Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 *Tex. L. Rev.* 1751, 1752–55 (2006) (describing the relationship between deinstitutionalization and other forms of social control and exclusion).

<sup>98</sup> See, e.g., Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 *Ga. St. U. L. Rev.* 965, 969 (2012) (quoting Erving Goffman, *Asylums: Essays on the Social Situations of Mental Patients and Other Inmates* 1–8 (1961)).

limited its radical and *anti-carceral* potential.<sup>99</sup> The problem was not deinstitutionalization as a goal, a project, or the result of a set of movements,<sup>100</sup> but rather the way in which reforms were embedded in carceral logics and a political economy that funneled people back into institutions of social control.<sup>101</sup>

Rather than replacing forms of incarceration and exclusion with humane, supportive, or meaningful inclusive models of care, many jurisdictions and communities carried out (inadvertently or not) a process of “transinstitutionalization”<sup>102</sup> or “transcarceration.”<sup>103</sup> Social control and exclusion continued, but with formerly institutionalized people shifted to jails, prisons, and homeless shelters.<sup>104</sup> Further, the response to deinstitutionalization may have helped entrench or accelerate processes of exclusion based on racial othering.<sup>105</sup> As Bernard Harcourt describes the process, “mental hospitals were deinstitutionalized by focusing on dangerousness and the result was a sharp increase in the black representation in asylums and mental institutions.”<sup>106</sup>

The analogy to deinstitutionalization in our contemporary moment of criminal law skepticism and increased attention to abolition might be imperfect,<sup>107</sup> but it certainly should help us to appreciate the dangers lurking beneath the liberatory, egalitarian, and humanistic calls to end mass incarceration.<sup>108</sup> Perhaps the lesson from this earlier struggle is that true deinstitutionalization is impossible.<sup>109</sup> Or, perhaps the analogy can be instructive in figuring out how best to avoid replicating past

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<sup>99</sup> Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* 2–3 (2020).

<sup>100</sup> “Deinstitutionalization” might refer to many different processes across different institutions and conceptions of “disability” or “mental illness.” See *id.* at 67.

<sup>101</sup> See *id.* at 11–12.

<sup>102</sup> See Harcourt, *Mass Incarceration*, *supra* note 97, at 87.

<sup>103</sup> Ben-Moshe, *supra* note 99, at 116.

<sup>104</sup> See Harcourt, *Mass Incarceration*, *supra* note 97, at 87–88.

<sup>105</sup> To be clear, while prisons and psychiatric hospitals both operate as institutions of control and exclusion, the populations (in terms of race, age, and gender) were different—i.e., the rise in incarceration post-deinstitutionalization did not represent a clear transfer of people from psychiatric hospitals to prisons. See Ben-Moshe, *supra* note 99, at 146–47.

<sup>106</sup> Harcourt, *Mass Incarceration*, *supra* note 97, at 86.

<sup>107</sup> See Ben-Moshe, *supra* note 99, at 135–59.

<sup>108</sup> See Schenwar & Law, *supra* note 59, at 51–85.

<sup>109</sup> See generally Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Richard Howard trans., Vintage Books 1965) (1961) (tracking the logics of exclusion and control as features of a range of social institutions).

mistakes.<sup>110</sup> Regardless, I see it as an important reminder of the risks of exceptionalization: focusing on criminal law and the formal institutions of the criminal system might allow us to understate the fundamental problems of exclusion, subordination, and control that might be endemic to any governance project or might be difficult to avoid in constructing any set of imagined alternatives.

To be clear, my claim in the pages that follow is not that there is a camp of scholars and activists who would identify as critical criminal law exceptionalists. Rather, my aim is to track and critique a set of arguments that reflect an exceptionalist understanding of criminal law. As the next Part demonstrates, those arguments or impulses appear in work done by reformers and radicals, liberals and socialists, and commentators whose politics or ideologies might be harder to nail down.

There certainly are contemporary critical accounts of the criminal system that are far from exceptionalist and frame criminal law as one of many objectionable engines of inequality.<sup>111</sup> Indeed, some form of de-exceptionalization might be understood as central to a group of radical left projects.<sup>112</sup> For decades, activists and scholars steeped in abolition or other radical anti-carceral movements have been grappling with how to escape punitive logics and the pathologies associated with criminal law.<sup>113</sup> And the growing focus on the criminal (or quasi-criminal) dimensions of the immigration system, the “child welfare” system, and even the healthcare system reflect an important impulse to understand and critique other forms of social control.<sup>114</sup> But, I worry that for some

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<sup>110</sup> See Harcourt, *Mass Incarceration*, supra note 97, at 57; Rabia Belt, *Mass Institutionalization and Civil Death*, 96 N.Y.U. L. Rev. 857, 894 (2021) (“In our present day, the prison, not the poorhouse, sits at the centerpiece of American institutions. Scholars have detailed the reduction in welfare state institutionalizations through activism, litigation, and defunding. However, mass institutionalization has not disappeared, nor have voting challenges and bans for people who live within institutions.” (footnote omitted)).

<sup>111</sup> See infra Section III.D.

<sup>112</sup> See infra Section III.D.

<sup>113</sup> See infra Section III.D.

<sup>114</sup> See, e.g., César Cuauhtémoc García Hernández, *Migrating to Prison: America’s Obsession with Locking Up Immigrants* 11–13 (2019); Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965*, at 3–4 (2017); Armando Lara-Millán, *Redistributing the Poor: Jails, Hospitals, and the Crisis of Law and Fiscal Austerity* 2–3 (2021); Roberts, *Torn Apart*, supra note 15, at 162; Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 267–68 (2002); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, Colum L. Rev. (forthcoming 2022) (manuscript at 6–7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3914257](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914257) [<https://perma.cc/K9MJ-M2S3>]; Sunita Patel, *Embedded Healthcare Policing*,

commentators, the push to move away from policing, punishment, and formal criminal legal institutions might risk embracing idealized visions of *non-criminal* governance and accepting power relations that aren't explicitly embedded in the violence and subordination of mass incarceration.<sup>115</sup> The growing embrace of radical critiques in more mainstream criminal legal thought brings with it promise. But accepting those critiques also means grappling with the harder questions central to a radical decarceral project. What does it mean to pursue accountability while rejecting punishment? What forms of domination or social control are acceptable?

As I will argue at greater length in Part III, then, taking many critiques of the criminal system seriously should invite, or perhaps even require, a conclusion that the objectionable features of U.S. criminal law are illustrative of broader pathologies of governance and punitive cultural impulses rather than exceptional to one area.<sup>116</sup> That's not to say that alternatives aren't better or that reformers might not work to address the structural flaws with alternative institutions. Rather, it's to say that I see it as important to surface those flaws and appreciate the ways that they complicate any shift away from criminal law. As abolitionist organizers Mariame Kaba and Rachel Herzing argue, “[C]ritics of the system may not need to defend the desire for expanded remedies, [but] we do need to try our best to reduce suffering and not to compound the existing harms.”<sup>117</sup>

I will return to those larger arguments and questions about the limits of criminal law's exceptionality in Part III. In the next Part, I offer three case studies or illustrations—areas where totalizing critiques appear to give way, accepting and perhaps even embracing the state and punitive institutions as somehow distinct from the uniquely objectionable structures of formal criminal punishment.

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69 *UCLA L. Rev.* (forthcoming 2022); Ji Seon Song, *Policing the Emergency Room*, 134 *Harv. L. Rev.* 2646, 2648 (2021).

<sup>115</sup> See *infra* notes 308–10 and accompanying text.

<sup>116</sup> In a sense, my claim echoes Vincent Chiao's argument that “the criminal law is fully enmeshed in . . . society's basic structure, and subject to the same principles of political evaluation that apply to that structure.” Chiao, *supra* note 41, at 254.

<sup>117</sup> Mariame Kaba & Rachel Herzing, *Transforming Punishment: What Is Accountability Without Punishment?*, in *We Do This 'Til We Free Us*, *supra* note 13, at 132, 136.

## II. EXCEPTIONALISM IN ACTION

As argued in the previous Part, criminal law exceptionalism takes—and has taken—many forms. In this Part, I hardly begin to catalogue each instance of this impulse or tendency. Instead, I offer three general examples or case studies, each of which reflects a similar underlying move to treat criminal law as distinct from other legal, political, or social institutions. My aim here is not to focus on the traditional modes of criminal law exceptionalism, but rather to consider the ways in which contemporary critical, abolitionist, and anti-carceral commentary might reflect a new mode of criminal law exceptionalism. First, I examine the continued enthusiasm for non-criminal state action or regulatory interventions despite seemingly totalizing critiques of the carceral state. Second, I describe the prevalence of criminal law exceptionalism in debates about the administrative state and legislative delegation. Finally, I describe widespread support for punitive action by authority figures and powerful institutions (e.g., bosses and schools) as a purported alternative to the unacceptable or undesirable punitiveness of the criminal system.

*A. The Criminalization/Regulation Distinction*

Criminal law skepticism and critical accounts of criminal law's administration often rest on a characterization of state power that appears inextricable from inequality, subordination, and injustice. Taken at face value, then, many contemporary anti-carceral critiques easily could be a part of a broader anti-statist or anarchist project.<sup>118</sup> That is, they appear to reflect a general hostility or skepticism towards the state and its police powers.<sup>119</sup> By identifying state action with projects of subordination, many critiques imply that the project of governance cannot be divorced from troubling logics (white supremacy, segregation, economic inequality, etc.).<sup>120</sup> And there certainly would be an overlap in any Venn

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<sup>118</sup> And, for some commentators and activists, it certainly is. See, e.g., Anthony J. Nocella II, Mark Seis & Jeff Shantz, Introduction: The Rise of Anarchist Criminology, *in* Contemporary Anarchist Criminology: Against Authoritarianism and Punishment 1, 1–8 (Anthony J. Nocella II, Mark Seis & Jeff Shantz eds., 2018).

<sup>119</sup> For further discussion of the deeply intertwined relationship between the carceral state and the state as an apparatus of governance, see *infra* Section III.A.

<sup>120</sup> See, e.g., Tanya Maria Golash-Boza, *Deported: Immigrant Policing, Disposable Labor, and Global Capitalism* 9–11 (2015); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* 4–5 (2009) (describing the role of criminal law in entrenching class boundaries); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. Rev.

diagram of the theoretical and practical relationship between abolition and anarchism.<sup>121</sup> But the two circles need not (and do not) overlap entirely.

Indeed, much contemporary U.S. abolitionism appears to adopt a socialist posture—i.e., the opposite of the carceral state often appears to be a strong welfare or redistributive state, as opposed to no state.<sup>122</sup> And, many liberal, left, and progressive critiques of the criminal system not couched in abolitionist terms similarly reflect a continued enthusiasm for the state and expansive regulatory projects. For example, Bernard Harcourt has argued that mass incarceration is best understood as reflecting a neoliberal governance project that has constructed a “weak” regulatory state tethered to a strong carceral state.<sup>123</sup> The problem, when viewed through this critical frame, isn’t too much state power; it’s that the state has been weakened in its capacity to advance redistributive ends associated with economic regulation and social welfare policy, while it has been strengthened in its capacity to criminalize, cage, and kill.<sup>124</sup> “[N]eoliberal penalty,” as it has defined U.S. policy, has reflected the “combination of free-market ideology and tough-on-crime politics.”<sup>125</sup> Politicians on the right and center-left successfully stressed “the need to reduce the size of our ‘bloated’ government at the same time as we increase the punishment sphere and the prison population.”<sup>126</sup>

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650, 689 (2020) (linking “policing and residential segregation”); Gruber, “Bluelining,” supra note 3, at 871 (arguing that policing protects racial hierarchy); Dorothy E. Roberts, Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing, 89 *J. Crim. L. & Criminology* 775, 788 (1999) (arguing that criminal law and police historically have been central components of “the regime of white domination of Blacks”).

<sup>121</sup> Of course, such a Venn diagram and any overlap would depend on how we define both “abolition” and “anarchism.”

<sup>122</sup> See Jordan T. Camp, *Incarcerating the Crisis* 147 (2016); cf. Akbar, *Abolitionist Horizon*, supra note 3, at 1844 (discussing various strands of abolitionist thought and praxis, including socialist and anarchist approaches).

<sup>123</sup> See Harcourt, *Illusion of Free Markets*, supra note 23, at 202–07; Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 *Dædalus* 74, 74 (2010) (tracing the “concomitant downsizing of the welfare wing and upsizing of the criminal justice wing of the American state”).

<sup>124</sup> See, e.g., David Harvey, *A Brief History of Neoliberalism* 2 (2005); Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* 1–2 (2016); Wacquant, supra note 120, at 41 (describing the replacement of a “(semi-) welfare state by a police and penal state”); Katherine Beckett & Bruce Western, *Governing Social Marginality*, 3 *Punishment & Soc’y* 43, 55 (2001).

<sup>125</sup> Harcourt, *Illusion of Free Markets*, supra note 23, at 203.

<sup>126</sup> *Id.*

The neoliberal penalty thesis and related claims about the relationship between the political economy of modern (or postmodern) capitalism and mass incarceration needn't invite a sort of anarchist or anti-statist project. The problem, in such accounts, is not governing or regulating; the problem is governing and regulating *through crime*.<sup>127</sup> That is, activists and academics needn't be committed to a project of dismantling the state or the organs of power if the problem isn't the state as such, but rather an ideology of governance linked to austerity and the fetishization of individual responsibility.<sup>128</sup> Instead, a number of academics and activists have embarked on projects of reallocating state power and state resources away from criminal law and towards other social services.<sup>129</sup>

In the abolitionist literature, this impulse is often described as the “positive project” of abolition.<sup>130</sup> Commentators argue that abolition isn't just about tearing down the prison industrial complex (i.e., the negative project of abolition); rather, it also entails restructuring and reimagining the state and institutions of governance.<sup>131</sup> Similarly, this impulse is

<sup>127</sup> See generally Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007) [hereinafter Simon, *Governing Through Crime*] (arguing that the dominant approach to governance in the United States has become identifying sources of concern and then responding via new criminal statutes or punitive methods).

<sup>128</sup> Cf. Richard Sparks, *State Punishment in Advanced Capitalist Countries*, in *Punishment and Social Control*, supra note 51, at 19, 35 (“In New Right political thought, the misguided generosity of the welfare state and the moral vapidness of liberal ‘permissiveness,’ with its refusal to countenance the necessity of social discipline, condemnation, and punishment, have conspired to produce this disaster [of a criminal and dangerous ‘underclass’].”); Aziz Rana, *The Two Faces of American Freedom* 4 (2010) (“[T]he goal of projecting power has placed security at the center of political discourse and has entrenched hierarchical forms of economic and political rule . . .”).

<sup>129</sup> See, e.g., Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 *U.C. Irvine L. Rev.* 1291, 1295 (2021) [hereinafter Bell et al., *Criminal System Replacement*] (“Some advocates of penal divestment advocate shifting funds from policing and the penal system to governmental agencies tasked with community support, service provision, housing, and welfare. This logic draws from a noncontroversial sociological insight that, as the American welfare state has mutated and devolved, the penal system has risen to supplant its intended work.”).

<sup>130</sup> See, e.g., Davis, supra note 6, at 105–15 (2003); McLeod, *Grounded Justice*, supra note 93, at 1161 (“By a ‘prison abolitionist framework,’ I mean a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement.”).

<sup>131</sup> See, e.g., Angela Y. Davis & Eduardo Mendieta, *Abolition Democracy* 95–96 (2005); McLeod, *Grounded Justice*, supra note 93, at 1162 (“According to Du Bois, to be meaningful, abolition required more than the simple eradication of slavery; abolition ought to have been a positive project as opposed to a merely negative one.” (citing W.E.B. Du Bois, *Black Reconstruction in America* (Transaction Publishers 2013) (1935))); McLeod, *Abolition*



reflected in the rhetoric of “invest/divest,” which calls for the state to *divest* from prisons and police and *invest* resources in marginalized communities via increased spending on education and social services.<sup>132</sup> The state still has an important role to play in the delivery of social services and the ordering of society, but the state’s role is reconceived.<sup>133</sup> Rather than representing capital or re-entrenching racial hierarchy, the state is reimagined as an embodiment of mass movement energy geared towards redistribution and constructing an egalitarian society.<sup>134</sup>

But socialistic visions of state involvement are hardly the only place where critical accounts of mass incarceration carve out space for the state and non-criminal regulatory projects. Indeed, lamentations about criminal law’s “unfortunate triumph” over non-criminal alternatives have long been a staple of academic treatments of overcriminalization.<sup>135</sup> Since at

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Democracy, *supra* note 3, at 1617 (“Contemporary movements for penal abolition—building on a longstanding body of abolitionist writing and theory—have embraced both a negative or deconstructive project of dismantling penal systems and a positive project of world-building.”); Episode 29—Mariame Kaba, *AirGo*, at 34:33 (Feb. 2, 2016), <https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba> [<https://perma.cc/F8QJ-AV2U>] (“Prison abolition is two things: It’s the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it’s also the building up of new ways of . . . relating with each other.”); Rafi Reznik, *Retributive Abolitionism*, 24 *Berkeley J. Crim. L.* 123, 133 (2019) (noting the “positive project that [abolition] emphatically professes to be”).

<sup>132</sup> See, e.g., *Invest-Divest, Movement for Black Lives*, <https://m4bl.org/policy-platforms/invest-divest/> [<https://perma.cc/H8FG-9L3F>] (last visited May 6, 2021); Eaglin, *To “Defund” the Police*, *supra* note 61, at 135–36 (describing the role of invest/divest arguments in response to police violence); Ctr. for Popular Democracy, *L. for Black Lives & Black Youth Project 100, Freedom to Thrive: Reimagining Safety & Security in Our Communities*, *Popular Democracy* 1 (July 4, 2017), <https://www.populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf> [<https://perma.cc/QMK9-SV82>]; Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 *Yale L.J.* 778, 826 (2021) (“The key policy insight here—the invest/divest framework—comes from decades of local organizing focused on advocating for divestment from prisons and policing, paired with resource investment in other means of giving communities the ability to support each other and to thrive.” (footnote omitted)).

<sup>133</sup> See *infra* Section III.A.

<sup>134</sup> See, e.g., Keeanga-Yamahtta Taylor, *What About Racism?*, *Jacobin* (Mar. 16, 2016), <https://www.jacobinmag.com/2016/03/black-lives-matter-slavery-discrimination-socialism/> [<https://perma.cc/XH3B-KA8Y>]; Abolition Working Group, *Democratic Socialists of Am.*, <https://www.dsausa.org/working-groups/abolition-working-group/> [<https://perma.cc/6A8P-ANX5>] (last visited July 1, 2021) (“For all of the working class to achieve collective liberation we must constrain, diminish, and abolish the carceral forces of the state—from prisons and police themselves, to their manifestations in all forms throughout society.”).

<sup>135</sup> See, e.g., Darryl K. Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 *J.L. Econ. & Pol’y* 657, 657 (2011) (“Few topics find more unanimity across the

least the 1960s, academics have bemoaned the use of criminal law to respond to a host of social problems, leading to the phenomenon of “overcriminalization.”<sup>136</sup> As Jonathan Simon has argued, the result—filtered through a post-War on Terror frame—is a politics of “governing through crime,” in which lawmakers mobilize the language of fear to justify criminal solutions to every problem from schoolyard violence to workplace misconduct.<sup>137</sup>

Since the 1980s, libertarian and conservative advocates have keyed on the concept of overcriminalization as a means of advancing a broader deregulatory agenda. Such a vision of overcriminalization hardly rests on a claim that *non-criminal* regulatory solutions would be socially desirable—the evil is state action; that the regulation risks serious penalties and stigma only makes it worse.<sup>138</sup> But, liberal, progressive, and left critiques of overcriminalization tend to adopt a very different frame: the solution to overcriminalization is not “deregulation” or “free markets”; it is administrative law, tort suits, or a host of non-criminal regulatory regimes.

Outside of the substantive criminal law, advocacy for more non-criminal state intervention has taken on greater political salience with the rise of calls to “defund the police.” Activists and advocates have argued that the way to eliminate the racialized violence of policing is to replace police with other sorts of first responders, or harm-mitigation workers, and “non-police health and safety solutions.”<sup>139</sup> These solutions are often framed as “community-based,” implying that police and the criminal system are not of the community.<sup>140</sup> In these accounts, the police officer

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ideological spectrum of criminal law scholars and Washington policy advocates interested in the criminal law than the conclusion that the United States suffers from too much criminal law . . . . Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes.”)

<sup>136</sup> See, e.g., Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 *Am. Crim. L.Q.* 17, 33 (1968) (“[C]riminal law is a highly specialized tool of social control, useful for certain purposes but not for others; that when improperly used it is capable of producing more evil than good . . .”).

<sup>137</sup> See Simon, *Governing Through Crime*, *supra* note 127.

<sup>138</sup> See *supra* note 22 and accompanying text.

<sup>139</sup> Cmtys. United for Police Reform, *Path to a Safe Healthy & Just Recovery: Cut NYPD’s Budget & Invest in Communities 2* (2021), [https://www.changethenypd.org/sites/default/files/cpr\\_fy22\\_nypd\\_budget\\_report\\_6-2021.pdf](https://www.changethenypd.org/sites/default/files/cpr_fy22_nypd_budget_report_6-2021.pdf) [<https://perma.cc/TV7D-GUDL>].

<sup>140</sup> See, e.g., *id.* at 10. This framing strikes me as important and potentially indicative of a skepticism of the state as such for many of the reasons outlined in this Article (histories of discriminatory policy, ideological and political commitments counter to radical or liberatory social projects). And, aspirationally, I find it appealing. But I also worry for two reasons about

represents the carceral state—a threat to people in need of mental health care or other social support. The social worker stands at the opposite pole and represents the welfare state, or perhaps a merger of state and community—an unarmed civil servant whose function is to support and assist.

But how confident should left and progressive critics be in the existence or possibility of a clean line between criminalization and regulation? And how comfortable should we be in concluding that agents of the non-carceral state can be trusted to deliver services in a way that won't remain imbricated in the same dangerous logics of risk-management and exclusion? Because, as *Interrupting Criminalization* organizers argue, there remains the problem of “[c]ops in new clothing.”<sup>141</sup> Indeed, “[t]here is a large body of research cataloguing the perils of the welfare state for poor people and communities of color—surveillance, blame and assessments of desert, humiliation and stigmatization, administrative burden, reinforcement of racial hierarchy, and the welfare state’s own carceral and neoliberal logics and justifications.”<sup>142</sup> From deinstitutionalization to critiques of the so-called “child welfare system,” don’t we already have sobering examples of the problems of an ostensibly kinder, gentler mode of delivering services?<sup>143</sup>

I will return to these questions in Part III after identifying two other areas where I see criminal law exceptionalism retaining purchase.

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the ability of a “community-centric” frame to check the state and the concerning underlying logics of control. First, community is a slippery concept, and within any community there might be important power imbalances and differences of opinion—some, perhaps, favoring the very logics or approaches that activists seek to avoid. See, e.g., Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 *Yale L.J.F.* 798, 810 (2021); Benjamin Levin, *Criminal Justice Expertise*, *Fordham L. Rev.* (forthcoming 2022) [hereinafter Levin, *Criminal Justice Expertise*]; Bernard E. Harcourt, *Matrioshka Dolls*, in Tracey L. Meares & Dan M. Kahan, *Urgent Times: Policing and Rights in Inner-City Communities* 81, 81 (Joshua Cohen & Joel Rogers eds., 1999). Second, the example of “community policing” demonstrates the effective way in which police, policymakers, and academics, have been able to effectively maintain—and even strengthen—punitive institutions by deploying the rhetoric of community and adopting minor policy tweaks that appear to strengthen the role of “the community” in the administration of criminal law.

<sup>141</sup> *Interrupting Criminalization*, supra note 96, at 25.

<sup>142</sup> See Bell et al., *Criminal System Replacement*, supra note 129, at 1301–02 (footnotes omitted).

<sup>143</sup> See *id.* (collecting sources).

*B. Delegating to Experts*

As a general matter, governance in the United States relies on the delegation of decision-making and policymaking authority to experts. While the Constitution forbids Congress from delegating its lawmaking authority to executive agencies,<sup>144</sup> the so-called “nondelegation doctrine” is rarely enforced.<sup>145</sup> Instead, the administrative state rests upon a foundation of congressional delegations to agencies—determinations that specialists in a given field should be able to apply their particularized expertise and act outside of the otherwise slow and messy political process.

Delegation—or at least deference—also lies at the heart of criminal law’s administration.<sup>146</sup> Judges defer to police in their judgements about who should be stopped, searched, and potentially subjected to further violence.<sup>147</sup> Sentencing judges defer to prosecutors and probation officers in their assessments of the proper punishment for a defendant.<sup>148</sup> Appellate judges defer to sentencing judges, based on their “expertise” and first-hand-knowledge in assessing defendants’ credibility and culpability.<sup>149</sup> Judges defer to prison officials in their treatment of

<sup>144</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989).

<sup>145</sup> See, e.g., Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. Irvine L. Rev. 855, 856 (2020).

<sup>146</sup> See generally Levin, *Criminal Justice Expertise*, supra note 140 (arguing that many structures of the U.S. criminal system rely on deference to purported “experts”).

<sup>147</sup> See, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1995 (2017); Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. Crim. L. & Criminology 407, 429 n.79 (2013) (“[P]olice officers receive an extremely high level of deference about their determinations . . . as long as they are prepared to invoke their ‘experience and expertise’ as the basis of their decision.” (footnote omitted)); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 301 (“[T]he Court in effect declared that police officers should receive as much deference as trial judges.”); Seth W. Stoughton, *Policing Facts*, 88 Tul. L. Rev. 847, 851 (2014) (arguing that appellate courts tend to defer to officers, but often base that deference on a misunderstanding of what policing looks like in practice).

<sup>148</sup> See, e.g., Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts 20–22* (1998); Anupam Chander, *Designating the Place of Confinement in Probation Sentences: A Judge’s Prerogative*, 8 Fed. Sent’g Rep. 173, 174 (1995).

<sup>149</sup> See e.g., *Koon v. United States*, 518 U.S. 81, 98 (1996) (noting the trial court judge’s “day-to-day experience in criminal sentencing”); Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L.J. 387, 389 (2006); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me. L. Rev. 569, 571 (2005) (“The judge [is] seen as an ‘expert’ in individualizing the sentence to reflect the goals of punishment, including rehabilitation and deterrence.”); Nancy Gertner, *What Has Harris Wrought*, 15 Fed Sent’g Rep. 83, 84 (2002); John F. Stanton, *Avoiding and Appealing Excessive Sentences*, 40 Litig. 46, 50 (2014) (“[T]he

incarcerated people because of the officials' "expertise" regarding the day-to-day functioning of prisons.<sup>150</sup> And, legislators defer to prosecutors when it comes to drafting and enforcing broad criminal statutes, based on prosecutors' purported expertise regarding the functioning of the criminal system.<sup>151</sup>

Outside of the criminal context, delegation is generally uncontroversial—or, at least, uncontroversial in mainstream liberal, progressive, and even left circles.<sup>152</sup> Deference to expert decision making has become an essential feature of the U.S. policy landscape. Of course, among some libertarians and conservatives, the administrative state remains a monument to anti-democratic lawlessness, and the nondelegation doctrine stands as a dead letter very much in need of reviving.<sup>153</sup> Yet those positions generally remain confined to the right of the political spectrum.

In the criminal law context, though, delegation and deference suddenly become much more complex. Left-leaning prison law scholars and advocates for the rights of incarcerated people bemoan the deference granted to wardens, the Bureau of Prisons ("BOP"), and other state and federal "correctional" authorities. In most critical accounts, these "correctional experts" have facilitated the abuse and dehumanization of incarcerated people, and patterns of legislative and judicial deference have not only allowed for that abuse and dehumanization, but effectively entrenched cruel practices by rubber stamping them with the imprimatur

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sentencing judge has more expertise in administering sentences and has the opportunity to observe the defendant and other trial participants firsthand. . . .").

<sup>150</sup> See, e.g., Sharon Dolovich, *Forms of Deference in Prison Law*, 24 *Fed. Sent'g Rep.* 245, 245 (2012); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 *U.C. Irvine L. Rev.* 89, 89–90 (2015); Keramet Reiter & Kelsie Chesnut, *Correctional Autonomy and Authority in the Rise of Mass Incarceration*, 14 *Ann. Rev. L. & Soc. Sci.* 49, 58 (2018).

<sup>151</sup> See, e.g., Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* 98–101 (1997); Darryl K. Brown, *Democracy and Decriminalization*, 86 *Tex. L. Rev.* 223, 232–33 n.31 (2007).

<sup>152</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2364 (2001) ("It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all. In only two cases, both in 1935, has the Supreme Court struck down a federal statute on the ground that it delegated too much authority to the executive branch."); Hessick & Hessick, *supra* note 9, at 291 ("One common criticism is that the doctrine is an empty formality, as evidenced by the near-uniform unwillingness to strike down statutes as improper delegations.").

<sup>153</sup> See generally Philip Hamburger, *Is Administrative Law Unlawful?* (2014) (answering the question in the affirmative).

of expertise.<sup>154</sup> Similarly, a wealth of critical literature has keyed on the supposed expertise of police,<sup>155</sup> sentencing judges,<sup>156</sup> and other criminal legal officials whose decision making has effectively been shielded from meaningful oversight by judges and lawmakers who have—time and again—deployed the language of expertise in deferring or effectively delegating policymaking authority.<sup>157</sup> Put simply, whereas delegation of decision-making authority to experts generally is treated as a good in many left-leaning circles, in the criminal law space these experts are often treated as suspect, and judicial deference is framed as irresponsible and inhumane rather than appropriate and necessary.<sup>158</sup>

Recently, criminal defense attorneys have taken a page out of the conservative or libertarian playbook by arguing for the reinvigoration of the nondelegation doctrine as a vehicle for striking down sex offender registration requirements.<sup>159</sup> Essentially, they have argued that laws that allow the Attorney General to craft notification and registration requirements represent an unconstitutional delegation of congressional lawmaking authority. While advocates have been raising these arguments for some time, they have gained greater traction and drawn greater scrutiny recently with the rightward turn on the U.S. Supreme Court.

In *Gundy v. United States*, these arguments made it all the way through the certiorari process before the Court rejected one such nondelegation challenge to the Federal Sex Offender Registration and Notification Act.<sup>160</sup> Before the ruling, liberal and progressive commentators outside of the criminal law space had treated *Gundy* as yet another example of a conservative judiciary run amok and in search of vehicles to strike down long-settled precedent.<sup>161</sup> Having initially feared *Gundy* as a potential assault on the administrative state, commentators in left-leaning circles

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<sup>154</sup> See supra note 150 (collecting sources).

<sup>155</sup> See supra note 147 (collecting sources).

<sup>156</sup> See supra notes 148–49 (collecting sources).

<sup>157</sup> See generally Levin, *Criminal Justice Expertise*, supra note 140 (arguing that the language of “expertise” has functioned to empower police, prosecutors, judges, prison officials, and other official actors in the criminal system).

<sup>158</sup> See *id.* (tracking this tension).

<sup>159</sup> See, e.g., Wayne A. Logan, *Gundy v. United States: Gunning for the Administrative State*, 17 *Ohio St. J. Crim. L.* 185, 187 (2019).

<sup>160</sup> 139 S. Ct. 2116 (2019).

<sup>161</sup> See, e.g., Lisa Heinzerling, *How the Supreme Court Created a Constitutional Case Against the Administrative State*, ACS Expert Forum, *Am. Const. Soc.* (Aug. 29, 2018), <https://www.acslaw.org/expertforum/how-the-supreme-court-created-a-constitutional-case-against-the-administrative-state/> [<https://perma.cc/QK98-BT7Q>].

generally hailed the Court's ruling as a much-needed defense of regulatory and social welfare projects.<sup>162</sup>

Granted, some critics of U.S. criminal legal policy have begun to craft arguments for why delegation might be objectionable in the criminal law context, without embracing a pre-New Deal conception of non-delegation.<sup>163</sup> Carissa Byrne Hessick and Andy Hessick, for example, have argued that the Constitution's exceptional treatment of criminal law establishes a different doctrinal landscape and imposes heightened burdens on Congress when it comes to criminal lawmaking.<sup>164</sup>

As a doctrinal matter, I find the Hessicks' arguments compelling. (And, I agree with many of the critiques of deference and delegation identified in the prison and criminal legal areas more broadly.)<sup>165</sup> I can imagine federal public defender offices adopting these claims and—perhaps less likely—judges accepting some version of their arguments, which would allow for civil libertarian victories in the criminal defense realm without dismantling the administrative state.<sup>166</sup> Stepping outside of the doctrinal realm, though, I see *Gundy*—not unlike prison law, policing, and the legal landscape of sentencing—as presenting more challenging theoretical questions about when and where delegation or deference to experts is socially desirable.<sup>167</sup>

Put differently, why should liberals, progressives, or leftists be comfortable with congressional delegations to the Food and Drug

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<sup>162</sup> See, e.g., Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden's Administration*, *Slate* (Dec. 1, 2020), <https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html> [<https://perma.cc/3NAR-FHMA>]; Ian Millhiser, *Brett Kavanaugh's Latest Opinion Should Terrify Democrats*, *Vox* (Nov. 26, 2019), <https://www.vox.com/2019/11/26/20981758/brett-kavanaugh-terrify-democrats-supreme-court-gundy-paul> [<https://perma.cc/M8VQ-P2RL>].

<sup>163</sup> See, e.g., Fissell, *supra* note 145, at 906 (“[My] argument, if accepted, would not lead to the death of the administrative state—it would merely confine agencies to the use of civil sanctions.”); Logan, *supra* note 159, at 201 (“Personally, I share the view that delegation in the modern era is necessary and can be beneficial. However, Congress simply went too far with SORNA.” (footnote omitted)).

<sup>164</sup> See Hessick & Hessick, *supra* note 9, at 281; cf. Barkow, *supra* note 52, at 994–95 (noting separation of powers issues inherent in the criminal law context).

<sup>165</sup> See generally Levin, *Criminal Justice Expertise*, *supra* note 140 (critiquing “expertise” and deference to “experts” in criminal legal practice and policymaking).

<sup>166</sup> Cf. Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 *Harv. L. Rev.* 164, 182 (2019) (“Several Justices have argued that courts should not defer to agencies in criminal matters . . . .” (footnote omitted)).

<sup>167</sup> But cf. generally Fissell, *supra* note 145 (articulating a theoretical case for why administrative crimes are more objectionable than ones created by the legislature).

Administration but not the Bureau of Prisons?<sup>168</sup> The answer, I think, sounds in a sort of skeptical or critical criminal law exceptionalism. Viewed through this lens, making sure that pharmaceutical companies aren't producing adulterated drugs or that automobile manufacturers aren't installing defective seatbelts are the legitimate province of the state. That's exactly the sort of thing that government is supposed to do. And, while there might be concerns about how those agencies behave under different administrations (e.g., the Environmental Protection Agency under President Trump might look very different than under President Biden), this exceptionalist position appears to reflect a view that those agencies represent fundamentally worthy enterprises. By contrast, it's not at all clear that there's *any* way that the BOP could advance the ends of justice.<sup>169</sup> So, there's no world (or no administration) in which these delegations should be celebrated or facilitated.<sup>170</sup>

Taking these critiques a step further reveals an underlying skepticism (at best) of "criminal justice experts" among many critics on the left.<sup>171</sup>

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<sup>168</sup> Cf. Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 *Am. U. L. Rev.* 1061, 1083 (2021) ("[T]he ability of Congress to delegate its power to agencies that have regulations with criminal penalties remains controversial." (footnote omitted)).

<sup>169</sup> See Levin, *Criminal Justice Expertise*, *supra* note 140, at 33–34 (tracing these arguments). This critique is distinct from a common one that suggests that the problem with U.S. criminal policy is deference to the wrong experts. See generally Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* (2019) (calling for greater deference to experts who can help advise on and implement evidence-based policies); Shon Hopwood, *Review, The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy*, 118 *Mich. L. Rev.* 1181, 1202–03 (2020) ("There is no reason for policymakers' continued deference to the views of federal prosecutors. Unlike federal prosecutors, other policy experts do not possess an inherent conflict of interest in trying to maintain power to the exclusion of all other goals. And a large number of policy experts—from criminologists to economists, political scientists, and legal scholars—agree that the criminal justice system can be reformed in ways that protect liberty and improve public safety, human lives, and communities, all at a lower cost. Policymakers should listen to them." (footnote omitted)).

<sup>170</sup> Certainly, narrower critiques of criminal law and its administration might treat delegations to more "liberal" agencies or experts as desirable, while remaining critical of delegations to experts or agencies with particularly punitive politics. Such an approach would reflect less of an objection to the project of criminal justice expertise than a simple, results-oriented political calculus. And, in that respect, such an approach might resemble other partisan positions on delegation—i.e., whether delegation to an agency is desirable depends on which party is in power, not the specific regulatory purview of that agency or the desirability of having policy in a given field shaped by experts or policymakers otherwise insulated from the political process.

<sup>171</sup> See generally Levin, *Criminal Justice Expertise*, *supra* note 140 (describing these critiques of expert-driven criminal policymaking).



Some commentators treat such “experts” as embedded in carceral logics or ways of seeing the world that help to reinforce racial exclusion, harsh punishments, or expansive forms of social control.<sup>172</sup> Those critiques strike me as spot on—in fact, I have articulated many of them myself.<sup>173</sup> But, why should we assume that other experts and other regulators aren’t similarly embedded in other troubling logics or ideologies?<sup>174</sup> What makes criminal law as a field uniquely unsuited to governance by experts? If the anti-democratic structure of expert-based decision making is so problematic in the criminal system, why isn’t it elsewhere? If the answer is that the experts in other realms have “better politics,” three key questions remain: (1) What are “better politics?” (2) Even if we can agree on what constitute “better politics,” how sure can we be that those other experts actually have better politics than criminal justice experts? And (3) if the problem with criminal policymaking by experts is not just the experts’ politics, but rather the anti-democratic model of governance by delegation to experts, why should that model be less problematic outside of the criminal law context?

### *C. Non-Criminal Punitiveness*

Criminal courtrooms are hardly the only places where charges of wrongdoing are adjudicated. And criminal law is hardly the only area of law that allows for powerful actors (public or private) to impose sanctions against an individual based on the wrong that she has done or harm that she has caused. Indeed, numerous legal and social institutions, both formal and informal, private and public, exist to respond to harm and

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<sup>172</sup> See, e.g., Bell, *Safety, Friendship, and Dreams*, supra note 68, at 710; Erin Collins, *Abolishing the Evidence-Based Paradigm* (unpublished manuscript) (on file with author); Eaglin, supra note 92; Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 *Yale L.J.F.* 848, 918 (2019) (arguing that lawyers, judges, and others who work in the criminal system have internalized and accepted the logic of the “punishment bureaucracy”); Roberts, supra note 87, at 1723.

<sup>173</sup> See, e.g., Levin, *Criminal Justice Expertise*, supra note 140, at 41–43 (arguing that experts and elite actors in the criminal system have a “carceral track record”); Benjamin Levin, *Review, De-Democratizing Criminal Law*, 39 *Crim. Just. Ethics* 74 (2020) (same); Benjamin Levin, *Response, Values and Assumptions in Criminal Adjudication*, 129 *Harv. L. Rev. F.* 379 (2016) (same).

<sup>174</sup> Cf. Simon, supra note 12, at 490 (“Prisons were an important node in a system of sites for expert-based interventions in the subjective lives of the poor and marginal but only part of an archipelago . . .”).

wrongdoing.<sup>175</sup> From the tort system, to school disciplinary structures, to models of workplace grievance resolution, institutions speak a criminal-law-like language (e.g., wrongs, harm, culpability, and accountability) without the punishments or processes associated with the criminal system.

Despite significant debate about its contours, non-state punishment remains popular in many circles, including among critics of the criminal system.<sup>176</sup> In search of accountability, many criminal law critics have expressed support for discipline by third parties, perhaps most notably schools and employers.<sup>177</sup>

As Aya Gruber has described, campus feminist activists—increasingly opposed to racialized mass incarceration—remain optimistic about the power of schools to function as disciplinary institutions in responding to rape, harassment, and sexual harm.<sup>178</sup> While “many student activists did not want their fervor for campus reforms to put more people in jail[,]” their “[p]rotest rhetoric veered toward the punitive—punishing and exposing ‘serial rapists.’”<sup>179</sup> Contemporary activists’ growing “anti-incarceration sentiments” might suggest an interest in “steer[ing] law and policy makers away from the tempting solution of broadened criminalization,” but abandoning criminal punishment need not—and often does not—mean abandoning a punishment framework.<sup>180</sup> Instead of the state, police, and cages, though, activists seek punishment via “quasi-

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<sup>175</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *Tex. L. Rev.* 917, 974 (2010); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 *Colum. L. Rev.* 1384, 1418 (2000); Erik Encarnacion, *Corrective Justice as Making Amends*, 62 *Buff. L. Rev.* 451, 526 (2014).

<sup>176</sup> As a formal matter, many commentators might not characterize this non-criminal “punishment” as punishment at all. Cf. generally Steven Arrigg Koh, “Cancel Culture” and Criminal Justice (unpublished manuscript) (on file with author) (examining the difference between criminal punishment and other social sanctions).

<sup>177</sup> See, e.g., Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration* 178 (2020) [hereinafter Gruber, *Feminist War on Crime*] (describing purportedly anti-carceral feminists’ support for school discipline); Aya Gruber, *#MeToo and Mass Incarceration*, 17 *Ohio St. J. Crim. L.* 275, 281 (2020) (same) [hereinafter Gruber, *#MeToo and Mass Incarceration*]; Benjamin Levin, *Criminal Employment Law*, 39 *Cardozo L. Rev.* 2265, 2288 (2018) [hereinafter Levin, *Criminal Employment Law*] (describing public support for discipline by professional sports leagues).

<sup>178</sup> See, e.g., Gruber, *#MeToo and Mass Incarceration*, supra note 177, at 281; Gruber, *Feminist War on Crime*, supra note 177, at 151–69.

<sup>179</sup> Gruber, *#MeToo and Mass Incarceration*, supra note 177, at 281.

<sup>180</sup> See, e.g., id.; Gruber, *Feminist War on Crime*, supra note 177, at 151–69.

criminal” campus tribunals, bureaucratic structures, and expulsions.<sup>181</sup> And, to some commentators and activists, that distinction is crucial: a turn to university Title IX procedures is justified in criminal law exceptionalist terms as demonstrating respect for survivors and providing accountability for wrongdoers without reinforcing the problematic aspects of criminal law.<sup>182</sup>

Such arguments are not only the province of campus activists. Indeed, the contemporary workplace is shaped by an understanding of employers as disciplinary authorities.<sup>183</sup> Historically, such a characterization had a decidedly negative slant (e.g., union-busting thugs, company towns, and the decimation of worker power), but over time, many on the left (broadly conceived) have come to embrace employer discipline as a good.<sup>184</sup> From the rise of the #MeToo movement, to the proliferation of movements to advance diversity, equity, and inclusion, there has been a progressive effort to demand that employers hold workers accountable for speech or conduct seen as marginalizing, subordinating, or harmful. Indeed, Ahmed White has recounted the ways in which Title VII and the framework of contemporary antidiscrimination law—much celebrated by progressives—rests on a vision of employers as key players in shielding subordinated workers by disciplining subordinating workers.<sup>185</sup> In remedying discrimination, “courts judge the sufficiency of the employer’s corrective response not only by its promptness but also with regard to whether it is sufficiently punitive under the circumstances.”<sup>186</sup> And, “an employer is more likely to avoid liability if it inflicts serious punishment

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<sup>181</sup> See, e.g., Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 *Calif. L. Rev.* 881, 897 (2016); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 *Harv. L. Rev. F.* 103 (2015).

<sup>182</sup> See Gruber, *#MeToo and Mass Incarceration*, *supra* note 177, at 281 (describing this position). But see Janet Napolitano, “Only Yes Means Yes”: An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 *Yale L. & Pol’y Rev.* 387, 388 (2015) (describing the challenge in using universities as the vehicle to police and punish sexual harm).

<sup>183</sup> See, e.g., Ahmed A. White, *My Coworker, My Enemy: Solidarity, Workplace Control, and the Class Politics of Title VII*, 63 *Buff. L. Rev.* 1061, 1063 (2015); Levin, *Criminal Employment Law*, *supra* note 177; Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 *J. Crim. L. & Criminology* 573, 597 (2009).

<sup>184</sup> See generally White, *supra* note 183 (tracking this shift over the course of the twentieth century).

<sup>185</sup> See *id.* at 1062–64.

<sup>186</sup> *Id.* at 1122–23 (citing *Loughman v. Malnati Org., Inc.*, 395 F.3d 404, 408 (7th Cir. 2005); *Jackson v. Quanex Corp.*, 191 F.3d 647, 664 (6th Cir. 1999)).

on the harasser . . . .”<sup>187</sup> This legal framework and cultural script treats the worker as victim;<sup>188</sup> the employer, then, is treated as a quasi-sovereign, expected to police its domain and hold workers to account for their transgressions.<sup>189</sup>

Certainly, many proponents of non-criminal punishments in workplaces or schools also support criminal legal solutions. Advocacy for hate crime legislation, expanded criminal punishments for sex crimes, or more aggressive policing of intimate-partner violence often accompany calls for private discipline.<sup>190</sup> Yet, criminal law exceptionalism retains purchase in some corners when it comes to non-criminal discipline. Indeed, even some activists associated with abolitionist collective Survived and Punished have argued, “[n]ot all consequences are carceral—some are principled parts of repair. . . . We do not believe [sic] policing+prisons are acceptable responses to DV and sexual violence. We do believe in consequences being necessary for repair and safety. Losing a platform, job, etc [sic] for abuse is not carceral.”<sup>191</sup>

On the one hand, the observation that such consequences aren’t “carceral” is obviously correct. On the other hand, to the extent an abolitionist project requires rejecting underlying logics of exclusion and punishment, shouldn’t these “non-carceral” consequences still raise concerns?<sup>192</sup> Unless we believe that bosses, schools, and powerful non-state actors are democratically accountable and committed to desirable

<sup>187</sup> *Id.* at 1124 (citing *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875–76 (9th Cir. 2001); *Knabe v. Boury Corp.*, 114 F.3d 407, 413 (3d Cir. 1997)).

<sup>188</sup> See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 *Colum. L. Rev.* 319, 333 (2005).

<sup>189</sup> See, e.g., Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk About It)* 63 (2017); Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* 103 (2015); Rana, *supra* note 128, at 51–52; Levin, *Criminal Employment Law*, *supra* note 177, at 2322–26.

<sup>190</sup> See, e.g., Jeannine Bell, *There Are No Racists Here: The Rise of Racial Extremism, When No One Is Racist*, 20 *Mich. J. Race & L.* 349, 376 (2015) (“[H]ate crime legislation is needed for the thousands of other bias-motivated attacks that take place without national scrutiny. What might make a difference in preventing horrible hate murders is for the government, and for everyone else, to take much more seriously the dangerous threats posed by racial extremists.”); Deborah Tuerkheimer, *Beyond #metoo*, 94 *N.Y.U. L. Rev.* 1146 (2019).

<sup>191</sup> #SurvivedAndPunished (@survivepunish), Twitter (Jun. 18, 2020, 1:16 AM), <https://twitter.com/survivepunish/status/1273484825458929664> [https://perma.cc/85PJ-YMWA]; #SurvivedAndPunished (@survivepunish), Twitter (Jun. 18, 2020, 2:23 AM), <https://twitter.com/survivepunish/status/1273501541559709697> [https://perma.cc/422X-C684].

<sup>192</sup> See *infra* Sections III.B, III.D.

social projects, shouldn't we worry about supporting or enhancing their disciplinary authority?<sup>193</sup> I think so. But I also realize that looking for punitive logics everywhere might become self-defeating—a barrier to meaningful efforts to decarcerate and an exercise in false equivalence.<sup>194</sup> In the final Part, I ask how and to what extent criminal law exceptionalism might be justified and what such justifications can tell us about what's really wrong with the carceral state.

### III. EXCEPTIONALISM'S EXPLANATIONS

Is criminal law exceptionalism defensible? Is it necessary or, perhaps, even inevitable? And what should we make of the case studies described in the previous Part? Do they reflect theoretical inconsistency, or do they help us appreciate the contours and different versions of anti-carceral thought? In this Part, I begin to answer these questions by examining a handful of possible explanations or justifications for the continued allure of exceptionalism among some criminal law critics. Despite my own skepticism about criminal law exceptionalism, my argument here is not that these explanations are necessarily *wrong*. Rather, my claim is that each of these explanations might cut more broadly, potentially undermining other left and critical projects or, at the very least, might suggest a particular and potentially narrow conception of what's so objectionable about the U.S. criminal system. And, on a larger scale, criminal law exceptionalism might help illuminate ideological disagreements about the nature of the state and modes of governance. Each of the case studies described above reflects a critique of certain aspects of the criminal system, but also appears to accept a bounded version of that critique. In this Part, I trace those bounds, asking what exceptionalism can tell us about the carceral state and what makes it distinguishable from other potentially authoritarian institutions.

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<sup>193</sup> See generally Levin, *Criminal Employment Law*, *supra* note 177.

<sup>194</sup> Cf. generally Koh, *supra* note 176 (outlining and distinguishing among different types of informal sanctions). And, to the extent that ensuring “accountability” remains a central component of many abolitionist or anti-carceral projects, see Schenwar & Law, *supra* note 59, at 219–26; Kaba & Herzing, *supra* note 117, at 132, 135, drawing clean lines between what is punitive and what is not will remain challenging.

*A. The Many Faces of the State*

The language of “the carceral state” or “the penal state” suggests that there is a specific—and specifically troubling—universe of governmental functions associated with punishment. By extension, this critical language implies that the problem is not the state as such; it is the corners of the state apparatus or the modes of governance associated with punishment and carcerality. Put differently, many critiques of the carceral state appear to presume that there is a *non-carceral state* and, in turn, that governance is not inextricable from punitiveness.<sup>195</sup>

This distinction retains a certain intuitive appeal, not just because of the deeply ingrained civil/criminal distinction, but because (particularly for left and progressive commentators) there is a sense that the state contains multitudes.<sup>196</sup> The statist/anti-statist distinction is too facile.<sup>197</sup> If you believe in social insurance or legal protections for workers, does that mean you also need to support a strong military or believe in robust institutions of criminal law and punishment? The easy answer, of course, is “no!” Social programs, the welfare state, and a web of public benefits on the one hand might be easily distinguished from institutions of imperialism and the features of a command-and-control state.<sup>198</sup> But, when the rubber meets the road, I’m less sure that this easy answer is always so easy.<sup>199</sup> Or, at the very least, I think it needs some unpacking.

Writing twenty years ago, Stephen Schulhofer argued that “political philosophy—the theory of the state—is for the most part unimportant for

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<sup>195</sup> But cf. David Graeber, *Fragments of an Anarchist Anthropology* 41 (2004) (defining the state as “a group of people who claim that, at least when they are around and in their official capacity, they are the only ones with the right to act violently”); Michael Bakunin, *Statism and Anarchy* 13 (Marshall S. Shatz ed. & trans., Cambridge Univ. Press 1990) (“The modern state, in its essence and objectives, is necessarily a military state . . . wherever force exists, it absolutely must be displayed or put into action.”).

<sup>196</sup> See, e.g., Pierre Bourdieu, *On the State: Lectures at the Collège de France, 1989–1992*, at 9–10 (Patrick Champagn, Remi Lenoir, Frank Poupeau & Marie-Christine Rivière eds., David Fernbach trans., Polity Press 2014).

<sup>197</sup> Cf. Rana, *supra* note 128 (tracing competing understandings of state power’s role in political culture).

<sup>198</sup> Cf. Bell et al., *Criminal System Replacement*, *supra* note 129, at 1301 (“The main benefit of the welfare-state logic of reinvestment is that it promises to help rebuild the supportive governmental arm that has been weakened and rendered more punitive in recent decades.”).

<sup>199</sup> Cf. Roberts, *Torn Apart*, *supra* note 15, at 161 (“Most people think of the child welfare system and the criminal punishment system as distinct parts of government. Child welfare is supposed to be based on civil law and therefore not entail the surveillance, punishment, and condemnation that characterize criminal justice. . . . In reality, the child welfare system operates surprisingly like its criminal counterpart.”).

purposes of doing work in criminal law theory. . . . [T]here is rarely mileage to be gained, in terms of criminal law theory, from sorting out which is the appropriate theory of the state.”<sup>200</sup> Recent years have seen a shift away from this position,<sup>201</sup> with academics explicitly embracing a “political theory turn” in their study of criminal law.<sup>202</sup> Viewed through this lens, “a comprehensive theory of criminalization require[s] nothing less than a theory of the state.”<sup>203</sup> I agree.<sup>204</sup> But, here, I offer a sort of corollary claim: a theory of *decriminalization* also requires nothing less than a theory of the state.<sup>205</sup> That is, my overarching argument in this

<sup>200</sup> Stephen J. Schulhofer, *The Mathematician, the Monk, and the Militant: Reflections on the Role of Criminal Law Theory*, 88 *Calif. L. Rev.* 705, 707 (2000); see also Stephanos Bibas, *Victims Versus the State’s Monopoly on Punishment?*, 130 *Yale L.J.F.* 857, 864 (2021) (“These questions should prompt us to *consider political theory*, which rarely talks with criminal jurisprudence.”).

<sup>201</sup> Of course, this isn’t to say that there wasn’t already engagement with such questions and issues, but it often occurred outside of the space of the legal academy and particularly outside of the U.S. legal academy. Cf. Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke & Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* 194 (1978) (“Most criminological theories—including much of ‘radical criminology’—have no concept or theory of the state. In conventional theories, the exercise of state power through the operation of the law is acknowledged only formally, and its mode of operation is treated as unproblematic.”).

<sup>202</sup> See, e.g., Chiao, *supra* note 41, at vii (“[C]riminal law and its associated institutions are . . . subject to the same principles of institutional and political evaluation that apply to public law and public institutions generally.”); Kiel Brennan-Marquez, *Rethinking the Relationship Between Punishment and Policing*, 17 *Ohio St. J. Crim. L.* 399, 405 (2020) (setting out to articulate a “political theory of criminal law” that explains “the state’s often-violent, more-than-occasionally deadly, exercise of enforcement power . . . .”); Nicola Lacey, *Approaching or Re-thinking the Realm of Criminal Law?*, 14 *Crim. L. & Phil.* 307, 309 (2020); Eric J. Miller, *Review, The End of Criminal Law?*, *The New Rambler Review* (Oct. 15, 2020), <https://newramblerreview.com/book-reviews/law/the-end-of-the-criminal-law> [https://perma.cc/QFM2-NFH6] (describing this tension in the literature); Alice Ristroph, *Just Violence*, 56 *Ariz. L. Rev.* 1017, 1040 (2014) [hereinafter Ristroph, *Just Violence*].

<sup>203</sup> Douglas N. Husak, *Overcriminalization: The Limits of the Criminal Law* 120 (2008); cf. Nicola Lacey, *State Punishment: Political Principles and Community Values* 198 (1988) (“[O]ne must acknowledge fairly and squarely the place of punishment within political philosophy [and] the interaction between the question of punishment and that of the nature of a just society . . . .”).

<sup>204</sup> And, in that respect, I also agree with Stanley Cohen’s assertion that “it is the nature of the state which shapes the nature of crime control,” Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* 272 (1985), and Ristroph’s claim that “[a] theory of punishment, or any other form of violence, should include an account of the agents that impose it.” Ristroph, *Just Violence*, *supra* note 202, at 1040.

<sup>205</sup> Cf. Ristroph, *Just Violence*, *supra* note 202, at 1040 (“[A] clear account of the identity and structure of the state is especially important if we seek to *regulate* policing and punishment.”).

Article is that seeing the *carceral* state as uniquely troubling would and should require an account or theory of the *non-carceral* state.

In this Section and this Article, I hardly set out to articulate such a grand theory. Instead, I hope to emphasize the importance of that project—of understanding what the state is, could be, and couldn't be—to the fight to end mass incarceration. And, perhaps even more so, its importance to the struggle to imagine alternatives to criminalization and carceral punishment.

Treating criminal law like other law requires a reckoning not just with the state's power, but also with the legitimacy of that power.<sup>206</sup> Subordination in one form or another appears inevitable, as “any exercise of state power over an individual implies (and requires) a relationship of subordination, in the sense of the final unavoidability of experiencing that power on one's person even in the absence of actual consent.”<sup>207</sup> And, in some sense, this observation leads to one of the challenges of thinking about how to move beyond mass incarceration and the institutions of the carceral state.

In critical discourse, the U.S. criminal system is punitive, it is carceral, and it is inhumane. The worst features are motivated by a desire for vengeance, a dehumanization of defendants, a drive to individualize blame and punishment for societal problems, and a contempt for the dignity of marginalized populations. Rather than reflecting the normative theories of punishment that theorists and judges hold up as just and desirable (deterrence, retributivism, incapacitation, and rehabilitation), the U.S. criminal system operates as a massive and nearly unconstrained engine of social control. Put simply, the carceral state is cruel.<sup>208</sup>

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<sup>206</sup> See Markus D. Dubber, *Criminal Law Between Public and Private Law*, in *The Boundaries of the Criminal Law*, supra note 43, at 191, 205; see also Alice Ristroph, *When Freedom Isn't Free*, 14 *New Crim. L. Rev.* 468, 484 (2011) (arguing that punishment from a Hobbesian perspective is “at best ‘imperfectly legitimate’”); Simon, *Law's Violence*, supra note 22, at 676 (“Rather than debating which flavor of the Strong State we prefer, policing or carceral, domestic or immigration oriented, we need to challenge the heart of its claim of legitimacy to protect communities from violence by identifying its contempt for legality, its violation of community autonomy and social well-being, and its investment in race as an instrument of knowledge and power.”).

<sup>207</sup> Dubber, supra note 206, at 205.

<sup>208</sup> And, in its cruelty, the carceral state stands as the embodiment of Stuart Hall's “strong state.” See Hall et al., supra note 201, at 304–05; see also Simon, *Law's Violence*, supra note 22, at 676 (“Rather than debating which flavor of the Strong State we prefer, policing or carceral, domestic or immigration oriented, we need to challenge the heart of its claim to legitimacy to protect communities from violence . . .”).



But, in appreciating the contemporary critiques of the criminal system and the vision of the state or structures of governance in any imagined alternative social ordering, I think it's necessary to drill down on foundational questions: Is the problem social control? Is the problem the state? *Isn't all state power social control?*<sup>209</sup> In a country that “governs through crime,” criminal law operates as the dominant vehicle of social control.<sup>210</sup> So, the cruelty of the system appears inextricable from the project of control. If “social control” is synonymous with or embedded in “governance,”<sup>211</sup> though, it's important to understand its complexity and perhaps its contingency. In his seminal work on the topic, Stanley Cohen observed that social control “is accompanied by many ideas and emotions: hatred, revenge, retaliation, disgust, [but also] compassion, salvation, benevolence or admiration.”<sup>212</sup> A project of “social control,” like a project of governance is complex, implicating winners and losers and questions about who wields power and to what ends.<sup>213</sup>

If the critique of the criminal system is a critique of social control as such, then criminal law exceptionalism should be dismissed out of hand.<sup>214</sup> This approach would involve adopting a conception of social control as “cover[ing] not just the obviously coercive apparatus of the

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<sup>209</sup> To the extent the answer is yes, though, “social control” might still have many meanings embedded in particular political economy or governing ideology. See Hall et al., *supra* note 201, at 201 (“[T]he state plays a critical role in *shaping* social and political life in such a way as to favour the continued expansion of production and the reproduction of capitalist social relations.”); Selections from the Prison Notebooks of Antonio Gramsci 208 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., Int'l Publishers 1971) (“The State is the instrument for conforming civil society to the economic structure . . .”).

<sup>210</sup> Simon, *Governing Through Crime*, *supra* note 127, at 3–5; see also David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 53–73 (2001) (describing the evolution of penal policies and institutions).

<sup>211</sup> See White, *Uncertain Fate*, *supra* note 80, at 803 (describing “[t]he shift from the social welfare system to the criminal justice system as the dominant mode of social control” in the United States).

<sup>212</sup> Cohen, *supra* note 204, at 1.

<sup>213</sup> Cf. Gourevitch, *supra* note 189, at 190 (“[A]lthough labor republican social analysis gave reason to believe that some amount of state coercion, in order to redistribute ownership and control, would be inevitable, we can easily understand why they were chary about taking that step, or at least over-emphasizing it.”).

<sup>214</sup> That is, the critical posture might require a view that “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.” Cohen, *supra* note 204, at 2. Of course, it's also possible that social control (like punishment, or the criminal system) might have a narrower definition that sweeps in fewer institutions of power. See *id.* at 3.

state, but also the putative hidden element in all state-sponsored social policy, whether called health, education or welfare.”<sup>215</sup> The state as apparatus of governance (not just the carceral state or punitive governance) becomes the necessary target of critique. Adopting this frame, we might conclude that a “surrogate relationship” exists “between the social welfare system and the criminal justice system,” as they function to train, discipline, and police the behavior of “the lower classes.”<sup>216</sup> This isn’t to say that we can’t distinguish forms of control or see meaningful distinctions between “the social control dimensions of the social welfare system” and the criminal system.<sup>217</sup> Perhaps a socialistic state, an anti-racist state, or another state embodying some egalitarian agenda would be preferable and would enact forms of social control that distributed better.<sup>218</sup> But institutions of governance would—necessarily—be coercive.<sup>219</sup> And they would be embedded in (and therefore reflective of) whatever pathologies accompanied the dominant political ideology.<sup>220</sup>

To be clear, this is not to suggest that a critique of criminal law or the carceral state must tend towards anarchism or some aspiration to stateless society.<sup>221</sup> Nor is it to suggest that renouncing the state (whatever that might entail as a theoretical and practical matter) would eliminate other

<sup>215</sup> *Id.* at 2.

<sup>216</sup> White, *Uncertain Fate*, *supra* note 80, at 802.

<sup>217</sup> *Id.*; see also Pierre Bordieu, *The Left Hand and the Right Hand of the State*, *Le Monde*, Jan. 14, 1992, *reprinted in* *Acts of Resistance 1* (Richard Nice trans., Polity Press & The New Press 1998) (distinguishing two arms of the state, the “social workers” and the “technocrats”).

<sup>218</sup> And, as David Garland has argued, institutions of punishment are complex, embedded in different logics. David Garland, *Punishment and Welfare: A History of Penal Struggles 255–56* (Quid Pro Books 2018) (1985). “[E]conomic structures,” he suggests, do not “determine penal outcomes but rather . . . penal outcomes are consciously negotiated within the limits that economic, political, and ideological structures impose.” *Id.* at vi. Therefore, “[t]hose who wish to see new forms of penal regulation that accord with the values of social equality, democracy, and welfare cannot expect such forms to develop automatically or in the train of any general move towards socialism.” *Id.* at 255.

<sup>219</sup> Cf. Gourevitch, *supra* note 189, at 15 (“The great evil is dependence on another’s will; the benevolence of that will is irrelevant; servitudes vary in their form and misery but they are servitudes all the same.”).

<sup>220</sup> For example, in White’s account, it is the “social marginality” bred by capitalism. White, *Uncertain Fate*, *supra* note 80, at 830. And, in other left frames, that point of primary concern might be the harms wrought by subordination tied to racism, hetero-patriarchy, ableism, or some other sort of oppressive ideology.

<sup>221</sup> See also *infra* Section III.D (arguing that there might be very different anti-carceral or anti-criminalization projects that might accord with different ideologies and visions of the state).

hierarchies or institutions of coercion or subordination.<sup>222</sup> Rather, it's to emphasize the importance of recognizing what makes the carceral state so objectionable, deciding what concessions are acceptable in replacing it, and stressing that disentangling the penal aspects of the state from other functions of the state might be easier said than done.<sup>223</sup>

### *B. Burdens Exceptionalism Redux*

Traditional criminal law exceptionalism generally did not treat extreme burdens on defendants as a justification for doing away with criminal legal institutions; rather, greater burdens justified greater procedural protections and a different doctrinal landscape than in the civil context.<sup>224</sup> But the underlying rationale of burdens exceptionalism remains compelling when situated in a more radical context: policing, cages, the death penalty, and the extreme deprivations of liberty associated with criminal law are unparalleled in their violence and dehumanizing force. That is, “[b]urdens exceptionalism can be exaggerated, but there is nonetheless good reason to see criminal law’s impositions of physical force and social stigma as distinctive.”<sup>225</sup>

Indeed, there’s a growing move among activists and academics to play up the violence of the criminal system. Accounts from incarcerated and previously incarcerated people are commonly deployed to highlight the cruelty of life “inside.”<sup>226</sup> Left and abolitionist commentators increasingly have adopted rhetoric that reinforces this narrative of exceptional violence and inhumanity: the “criminal justice system” has become the “criminal system” the “criminal legal system” or even the “criminal

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<sup>222</sup> Cf. Graeber, *supra* note 195, at 66–70 (disentangling concepts of rulership, sovereignty, and state).

<sup>223</sup> Cf. Harcourt, *Mass Incarceration*, *supra* note 97, at 57 (“All of these ideas may well involve Faustian bargains, and the dangers associated with each are apparent; but, given our previous experience with deinstitutionalization, there is no reason to believe that it will be possible to reduce prison populations without getting our hands dirty.”).

<sup>224</sup> See *supra* Subsection I.A.1.

<sup>225</sup> Ristroph, *Intellectual History*, *supra* note 32, at 1954 (emphasis omitted); see also White, *Uncertain Fate*, *supra* note 80, at 802 (arguing that the criminal system and “social welfare system” advance similar ends of social control but that the social welfare system does so in a comparatively “soft” manner).

<sup>226</sup> See generally M. Eve Hanan, *Invisible Prisons*, 54 *U.C. Davis L. Rev.* 1185 (2020) (arguing for greater engagement by lawyers, scholars, and judges with the experiences of incarcerated people).

punishment system”;<sup>227</sup> “incarceration” has become “caging”;<sup>228</sup> and the language of a “broken” system has been replaced by the language of a system that is “working the way it is supposed to,” implying that the violence and marginalization of already-marginalized groups is a feature, not a bug, of U.S. criminal law.<sup>229</sup>

Burdens exceptionalism, then, appears to retain intuitive appeal as a part of a larger anti-criminalization, anti-carceral, or abolitionist project: stressing the extreme cruelty of criminal legal institutions makes real and immediate the need to decarcerate and decriminalize.<sup>230</sup> And burdens exceptionalism makes sense: cages are awful; policing is violent; and the specter of the state doing physical violence to individuals should raise concerns for observers of many different political and ideological

<sup>227</sup> See, e.g., Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. Rev. 859, 862 (2012); Bell et al., *Demosprudence of Poverty*, supra note 15, at 1475–76 n.7 (2020); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 Wash. L. Rev. 581, 617 (2009); Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice”*, 15 Ohio St. J. Crim. L. 619, 620 (2018) (“[N]ot only have scholars critiqued the characterization of the criminal justice system as a system, but some scholars and activists have begun to challenge the use of the term ‘criminal justice’ at all. Given the widely articulated concerns about structural inequality and the massive U.S. prison population, is ‘criminal justice’ an accurate or appropriate description of the nation’s model of criminalization, policing, prosecution, and punishment?”); Andrea J. Ritchie, *The Pertinence of Perry to Challenging the Continuing Criminalization of LGBT People*, 37 N.Y.U. Rev. L. & Soc. Change 63, 64 (2013); Dean Spade, *Keynote Address*, 19 Colum. J. Gender & L. 1086, 1094 (2010) (describing problems associated with the “criminal punishment system”).

<sup>228</sup> See, e.g., Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 452 (2018) [hereinafter Akbar, *Radical Imagination*] (“Rather than addressing directly the underlying social, economic, and political problems, we police, cage, and throw away the people who struggle through them.”); End the War on Black People, supra note 3 (“Until we achieve a world where cages are no longer used against our people we demand an immediate change in conditions and an end to all jails, detention centers, youth facilities and prisons as we know them.”); Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 Harv. L. Rev. F. 253, 256 (2015) (describing a system of “massive human arresting and caging”); McLeod, supra note 3, at 1615 (“Across the country, contemporary movements against the violence of policing have taken up the cause of penal abolition, denouncing caging and minutely controlling human beings while re-envisioning democracy in genuinely liberatory terms.”); Kristen Nelson & Jeanne Segil, *The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19*, 98 Denv. L. Rev. 337, 341 (2021) (“[W]e aspire to a future where these human cages cease to exist.”); Roberts, supra note 65, at 12 (“The United States stands out from all nations on Earth for its reliance on caging human beings.”).

<sup>229</sup> See, e.g., Butler, supra note 78, at 1425–26; Herzing, supra note 79, at 193–94.

<sup>230</sup> See infra Section III.E; cf. Benjamin Levin, *Criminal Law in Crisis*, Colo. L. Rev. F. 1 (2020) [hereinafter Levin, *Criminal Law in Crisis*] (arguing that a “crisis” frame invites greater urgency in activism and policy-making).

commitments.<sup>231</sup> So, the move to accept (or at least tolerate) punitive impulses when they don't yield a criminal conviction or a clear deprivation of liberty associated with criminal punishment might appear straightforward and not necessarily surprising or concerning.<sup>232</sup>

The problem, though, is that the obvious logic of critical burdens exceptionalism isn't that obvious. Adopting a Foucauldian frame, we might see a "carceral continuum that diffuse[s] penitentiary techniques into the most innocent disciplines."<sup>233</sup> Following from such a vision of punitiveness and social control as embedded in a range of institutions, much abolitionist and radical commentary has identified the evils of incarceration as inextricable from broader ideologies, politics, and ways of approaching problems.<sup>234</sup> And, as Marie Gottschalk has argued, "[t]he problem of the prison beyond the prison is enormous and growing," as individuals "are ensnared in a web of controls that stretches far beyond the prison gate."<sup>235</sup> Further, the growing literature on collateral consequences blurs the lines between civil and criminal and stresses that ostensibly "civil" penalties or consequences "collateral" to the formal punishment imposed by the state (disenfranchisement, deportation, and the loss of housing, employment, and benefits) might be even more harmful and disruptive than carceral penalties.<sup>236</sup> Particularly when they

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<sup>231</sup> See *infra* Section III.E.

<sup>232</sup> For purposes of this discussion, I omit engagement with the small but important white-collar literature on what it would mean to conceive of non-carceral, but decidedly criminal, punishment for corporations. See, e.g., W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 *Vand. L. Rev.* 905, 910 (2019); W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 *Ohio St. L.J.* 601, 637–41 (2017).

<sup>233</sup> Foucault, *supra* note 17, at 297; cf. also Ben-Moshe, *supra* note 99, at 272 (arguing that post deinstitutionalization, "[t]he literal cage of congregate institutional and hospital was extended through an iron cage of bureaucratic surveillance and mandates").

<sup>234</sup> See *infra* Section III.D; see also Andrew Dilts, *Punishment and Inclusion: Race, Membership, and the Limits of American Liberalism* 227 (2014) ("[T]he harder and more important work is to destroy the structures, the ways of thinking, and the practices . . ."); Kaufman et al., *supra* note 80, at 490 ("Decarceration is not enough; even if expressive punishment decreases, this research shows how the penal state can and likely will remain involved in criminalized people's lives in consequential ways that range from legal to extralegal, surface to submerged, and present to absent.").

<sup>235</sup> Gottschalk, *supra* note 23, at 256.

<sup>236</sup> See, e.g., Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 *Fordham L. Rev.* 2299, 2313 (2017) ("Many of these [collateral] consequences have a far broader reach and impact on individuals' lives than one or two days behind bars."); John P. Gross, *What*

are directed at already-marginalized or race-class subordinated individuals, fines, fees, evictions, expulsions, and firings all do great harm. Indeed, “[f]or many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities.”<sup>237</sup> The burdens of criminal punishment might not necessarily be exceptional, or at least, to the extent they are, they might be exceptional in degree, rather than in kind.<sup>238</sup>

My suggestion, then, is that there is a deep tension between a sort of anti-carceral burdens exceptionalism on the one hand and a capacious understanding of the criminal system and criminal punishment on the other. Going back to the analysis in Part I, if one were to accept formalistic distinctions between civil and criminal, between collateral consequences and punishment, and between state and private action, then it would make sense to accept burdens exceptionalism as a justification for viewing criminal law and criminal legal institutions as uniquely objectionable.<sup>239</sup> There would be a bright line between criminal punishment and all other sanctions, harms, or burdens. Once those distinctions break down, though, so too does the clear logic of burdens exceptionalism.<sup>240</sup>

Commentators have long bemoaned judges’ failure to treat the loss of benefits, housing, or employment as punishment. And a range of commentators—including the American Bar Association Task Force on Collateral Sanctions and Discretionary Disqualification of Convicted

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Matters More: A Day in Jail or a Criminal Conviction?, 22 Wm. & Mary Bill Rts. J. 55, 88 (2013) (“[A] criminal conviction is far more damaging than a day in jail.”).

<sup>237</sup> Chin, *supra* note 16, at 1791.

<sup>238</sup> Cf. Ben-Moshe, *supra* note 99, at 15 (“Incarceration does not just happen in penal locales.”).

<sup>239</sup> Cf. Seidman, *supra* note 31, at 159–60 (“[C]riminal law so stubbornly resist[s] the penetration of realist insights . . . [Because] if the criminal law became realist, it would no longer be the criminal law. Criminal law . . . entails a formalist world view complete with its emphasis on individualism, freedom of choice, and adjudicatory models of justice.”).

<sup>240</sup> But cf. Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 Mich. L. Rev. 1225, 1244 (2022) (reviewing Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration* (2020)) (“[I]t is not clear that these abolitionists believe that issues like housing insecurity, poverty driven by capital, and dismissal from education are circumstances as severe as incarceration. Instead, they may believe prison abolition is only possible, theoretically and practically, with the abolition of other practices and economic ordering. But implicit is a suggestion that incarceration is not an unusual punishment deserving of exceptional treatment.” (emphasis omitted)).

Persons<sup>241</sup>—have suggested that judges should be required to take these consequences into consideration at sentencing.<sup>242</sup> But, if those hardships are understood as punishment (as I think they should be),<sup>243</sup> are the burdens of criminal punishment exceptional? How can non-criminal discipline (by employers, landlords, state regulatory and licensing authorities) that imposes those punishments be distinguished meaningfully from criminal discipline?<sup>244</sup> To be clear, that's not to say that the unmediated violence of incarceration and policing is *the same* as these other harms;<sup>245</sup> rather, it's to say that lines are potentially blurry and the hierarchy of harm and suffering can't necessarily be constructed with the civil/criminal distinction serving as a straightforward categorical divider.<sup>246</sup> Non-criminal alternatives certainly might be "better than jail," but that's a deceptive and dangerously low bar to clear.<sup>247</sup> If our concern is subordination, the most obvious forms of state violence certainly would be particularly concerning; but, focusing only on those forms would obscure more widespread and insidious modes of domination.<sup>248</sup>

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<sup>241</sup> Am. Bar Ass'n, ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons 3 (3d ed. 2004).

<sup>242</sup> See, e.g., Chin, *supra* note 16, at 1830 ("Because civil death serves the function of punishment, and is either punishment in the constitutional sense or its constitutional cousin, it is appropriate that actors in the criminal justice system account for it and use it . . . . Sentencing is designed to impose punishment that is proportionate to the offense and consistent with that imposed on similar offenders. These goals cannot be achieved without evaluating the total package of sentencing facing an individual."); Margaret Colgate Love, Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code, 2015 Wis. L. Rev. 247, 260–71 (examining efforts to incorporate consideration of collateral consequences into the sentencing process); cf. Eisha Jain, Prosecuting Collateral Consequences, 104 Geo. L.J. 1197, 1217–18 (2016) (examining how knowledge about collateral consequences affects the plea-bargaining process).

<sup>243</sup> See Levin, *supra* note 177, at 2305–06 (arguing that collateral consequences are effectively punishment and should be considered by judges and legislators).

<sup>244</sup> Cf. Sandra G. Mayson, Collateral Consequences and the Preventive State, 91 Notre Dame L. Rev. 301, 361 (2015) (arguing that collateral consequences are best understood not as punishment but as an alternative form of social control grounded in predictions of future dangerousness).

<sup>245</sup> See Ristroph, Intellectual History, *supra* note 32, at 1954 (arguing that burdens exceptionalism is more defensible than other forms of criminal law exceptionalism).

<sup>246</sup> See Kaufman et al., *supra* note 80, at 490 ("Today's penal state operates in nuanced ways and through intermediary sites to control criminalized people in a host of overt and obscured ways. The task moving ahead is not merely to displace punishment and control outside of the prison walls; if the nuance in how the penal state operates is overlooked, any proposed solutions will fail.").

<sup>247</sup> See Zatz, *supra* note 62, at 214–15.

<sup>248</sup> See Rana, *supra* note 128, at 51–52.

*C. The Public/Private Distinction*

Shifting away from the state and questions of state violence, a certain amount of the punitiveness or “punishment” described in Part II easily could be classified as “private” rather than “public.”<sup>249</sup> And, at first blush, that distinction might be significant: if much of what’s wrong with the criminal system has to do with institutions of state violence (police, prisons, etc.), then what’s wrong with non-state institutions imposing some sort of punishment on someone who has caused harm or poses an unacceptable risk?<sup>250</sup> The reliance on a public/private distinction here should be worrying for three reasons (beyond the broader concerns about the distinction as theoretically incoherent)<sup>251</sup>: (1) it understates private power and the significance of “private” punitive action; (2) it reinscribes burden exceptionalism; and (3) it understates the potential feedback loop between “private” and “public” punishment.

First, the distinction, in emphasizing the importance and essential character of state violence and criminal punishment, risks underplaying the significance of private actors and punitive action that hardly could be classified as formal “criminal punishment.” Certainly, blurring a line between private discipline and formal state punishment might be unwelcome to certain punishment theorists. In one classic formulation, “What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.”<sup>252</sup> And, in most traditional accounts of criminal law, only the state—acting on behalf

<sup>249</sup> See *supra* Section II.C.

<sup>250</sup> What constitutes “harm” or “acceptable risk” would be an important and difficult question to answer even if the public/private distinction weren’t otherwise problematic. See, e.g., Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 *J. Crim. L. & Criminology* 109, 119 (1999) (describing “a cacophony of competing harm arguments without any way to resolve them”); Jocelyn Simonson, *Bail Nullification*, 115 *Mich. L. Rev.* 585, 614–15 (2017) (discussing fraught conceptions of “community safety” and “risk” in the bail context).

<sup>251</sup> See, e.g., Roberto Mangabeira Unger, *Law in Modern Society* 192–93 (1976); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1349 (1982) (arguing that the public/private distinction—like other liberal legalist distinctions—is incoherent); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 *U. Pa. L. Rev.* 1358, 1415 (1982) (“[N]o private ordering system is autonomous, or, to put it another way, . . . the notion of a public/private distinction is incoherent.”); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reforms*, 96 *Harv. L. Rev.* 1497, 1499–501 (1983).

<sup>252</sup> Hart, *supra* note 73, at 404.



of “the people”<sup>253</sup>—could advance these ends and carry out this collective condemnation.<sup>254</sup>

But, once again, that understanding of criminal law and “punishment” falls afoul of contemporary concerns about collateral consequences and broader logics of exclusion.<sup>255</sup> Further, it disregards the way in which private actors’ disciplinary authority and disciplinary actions often purport to reflect public opinion. That appeal to public desire for accountability is perhaps most obvious in the contexts of gender-based violence, but it appears elsewhere. And, regardless, there remains a robust school of thought that suggests that private mechanisms of “justice,” particularly tort law, reflect a desire to right wrongs and advance broader community visions of moral desert.<sup>256</sup> Put simply, private actors often purport to or are seen as advancing public ends when they discipline or enact punishment.<sup>257</sup> Further, the suggestion that private punitive action is less concerning also appears to rest on an overly formalistic distinction between private and public that understates the vast power held by private actors. The state certainly is powerful; but so are schools, bosses, and a wide range of corporate entities.<sup>258</sup>

Second, burdens exceptionalism appears to underpin much of the significance of the public/private distinction here. In a system that has rejected private prosecutions and—at least nominally<sup>259</sup>—rejected

<sup>253</sup> But see Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 *Colum. L. Rev.* 249, 251 (2019) (arguing that this vision of criminal procedure ignores that criminal defendants and opponent of punishment are also “the people”).

<sup>254</sup> See Mayson, *supra* note 10, at 452–54 (describing this conception of criminal law); cf. Dubber, *supra* note 206, at 192 (“Other institutions, even individuals, can affect, minimize, or maximize others’ or their own welfare, but only the normative state manifests the idea of right.”).

<sup>255</sup> Cf. Anderson, *supra* note 189, at 39, 56 (comparing states’ and employers’ power to “exile” people under their control).

<sup>256</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* 1 (2020) (arguing that tort law is best understood as a mechanism for righting wrongs).

<sup>257</sup> See generally Levin, *Criminal Employment Law*, *supra* note 177, at 2316 (arguing that private employers effectively have been “deputized” as agents of the criminal system).

<sup>258</sup> See, e.g., K. Sabeel Rahman, *Infrastructural Regulation and the New Utilities*, 35 *Yale J. on Reg.* 911, 916 (2018) (“For these Progressive Era legal thinkers, the problem with such private power was that these firms increasingly exercised a kind of quasi-sovereign power, yet were not subject to the kinds of checks and balances that the law imposed on public state actors.”); Cohen, *Property and Sovereignty*, *supra* note 36, at 14.

<sup>259</sup> See, e.g., Tamar R. Birckhead, *The New Peonage*, 72 *Wash. & Lee L. Rev.* 1595, 1607–08 (2015) (“[T]he contemporary ‘justice tax,’ faced by [court-involved individuals] . . . ultimately has the same societal impact as the post-Civil War practice of peonage: both function to maintain an economic caste system.”).

debtors' prisons, the state retains a monopoly not only on violence, but also on the institutions of formal criminal punishment.<sup>260</sup> A landlord can evict, and a boss can fire, but neither of them can incarcerate.<sup>261</sup> Again, these observations are fair as far as they go.<sup>262</sup> But, for the reasons outlined in the previous Section, a capacious account of the criminal system and cultural punitiveness should require us to reject (or at least be extremely wary of) this formalist distinction. And to the extent we are concerned about domination and powerful actors subordinating powerless ones, a formalist account of punishment that focuses exclusively on the state misses much.<sup>263</sup>

Finally, even if my other concerns about the public/private distinction leave some readers unconvinced, it's worth considering the ways in which private punitive action might implicate public punishment (i.e., formal "criminal law"). If there truly were sphere separation such that private action didn't implicate the state or involve communication between public and private actors,<sup>264</sup> perhaps some of the exceptionalist arguments traced above might do more work.<sup>265</sup> If private punishment actually supplanted criminal punishment, there might be good reasons to worry,<sup>266</sup>

<sup>260</sup> See, e.g., Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 *Harv. J.L. & Gender* 237, 243 (2008) (discussing the distinction between private rights of self-defense and the state's monopoly on violence). But see Guyora Binder, *Victims and the Significance of Causing Harm*, 28 *Pace L. Rev.* 713, 726 n.48 (2008) ("The state's monopoly on violence is never complete, even in theory. Persons will sometimes be privileged to use force in defense of their own or others' entitlements, albeit as agents of the state.").

<sup>261</sup> Anderson, *supra* note 189, at 63 (arguing that employers act as "private governments," but conceding that they are not "as powerful as states"). But see Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 *N.Y.U. L. Rev.* 144, 150 n.10 (2003) ("One also cannot distinguish between the State and private entities on the ground that only the former has a monopoly on violence. . . . [T]he fact that private organizations cannot themselves bring violence to bear on their subjects does not distinguish them from many organs of the State . . .").

<sup>262</sup> See Niko Kolodny, *Help Wanted: Subordinates*, *in* Anderson, *supra* note 189, at 99, 107 (distinguishing between harm done by employers and harm done by the state).

<sup>263</sup> Cf. Rana, *supra* note 128, at 51 ("The essence of slavery lay not in actual force but rather in living permanently under the cloud of possible compulsion and subjection to the arbitrary will of another. . . . [L]iberty was not simply the absence of coercion but in fact required independence from the very possibility of external control.").

<sup>264</sup> Cf. sources cited *supra* note 251 (critiquing this vision of a clean split between "public" and "private").

<sup>265</sup> See *supra* Section II.B.

<sup>266</sup> For example, the specter of private prosecution might conjure up images of prosecutions that raise distributive concerns (i.e., wealthy or politically powerful victims effectively mobilizing the prosecutorial arm of the state to advance their interests against less-powerful defendants).

but the fear of a vicious cycle between public and private wouldn't be one of them.<sup>267</sup> However, private punishment need not supplant formal criminal punishment. Schools, employers, and other actors who enact discipline aren't precluded from cooperating with prosecutors, sharing evidence, or helping to ensure that a defendant is subject to state violence.

In the public context, this dynamic is a defining feature of white-collar enforcement, where the line between civil enforcement and criminal prosecutions is often fuzzy. Potential civil violations often involve the same conduct as potential criminal ones,<sup>268</sup> and civil regulatory enforcement actions frequently accompany (or are accompanied by) criminal prosecutions,<sup>269</sup> leading to complications of the procedural protections afforded criminal defendants.<sup>270</sup> *Qui tam* suits often provide the groundwork for later state prosecutorial action, effectively privatizing aspects of the criminal process.<sup>271</sup> And, indeed, the Supreme Court has recognized the possibility that the government might use civil

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<sup>267</sup> On the tension between public and private prosecutions, see generally I. Bennett Capers, *Against Prosecutors*, 105 Cornell L. Rev. 1561 (2020).

<sup>268</sup> See, e.g., *United States v. Ward*, 448 U.S. 242, 250 (1980) (addressing overlapping civil and criminal sanctions); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. Pa. L. Rev. 1295, 1327–28 (2001) (“Parallel statutory regimes providing civil and criminal sanctions for essentially the same conduct exist in virtually every area of white-collar wrongdoing, including health care fraud, environmental harms, workplace safety, and securities law.” (footnotes omitted)); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1166 (1991) (“With white collar crime, however, the line between legitimate and illegitimate behavior, or civil and criminal transgressions, is unclear, overlapping, and often fluctuating.”).

<sup>269</sup> See, e.g., Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 Vand. L. Rev. 573, 615–17 (1994) (describing this dynamic); Craig H. Zimmerman, *Parallel Criminal and Civil Proceedings*, 25 Am. Crim. L. Rev. 522, 522 (1988) (same).

<sup>270</sup> See, e.g., Hughes, *supra* note 269, at 584 (“[B]reaches of regulatory schemes are for these reasons increasingly likely to lead to a cluster of parallel civil and criminal investigations and legal processes. This striking development has called into question the restriction of constitutional guarantees to procedures that are initiated by traditional criminal forms of charging, which depend on statutory classifications that appear increasingly more formal and less functional.” (footnotes omitted)).

<sup>271</sup> See, e.g., Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 730 (2004); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1272 (2012) (noting that “DOJ’s ability to intervene in qui tam suits” allows it to take “‘primary’ control over their prosecution”).

investigations as a means of teeing up or facilitating criminal prosecutions.<sup>272</sup>

A similar dynamic emerged in the context of the #MeToo movement, where ostensibly non-criminal actions (e.g., outing people on social media for harassment or abuse; employers firing or disciplining alleged abusers or harassers) ultimately led to criminal prosecution.<sup>273</sup> It may be that accusers didn't or don't intend to trigger the state violence of the criminal law, but it's not clear how one would go about insulating private "accountability" in this way from the institutions of public enforcement.

#### *D. The Scope of Criminal Law Skepticism*

Lurking beneath many contemporary critical conversations about U.S. criminal law is an enormously important but often unstated question: *What's actually wrong with the criminal system?*<sup>274</sup> There's a temptation to assume that critiques and most critical voices have some shared first-principles commitments and objections—that there is a "we" when it comes to criminal law skepticism, abolition, and/or decarceration. As a general matter, though, I think there's no such consensus—the movements opposing the status quo of U.S. punishment are diverse and reflect a wide range of ideological commitments, visions, and critiques.<sup>275</sup>

And, in some sense, understanding those underlying fissures within the real and imagined movements for reform, transformation, or abolition should be critical to understanding criminal law exceptionalism. Put differently, whether criminal law exceptionalism is a problematic, desirable, or even necessary component of a decarceration project depends on the nature of the decarceration project.

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<sup>272</sup> See *United States v. Kordel*, 397 U.S. 1, 11–12, 12 nn.23–27 (1970). The *Kordel* Court offers a lengthy list of citations to lower court cases in which defendants had argued that the government had manipulated the civil process as an end run around procedural protections afforded in the criminal context. See *id.*

<sup>273</sup> See generally Gruber, #MeToo and Mass Incarceration, *supra* note 177 (tracing the relationship between #MeToo activism and punitive criminal policies).

<sup>274</sup> See generally Levin, Consensus Myth, *supra* note 4 (examining different answers to this question); see also Akbar, Radical Imagination, *supra* note 228 (identifying distinct radical and liberal answers to this question and to the follow-up question of how to go about addressing the system's harms).

<sup>275</sup> See, e.g., Akbar, Radical Imagination, *supra* note 228 (describing different visions of how to respond to the criminal system's injustices); Amy J. Cohen, Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States, 104 *Minn. L. Rev.* 889, 889–90 (2019) (same); Eaglin, To "Defund" the Police, *supra* note 61, at 124 (same); Levin, Consensus Myth, *supra* note 4 (same).

Throughout this Article, I generally have focused on left critiques of the criminal system that focus on the distributive consequences of criminal law and the criminal system's role in creating and sustaining racial and socioeconomic inequality. I have made this choice in large part because that frame—or that constellation of critiques, movements, and political projects—strikes me as ascendant in the contemporary political moment both inside and outside of the legal academy. This rhetoric defines the protests and uprisings of the Black Lives Matter era. And, the nascent skeptical and abolitionist turns in legal scholarship reflect a similar set of moves.<sup>276</sup> Of course, there are other critiques and political projects hostile to the carceral state: conservative and libertarian de-regulatory projects; civil libertarian efforts aimed at shielding individuals from an abusive state; and other radical or abolitionist projects focused on the fundamental inhumanity of cages and state violence from a deontological, rather than a distributive, perspective.<sup>277</sup>

Appreciating the distinction among these projects, critiques, and movements should be an essential component of our moment in “criminal law skepticism.” From debates about how to address police violence to disputes about what sort of “bail reform” is desirable, theoretical and ideological splits yield disparate policy preferences. And those splits occur even among activists and commentators often lumped together. Despite the rise of “abolition” in public discourse, there is disagreement about what abolition means or requires. As longtime abolitionist organizers Kaba and Herzing argue, clarity about disagreements matters because “principles matter. One may advocate for radical reform of surveillance, policing, sentencing, and imprisonment without defining oneself as a prison abolitionist.”<sup>278</sup> Disagreements *across* movements or ideological camps should come as no surprise. Disagreements *within* a movement are inevitable. And understanding the tensions within and across movement and ideological camps should be a key component of any path forward.

For example, Paul Butler has suggested that “[a]ctivists should consider how much of their focus should be on improving the criminal justice system versus ending white supremacy. It is possible to do the

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<sup>276</sup> See, e.g., Ben-Moshe, *supra* note 99, at 111 (describing abolition as opposed “not only to physical spaces of containment but to particular logics and discourses”).

<sup>277</sup> On these distinctions and different visions of abolition or decarceration, see generally Langer, *supra* note 6.

<sup>278</sup> Kaba & Herzing, *supra* note 117, at 134.

former without the latter.”<sup>279</sup> While I might suggest that it would be possible to re-craft a brutal criminal system that doesn’t advance white supremacy, Butler’s framing of this choice or tension strikes me as important. There is a temptation in discussions of social change (particularly in left, radical, and even progressive circles) to imagine that all of one’s commitments point in the same direction and never stand in tension. Recognizing and acknowledging those tensions requires a reckoning with priorities, goals, and acceptable concessions along the way.

For purposes of this Article, then, the distinction that Butler draws is critical. Is the project *ending criminal punishment*, or is the project *ending the inequities and punitiveness associated with the U.S. criminal system*? Contemporary U.S. abolitionist movements and activists tend to frame their political project as focused on a constellation of institutions much broader than jails, prisons, and policing.<sup>280</sup> Ruth Wilson Gilmore, co-founder of Critical Resistance, describes abolition as being “about abolishing the conditions under which prison became the solution to problems rather than abolishing the buildings we call prisons.”<sup>281</sup> And, in arguing for the transformative potential of abolitionist organizing, Dean Spade explicitly rejects criminal law exceptionalism:

Prison abolition activists have offered an important analysis of how the norms and values that uphold practices of mass imprisonment in the US also impact the interpersonal and activist realms. 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.<sup>282</sup>

Similarly, in their *Manifesto for Abolition* and introduction to *Abolition: A Journal of Insurgent Politics*, the Abolition Collective argues:

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<sup>279</sup> Butler, *supra* note 78, at 1470.

<sup>280</sup> See, e.g., Kaufman et al., *supra* note 80, at 490–91 (collecting sources).

<sup>281</sup> Haymarket Books (@haymarketbooks), Twitter (May 30, 2020, 8:46 AM), <https://twitter.com/haymarketbooks/status/1266742872549797888> [<https://perma.cc/S8XZ-94TZ>]; see also Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 Soc. Just. 212, 215 (2000) (“The call for prison abolition urges us to imagine and strive for a very different social landscape.”).

<sup>282</sup> Spade, *supra* note 227, at 1107.

‘Abolition’ refers partly to the historical and contemporary movements that have identified themselves as ‘abolitionist’: those against slavery, prisons, the wage system, animal and earth exploitation, racialized, gendered, and sexualized violence, and the death penalty, among others. But we also refer to *all* revolutionary movements, insofar as they have abolitionist elements—whether the abolition of patriarchy, capitalism, heteronormativity, ableism, colonialism, the state, or white supremacy. Rather than just seeking to abolish a list of oppressive institutions, we aim to support studies of the entanglement of different systems of oppression, not to erase the tensions between different movements, but to create spaces for collective experimentation with those tensions.<sup>283</sup>

That is, if the underlying targets of critique and activism are punitive logics and structures of “exile” and subordination, then the critical project necessarily needs to reach (and does reach) beyond cages and the formal institutions of criminal law.<sup>284</sup> If the underlying target of critique and activism is just the criminal system as such, I’m still not at all sure that exceptionalism makes sense,<sup>285</sup> but exceptionalism certainly is more plausible if the project of criminal law skepticism is understood as an exceptional critique of an exceptional set of institutions.

Put slightly differently, it’s not clear to me that being opposed to criminalization and criminal punishment necessitates embracing some broader theoretical or political project touching on a host of non-criminal institutions.<sup>286</sup> But if the critiques of the criminal system become as sweeping as they increasingly have in many corners, they *do* cut more broadly and—if taken seriously—do appear to necessitate larger, transformative projects and politics beyond the realm of criminal legal

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<sup>283</sup> Manifesto for Abolition, Abolition: A J. of Insurgent Pol., <https://abolitionjournal.org/frontpage> [<https://perma.cc/6TAK-SBGM>] (last visited Aug. 5, 2022).

<sup>284</sup> See Ben-Moshe, *supra* note 99, at 274 (“[C]losure of carceral institutions . . . is a necessary but not sufficient action on the road to abolition.”).

<sup>285</sup> As I have argued throughout this Article, criminal law, criminal punishment, and the criminal system all are nebulous concepts. Unless we are prepared to accept formalistic definitions of each, it is difficult to disentangle criminal law from a host of other legal, political, and social institutions. See Foucault, *supra* note 17, at 297 (defining the “carceral archipelago”). So, addressing the injustices of the criminal system would appear to necessitate stepping outside of the confines of “criminal law.”

<sup>286</sup> See Levine, *supra* note 240, at 30–38 (asking “how wide should the abolitionist stance be” when it comes to opposing non-criminal institutions).

institutions.<sup>287</sup> “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 anti-prison movement to reverse it.”<sup>288</sup>

### *E. Instrumental Exceptionalism*

The final explanation might be the most straightforward: perhaps exceptionalism retains purchase in critiques of the criminal system because it allows for easier or more effective arguments and advocacy. Perhaps some exceptionalist critiques don’t reflect a belief that criminal law is *truly* exceptional; they reflect a considered judgement that criminal law exceptionalism offers a vehicle for introducing broader arguments for political and social change.

Exceptionalism is an effective—and often necessary—rhetorical frame in advocacy.<sup>289</sup> “[T]he language of crisis, disruption, and exceptionality provides a hook and a means of shining light on the darkest corners of criminal law. It also allows for and often appears to necessitate an emergency response.”<sup>290</sup> A crisis frame that suggests an exception to the (acceptable or desirable) norm might prove valuable for activists seeking to upset or unsettle “the pre-existing system of social relations.”<sup>291</sup>

In the realm of criminal law, attorneys and activists have deployed this frame frequently: from the Innocence Movement to advocacy to end the death penalty, life without parole, and solitary confinement, claims of the system’s injustice are often framed as being exceptionally bad.<sup>292</sup> The

<sup>287</sup> Although, the exact contents or contours of any such project or politics do not strike me as natural or inevitable.

<sup>288</sup> Simon, *Carceral State*, supra note 12, at 499–500.

<sup>289</sup> See Levin, *Criminal Law in Crisis*, supra note 230, at 13 (collecting examples).

<sup>290</sup> *Id.* at 14; see also Ristorph, *Intellectual History*, supra note 32, at 1951 (“The language of crisis has obvious rhetorical appeal. It has long been used to grab readers’ or listeners’ attention in contexts far beyond criminal law.”)

<sup>291</sup> Stuart Hall & Bill Schwarz, *State and Society, 1880-1930*, in Stuart Hall, *The Hard Road to Renewal: Thatcherism and the Crisis of the Left* 95, 96 (1990) (“Crises occur when the social formation can no longer be reproduced on the basis of the pre-existing system of social relations.”); see also Gilmore, supra note 8, at 54 (“Crisis is not objectively bad or good; rather, it signals systemic change whose outcome is determined through struggle.”).

<sup>292</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) (“In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.”); Brandon L. Garrett, *Judging Innocence*, 108 *Colum. L. Rev.* 55, 73 (2008) (describing “unique former convicts” who were exonerated after post-conviction DNA testing); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 *J. Crim. L. & Criminology* 587, 610 (2005) (describing



incremental, death-by-a-thousand-cuts approach that advocates have pursued often relies on a set of iterative exceptionalism claims.<sup>293</sup> The argument that life without parole for juveniles should be unconstitutional because it is exceptionally cruel (because juveniles are exceptional) leads to the argument that life without parole for anyone should be unconstitutional (because life without parole is exceptional).<sup>294</sup> Death penalty abolitionists—by definition—believe that the death penalty is wrong across the board, but that need not (and historically has not) stopped many of them from arguing that it would be exceptionally objectionable for the state to execute an innocent person, a person with developmental disabilities, or a person whose sentence reeks of racial bias.<sup>295</sup>

Similarly, in order to succeed in court, criminal defendants and victims of state violence often must frame their cases as exceptional. To defeat qualified immunity,<sup>296</sup> to assert ineffective assistance of counsel,<sup>297</sup> to make out a successful habeas claim, or argue that a trial or sentencing judge erred, litigants often must be able to demonstrate that some institutional actor behaved in a way that reflected a significant deviation from the norm.

On a grand scale, then, advocates and activists might argue that criminal law and criminal punishment are exceptional not because they really are distinct from other institutions of law and society, but because advocates and activists have to start somewhere in advocating for social

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the Supreme Court's focus on innocence as one of the "few and narrow exceptions" available to individuals seeking to have their convictions vacated).

<sup>293</sup> See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *Harv. L. Rev.* 355, 410 (1995) [hereinafter Steiker & Steiker, *Second Thoughts*] (describing and critiquing this litigation strategy).

<sup>294</sup> See, e.g., Eva Rodriguez, *Bryan Stevenson Savors Victory in Supreme Court Ruling on Juvenile Life Sentences*, *Wash. Post.* (June 25, 2012), [https://www.washingtonpost.com/lifestyle/style/bryan-stevenson-savors-victory-in-supreme-court-ruling-on-juvenile-life-sentences/2012/06/25/gJQA8Wqm2V\\_story.html](https://www.washingtonpost.com/lifestyle/style/bryan-stevenson-savors-victory-in-supreme-court-ruling-on-juvenile-life-sentences/2012/06/25/gJQA8Wqm2V_story.html) [https://perma.cc/5TC5-BMCW] ("Children are different than adults. We recognize that children need extra protection.").

<sup>295</sup> See generally Steiker & Steiker, *Second Thoughts*, supra note 293 (describing and critiquing these litigation strategies).

<sup>296</sup> See, e.g., *Harris v. Bd. of Educ.*, 105 F.3d 591, 595 (11th Cir. 1997) ("In all but the most exceptional cases, qualified immunity protects government officials performing discretionary functions from the burdens of civil trials and from liability for damages.").

<sup>297</sup> *United States v. Rodriguez*, 675 F.3d 48, 56 (1st Cir. 2012) ("It is only in exceptional cases when there are no 'critical' facts in dispute and the record has been sufficiently developed that we will address an ineffective assistance of counsel claim on direct appeal.").

change.<sup>298</sup> 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.<sup>299</sup> But it might offer a powerful illustration of all that’s wrong or objectionable about contemporary society.<sup>300</sup> The violence and injustice are on the surface.<sup>301</sup> One need not accept the traditional exceptionalisms described in Part I in order to recognize that criminal law has a certain public resonance.<sup>302</sup>

Further, even if criminal law isn’t exceptional in theory or practice, it might be exceptional as a vehicle for understanding inequality and subordination.<sup>303</sup> It’s telling that—in a moment of drastic inequality across axes of race and class—the vernacular of the “New Jim Crow” has come to refer specifically to criminal law and mass incarceration.<sup>304</sup> And,

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<sup>298</sup> Cf. Levine, *supra* note 240, at 33–37 (expressing skepticism about linking prison abolition to projects of abolishing “punitive logics” in non-criminal arenas and arguing that is “possible that an abolitionist message suffers when its message, ‘prison and jails are exceptionally dehumanizing,’ lacks clarity”).

<sup>299</sup> See *supra* Section III.D.

<sup>300</sup> Cf. James Forman, Jr., *Locking Up Our Own: Crime and Punishment in Black America* 8 (2017) (describing indigent criminal defense as “the unfinished work of the civil rights movement”).

<sup>301</sup> See Angela Harris, *Governing Through Sex Crimes?*, JOTWELL (Oct. 22, 2010), <https://crim.jotwell.com/governing-through-sex-crimes/> [https://perma.cc/A9YT-RJ3A] (“The problem with criminal law and procedure for a critical thinker . . . is that it arrives pre-deconstructed, so to speak. . . . American criminal law and procedure, like American Indian law, was driven by extra-doctrinal pressures that were painfully obvious to all.”); Austin Sarat, *Examining Assumptions: An Introduction to Punishment, Imagination, and Possibility*, in *The Punitive Imagination: Law, Justice, and Responsibility* 1, 1 (Austin Sarat ed., 2014) (“[M]any have remarked that how a society punishes reveals its true character. Punishment then tells us who we are. The way a society punishes demonstrates its commitment to standards of judgment and justice, its distinctive views of blame and responsibility, its understandings of mercy and forgiveness, and its particular ways of responding to evil.” (footnotes omitted)).

<sup>302</sup> See Bibas, *supra* note 75, at xvii (2012) (“In other areas of government, rational apathy and faith in expertise leads voters to defer to experts . . . . In contrast, many ordinary citizens do not defer to criminal justice experts but show passionate interest in how insiders handle criminal cases.”).

<sup>303</sup> See *id.* at xviii.

<sup>304</sup> See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); see also Paul Butler, *One Hundred Years of Race and Crime*, 100 *J. Crim. L. & Criminology* 1043, 1047 (2010) (“One narrative is that mass incarceration is the ‘New Jim Crow.’ Under this analysis, slavery, de jure segregation, and now mass incarceration serve many of the same functions and have many of the same effects.” (footnotes omitted)); Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 *B.U. L. Rev.* 1185, 1193–94 (2013) (tracing this history); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87

in recent years, the catalyst for Black-led uprisings and widespread reckonings with racial injustice time and again has been police violence against civilians.<sup>305</sup> Academic parsing aside, maybe it just makes sense to use criminal law as a point of emphasis for efforts to reform, transform, or abolish U.S. institutions of injustice. Appreciating the violence and inequality baked into a host of practices and structures of governance is easier when the stakes are so high: policing, caging, and killing don't require explication or unpacking; they evoke visceral and emotional responses.<sup>306</sup> And, tying abolition of criminal legal institutions might risk "muddling" the clarity of an anti-carceral message or movement.<sup>307</sup>

Yet there is good reason to remain wary of instrumental criminal law exceptionalism. Framing criminal law as uniquely problematic risks legitimating inequity, injustice, and subordination in non-criminal legal institutions.<sup>308</sup> By carving out one particular corner of the legal system as the locus of All That Is Wrong, this tactic risks entrenching other deeply

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N.Y.U. L. Rev. 21, 25–27 (2012) (tracing the history of the "New Jim Crow" analogy). But cf. Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 *Harv. L. Rev.* 1575, 1599 (2019) (critiquing the radical potential of the Jim Crow analogy).

<sup>305</sup> See, e.g., Elizabeth Hinton, *America on Fire: The Untold History of Police Violence and Black Rebellion Since the 1960s*, at 282–304 (2021) (tracing contemporary uprisings to Black rebellions of the 1960s and tying all of them to racist policing); Akbar, *Abolitionist Horizon*, supra note 3, at 1814 (2020) (discussing uprisings in the summer of 2020); Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, *N.Y. Times* (Nov. 25, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<https://perma.cc/7Q7H-QXGZ>]; Claudia Rankine, 'The Condition of Black Life Is One of Mourning', *N.Y. Times Mag.* (June 22, 2015), <http://www.nytimes.com/2015/06/22/magazine/the-condition-of-black-life-is-one-of-mourning.html> [<https://perma.cc/QJS6-D3H4>]; cf. Daniel Farbman, *It Is Not an Era of Repose: How the Legal System Personalizes Injustice and Sparks Protest*, 12 *L., Culture & Human.* 172, 173 (2016) ("[T]he flashpoint for a national wave of outrage and action was not the moment of violence, but rather the moment when the legal process sanctioned that brutality by refusing to even contemplate punishment.").

<sup>306</sup> See Harris, supra note 301. See generally Foucault, *Discipline and Punish*, supra note 17 (describing the violence at the heart of criminal law and punishment).

<sup>307</sup> Levine, supra note 240, at 35; see also *id.* at 6–7 ("Does connecting the dehumanization of imprisonment to other potentially unfair punitive responses, whether civil or administrative and public or private, risk losing the clarity of the prison abolitionist movement's narrative and sense of crisis?").

<sup>308</sup> By legitimation, I refer to the Gramscian concept. See, e.g., 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, 398 (1997); *Selections from the Prison Notebooks of Antonio Gramsci* 246–47 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *Yale L.J.* 2176, 2189 (2013); Steiker & Steiker, *Sober Second Thoughts*, supra note 293, at 429–32.

flawed institutions and sending the message that they are better and not susceptible to the same or similar critiques.<sup>309</sup> While treating criminal law as exceptional in its brutality or in its reflection of race-class subordination might invite greater public outrage and attention, it also might send the message that other violent and authoritarian institutions are “normal” or that punitive logics are confined to one class of actors and institutions.<sup>310</sup>

To the extent that criminal law exceptionalism operates as an advocacy strategy, then, it can and should be weighed against competing strategies. Indeed, much abolitionist writing and organizing reflects the struggle over how to frame what is to be abolished and how to frame an opposition to cages as a component of a broader liberationist political project. And, even considering the legitimation concerns described above, it is certainly possible that a cost-benefit (or, perhaps, distributive)<sup>311</sup> analysis would militate in favor of retaining an exceptionalist frame for a decidedly non-exceptionalist project. I’m not sure, and I imagine that such a calculus would vary dramatically depending on the context.<sup>312</sup>

But embracing, or at least recognizing the potential utility of, an exceptionalist frame also necessitates acknowledging when and where such exceptionalism makes sense or is necessary. Instrumental exceptionalism ultimately might force us to confront tensions between various projects and roles—i.e., which exceptionalist arguments might I make in a brief on behalf of a client, which might I make if advocating for a policy change, which might I make in trying to convince a friend, and which might I make in writing this Article.

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<sup>309</sup> Or, at least, this sort of legitimation might be concerning if the goal of academic and activist energy is addressing institutions beyond the criminal system. See *supra* Section III.D.

<sup>310</sup> See Ristroph, *Intellectual History*, *supra* note 32, at 1953 n.10 (describing the way that exceptionalism implies a “normal”); cf. Giorgio Agamben, *State of Exception* 31 (2003) (Kevin Attell trans., Univ. of Chi. Press 2005) (“Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation.”).

<sup>311</sup> See generally Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *Fordham L. Rev.* 3211, 3213 (2015) (describing distributional approaches to resolving questions of criminal policy).

<sup>312</sup> Cf. Levin, *Criminal Law in Crisis*, *supra* note 230, at 16 (noting that the crisis frame was useful as a means for saving the lives of incarcerated people during a pandemic).

## CONCLUSION

In some sense, criminal law *is* exceptional. To deny its exceptionality would be to deny the violence of cages and police and the dehumanizing force of the carceral state. But, appreciating the cruelty of the criminal system and its role in U.S. political economy should require us to confront the limits of its exceptionality. Just as the boundaries of the criminal system itself are uncertain,<sup>313</sup> so too are the boundaries of the critiques of the criminal system. Ultimately, then, my goal is not to downplay the defining features of the carceral state or their glaring cruelty. Rather, I have argued that distributional inequities, punitive impulses, and authoritarian tendencies that critics have identified as hallmarks of the carceral state are not outliers. Criminal law is the tip of the iceberg, the case in point, the symptom that is so painful that it can't be ignored.

But what underlying disease do criminal law and the injustices of mass incarceration indicate? Depending on the critical account, the disease might be the inequities of capitalism, the subordination of racial hierarchy and heteropatriarchy, or perhaps just a lack of empathy and a desire to see suffering. Regardless, I have argued that it's important to understand the power, but also the limits, of critiques of the U.S. criminal system. The system's remarkable violence and inhumanity have allowed for vibrant activism and academic spaces of contestation. Yet the violence and inhumanity of the system also risk inviting surface-level condemnation and obscuring deeper problems and deeper critiques. If the problems of criminal law transcend cages, handcuffs, and the most egregious forms of state violence, then critiquing criminal law should require critics of the carceral state to ask how far we are willing to go. What would it mean to abolish punitiveness and coercion? How could the state intervene without replicating the violent subordination of mass incarceration? Is there a place for the state at all? And what private or non-criminal subordination would we accept in the name of "accountability" and "justice"?<sup>314</sup> These are hard questions. But we'll need to ask and answer them if we hope to move beyond a society that relies on criminal law as its one-size-fits-all answer and that treats "punishment" and "justice" as synonymous.

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<sup>313</sup> See *supra* note 15 and accompanying text.

<sup>314</sup> See *supra* note 194 and accompanying text.