

Disentangling Safety and Accountability in Criminal Justice Policy

Benjamin Levin*

ABSTRACT: In this Article, I argue that the U.S. criminal system and debates about criminal justice reform reflect an elision of two largely distinct social functions: ensuring public safety and imposing accountability for harmful conduct. Despite deep disagreement about the specifics, most commentators seem to accept that these are both important social functions. Abolitionists claim that the criminal system doesn't keep people safe and provide accountability. Instead, it harms—and perhaps is meant to harm—people from marginalized communities and protects the interest of socially dominant groups. Reformers contend that the criminal system can and should serve the safety or accountability interests, but it currently doesn't. Meanwhile, defenders of the status quo claim that criminal legal institutions serve these two core state functions (and perhaps others).

I argue that it's a mistake to imagine that the same institutions could or should fulfill both of those functions. I contend that the contemporary U.S. criminal system often relies on a foundational problem: entangling the safety function and the accountability function. Imposing some degree of stigma might be a desirable feature of an accountability-based system, but is it actually necessary in a system focused on public safety? Similarly, forms of surveillance and social control might be defensible features of a system focused on public safety, but are they actually necessary to ensure accountability? The answer to both of these questions should be no. But with criminal legal institutions understood as advancing both functions, we are left with a troubling, incoherent, and often-counterproductive amalgam of the problematic features of both. Ultimately, we all won't agree on the best way to ensure public safety or to hold people accountable. But, taking seriously the distinction between those ends

* Professor of Law, Washington University in St. Louis. For helpful comments and conversations, thanks to Aliza Hochman Bloom, Jenny Braun, Erin Collins, Jessica Eaglin, Meredith Esser, Malcolm Feeley, Chad Flanders, Thomas Frampton, Trevor Gardner, Russell Gold, Sharon Jacobs, Joe Kennedy, Steve Koh, Alice Ristroph, Joan Segal, Sarah Swan, India Thusi, Susannah Barton Tobin, and Ahmed White. This Article also benefitted from the comments of workshop participants at CrimFest 2024. Many thanks, as well, to the editors of the *Iowa Law Review* for their invaluable assistance.

might help set the stage for more fruitful debates about what features of contemporary penal administration should be preserved, reformed, or abolished.

INTRODUCTION	1010
I. THE FUNCTIONS OF THE CRIMINAL SYSTEM.....	1017
A. <i>A MESS</i>	1018
B. <i>COMMON THEMES</i>	1021
II. INSTITUTIONAL DESIGN AND INSTITUTIONAL CONFUSION.....	1024
A. <i>INCARCERATION</i>	1026
B. <i>POLICING</i>	1029
C. <i>BAIL AND PRETRIAL DETENTION</i>	1033
D. <i>COLLATERAL CONSEQUENCES</i>	1036
III. CONFLICTING THEORETICAL FRAMEWORKS.....	1041
A. <i>BUREAUCRATIZATION AND DEMOCRATIZATION</i>	1042
B. <i>CRIMINAL LAW EXCEPTIONALISM</i>	1047
C. <i>PENAL WELFARE</i>	1050
IV. THE LIMITS OF DISENTANGLING	1054
A. <i>INEVITABLE OVERLAP</i>	1055
B. <i>NECESSARY LIMITING PRINCIPLES</i>	1057
C. <i>WHO IS DISENTANGLING WHAT?</i>	1060
CONCLUSION	1062

INTRODUCTION

The conventional U.S. criminal law course begins with a theoretical question: Why does society punish? First-year law students learn a number of answers, but casebooks and professors offer two primary justifications—retributivism and utilitarianism.¹ The retributivist believes that punishment is *deserved* when a person does wrong or causes harm.² And the utilitarian believes that punishment is desirable when it would benefit society—by deterring

1. On the foundational nature of this distinction, see Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 527 (1992) (“Criminal law scholars often find . . . jargon-cluttered [sociological] schemes banal or tautological, and when they need a dash of theory they tend to recur to the more philosophically grandiloquent rhetoric of the purposes of punishment—most obviously in debates between retributivism and utilitarianism.”).

2. For a description of various theories of retributivism, see R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 19–27 (2001).

future harm,³ by rehabilitating individuals to prevent them from reoffending,⁴ or by incapacitating people to keep others safe.⁵ That’s a wildly oversimplified version of an enormous body of theoretical writing, but it basically sums up how generations of lawyers have been taught to understand criminal law and to view society’s decisions about criminal punishment: The institutions should serve both a utilitarian safety function and a retributivist accountability function.⁶

In recent years, this foregrounding of the “traditional” purposes of punishment has come under fire from students and academics alike.⁷ Focusing on questions of morality and imagining coherent theoretical justifications can’t possibly explain the system of mass processing or “managerial justice” that leads to millions of people a year—disproportionately people from race–class subordinated populations—in cages or under state supervision.⁸ Critics contend that ideal theory has little place in the study of such a brutal set of institutions,⁹ and, that this focus on first principles and “theories of punishment” obscures the actual workings of the criminal system.¹⁰

I find many of these critiques persuasive. But in this Article, I return to first principles. The conventional law school framing misses much. At the

3. For an articulation of deterrence-based criminal law, see Cesare Beccaria, *On Crimes and Punishments*, in *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 1, 21 (Richard Bellamy ed., Richard Davies & Virginia Cox trans., Cambridge Univ. Press 1995) (1764).

4. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (describing rehabilitation as reflecting “a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society”).

5. For accounts of incapacitation as a primary justification for rising prison populations in the latter part of the twentieth century, see Jessica M. Eaglin, *Against Neorehabilitation*, 66 *SMU L. REV.* 189, 196–98 (2013); and Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 457–58 (1992).

6. Cf. Weisberg, *supra* note 1, at 527 (“[W]hen [criminal law scholars] need a dash of theory they tend to recur to the more philosophically grandiloquent rhetoric of the purposes of punishment—most obviously in debates between retributivism and utilitarianism.”).

7. See, e.g., Jeffrey G. Murphy, “*In the Penal Colony*” and *Why I Am Now Reluctant to Teach Criminal Law*, 33 *CRIM. JUST. ETHICS* 72, 74–76 (2014) (emphasizing the disconnect between the Model Penal Code and the realities of mass incarceration); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 *HARV. L. REV. F.* 200, 211 (2021) (critiquing the uncritical posture of U.S. criminal legal education).

8. See generally Alice Ristroph, *The Curriculum of the Carceral State*, 120 *COLUM. L. REV.* 1631 (2020) (critiquing substantive criminal law classes as constructing this ostensibly coherent, morals-based understanding of the criminal system).

9. See, e.g., *id.* at 1694.

10. See, e.g., Michael T. Cahill, Response, *Criminal Law’s “Mediating Rules”: Balancing, Harmonization, or Accident?*, 93 *VA. L. REV. BRIEF* 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”); 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) (“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.”).

same time, I see that initial dialectic—that opposition between retributivists and utilitarians, between culpability and safety—as critical to understanding contemporary debates about criminal justice reform and abolition. My suggestion is hardly that decades of mass incarceration could be reversed and the carceral state dismantled if somehow everyone could agree on the correct theory of punishment. Instead, I argue that these articulated justifications for what criminal legal institutions should (or shouldn't) do provide insight into basic understandings of the social function and cultural meaning of criminal law. And in a moment of much-needed reckoning with U.S. criminal policy, it's necessary to tease out what exactly it is that criminal legal institutions—prisons, police, etc.—are supposed to do or what social need they might serve.¹¹

For reformers and defenders of the status quo, it's important to articulate what the institutions of penal administration are supposed to do so that they can figure out if those institutions actually are achieving their desired ends and how they might achieve those ends better. And for abolitionists or more radical critics, it's important to articulate what noncriminal institutions could achieve those ends (to the extent that those ends are themselves desirable) so that we can appreciate the costs and benefits of moving away from a criminal legal framework.

In this Article, I argue that the U.S. criminal system and debates about criminal justice reform reflect an elision of two largely distinct social functions: ensuring public safety and imposing accountability for wrongdoing or harmful conduct.¹² Beyond philosophical discussions of retributivism or utilitarianism, U.S. criminal justice is commonly associated with two core functions—ensuring public safety and ensuring accountability for wrongdoing.¹³ I say “associated with” because we live in a moment of massive debate about what criminal legal institutions are *designed* to do and what they *actually* do.¹⁴ Abolitionist

11. Cf. Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 929–30 (2021) (“If we truly want to achieve public safety, we need to look beyond minimizing the harms of policing and focus on what it is exactly the police do daily, asking whether the police are the institution best suited to the panoply of societal needs they confront regularly.”).

12. Throughout this Article, I refer to the “criminal system” advisedly—mindful of critiques that the system may not actually be a system. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993) (“[T]he criminal justice ‘system’ is not a system at all.”); Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 65 (2018); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421 (2018). Despite its significant shortcomings, I find the phrase a useful shorthand for a difficult-to-define set of institutions. See Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 932–34 (2023) (describing the possible benefits of the “criminal system” as a label for institutions of U.S. penal administration).

13. See CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE, at ix, 3–4 (Ronald Roesch et al. eds., 2007) (identifying “culpability” and “dangerousness” as the core issues that criminal law addresses).

14. Prior to more recent radical critiques, the literature on punishment theory reflected a certain amount of slippage and debate as to the normative and descriptive aspects of punishment theorizing: Were commentators seeking to describe how punishment *should* be justified in an

commentators claim that the criminal system doesn't keep people safe and provide accountability. Instead, it harms—and perhaps is meant to harm¹⁵—people from marginalized communities while protecting the interest of socially dominant groups.¹⁶ Reformers contend that the criminal system can and should serve the safety and accountability interests, but it currently doesn't—or at least doesn't as well as it should.¹⁷ Meanwhile, preservationists or defenders of the status quo claim that criminal legal institutions serve these two core state functions (and perhaps others).

Nevertheless, most commentators seem to accept that these are both important social functions. Indeed, a review of contemporary scholarship and activism suggests that most abolitionists, reformers, and defenders of the status quo believe that there is a social need for public safety and security, as well as individual accountability for wrongdoing and harm.¹⁸ To be sure, a lot of nuance is lost in that generalization.¹⁹ For example, believing that people should be

ideal world or how lawmakers *had* justified punishment in reality? See, e.g., Darryl K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 AM. CRIM. L. REV. 73, 78–79 (2012) (“The idea that every criminal offense is defined by wrongdoing and culpability is aspirational and normative rather than descriptive—or at best, descriptive of the many offenses when one acknowledges many exceptions. Observers on both sides of the Atlantic overwhelmingly take the view that Anglo-American codes over-criminalize . . .”); Michael T. Cahill, *Thoughts on Zaibert's Rethinking*, 71 RUTGERS U. L. REV. 937, 943 (2019) (“Even some of the classic normative purposes of punishment seem to interact poorly with the classic descriptive understanding of what punishment is . . .”).

15. On the complicated role of intention in criminal policy and critical scholarship, see generally Hadar Aviram, *What Were “They” Thinking, and Does It Matter? Structural Inequality and Individual Intent in Criminal Justice Reform*, 45 LAW & SOC. INQUIRY 249 (2020) (book review). See also DAVID GARLAND, PUNISHMENT AND WELFARE 262 (1985) (“As for the relation between penalty and other social institutions, it has been demonstrated that this is a complex . . . interlinking relationship of pulls and relays, exchanges and interactions. . . . [I]t can make no sense to conceive of this relationship as one of simple determinism [P]enality is constructed around an eclectic series of disparate and contradictory forms and logics”); and Ashley T. Rubin, Essay, *True Believers, Rational Actors, and Bad Actors: Placing The Prison and the Factory in Penal-Historiographic Context*, 22 PUNISHMENT & SOC'Y 736, 740 (2020) (noting that criminal policymakers “had a multiplicity of motivations”).

16. See, e.g., Rachel Herzing, Commentary, *“Tweaking Armageddon”: The Potential and Limits of Conditions of Confinement Campaigns*, 41 SOC. JUST. 190, 193–94 (2014) (“Far from being broken . . . the prison-industrial complex is actually efficient at fulfilling its designed objectives—to control, cage, and disappear specific segments of the population.”); 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.”).

17. For one account of how the “criminal legal system” could be turned into a “criminal justice system,” see generally JEFFREY BELLIN, MASS INCARCERATION NATION (2023).

18. See *infra* Section I.B.

19. Compare Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1703–04 & n.6 (2023) (critiquing police abolition as disregarding the “African American security interest”), with India Thusi, *Policing Is Not a Good*, 110 GEO. L.J. ONLINE 226, 249 (2022) (“Policing scholars and activists should move away from a framing of policing that may be misinterpreted as equating more police with more protection.”).

held accountable doesn't mean agreeing on the accountability mechanism—there's a big difference between restorative justice and incarceration,²⁰ or between shaming and execution.²¹ And, there's significant disagreement about how—and by whom—those functions should be performed. For example, believing that people should feel safe on the street in their neighborhood doesn't mean agreeing on whether police presence is necessary to achieve public safety.²² But in broad terms, my sense is that there actually is pretty significant agreement that these are two important social functions.²³

In this Article, I argue that it's a mistake to imagine that the same institution(s) could or should fulfill both the public safety and the accountability functions. I contend that the contemporary U.S. criminal system—and, in turn, efforts to reform or transform it—often relies on a foundational problem: an elision of the safety function and the accountability function. For example, I argue that imposing stigma might be a desirable feature of an accountability-based system but it might be unnecessary, or even undesirable, in a system focused on public safety. Similarly, surveillance and social control might be defensible features of a system focused on public safety but are not necessary, and therefore less defensible, if the focus is ensuring accountability. With criminal legal institutions understood as advancing both functions, we are left with a troubling, incoherent, and often-counterproductive amalgam of the problematic features of both.²⁴

To be clear, this Article isn't a critique of "irrational" criminal policy solely for its irrationality.²⁵ I am skeptical at best that institutions of criminal

20. For a thoughtful account of the punitive dimensions of restorative justice, though, see generally Shirin Bakhshay, *Restorative Justice as Punishment* (unpublished manuscript) (on file with the *Iowa Law Review*).

21. See, e.g., Mariame Kaba & Rachel Herzing, *Transforming Punishment: What Is Accountability Without Punishment?*, in MARIAME KABA, *WE DO THIS 'TIL WE FREE US* 132, 132–38 (Tamara K. Nopper ed., 2021) (advocating for noncarceral models of accountability).

22. See, e.g., Monica C. Bell, *Next-Generation Policing Research: Three Propositions*, 35 J. ECON. PERSPS. 29, 29 (2021) ("[P]olicing and public safety are not one and the same. Instead of starting from the presumption that more or better policing is the only route to public safety, many researchers are wondering whether organized community efforts could work better than traditional policing in achieving the goals of building public safety and improving community outcomes."); Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 728–29, 787 (2022) (arguing that an overemphasis on policing reflects an overly narrow understanding of "public safety").

23. See *infra* Section I.B.

24. In this respect, my argument follows from Darryl Brown's important "conceptual" and "practical" observation that "retributivist and deterrent motives sometimes conflict." Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1297 (2001).

25. I am quite sympathetic to critiques of attempts to rationalize criminal policy. Indeed, I've made such critiques myself. See Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2837 (2022) (critiquing claims that a turn to expertise can resolve the problems of U.S. penal administration). For related critiques, see Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403, 408 (2022) (critiquing "the evidence-based paradigm" for reform and the way that it "advances a set of assumptions and beliefs about what the system should strive

law—at least as constituted in the United States—are well-suited to advance either end in an egalitarian, fair, and humane manner. Nor do I claim that disentangling these functions or rationalizing the criminal system would do the essential work of addressing the background inequities, biases, and problems of political economy that might well hamper any new institutions or institutional arrangements (criminal and civil, alike).²⁶ Further, a rational system could be brutal, cruel, or unjust.

But if we as a society are to reform, transform, or even abolish criminal legal institutions, it's important to understand what we're actually looking to accomplish. Which functions are necessary and defensible, and which are not? Which functions belong under the ambit of the criminal system, and which do not?²⁷ And, how should we understand the relationship between the criminal system and other institutions that currently serve or potentially might serve these same functions?

Asking those questions should be a component of any normative vision for criminal justice—whether that vision is preservationist or minimalist, reformist or abolitionist. And answering them, I argue, requires a greater engagement with the threshold question of what people want (or don't want) from criminal legal institutions in the first place.

Before I proceed, a caveat is in order. I am hardly the first person to suggest that U.S. criminal law serves too many different functions. More than a half century of scholarship and advocacy decrying “overcriminalization” has critiqued the use of criminal law as a one-size-fits-all response to social problems.²⁸ I build on that scholarship in this Article. But I am less focused on specific claims about the proper scope of criminal law and punishment—on identifying a defensible core of substantive criminal law. Instead, I am focused on the broader constellation of actors and institutions that enforce and administer criminal law.²⁹ In this respect, my analysis builds on recent

to achieve, whom it should target, how it should work towards those goals, and whose voices and interests matter”).

26. See Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1385 (2022) (“[W]hat 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? What if the problem is the state itself or, at least, a set of power relations that define the U.S. political economy?” (footnote omitted)).

27. Cf. 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?”).

28. See *infra* Part I.

29. As I argue throughout this Article, I also see it as important to move beyond a punishment-centric framework in thinking about the criminal system and its justifications—much of penal administration isn't technically “punishment,” so determining whether these practices and institutions should be reformed, transformed, or abolished requires discussions that exceed the limits of traditional academic debates about the “purposes of punishment.” For an extended

policing scholarship and advocacy that seek to unpack institutional purposes, to understand the policing function, and to consider what it would look like to shift some or all of those roles out of the ambit of criminal law.³⁰

My argument proceeds in four parts. In Part I, I describe longstanding debates about the proper purpose of criminal law. Recognizing these deep disagreements, I argue that there actually are commonalities across literatures and movements. Therefore, I lay out what I take to be the two dominant functions that criminal institutions—or their alternatives—might fulfill. Looking to theoretical literature and contemporary policy debates, I describe the safety-centric and accountability-centric accounts of the criminal system. I recognize the ways in which the two functions might overlap. For example, individual accountability might be understood as a necessary deterrent to ensure public safety, and public safety might be understood as a benefit to holding people accountable. But, I try to tease apart different ways of thinking about both safety and accountability as overarching objectives.

In Parts II and III, I highlight the consequences of eliding the two different functions. To that end, I provide a series of illustrative examples—areas where a confusion of functions contributes to greater injustice, stymying reform and exacerbating disagreements between people working to change the criminal system. In Part II, I look to specific problems of institutional design in the context of incarceration, policing, bail, and collateral consequences. In Part III, I focus on larger theoretical frameworks for reform or critique: debates about bureaucratization or democratic empowerment as the desirable model for change; disagreements over whether criminal law is or should be exceptional as compared to other legal regimes; and conflicts over whether the state should engage in penal welfare by providing social services via criminal legal institutions.³¹ I argue that distinguishing between a focus on public safety and accountability could clarify these disagreements between advocates, activists, and academics, potentially making these debates more productive by surfacing first-principles disagreements or sites for compromise. Assuming shared

articulation of this argument, see Benjamin Levin, *The Limits of "Punishment,"* 114 CALIF. L. REV. (forthcoming 2026). This position is consistent with other arguments that critique criminal legal institutions but resist characterizing those institutions as punishment. See Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 303 (2015) (arguing that collateral consequences aren't punishment and instead "are contiguous with other mechanisms of predictive control that have multiplied both within and outside of the criminal justice system, including predictive policing, risk-based sentencing, and targeted surveillance"); Lee Kovarsky, *Suffering Before Execution*, 109 VA. L. REV. 1429, 1432 (2023) ("I have a different view: that pre-execution confinement is a form of *nonpunitive* custody."); Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 776 (1998) (arguing that a narrower definition of punishment allows for a clearer focus on curbing the abuses of the "preventive state").

30. See *infra* Section II.B.

31. On different definitions or understandings of "penal welfare," see Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1337 n.15 (2016). For the classic use of the term, see DAVID GARLAND, *THE CULTURE OF CONTROL* 38 (2001).

commitments or common assumptions when they are absent—in the academy, in legal practice, and in society at large—strikes me as a recipe for trouble.

In Part IV, I step back to consider several possible criticisms of the project of disentanglement. Ultimately, we won't all agree on the best way to ensure public safety or to hold people accountable. But, taking seriously the distinction between those ends might help set the stage for more fruitful debates about what features of contemporary penal administration should be preserved, reformed, or abolished.

I. THE FUNCTIONS OF THE CRIMINAL SYSTEM

Criminal legal institutions serve numerous social functions. That's in part because of significant political, philosophical, and ideological differences among policymakers, voters, and members of society.³² And, it's in part because there are many different institutions that might be thought of as comprising the criminal system.³³ Indeed, one problem with legal scholars' preoccupation with the purposes of punishment is that criminal institutions do far more than punish—they surveil, control, and provide social services, among many other functions.³⁴

Even if the criminal system were imagined as somehow unified in purpose,³⁵ it would be surprising if each institution or set of actors—police, prisons, probation departments, and so on—served the same function or were justified in the same terms. So, a theoretical engagement with the criminal system

32. It would be surprising if institutions resulting from the democratic process or from a pluralist society actually reflected only a single justification.

33. On this broader point about the amorphous nature of the criminal system and the wide range of actors and institutions associated with it, see generally Dolovich & Natapoff, *supra* note 27; and Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619 (2018).

34. See *supra* note 29; see also Nicole Kaufman, Joshua Kaiser & Cesraéa Rumpf, *Beyond Punishment: The Penal State's Interventionist, Covert, and Negligent Modalities of Control*, 43 LAW & SOC. INQUIRY 468, 469 (2018) ("The penal state reaches *beyond* carceral confinement and the well documented iterations of this confinement through civil laws and regulations, bureaucratic operations, and for profit and nonprofit nongovernmental organizations (NGOs)."); Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222 (2012) ("The shadow carceral state also operates in opaque, entangling ways, ensnaring an ever-larger share of the population through civil injunctions, legal financial obligations, and violations of administrative law."); David Garland, *The 2012 Sutherland Address: Penalty and the Penal State*, 51 CRIMINOLOGY 475, 479 (2013). Of course, the foundational cite here is MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 297 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (identifying institutions and modes of governance, "which, well beyond the frontiers of criminal law, constitute[] what one might call the carceral archipelago").

35. In contrast, critics of treating the "criminal justice system" as a *system* tend to emphasize the problems of imagining this sort of coherence in purpose and governing ideology. See Harcourt, *supra* note 12, at 421; Mayeux, *supra* note 12, at 65.

requires a theoretical engagement with its component parts—not just with punishment.³⁶

In this Part, I start by identifying competing claims about what criminal legal institutions do, or should do. I argue that the lack of agreement complicates much contemporary criminal justice reform. But, I argue that deep disagreement about criminal law and policy belies underlying agreement about the importance of two core social functions: public safety and individual accountability.

A. A MESS

For centuries, criminal legal scholars have debated the proper purpose of criminal law and punishment. Those debates will be familiar to anyone who has sat through a U.S. criminal law course.³⁷ Those debates also can be slippery. Are commentators making normative arguments that sound in ideal theory (i.e., what criminal legal institutions *ought* to do)? Or are they making descriptive claims (i.e., what criminal legal institutions *are* doing)?³⁸ In contrast to mainstream discussions, different radical or critical literatures suggest their own alternate accounts of criminal law's functions: enforcing hierarchy or entrenching inequality across lines of race, class, ability, and sexuality; suppressing dissent or threats to the dominant social order; and so forth.³⁹

I couldn't begin to summarize these entire literatures—competing visions and endless fine-grained distinctions among flavors of retributivism, expressivism, or deterrence theory—in a few pages. And, doing so would add little to an already-massive body of writing. However, it's fair to say that “criminal law itself does not have a single overriding purpose.”⁴⁰ As criminal legal theorist Alice Ristroph argues, searching for coherent justifying principles is a Sisyphean task:

[T]he various humans who authorize and implement criminal sanctions will typically be able to give reasons for their actions, though they may not all give the same reasons. But I suspect it is not possible to give a non-tautological statement of purpose that captures all or most instances of criminal law. . . . [F]or any single given criminal statute, the purposes of a legislator may not align with those of the prosecutor nor yet again the sentencing judge. The bottom line is that associating criminal law with one overarching purpose is likely

36. For an extended argument along these lines, see generally Levin, *supra* note 29.

37. See *supra* notes 1–10 and accompanying text.

38. For a claim that the slippage between normative and descriptive projects broadly hampers criminal legal scholarship, see Adam J. Kolber, *How to Fix Legal Scholarship*, 95 IND. L.J. 1191, 1193 (2020).

39. See *supra* note 16 and accompanying text. In these literatures, there are divisions (and sometimes slippage) between accounts that treat the injustices of the criminal system as unintended consequences and accounts that treat the criminal system as an institution designed to marginalize and subordinate. See *supra* notes 15–16 and accompanying text.

40. Ristroph, *supra* note 8, at 1703.

to cloud, rather than clarify, our understanding of actual human practices.⁴¹

Despite the difficulty of identifying a single overarching purpose, commentators continue to make claims about what criminal legal institutions should do or how society might suffer without the institutions of penal administration.⁴² Indeed, a certain amount of that work increasingly is framed in opposition to abolitionist or radical critiques that question the necessity or desirability of criminal legal institutions.⁴³

For example, philosopher Doug Husak argues that criminal law performs at least ten “valuable” functions—or at least that eliminating criminal law would impose costs in ten areas⁴⁴: (1) reducing crime;⁴⁵ (2) expressing public values;⁴⁶ (3) responding to harm in situations where insurance couldn’t reimburse victims for damages;⁴⁷ (4) suppressing “non-legal violence and vigilantism”;⁴⁸ (5) affording “special powers to legal officials”;⁴⁹ (6) allowing for accurate adjudication;⁵⁰ (7) allowing for proportionate responses to wrongs and harms;⁵¹

41. *Id.*

42. A significant strand of criminal legal scholarship also insists that there actually is deep social agreement on criminal law and the necessity of criminal punishment for certain commonly agreed-upon wrongs or harms. For examples of this approach to criminal law as almost prepolitical, see Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1892 (2007); Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1646, 1687–88 (2007); Paul H. Robinson, *Criminal Law’s Core Principles*, 14 WASH. U. JURIS. REV. 153, 164–93 (2021); and Steven Arrigg Koh, *Criminal Law’s Hidden Consensus*, 101 WASH. U. L. REV. 1805, 1844 (2024). For a discussion and critique of this literature, see Donald Braman, Dan M. Kahan & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1551–57 (2010).

43. *E.g.*, TOMMIE SHELBY, *THE IDEA OF PRISON ABOLITION* 2–17 (2022); Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 266, 284 (2023); Gardner, *supra* note 19, at 1722–23 & n.85 (arguing that minimalism is a more desirable “normative position” than abolition in part because it “recognize[s] the state’s responsibility to protect members of the African American underclass from private violence”); Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44–46 (2020); Christopher Slobogin, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 543–53 (2024).

44. Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 34–35 (2020).

45. *Id.* at 35–36.

46. *Id.* at 36–38; see also Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 401–03 (1965); R.A. DUFF, *THE REALM OF CRIMINAL LAW* 19 (2018); Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 11–15 (Wesley Cragg ed., 1992).

47. Husak, *supra* note 44, at 38–41.

48. *Id.* at 41–44; see also Paul H. Robinson, *The Moral Vigilante and Her Cousins in the Shadows*, 2015 U. ILL. L. REV. 401, 404 (“One final mechanism by which a system’s earned moral credibility can promote effective crime control is its ability to avoid vigilantism.”).

49. Husak, *supra* note 44, at 44–46.

50. *Id.* at 46.

51. *Id.* at 47–49.

(8) providing a vehicle for addressing “public wrongs”;⁵² (9) responding to “the public demand for justice”;⁵³ and (10) offering some limitations on, or rational basis for, the imposition of collateral consequences.⁵⁴

I certainly don’t think that U.S. criminal law actually serves all of these functions.⁵⁵ Nevertheless, I agree with Husak that many people (academics and nonacademics alike) turn to criminal legal institutions for these—and many other—social functions. We live in a society that “governs through crime,”⁵⁶ and criminal law and criminal justice actors (police, prosecutors, etc.) often are the state actors that people turn to as the answer to social problems.⁵⁷ So, criminal law (and the criminal system) mean many different things to many different people. That realization presents challenges as we consider how to evaluate or improve criminal law: How can we determine if a policy has succeeded or failed if we don’t know what that policy was supposed to do in the first place? How could we reform or improve an institution when we as a society (or community of concerned commentators) can’t agree on what the institution is supposed to do?

And even if we all could agree on the purpose of criminal law and punishment (which we can’t), that would leave a host of questions about all of the *nonpunitive* functions that criminal legal actors and institutions serve. Indeed, focusing only on criminalization and punishment risks understating how many different actors and institutions comprise the criminal system.⁵⁸

Looking beyond substantive criminal law, we see a host of actors and institutions with similarly complicated purposes, goals, or justifications. For example, consider U.S. models of policing. Activists and scholars increasingly have emphasized the wide variety of functions that police perform.⁵⁹ Policing scholar Barry Friedman has identified numerous discrete functions that police officers serve, from acting as first responders, social workers, and traffic cops,

52. *Id.* at 50–51.

53. *Id.* at 51–54.

54. *Id.* at 54–58 (describing collateral consequences as “harms suffered by offenders [that] take place *after* their ‘official punishment’ has ended . . . resulting from decisions by other state actors as well as by private parties”). For more discussion of collateral consequences, see *infra* Section II.D.

55. And to the extent it might serve some of these functions, I remain skeptical at best that it is the only institution that could serve those functions, or that the benefits of using criminal law to serve those functions aren’t outweighed by the costs.

56. For an account of how the United States became a country that governed (and was governed) through crime, see generally JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007).

57. See, e.g., DERECKA PURNELL, *BECOMING ABOLITIONISTS* 12 (2021) (“We called 911 [f]or almost everything—except snitching. Nosebleeds, gunshot wounds, asthma attacks, allergic reactions. Police accompanied the paramedics.”); Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 *LAW & SOC’Y REV.* 314, 316, 328 (2016) (describing “low-income African-American mothers[.]” pattern of “occasional police reliance”); Benjamin Levin, *Prosecuting the Crisis*, 50 *FORDHAM URB. L.J.* 989, 997–98 (2023) (making this claim with respect to prosecutors).

58. See Dolovich & Natapoff, *supra* note 27, at 2.

59. See *infra* Section II.B.

to being “purveyors of force and law” and crime fighters.⁶⁰ Once again, critical commentators suggest a different set of nefarious functions, including preserving racial segregation and subordinating marginalized groups.⁶¹ And other commentators have described different functions, roles, or tasks.⁶² But regardless of the exact menu or constellation, this observation that police do (too) many different things has been a central component of much contemporary advocacy—whether calls to “defund” the police or to “divest” from policing and “invest” in alternative government services,⁶³ or simply calls to shift some tasks away from police and to health care or social workers.⁶⁴

These disputes about core functions extend to other features of the criminal system. In short, debates about criminal policy reflect not only deep-seated political and ideological policy differences, but also differences (both normative and descriptive) in how people understand the social function of criminal legal institutions.⁶⁵ Layer such uncertainty onto growing disagreements about whether criminal legal institutions should be preserved, reformed, minimized, or abolished, and searching for clarity or commonly accepted terms and positions can feel like a fool’s errand.

B. COMMON THEMES

Difficult though it may be to believe, then, I argue that debates about criminal policy tend to reflect some shared commitment to—or desire for—core social functions: public safety and accountability. To be clear, this agreement is thin. Commentators disagree about whether criminal legal institutions

60. Friedman’s detailed set of police officer functions include: (1) “the first responder”; (2) “the purveyors of force and law”; (3) “the mediator cop”; (4) “the social worker cop”; (5) “the traffic cop”; (6) “the crime-fighting, law enforcement cop”; (7) “the proactive cop”; and (8) “‘community’ police.” Friedman, *supra* note 11, at 954, 956, 963, 965, 967, 970, 973, 977.

61. See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 689 (2020) (describing “policing as part of a broader program of racial control”); Aya Gruber, *Policing and “Bluelining,”* 58 HOUS. L. REV. 867, 873 (2021) (arguing that “policing . . . has succeeded spectacularly at what I call ‘bluelining,’ that is, maintaining raced and classed spatial and social segregation through the threat and application of violence”); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 691 (2018) (tracing the relationship between modern police and slave patrols as a part of an ongoing project of racial control); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 21 (2019) (making the same claim); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1824–25 (2020) (“[T]he historical, material, and ideological critiques create a framework for understanding the fundamental problems of policing. They suggest policing is not broken, but working in ways that reflect and extend the status quo social relations.”).

62. See *infra* Section II.B.

63. On “invest/divest,” see *Invest-Divest*, MOVEMENT FOR BLACK LIVES, m4bl.org/policy-pla-tforms/invest-divest [https://perma.cc/GT2Z-qjQ7]; Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1558 (2022). On “defund,” see generally Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120 (2021).

64. See *infra* notes 106–09 and accompanying text.

65. To be clear, I don’t mean that the institutions of penal administration are unique in having different or competing justifications. See *infra* notes 256–59 and accompanying text.

are the proper site to ensure accountability and public safety. They disagree about whether the state or private actors are better suited to serve these functions. They even disagree about what constitutes “public safety” and “accountability.” But, debates about criminal policy tend to reflect a focus on these twin aims.

All of which is to say that I hardly mean to suggest that there’s anything beginning to approximate a consensus position that could unite critics and defenders of the status quo in support of an ideal criminal justice system.⁶⁶ I’m not arguing that everyone agrees that we need criminal legal institutions to achieve accountability and public safety. Rather, I contend that preservationists, reformers, and abolitionists tend to have some basic shared understanding that accountability and public safety are important (and perhaps necessary) features of social organization. So, even when commentators disagree or appear to be talking past each other, it’s striking that much discussion comes back to these core functions and how they might (or might not be) advanced.

These functions serve as the twin rationales for much criminal institutional design:

Culpability and dangerousness . . . are the two central issues raised by any sensible societal attempt to deal with antisocial behavior. We punish people who have committed a criminal act with a blameworthy state of mind. We enhance people’s criminal sentences or commit them to psychiatric hospitals and detention centers when we think they are likely to harm others. Other criteria for determining when people will be deprived of life or liberty are secondary to these two crucial determinations.⁶⁷

As a growing universe of commentators have taken up the cause of criminal justice reform, they have focused on how to advance these functions in a more just or more humane fashion. How much and what types of punishment are necessary to satisfy the public desire for accountability? What incursions into individual liberty are acceptable tradeoffs to ensure public safety? And how can the state perform both of these functions in a way that doesn’t exacerbate racial and socioeconomic inequality?

The focus on the twin pillars of safety and accountability even extends to the radical corners of criminal legal thought. A significant amount of abolitionist and radical commentary doesn’t disclaim accountability and public safety as important social functions. Quite the opposite.

66. While I agree with Steve Koh’s insight that “redressing wrongs” is a shared concern for many people in society, I disagree with him that there’s a “hidden consensus” on this point when it comes to imagining a criminal system that might serve the interests of critics and preservationists. See Koh, *supra* note 42, at 1815–16.

67. SLOBOGIN, *supra* note 13, at ix.

We might be able to imagine a rejection of criminal law that similarly rejects these social functions—perhaps a critique of any sort of sanctioning or an acceptance of a great deal of interpersonal violence.⁶⁸ But despite critiques of abolition as inviting widespread violence and impunity,⁶⁹ it's worth noting that abolitionists tend to couch their arguments in terms of *increasing* public safety and ensuring *real* accountability.⁷⁰ Radical critics contend that criminal legal institutions don't actually ensure public safety or accountability;⁷¹ or—to the extent that they might—the human and social costs of criminal legal approaches are unacceptable.⁷² Much abolitionist writing and activism instead focuses on articulating alternative frameworks for, or conceptions of, safety and accountability.⁷³

Whether radical or more mainstream, commentary often doesn't reflect an equal emphasis on public safety and accountability. Instead, much commentary reflects a focus on one over the other. Indeed, a significant amount of reformist academic writing argues for a prioritization of public safety and critiques U.S. criminal policy for overemphasizing accountability and moral desert.⁷⁴

68. This isn't the position adopted by contemporary anarchist and anti-statist abolitionists who tend to embrace mutual aid or communitarian methods of ensuring public safety and obtaining accountability. See ANDREA J. RITCHIE, *ABOLITION & THE STATE* 5–15, <https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/63743b68cd71d319d5229a6f/1668561795501/Abolition+and+the+State.pdf> [<https://perma.cc/K82D-QGCB>]; WILLIAM C. ANDERSON, *THE NATION ON NO MAP* 19 (2021); Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *YALE L.J.* 2497, 2577 (2023). That said, an absolute rejection of institutionalized accountability and public safety might result from taking certain stated positions to their extremes. See Benjamin Levin, *Abolitionisms*, 10 *UCLA CRIM. JUST. L. REV.* (forthcoming 2026). *But cf.* MICHAEL J. ZIMMERMAN, *THE IMMORALITY OF PUNISHMENT*, at vii (2011) (“I doubt that legal punishment—punishment by the state of its subjects—can be justified.”).

69. See *supra* notes 44–54 and accompanying text.

70. See, e.g., Mariame Kaba & Andrea J. Ritchie, *Reclaiming Safety*, *INQUEST* (Aug. 30, 2022), <https://inquest.org/reclaiming-safety> [<https://perma.cc/J8KD-HGGM>] (“Contrary to assumptions that abolitionists don't care about safety, we care a great deal about it. We recognize that safety is a basic human need.”); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 *HARV. L. REV.* 1684, 1686–87 (2019).

71. See, e.g., MARIAME KABA & ANDREA J. RITCHIE, *NO MORE POLICE* (2022); Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, *APPEAL* (Oct. 7, 2019), <https://theappeal.org/amber-guyger-botham-jean> [<https://perma.cc/4MNR-PJSD>] (arguing that the “justice” achieved by convicting violent police officers isn't truly justice); Thusi, *supra* note 19, at 229 (arguing that police don't actually keep people safe).

72. Cf. Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 *COLUM. L. REV.* 1531, 1573–93 (2024) (critiquing criminalization in consequentialist and nonconsequentialist terms).

73. See, e.g., Kaba & Herzing, *supra* note 21, at 135 (explaining efforts to ensure accountability without punishment); Alexander Afnan, *An Abolitionist Vision: Reclaiming Public Safety from a Culture of Violence*, 28 *VA. J. SOC. POL'Y & L.* 1, 38 (2021) (arguing for “replac[ing] violence” with “the culture of community wellbeing”); Christopher Lau, *Interrupting Gun Violence*, 104 *B.U. L. REV.* 769, 796 (2024) (“Violence interruption organizations grew out of a vision for safety that does not primarily rely on carceral intervention.”).

74. See *infra* Section III.A.

It is possible that there might be some inevitable overlap or interaction between these two functions.⁷⁵ For example, accountability (whether via criminal punishment or some other means) might be justified in terms of public safety.⁷⁶ If someone who broke the law, violated social norms, or caused harm were not held accountable, the argument goes, then future wrongdoing would go undeterred.⁷⁷ The individual wrongdoer and others in the community would conclude that they wouldn't face consequences if they transgressed.⁷⁸ In other words, accountability might be necessary to induce compliance.⁷⁹ Relatedly, some commentators have claimed that a failure to hold people accountable might result in vigilantism,⁸⁰ which ultimately would lead to a less safe society.⁸¹

Nevertheless, I think it's important to appreciate the difference between arguments grounded in the logic of public safety and arguments grounded in the logic of accountability for accountability's sake. In the following parts, I argue that the overlap between these two logics or functions is cause for concern—a possible explanation for some of the status quo's injustices and an impediment to productive discussions about how to address those injustices.

II. INSTITUTIONAL DESIGN AND INSTITUTIONAL CONFUSION

It would be a mistake to presume that each institution of U.S. penal administration reflects a clear or unified purpose.⁸² Not only is a district attorney's office in Missouri different from one in Massachusetts, but each institution may contain a range of competing interests and individuals—one assistant district attorney might understand the office's primary role as advancing victims' interests, whereas another might understand the office's role as keeping the community safe. And each of those actors might hold a range of

75. See *infra* Section IV.A.

76. Although many commentators justify accountability or “doing justice” in “deontological” terms—as having “value in itself.” Robinson, *supra* note 48, at 403.

77. For an extended defense of this position and the need for punishment, see PAUL H. ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* 141–236 (2013).

78. It's worth noting that many of the academic arguments along these lines equate punishment and accountability. See Robinson, *supra* note 48, at 403 (“‘Doing justice’ is meant here in its dictionary sense of giving an offender the punishment deserved.”). But this line of reasoning might apply to accountability mechanisms beyond formal criminal punishment.

79. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 408–09 (1958).

80. See Paul H. Robinson, Joshua Samuel Barton & Matthew Lister, *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply*, 17 *NEW CRIM. L. REV.* 312, 316 (2014) (collecting sources). *But cf.* Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 *STAN. L. REV.* 77, 123–24 (2013) (“[T]he research reported in this Article suggests that a failure to track community members' views on punishment does not have a significant or lasting impact on their willingness to be law-abiding citizens.”).

81. Because of widespread private violence.

82. See *infra* notes 256–60 and accompanying text.

competing and shifting views on institutional purpose and their place within the system.⁸³

Nevertheless, in this Part, I emphasize the way that competing understandings of institutional purpose exacerbate many of the injustices of U.S. penal administration. I look at a series of examples in turn: incarceration, policing, pretrial detention, and collateral consequences. In each case, I argue that an institution primarily focused on accountability would look dramatically different from one focused on public safety. The impact of prioritizing these different purposes on these institutions are summarized in Table 1. And in each case, I contend that the combined effect of both rationales (in legal theory, judicial opinions, policy discourse, and the public imagination) tends to lead to troubling results. Despite, and perhaps because of, efforts to justify these institutions in terms of *both* accountability and public safety, many of these institutions actually become harder to justify—even when taken on their own terms.

Table 1. How Prioritization of Public Safety or Accountability Functions Might Affect Institutional Design

	Public Safety	Accountability
Incarceration	Incarceration only should be a punishment for people viewed as posing a danger. Prisons needn't (and perhaps shouldn't) be unpleasant.	Incarceration only should be a punishment if society concludes that it is the correct way (however defined) to hold a person accountable for harm or wrongdoing.
Policing	Policing should be preventative and serve functions unrelated to solving crimes if those functions increase public safety.	Policing should focus primarily, if not exclusively, on its crime-solving function and ensure that people who break the law are "brought to justice."
Pretrial Detention and Bail	Pretrial detention and bail should be designed to ensure that arrested individuals aren't a threat to public safety (however defined).	Pretrial detention and bail should be designed to ensure continued appearance at court dates.
Collateral Consequences	Collateral consequences should be imposed and designed to reduce the risk of reoffense. They might be justified if they were rationally designed to reduce the risk of reoffending.	Collateral consequences should be imposed where society concludes that the forfeiture of a right is the correct way to hold a person accountable for harm or wrongdoing.

83. That's one reason that making claims about institutional purpose in the criminal system is often a dicey proposition. See generally Aviram, *supra* note 15.

A. INCARCERATION

Over the course of the twentieth century, incarceration became a primary mode of punishment in the United States.⁸⁴ While alternate forms of punishment abound,⁸⁵ and while many people each day are on parole or dealing with noncarceral restrictions on their liberty,⁸⁶ “mass incarceration” has become the label for U.S. penal policy for good reason.⁸⁷ Days, months, and years have become the vernacular for describing how serious an offense is or how harsh a punishment might be.⁸⁸

84. See, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 885 (2009) (describing the United States as “a society where incarceration is the most common penalty for criminal acts”); Edward L. Rubin & Malcolm M. Feeley, *Criminal Justice Through Management: From Police, Prosecutors, Courts, and Prisons to a Modern Administrative Agency*, 100 OR. L. REV. 261, 292 (2022) (“The standard way we deal with serious offenders in our society, and an alarmingly common way that we deal with minor offenders, is to imprison them, often for periods that range from long to extremely long to outrageously long.”). But see Malcolm M. Feeley, *Criminal Justice as Regulation*, 23 NEW CRIM. L. REV. 113, 124 (2020) (“A suspended sentence coupled with probation is now probably the most frequently imposed sentence in the Anglo-American world.”).

85. See Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1313–15 (2023) (tracing “the rise of non-carceral punishment[s]” as alternatives to incarceration).

86. For the most recent data from the Bureau of Justice Statistics, see generally DANIELLE KAEBLE, BUREAU OF JUST. STAT., NCJ 310118, PROBATION AND PAROLE IN THE UNITED STATES, 2023 (2025), <https://bjs.ojp.gov/document/ppus23.pdf> [<https://perma.cc/4T9M-5XUL>].

87. On the use and meaning of “mass incarceration,” see Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 276–90 (2018). But see 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)).

88. I often am struck by this dynamic when teaching first-year Criminal Law. I frequently ask students what they think would be an appropriate punishment for a given offense, and the answer frequently is some period of incarceration. When I ask why incarceration and why that length of incarceration, answers vary, but I tend to hear some version of the following: “It’s a serious crime, and x years seems like a serious sentence.” There’s certainly something to be said here about “anchoring effects” and “scale distortion”—how the ubiquity of very long sentences normalizes long periods of incarceration and leads to comparative analysis based on those high baselines, defaults, or points of comparison. See Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 CARDOZO L. REV. 59, 71–78 (2016). But I also think there’s something to be said about the circularity of many arguments for long prison sentences. The argument goes something like this: It’s a serious crime, so it requires a lengthy prison sentence in response. Why is a lengthy prison sentence the appropriate response for a serious crime? Because society punishes serious crimes with lengthy prison sentences.

To be clear—and as I explain in this Section—people might have a range of reasons for believing that a long prison sentence is the appropriate punishment for a given crime. But, I worry about this default to carceral punishment, particularly lengthy periods of carceral punishment—it often doesn’t even make sense on its own terms and without some clear objective or rationale, it seems extremely difficult to slow, stop, or curb the punitive impulses that drive it. Sure, incarceration *could* be one serious punishment for a serious crime. Yet actually accepting or advocating for incarceration as the correct or desirable response should require greater explanation or support. Cf. Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, 17 CRIM. L. & PHIL. 5, 13 (2023) (“My usual reaction to expressive theories of punishment has been, couldn’t

Whatever one's feelings about the acceptability or desirability of incarceration as a mode of punishment, the use of incarceration strikes me as a place where a focus on public safety might lead to a very different approach than a focus on accountability. For example, if you believe that it is important for the state to hold a person accountable for causing harm, it's not inevitable that you would favor a particular sort of punishment. There might be a host of noncarceral responses to harm or wrongdoing that would achieve accountability more effectively. Indeed, corporal punishments and shaming punishments—vestiges of an earlier moment in penal theory⁸⁹—might actually reflect a clearer focus on *punishing* individual defendants, rather than ensuring public safety.⁹⁰

To the extent that a preference for retributivism (or something like it⁹¹) might drive a desire for accountability, what would that tell us about what prisons should look like? It actually might suggest that prisons should be brutal places, or at least that the suffering is the point.⁹² But, even accepting this logic gets us to a host of complicated and difficult follow-up questions: How would one design jails or prisons that could punish many different people in a way that would proportionally reflect their different levels of culpability or the different sorts of harm that they caused? How would individual carceral sentences reflect the characteristics of individual defendants in a way that reflected “just deserts”?⁹³ Brutality aside (and that's a very big aside), our current

you find a less violent way of expressing yourself?”); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1471–72 (2021) (critiquing expressivist arguments for punishment for relying on the “empirical assumption[] . . . that incarceration is uniquely or dramatically better suited to sending such a message than non-criminal sanctions”).

89. For a discussion of this earlier moment and its relationship to the rise of the prison, see generally FOUCAULT, *supra* note 34.

90. To be clear, punishment and accountability aren't synonymous, and there certainly might be numerous other ways to achieve accountability that wouldn't explicitly be punitive. For a discussion of alternatives, see Kaba & Herzog, *supra* note 21, at 160–63; and DANIELLE SERED, *UNTIL WE RECKON* 91–128 (2019).

91. Revenge, etc.

92. See, e.g., Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 125–26 (2010) (“The scriptural maxim posits that one should give an eye for an eye and a tooth for a tooth. Many have understood the maxim as counsel for brutal revenge and condemned it for this reason.” (footnote omitted)); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 998 (2016) (“Americans think their prisons are brutal, and they are right. . . . Rhetorical tropes to the effect that prison conditions *should* be harsh are familiar features of the American political landscape (for example, jokes about prison rape, objections to ‘country club prisons,’ polls indicating that prison conditions are believed to be harsh but should be harsher still, an unwillingness to spend money to make prisons less crowded or more humane, and arguments to the effect that violence and sexual coercion are appropriately part of the sentence).”).

93. For a critique of punishment as failing to reflect individual, subjective experience, see generally Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009). For discussion of how individual characteristics and condition of confinement can make ostensibly similar punishments different, see Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1856–66 (2020); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISCIPLINARY L.J. 509, 525–35 (2014); Michael Pinard & Anthony C. Thompson,

model of incarceration strikes me as a massive failure if punishment is imagined as something that should be personalized or focused on the individual.⁹⁴

Were public safety truly the lodestar for penal policy or the reason that society relied on incarceration, it's not at all clear to me that prisons should be brutal places or that incarcerated people should be treated badly at all. Certainly, some deterrence proponents might think it's important for incarceration to be brutal (or at least sufficiently unpleasant) to achieve the desired deterrent effect. But, studies offered in support of the deterrent effect of punishment tend to show that it is the swiftness and certainty of punishment—not its severity—that are most important to achieving deterrence.⁹⁵ And even if harsher punishments achieved some greater deterrence,⁹⁶ we might hit a point of diminishing returns—or at least, any potential deterrence benefits might be outweighed by other social costs that actually would make society less safe (e.g., a diminishing belief in the fairness and legitimacy of state institutions, greater trauma and desocialization experienced by incarcerated people during their time in prison, and so forth). In fact, studies suggest that overreliance on harsh sentences in brutal prisons may increase, rather than reduce crime.⁹⁷

Put slightly differently, it's not at all clear that models of incarceration that provide much greater freedom and much better services to incarcerated people would be at odds with a safety-focused approach. Indeed, they might be much more in keeping with a theory of criminal justice rooted in public safety: These models of incarceration might deter and/or might keep the rest of the community safe, but they also might be more likely to aid in rehabilitation or make it more likely that formerly incarcerated people are able to reenter society successfully. (That's not to mention that such modes of incarceration

Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 601 (2006); Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1301–03 (2011); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1630 (2010); and E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 443 (2015).

94. See Benjamin Levin, *Criminal Law in Crisis*, 92 U. COLO. L. REV. F. 1, 5–6 (2020).

95. See Stephanos Bibas, *Chaotic Childhoods*, U. CHI. L. REV. ONLINE, Jan. 2024, at 13 & n.12 (book review) (collecting sources).

96. It's worth noting the rich literature critiquing the empirical foundation for deterrence-based arguments for criminal punishment. See, e.g., PANEL ON RSCH. ON DETERRENT AND INCAPACITATIVE EFFECTS, NAT'L RSCH. COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 4–7 (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978) (describing uncertain results of studies on deterrence); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999) (“Deterrence arguments also draw incessant fire from academic theorists. Empirically, deterrence claims are speculative.”); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1350 n.227 (2006) (“Deterrence is simply too indeterminate to be of use . . .”).

97. See generally Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049 (collecting evidence in support of this claim).

also might advance the personal-safety interests of incarcerated people, who remain members of the “public.”⁹⁸)

In contrast, such models of incarceration might fail to satisfy some people focused on accountability—the societal inquiry wouldn’t be whether incarceration (and what conditions of confinement) were necessary to keep society safe. It would be whether the punishment fit the crime or delivered the appropriate sanction to signal society’s moral condemnation of the wrongdoing or respond to the harm.

As is, we are left with a troubling mash-up of these two theories or approaches. Prison has become a default mode of punishment, and long sentences have become ubiquitous in part because of claims about risk management—people identified as “dangerous” are segregated from the rest of society.⁹⁹ At the same time, the brutality of prisons—from lack of medical care and nutritious food to widespread violence and sexual abuse—is accepted and even justified using the language of desert. My point isn’t that our system of incarceration is illogical—although it is.¹⁰⁰ It’s that the combination of two commonly accepted social functions may be even worse than the sum of its parts. We don’t just get the warehousing and segregation of people, particularly those from marginalized communities; we get that warehousing and segregation in extremely brutal form, cloaked in the language of morality.

B. POLICING

The “[p]olice have long served as the default government agency for addressing all sorts of social problems,” and so the policing function is much broader and much different than it appears when we read Fourth Amendment case law or consider political debates about policing reform.¹⁰¹ A growing strand of policing scholarship emphasizes the mismatch between public perceptions

98. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1204 (2015) (“But prison itself is a place where interpersonal violence, theft, and abuse are rampant and largely unreported. Therefore, incarceration does not necessarily reduce or incapacitate the commission of crime, but rather changes its location.” (footnote omitted)); Meredith B. Esser, *Extraordinary Punishment: Conditions of Confinement and Compassionate Release*, 92 FORDHAM L. REV. 1369, 1393 n.180 (2024) (describing “the intrinsic lack of safety that people in prison perpetually experience”).

99. For an extended explanation of this approach to punishment as a driver of mass incarceration, see generally Feeley & Simon, *supra* note 5.

100. Cf. Rubin & Feeley, *supra* note 84, at 295 (describing “[t]he problem of incoherence and fragmentation” in U.S. prison policy).

101. Farhang Heydari, *The Invisible Driver of Policing*, 76 STAN. L. REV. 1, 9–10 (2024).

of policing and what police actually do.¹⁰² As Barry Friedman argues, “this image of cops primarily as crimefighters is not really true. Not remotely.”¹⁰³

Shima Baradaran Baughman contends that elite legal and mass cultural understandings of policing rely on a “mythology of police” focused on crime fighting that stands in stark contrast with the reality:

Day-to-day policing has remarkably little to do with crime, despite public perception to the contrary. The vast majority of police time is spent on noncriminal functions such as health, transportation, and public order. Some estimates put public order (non-criminal functions) at ninety percent of police time. A recent survey of several cities who self-reported time spent by police revealed that only four percent of police time was spent working on violent crime. The bulk of police time was spent on calls about noncriminal matters (around thirty-seven percent), with traffic concerns taking up the next biggest chunk of police time at fifteen percent. Another substantial portion of police time is occupied by administrative reporting or personal time. Indeed, one set of scholars found that the average officer spent one hour per week responding to crimes in progress.¹⁰⁴

And this mismatch presents significant problems for both training and reform.¹⁰⁵ Although “police primarily are conceived of, and trained to be,

102. See, e.g., Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 101 (2021) (“Day-to-day policing has remarkably little to do with crime, despite public perception to the contrary.”); Michal Buchhandler-Raphael, *Mapping Alternative First Responder Models to Domestic Violence*, 30 VA. J. SOC. POL’Y & L. 15, 19 (2023) (“Contrary to popular belief that the main role of police is to ‘fight crime,’ police function mostly as first responders to service calls involving people in various types of crises, including severe mental illnesses, substance abuse, homelessness, and DV.”); Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1600 (2022) (“Part of the reason police are saddled with so many social problems is because, as the police themselves point out frequently, they are the only ones who respond around the clock, all days of the week and year.”); Friedman, *supra* note 11, at 930–31 (describing “the actual problems the police are called out daily to address”); Madalyn K. Wasilczuk, *Developing Police*, 70 BUFF. L. REV. 271, 285–86 (2022) (“Popular media and political rhetoric imagine cops as crimefighters: intervening in serious, violent crimes-in-progress, chasing down suspects, engaging in combat, and using military-style equipment. But that’s not what police do. Police spend most of their time, even in large, urban centers, on motorized patrol, dealing with minor disturbances and traffic violations. . . . [T]he roles police are called upon to fill in those disputes are more often those of first responder, mediator, and social worker, rather than action movie hero.” (footnotes omitted)).

103. Friedman, *supra* note 11, at 948.

104. Baughman, *supra* note 102, at 101–02 (footnotes omitted); see also Friedman, *supra* note 11, at 949 (“Cops do remarkably little crime-fighting. A major theme of the earliest studies concerning urban officer workload involved dispelling the popular myth that police spend most of their time protecting the ‘thin blue line’ between law and order.” (internal quotation marks omitted)).

105. See Friedman, *supra* note 11, at 944 (“When police are called to the scene they bring with them what they have been trained to do: deploy force and law. Yet, these are often the wrong responses to what a situation requires. To achieve real public safety, we need to dissect what cops

purveyors of force and law . . . in reality they spend their day dealing with a host of social problems and requests for assistance to which force and law are inapposite.”¹⁰⁶

This insight has come to play an important role not only in critical scholarship on policing, but also in advocacy and activism. The “defund the police” movement and assorted other movements for police abolition have argued that the roles currently played by police officers could be shifted to state and nonstate actors.¹⁰⁷ Even if their ambition isn’t a full dismantling of the police, many reformists have similarly embraced policies and proposals that would reduce the footprint of police and reassign many tasks—particularly responding to medical emergencies and wellness checks—to other institutions.¹⁰⁸ For example, Friedman has called to “disaggregate the policing function,” leaving what he sees as core policing functions in the hands of officers, but moving a range of community-care or public-welfare services out of the ambit of the police.¹⁰⁹

I agree with scholars and activists who have called for, and are calling for, a reckoning with what police actually do. To that end, I think it’s helpful to understand certain aspects of the “catchall”¹¹⁰ policing role as reflecting an elision of the safety and accountability functions—or to appreciate how visions of policing (or of a society without police) would differ depending on which function were prioritized. As should be clear, we could tease out a range of functions or commitments that define contemporary policing (both in practice and in the public imagination).¹¹¹ Indeed, the functions that I identify differ

actually do during their workday: what problems they confront and what tools are needed for the task.”).

106. *Id.* at 933.

107. *See, e.g.*, Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> (on file with the *Iowa Law Review*) (“We should redirect the billions that now go to police departments toward providing health care, housing, education and good jobs.”); Eaglin, *supra* note 63, at 128 (describing proposed legislation in Chicago that would “designate other social welfare actors, rather than police officers, to respond to mental-health-related calls for help”); Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1300 (2021) (same).

108. *See, e.g.*, Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2716–17 (2021) (describing efforts along these lines in Denver, Eugene, and Oakland); Rubin & Feeley, *supra* note 84, at 284 (“The calls to defund the police that have proved to be such an attractive target for law-and-order conservatives can be understood as a demand that the independent, militaristic police department be replaced with an administrative structure that assigns appropriate staff to the wide variety of different tasks that are needed to improve the safety of American communities.”).

109. *See* Friedman, *supra* note 11, at 931 (emphasis omitted).

110. Nirej Sekhon, *Catchall Policing and the Fourth Amendment*, 71 DUKE L.J. ONLINE 111, 112 (2022) (“The ‘catchall tradition’ has long defined American policing. Police direct traffic, resolve private disputes, help the sick and injured, do animal control, and far less frequently than one might think, they make arrests.” (footnote omitted)).

111. *See supra* notes 62–63 and accompanying text.

at least in part from the ones identified by Baughman, Friedman, and others. But I think that homing in on accountability and public safety as overarching goals, visions, or functions should be helpful as a means of circling back to first principles. Asking why people might want police in the first place should be an important part of appreciating whether police (as currently constituted) actually serve those functions, and whether they could.

Much writing about policing presupposes that the goal of policing is “public safety.” But if police were solely focused on public safety, then we’re left with a critical set of questions: What is public safety, and what’s the best way of achieving it? Put differently, if police are the state’s frontline “public safety officers,” then designing that institution requires answering some first-principles questions. Indeed, a significant amount of contemporary commentary on policing stresses the need to reconceive of “public safety”—as a social good or social function that could look very different from its conventional understanding in criminal policy circles.¹¹² Perhaps a true prioritization would involve improving health care, schooling, and access to resources, rather than conventional policing.¹¹³ To be clear, that position might be consonant with an abolitionist position (i.e., police can’t actually keep communities—particularly race–class marginalized communities—safe) or a range of reformist positions (e.g., police represent an important component of a public-safety-focused agenda, but their role should be smaller or different than it currently is). Either way, though, the questions to be answered are questions about public safety: what it actually is and what role police might (or might not) play in ensuring it.

In contrast, an accountability frame for policing presumably would emphasize the investigative function. Police would be there to ensure that individuals who broke the law or harmed others were held accountable. Arrest powers might or might not be a key component of accountability-based policing.¹¹⁴ But an enormous amount of the “peace keeping” or “order maintenance” that defines both broken-windows and “community” policing wouldn’t advance accountability interests. And prevention-based policing would be at odds with a purely accountability-focused system. It’s conceivable that some degree of police and community interaction could be justified on instrumental terms—building community trust might be important because cooperation from witnesses and other community members would be important

112. See, e.g., Monica Bell, *Black Security and the Conundrum of Policing*, JUST SEC. (July 15, 2020), <https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing> [http://perma.cc/6MYH-CL2Z] (“[S]ecurity, both objectively and subjectively, may not be solely or even primarily related to policing.” (emphasis omitted)); Friedman, *supra* note 22, at 790–91 (2022) (advocating a broader concept of public safety); Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 690 (2022) (“[T]his Article expands the notion of public safety to also include those things vital to the safety of the community.” (emphasis omitted)).

113. See *supra* note 112 and accompanying text.

114. On the question of whether—or to what extent—the arrest power is necessary to serve this objective, see generally Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307 (2016).

to police success in the investigative context.¹¹⁵ Nevertheless, these sorts of noninvestigative functions wouldn't have any intrinsic value if police were understood as investigators, rather than public safety officers or broader keepers of the peace. As a result, the vast majority of what police do in jurisdictions across the country bears little relationship, if any, to a broader accountability function for the criminal system.

C. BAIL AND PRETRIAL DETENTION

Every day, hundreds of thousands of legally innocent people are incarcerated in jails as they await trial.¹¹⁶ Pretrial detention has largely driven the explosion in jail populations over the last forty years.¹¹⁷ And staggering figures on race- and class-based disparities in who gets held pretrial have helped to drive significant activism and advocacy to address cash bail and pretrial incarceration.¹¹⁸

As both a doctrinal and theoretical matter, pretrial detention once again reflects the peculiar elision of public safety and accountability. For example, under the Bail Reform Act of 1984 (the statute that governs federal bail practices and serves as a template for many states' approaches), a judge can deny bail and detain a person pretrial in two circumstances: when a person is deemed to be a flight risk, and when a person is deemed to pose a danger to the community.¹¹⁹

As in the context of incarceration and policing, the rationale for the system(s) that we currently have becomes weaker the closer that we look. If the goal of a bail system were to ensure that people appear in court so that they may be held accountable if convicted—the commonly articulated “flight risk” rationale—then it's nearly impossible to justify the massive population of people held in jails every day awaiting trial. Or, in order to justify the widespread use of pretrial incarceration, one would need to make the case

115. For an influential account of the relationship between perceptions of institutional legitimacy and witness cooperation, see Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 262 (2008). *But cf.* Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834, 871 (2015) (“The basic intuition behind community policing is that increased communication and collaboration between police and communities will benefit both parties and cultivate a stronger ethos of civic engagement in marginalized communities—those with less social power and socioeconomic standing. The precise causal mechanics of this process, however, are far from clear.” (footnote omitted)).

116. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/6FXV-DHCL>].

117. See Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL'Y INITIATIVE (May 31, 2017), <https://www.prisonpolicy.org/reports/jailovertime.html> [<https://perma.cc/Z7BW-BK4K>].

118. See SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK* 93–107 (2018); JOCELYN SIMONSON, *RADICAL ACTS OF JUSTICE* 16–51 (2023).

119. See 18 U.S.C. § 3142(f), (g)(4) (2018).

that incarcerating legally innocent people was necessary to achieve this end—and that the poor people who were disproportionately detained pretrial wouldn't appear in court absent incarceration.

The evidence that we have doesn't appear to support such bold claims. Studies show that relatively low-cost and nonintrusive methods are effective at increasing appearance rates.¹²⁰ For example, several jurisdictions have experimented with providing text message notifications to remind people of their court dates.¹²¹ One study in New York found a twenty-one percent reduction in failures to appear when people were sent text message notifications.¹²² And increased reminders in Arizona state courts reduced failure-to-appear rates by twenty-three percent.¹²³ Indeed, one report from the Arnold Foundation concludes that “court date notifications continue to have the greatest impact on court appearance, oftentimes providing as much as 30 to 50 percent increase in appearance rates.”¹²⁴ That is, it's not at all clear that pretrial detention or cash bail are necessary to ensure appearance at future court dates. And many common conditions of release (curfews, drug tests, stay away orders, etc.) seem to bear no relationship to appearance at future court dates.

An accountability-focused system would be designed exclusively to ensure appearance for future court dates.¹²⁵ And, such an objective or approach hardly justifies the current prevalence of cash bail, pretrial detention, and supervised release.

That's not to say that a public-safety-focused approach is either the right way to go or is necessarily what we have in most jurisdictions. An exclusive

120. See, e.g., Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 884–85 (2022) (“Providing support regarding pretrial appearance—such as text notifications, assistance with rescheduling, or transportation—can increase court appearance without resorting to detention. However, research is mixed on the efficacy of many more burdensome pretrial conditions because for many arrestees, simple release may be most effective.” (footnotes omitted)); COLIN DOYLE, CHIRAAG BAINS & BROOK HOPKINS, HARV. L. SCH., *BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS* 13 (2019), <https://static.prisonpolicy.org/scans/Harvard%20Guide%20to%20Bail%20Reform.pdf> [<https://perma.cc/2Z5K-6GDM>]; STEVENS H. CLARKE, JEAN L. FREEMAN & GARY G. KOCH, *THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND REARREST WHILE ON BAIL* 31–33 (1976).

121. See DOYLE ET AL., *supra* note 120, at 4; Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 474 (2021).

122. Alissa Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE 682, 682–84 (2020).

123. Maria Elena Cruz, *Arizona's Task Force on Fair Justice for All*, in NAT'L CTR. FOR STATE CTS., *TRENDS IN STATE COURTS* 48, 50 (Deborah W. Smith, Charles F. Campbell & Blake P. Kavanagh eds., 2017).

124. LAURA & JOHN ARNOLD FOUND., *REQUEST FOR PROPOSALS TO CONDUCT RESEARCH ON IMPROVING PRETRIAL COURT APPEARANCE* 4 (2018).

125. Alternatively, an accountability model might be explicitly punitive—pretrial detention and restrictions on liberty might be designed to punish or hold a person for the crime that they allegedly committed. To be clear, this approach would be flagrantly unconstitutional—a clear violation of the presumption of innocence. Nevertheless, there might be good reason to think that many contemporary practices actually reflect this approach.

prioritization of public safety would lead to a reduced emphasis on failure to appear. Rather, the emphasis presumably would be on ensuring that people didn't cause harm while they awaited trial. Indeed, this approach might lead to extensive restrictions on liberty that had little to do with the charged crime and instead reflected actuarial approaches to risk management. For example, even if a defendant had never had substance-use issues, a judge might prefer to impose restrictions on the use of alcohol or certain other drugs because of evidence that such substances increased the likelihood of violence or impulsive behavior. Similarly, pretrial detention might be justified not because a person was a flight risk, but rather as a means of protecting potential witnesses or based on some sort of predictive assessment of a risk of violence or dangerous behavior.¹²⁶

As should be clear, this preventative approach finds significant purchase in a certain amount of contemporary bail policy—many restrictions on people's liberty pretrial seem to have little to do with the adversarial process and often appear to fall afoul of the presumption of innocence.¹²⁷ Instead, the broad sweep of pretrial incarceration and restrictive conditions of release speak to broader projects of risk management and social control. And as with any larger project of risk management in the criminal legal context, there would be an important set of follow-up questions about how "risk" is defined or coded, and how those metrics reflected or entrenched inequities across lines of race, class, and cultural marginalization.

Of course, as noted in the prison context, reducing risk needn't lead to increasing incarceration—even if it led to social control and restrictions on liberty.¹²⁸ One might adopt a safety-focused approach that involves reducing pretrial detention. Perhaps this approach would focus on the harms associated with incarceration (brutal conditions inside, and so forth) and seek to impose noncarceral conditions of release if at all possible. Relatedly, this approach might emphasize that incarcerated people are also part of the "public," so a more just conception of "public safety" would factor in the safety of incarcerated people, forcing us to ask whether jail overcrowding increases the likelihood

126. See *United States v. Salerno*, 481 U.S. 739, 742 (1987) ("By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to 'give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.'" (quoting S. REP. NO. 98-225, at 3 (1983))).

127. See *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) ("Without question, the presumption of innocence plays an important role in our criminal justice system. The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." (internal quotation marks and citation omitted)). *But see* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 776 (2011) (arguing for a greater emphasis on the presumption of innocence in crafting bail policy).

128. See *supra* note 98 and accompanying text; see also *infra* note 152 and accompanying text.

of illness or violence,¹²⁹ or whether the person who would be detained pretrial poses some risk to the incarcerated population.¹³⁰

Whatever approach to public safety one prefers, what I hope is clear is that a concern for “public safety” pretrial bears little direct relationship to whether a person will show up to court dates.¹³¹ And the intrusions into the liberty of a person awaiting trial—whether incarceration, electronic monitoring, or curfews—actually appear to stand in tension with an understanding of criminal adjudication as focused on determining guilt and assigning punishment only to those convicted of crimes. Pretrial detention and restrictions on liberty focused solely on public safety suggest that arrest might serve a broader regulatory function—allowing state actors the ability to monitor or control individuals, outside of a conventional punishment or accountability framework.¹³² Yet, the association of bail with accountability and the adversarial system both implies a possibly misplaced moral content (the regulatory function is intertwined with the language of culpability) and also misleadingly suggests that the system has limits (its role in the adjudicative process suggests that arrestees will benefit from constitutional protections and procedural-justice norms).¹³³

D. COLLATERAL CONSEQUENCES

Collateral consequences—restrictions or harms beyond formal sentences borne by people with criminal records—have received growing attention as the numbers of both collateral consequences and people with criminal records have increased.¹³⁴ According to commonly cited figures, nearly one in three

129. See *supra* note 98 and accompanying text.

130. *Id.*

131. Any relationship would rely on claims about failure to appear as producing a culture of lawlessness (reflecting something like “broken windows” theory), or on claims about accountability as necessary to ensure public safety. See James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29, 29.

132. For an extended argument that arrests serve a regulatory function, see generally Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015).

133. On the elision of arrests and convictions and the false assignment of guilt or blame to people based on arrests, see generally Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019). On the limited checks on pretrial supervision, see generally Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022).

134. See Alec C. Ewald, *Barbers, Caregivers, and the “Disciplinary Subject”: Occupational Licensure for People with Criminal Justice Backgrounds in the United States*, 46 FORDHAM URB. L.J. 719, 721–22 (2019) (“The last fifteen years have seen a great efflorescence of research and advocacy relating to the collateral consequences of criminal convictions in the United States. Seeking to understand the ways a criminal record restructures the rights of citizenship, scholars, reformers, and journalists have analyzed policies restricting voting, firearms ownership, jury service, receipt of public benefits, military service, access to housing, and more — a web of state and national rules that together threaten to place Americans with convictions in a state of legal nonfreedom.” (footnotes and internal quotation marks omitted)); Chin, *supra* note 87, at 1797–99 (describing commentary on collateral consequences over time).

adults in the United States has a criminal record.¹³⁵ Therefore, it's little surprise that academics, activists, and policymakers have been paying more and more attention to the "hidden sentences" associated with arrest and conviction.¹³⁶

But collateral consequences confound commentators and legal practitioners alike. There are tens of thousands of restrictions imposed on people with criminal records, and those restrictions are scattered across federal, state, and local codes, making it very difficult to keep tabs on every regulation, requirement, or prohibition.¹³⁷ The effects of some collateral consequences might be minor, but many are hugely significant and disruptive.¹³⁸ Indeed, some defendants might be willing to take more time in jail or prison in exchange for avoiding particularly burdensome collateral consequences (e.g., deportation, loss of housing or employment, or sex offender registration).¹³⁹

Yet judges and justices generally have refused to treat collateral consequences as punishment,¹⁴⁰ and the doctrinal, political, and theoretical treatment of collateral consequences remains uncertain. What sorts of restrictions on a person based on a criminal record are acceptable, and why?

135. See NICOLE D. PORTER, SENT'G PROJECT, SUCCESSES IN CRIMINAL LEGAL REFORMS, 2021, at 1 (2021), <https://www.sentencingproject.org/reports/successes-in-criminal-legal-reforms-2021> [<https://perma.cc/8DDL-4TCK>].

136. See, e.g., Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 177–78 (2019) ("Their sweeping and indiscriminate nature permits punishment for wrongdoing in ways that go beyond the sentencing process and are subject to fewer checks. For this reason [collateral consequences] regimes have been described as secret or hidden sentences, an invisible punishment that creates shadow citizens, and most pointedly: new civil death." (footnotes and internal quotation marks omitted)).

137. See generally *National Inventory of Collateral Consequences of Conviction*, CSG JUST. CTR. (2025), <https://niccc.nationalreentryresourcecenter.org/consequences> [<https://perma.cc/963Y-WVVK>] (interactive database listing over 42,000 collateral consequences imposed by state criminal law).

138. A single footnote can't begin to capture the important growing literature on collateral consequences. For two leading accounts of the harms suffered by people with criminal records, though, see generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); and DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

139. See, e.g., John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 89 (2013) ("No reasonable person would choose to have a criminal record for the rest of his life when he could avoid it by spending a single night in jail. The Court has recognized that defendants need counsel to avoid the enmeshed penalties of conviction, and it has acknowledged the fact that our criminal-justice system is a system of plea bargaining. The time has come for the Court to accept the fact that convictions sometimes matter more than incarceration and to extend the Sixth Amendment right to counsel to criminal prosecutions where the conviction itself will subject a defendant to a web of enmeshed penalties."). On the role of collateral consequences in the plea-bargaining process, see generally Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901 (2017); and Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016).

140. E.g., *Demore v. Kim*, 538 U.S. 510, 531 (2003); *Smith v. Doe*, 538 U.S. 84, 92 (2003); *De Veau v. Braisted*, 363 U.S. 144, 159–60 (1960). For a larger collection of constitutional challenges to collateral consequences, see MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* 211–13, 216–19 (2013).

Are any collateral consequences desirable? If so, which ones? Once again, I argue that the safety–accountability elision helps to explain some of the confusion here and that teasing the two apart might help in tackling important normative questions about collateral consequences.

It’s conceivable that collateral consequences might be understood as an additional means of holding guilty defendants accountable. Under this view, a carceral or noncarceral sentence wouldn’t necessarily go far enough or would fail to force guilty defendants to confront the wrongfulness of their conduct or the harm that they’ve done.¹⁴¹ Perhaps public opinion and the prevalence of certain retributive or punitive impulses would:

require that convicted individuals be punished further at the conclusion of their sentences. Under this retributive theory, collateral consequences are imposed as extensions of the “criminal” punishment—in essence, they supplement the direct punishment. This theory holds particular weight in instances where collateral consequences are imposed automatically upon conviction for particular criminal offenses regardless of individual circumstances and in instances where the collateral consequences are not directly connected to the underlying criminal conduct (or where the connection between consequence and conduct has not been articulated legislatively).¹⁴²

Depriving people convicted of felonies of their ability to vote or stripping them of a range of other rights—reminiscent of the historical practice of “civil death”—might be understood as reflecting a societal determination that punishment should extend beyond the formal sentence.¹⁴³ These arguments often reflect a sort of forfeiture logic—by committing a crime, a person forfeits certain rights or privileges (e.g., voting, gun ownership, etc.).¹⁴⁴

Alternatively, collateral consequences might be justified on public safety terms. Some restrictions might be understood as reflecting a legislative or societal judgement that certain convictions or interactions with the criminal system indicated a potential risk.¹⁴⁵ For example, restricting gun ownership

141. Or would fail to convince the rest of society that a defendant had been held accountable and/or punished sufficiently.

142. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 509 (2010).

143. On the historical use of “civil death” as a punishment for crime, see Chin, *supra* note 87, at 1793–98.

144. See, e.g., Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1073 (“For liberals, the ideal state is a neutral compact designed to allow individuals to define their own ‘goods,’ and political activity is instrumental and self-interested. But having violated the rules, the criminal forfeits the right to participate in such activity”); Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725, 1731 (2014) (“On this view, because offenders have violated the terms of the [social] contract, they have forfeited their right to participate further in the enterprise of democratic self-governance.”).

145. For an argument that this is the primary function of many collateral consequences, see Mayson, *supra* note 29, at 335, 345.

for people convicted of certain crimes (or subject to restraining orders for intimate partner violence) might reflect a determination that those people would pose a socially unacceptable risk if armed. Similarly, employment restrictions for teachers or childcare workers might reflect a societal concern about the potential risks posed to vulnerable populations.

Of course, collateral consequences generally aren't precisely crafted. For example, the sex offender registry and related regulations might impose the same restrictions on a high schooler who had sex with their classmate as an adult who repeatedly molested young children. Similarly, a blanket ban on people with felony convictions owning firearms would treat the person convicted of felony copyright infringement the same as the person convicted of murder. Nevertheless, sloppily crafted collateral consequences still might be justified on public safety terms:

One might also argue that collateral consequences unrelated to the underlying criminal act are still legitimate because they serve deterrence purposes and thus enhance public safety. The idea here is that deterrence could be a plausible goal even when the nexus between the criminal act and the collateral penalty is tenuous or nonexistent. In this context, denying public housing to an individual convicted of any misdemeanor (or, in some jurisdictions, even a noncriminal violation) may not be the result of any assumption that the particular individual would pose a danger to his or her neighbors. Rather, the penalty serves to deter individuals living in public housing and prospective public housing tenants from engaging in criminal activity.¹⁴⁶

In other words, there might be a range of reasons beyond accountability-based forfeiture logic or simple prejudice against people with criminal records for voters and policymakers to support at least some collateral consequences.

None of this is to say that collateral consequences would be socially desirable if they were applied more rationally or were justified by policymakers in clearer terms. Nevertheless, I hope to highlight the way that disentangling or disaggregating the functions of the criminal system might lead to very different understandings of what's wrong with collateral consequences—and perhaps also what a defensible regime of collateral consequences might look like.

Were collateral consequences conceived of as an accountability or punishment mechanism, they wouldn't really be collateral at all—they would be punishment. Indeed, this understanding jibes with the position taken by many scholars and the American Bar Association's Task Force on Collateral Sanctions and Discretionary Disqualification of Convicted Persons—that judges should take these consequences into account when sentencing.¹⁴⁷

146. Pinard, *supra* note 142, at 508 (footnotes omitted).

147. See AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 29–30 (3d ed. 2004).

Perhaps the most far-fetched version of an accountability-focused approach would involve considering whether what we now call “collateral consequences” might replace carceral punishment altogether. That is, imagine a system in which collateral consequences actually replaced conventional punishment—rather than facing a carceral or probationary sentence, defendants might face alternative restrictions on their liberty. Such a scheme might be problematic for any number of reasons, but it would be different than the scheme(s) we currently have, and many objections to it necessarily would be different as well. And, getting to a point where these consequences might replace conventional carceral punishment would require understanding—and designing—collateral consequences as accountability mechanisms.

Alternatively, a purely safety-based approach would require that collateral consequences were justified in utilitarian terms as a vehicle for managing risk. Under this approach, the sort of “forfeiture” logic that seems to drive practices like disenfranchisement wouldn’t hold water.¹⁴⁸ Instead, there’d need to be evidence that a practice (say, disenfranchisement) actually increased public safety. So, as with an accountability approach, there would need to be some relationship between the collateral consequence and risk. For example, given how many crimes are classified as “felonies,” it’s not at all clear that a felony conviction, rather than a misdemeanor conviction, says something different about the potential future risk posed by a person.¹⁴⁹ Indeed, a more rigorous safety-based analysis would force us to grapple with the biases and prejudices that shape a significant amount of risk prediction. These include not only beliefs about past offending leading to future offending, but also raced and classed perceptions of dangerousness, as well as the reality that criminal records might well reflect disparities in policing and prosecution across lines of race and class. And as with an accountability focus, we could imagine a world where what are now collateral consequences might come to replace conventional punishment.¹⁵⁰ If the reason that the United States incarcerates so many people is in significant part because of a belief that people who commit crimes must be incarcerated to keep the public safe,¹⁵¹ then couldn’t

148. See *supra* note 144 and accompanying text.

149. See Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 565–66 (2018) (“The social meaning of felony, as opposed to its legal meaning, is a significantly harmful or depraved crime. Accordingly, discrimination against felons is widely accepted, and even demanded, on the presumption that felony convictions are reliable indicators of dangerousness and bad character. . . . Thanks to the deep-seated beliefs about bad character and wrongful actions that give felony its social meanings, constraints on felons are tolerated and legitimized, even when (or perhaps because) they are distributed in clearly inegalitarian ways.”).

150. Again, there are an enormous number of theoretical and practical objections to this claim, and addressing them all falls well outside the scope of this Article. But, I do think there’s value in teasing out this thought experiment—of trying to articulate what it actually is that would be objectionable or desirable about a world where a criminal system existed, but without carceral punishment, the brutal feature that has come to define it.

151. See *supra* note 5.

a collateral consequences framework focused on safety and risk reduction accomplish the same thing without the brutality of prisons?¹⁵²

Of course, an uncritical enthusiasm for the logic of deterrence might undercut some of the potential benefits of disentangling or disaggregating here (or perhaps anywhere). If each additional collateral consequence were seen as a way of deterring criminal conduct, then maybe some people would be comfortable with a host of collateral consequences that had nothing to do with any specific risk posed by an individual.¹⁵³ To be clear, though, that's a position that would be at odds with any meaningful idea of proportionality and might lead to outrageous results (e.g., imposing the death penalty for very minor offenses).¹⁵⁴ Nevertheless, this position (unless held in extreme forms) presumably still would be bounded by some concept of "optimal deterrence"—ultimately *some* collateral consequences would be excessive because the harm done would outweigh any conceivable deterrent benefit.¹⁵⁵

Major complications aside, I think there's value to appreciating the competing rationales that might help drive the continued growth of collateral consequences. And focusing on safety and accountability as distinct rationales might help in the process of articulating why given collateral consequences are indefensible, why some collateral consequences should be understood as punishment, and perhaps even why collateral consequences might provide a window into noncarceral models of managing risk or ensuring accountability.

III. CONFLICTING THEORETICAL FRAMEWORKS

The safety–accountability distinction rears its head not only in debates about specific penal institutions, but also in broader debates about systemic reform. Recent years have seen an increase of scholarship and activism focused on addressing the injustices of the criminal system—police violence, widespread racial disparities, and the growing population of people incarcerated

152. This claim resonates with Allegra McLeod's argument that "preventive justice" could be consonant with abolitionist commitments. See McLeod, *supra* note 98, at 1165. McLeod argues that a focus on crime prevention needn't lead to broken windows and harsh punishment and instead could lead to nonpunitive or noncarceral regulatory approaches. See *id.* at 1165–66. As McLeod describes it, "preventive justice, in its overlooked iterations—outside the criminal law context—may begin to illuminate how it might be possible to rely radically less on criminal law enforcement to serve the ends of security and collective peace." *Id.* at 1165. Of course, nonpunitive, preventive intervention still could involve restrictions on liberty, surveillance, or increasing state power. So, the extent to which these alternative approaches would be attractive (or more desirable than present approaches) would depend on one's views about prevention, prediction, and state power—not simply one's views on criminal law and formal institutions of policing or criminal punishment.

153. See Pinar, *supra* note 142, at 508 (describing this position).

154. Cf. Benjamin Levin, *Criminal Law Minimalisms*, 101 WASH. U. L. REV. 1771, 1797 (2024) (describing a version of this sort of radical consequentialist position as an outlier that finds itself at odds with a wide range of different approaches to criminal policy).

155. Cf. *id.* (making a similar point about the limits of even radically amoral consequentialist criminal policy).

or under state supervision. But interest in scaling back the carceral state hardly reflects a unified approach or set of commitments.¹⁵⁶ In this Part, I argue that thinking about safety versus accountability also helps us to better appreciate common critiques and understand the fault lines between different reformist and transformative visions. To that end, I consider three different critical theoretical debates in the literature on criminal justice reform: disagreements about whether to rely on bureaucratic/technocratic or democratic approaches in reform efforts; debates about whether criminal law should be understood as exceptional; and disagreements about whether to leverage the penal system to deliver social services.

Table 2. How Prioritization of Public Safety or Accountability Might Affect Theoretical Debates About Criminal Justice Reform

	Public Safety	Accountability
What is the favored approach to criminal justice reform?	Bureaucratic or technocratic approach ¹⁵⁷	Democratic or community-input-focused approach
Is criminal law exceptional?	No	Maybe ¹⁵⁸
Should criminal legal institutions provide social services?	Probably	Probably not

A. BUREAUCRATIZATION AND DEMOCRATIZATION

A significant amount of contemporary commentary on criminal justice reform reflects a divide between bureaucratic or technocratic approaches, on the one hand, and democratic approaches on the other.¹⁵⁹

156. See generally Levin, *supra* note 87.

157. But see *infra* notes 184–85 and accompanying text.

158. Exceptionalism claims certainly strike me as stronger if the criminal system is imagined as a space of righting wrongs than if it is imagined as a space for ensuring public safety. That said, there certainly are other institutions or areas of law that might be understood as reflecting a similar moral bent and a focus on accountability or the righting of wrongs. For one account of tort law as a vehicle for accountability via “civil recourse,” see generally JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020).

159. Josh Kleinfeld describes this “foundational, enormously important . . . line of disagreement” in debates about criminal policy:

On one side are those who think the root of the present crisis is the outsized influence of the American public . . . and the solution is to place control over criminal justice in the hands of officials and experts. On the other side are those who think the root of the present crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public’s concerns and sense of justice, and the solution is to make criminal justice more community focused and responsive to lay influences.

Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017). Others have identified a similar divide in the literature. See, e.g., Rebecca Goldstein, *The Politics of*

Bureaucratizers—or those who favor technocratic approaches to criminal justice reform—argue that the path to better and less punitive criminal policy is to wrest decision-making from voters. For these commentators, “punitive populism” has served as a primary driver of mass incarceration,¹⁶⁰ so shifting decision-making authority to “experts” would help reverse the course of U.S. criminal policy. In contrast, *democratizers* argue that U.S. penal policy reflects a failure of democracy—communities have lacked the ability to engage in meaningful self-governance and to make their own decisions about criminal law and punishment.¹⁶¹ We might distinguish or map these groups in different ways—and even ask whether this is the right distinction to draw between reformist positions.¹⁶² Nevertheless, disentangling the safety and accountability functions might help us make sense of the perceived bureaucratizer–democratizer split.

Bureaucratizers tend to speak consistently in the language of public safety. And in many ways, that makes sense, or at least that makes their chosen

Decarceration, 129 YALE L.J. 446, 450 (2019) (reviewing RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019)); Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 75–76 (2020) (reviewing RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019)); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 534–40 (2020); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 3–4 (2019); John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 714 (2020); David Alan Sklansky, *Populism, Pluralism, and Criminal Justice*, 107 CALIF. L. REV. 2009, 2011 (2019).

160. E.g., DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE* 185–87 (2016); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 880 (2009); Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”*: *American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597, 608–09, 616 (2011); Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 HARV. L. REV. 1299, 1324 (2013) (reviewing STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012)).

161. See, e.g., Stephanos Bibas, *Improve, Dynamite, or Dissolve the Criminal Regulatory State?*, in *THE NEW CRIMINAL JUSTICE THINKING* 61, 61–62 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (“Instead of relying more on expertise and wonkish incremental reforms or repudiating the whole exercise, I advocate a return to criminal justice’s populist moral roots as the system’s guiding star.”); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1598–99 (2017); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 253–56 (2019); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1610 (2017); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 278 (2015) (arguing that a “technicist approach” to reform “is inattentive to the important political and symbolic dimensions of crime prevention and penal policy more generally”).

162. See Levin, *supra* note 25, at 2787 (“One of my core claims in this Article, though, is that the line between technocratic or bureaucratic arguments on the one hand and democratic ones on the other is much blurrier than it appears. By pitting technocracy and democracy against one another, as clear and incommensurable poles and goals, much writing about the U.S. criminal system understates both deep political divisions and points of potential commonality.”). Cf. DAVID KENNEDY, *A WORLD OF STRUGGLE* 39 (2016) (“[T]he effort to ‘replace technocracy with democracy’ . . . leaves unexplored the assumption that they are essentially different while shielding from controversy the process by which earlier struggles had settled this as technical and this as political.”).

reforms make sense. If you believe that the criminal system's primary function is to ensure public safety, it might make sense to embrace a technocratic turn—to say that reducing danger and managing risks are the sorts of problems that technocrats are well positioned to solve. Risk management is an approach that is common in academic and elite policy circles—it involves “evidence-based” arguments and implies that there is a proper way to analyze policy questions.¹⁶³ Deploying such a proper method is the sort of task that we commonly associate with technocracy.¹⁶⁴ The vision of the expert as a scientist or neutral designer extends from other corners of the administrative state and other debates about how to regulate risk in society.¹⁶⁵

Starting from this premise, a “public safety agency” seems like the bureaucratizer's ideal criminal justice system.¹⁶⁶ Rather than a site of moral judgement and collective values, the system (or “agency”) would function as a site for reducing risk and harm. Rather than speaking the language of right and wrong, a bureaucratic or technocratic approach speaks an ostensibly amoral language.¹⁶⁷ Such a description sounds very different from the criminal justice system described by many theorists of retributivism, expressivism, and the like. And, it sounds very different from the “criminal justice system” described in the popular press and presented in much mass culture—the place where “justice” is done and where determinations of right and wrong are made on a grand scale.¹⁶⁸ Instead, this technocratic model sounds more like

163. See generally Collins, *supra* note 25 (critiquing the evidence-based paradigm).

164. See Levin, *supra* note 25, at 2812–13 (“The vision is tempting, not only because it may jibe with the worldview of managerial and professional class commentators who see in it a sort of clarity and familiarity (i.e., these are, after all, the sorts of problems that we have been trained to solve), but also because it is so eminently *manageable*. Thinking about a criminal system that could be assessed, calibrated, and then repaired invites proposals, policy analysis, and a shared sense that if only the right people, resources, and metrics were deployed, society could get it right.” (footnotes omitted)).

165. See, e.g., Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2024 (2015) (“This important role of agency-as-expert coincided with the inherently optimistic belief that there were ‘objectively correct solution[s] to the country’s problems.’” (quoting Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 417 (2007))).

166. For proposals along these lines, see Rubin & Feeley, *supra* note 84, at 314–15; and Mark R. Fondacaro, *Social Ecology, Preventive Intervention, and the Administrative Transformation of the Criminal Legal System*, 40 GA. ST. U. L. REV. 277, 301–04 (2024).

167. Cf. Levin, *supra* note 25, at 2813 (“Politics are messy. People are unpredictable and irrational. And, confronting the specific, localized pathologies of thousands of criminal systems is daunting. Turning to experts and their potential neutral principles and applications provides some optimism and promises to transform a Sisyphean task into something digestible, manageable, and improvable—if not actually fixable.”).

168. On this public imagination of criminal law, see STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE*, at xv (2012).

conventional forms of governmental regulation and many other corners of the administrative state.¹⁶⁹

In proposing a unified criminal justice agency focused on preventing harm, Ed Rubin and Malcolm Feeley observe that “administrative agencies are our dominant mode of governance, the mechanism that we use for nearly all other government functions.”¹⁷⁰ So, an administrative or bureaucratic model here should come as little surprise—it’s the norm in governing, rather than the exception. It’s certainly possible (and perhaps likely) that something like “accountability” would be necessary to ensure public safety,¹⁷¹ but the safety-focused technocratic approach seems to allow for accountability only as a means to an end—a technique to reach an optimally safe society.

In contrast, if your primary concern were the accountability function, it’s not clear why technocrats or bureaucrats would be particularly well suited to respond to your big questions or concerns. It might well be that the criminologist, legal scholar, or data scientist has some epistemic advantage when it comes to designing institutions to prevent harm or crafting policies that might decrease the likelihood of violence, but it’s not at all clear why any of these actors have some special epistemic or institutional advantage when it comes to determining what is morally right or wrong.¹⁷² What training or special set of skills would equip an “expert” to determine what sort of accountability is desired or deserved in a given community?¹⁷³

Indeed, the accountability function would lend itself much more to a focus on democracy and community involvement. Maybe some people would prefer an “accountability agency,” but it’s not clear that this function (unlike the public safety function) would need to be performed solely or primarily by the state—or that it would need to retain many, or any, of the features of the contemporary criminal system. Instead, the language of accountability seems to evoke broader discussions of norms, fairness, and justice. And in turn, these are concepts that are often associated with lay participation, as in the form of the jury or with broader democratic input and political participation.¹⁷⁴

169. For an extended version of this argument, see VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* 28–29 (2019).

170. Rubin & Feeley, *supra* note 84, at 270–71.

171. See *supra* notes 76–81 and accompanying text.

172. Cf. Robinson, *supra* note 48, at 403 n.1 (“In determining ‘just deserts,’ it is not only moral philosophers, but also lay people, who are good at distinguishing among cases according to their relative moral blameworthiness.” (citing Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1846–80 (2007))).

173. To the extent that one might possess an expertise in moral desert or community values, that would be a distinct expertise from one in how to reduce risk. See generally Levin, *supra* note 25 (describing different possible conceptions of criminal justice expertise).

174. See, e.g., Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255, 1270–73 (providing examples of juries being “described as the community’s conscience, representatives or fiduciaries of the community”); Simonson, *The Place of “The People” in Criminal Procedure*, *supra* note 161, at 261–64 (describing the perception among scholars that

After all, if the goal were to determine what people in a community believe is the appropriate way to respond to harm, then it would make sense to ask the people themselves.¹⁷⁵ Democratic input in policymaking or community control of institutions might become attractive as a means of ensuring that accountability is achieved and that community will is respected. Of course, that's easier said than done. Defining the boundaries of a community is a tricky task, and community values are hardly monolithic.¹⁷⁶ But, a preference for democratic involvement over technocratic management certainly makes more sense if the "criminal justice system" is understood as a justice-and-accountability-focused institution rather than a public-safety-focused institution.

I don't mean to suggest that there's a clear one-to-one relationship here—that "public safety" necessarily equates to a preference for technocracy or bureaucracy and that "accountability" necessarily equates to a preference for democratic participation or community control. Rather, my claim is that appreciating first-principles disagreements about overarching institutional purposes (i.e., what function criminal legal institutions are supposed to serve) can help understand disagreements about policymaking processes. And mixing and matching functions (accountability vs. public safety) and processes (bureaucracy vs. democracy) reveals the unstated assumptions that often drive competing proposals and literatures—why one approach might appear to be an obvious or natural fit for some commentators, but not for others.

It's certainly possible, for example, that technocratic involvement would be desirable for academics and activists focused on accountability. But if so, the sort of expertise or technocratic specialty would need to be something very different from what tends to be invoked in the bureaucratizer or technocratic literature. Put differently, experts might have a role to play here, but only if we believe that there are experts in accountability—experts in right and wrong or on community values. Maybe that would mean certain community leaders, religious leaders, philosophers, or other people with a position of status or insight into community values, morals, or psyche. But even if such expertise were desirable (or discernable), it's important to recognize that such an expert-based model would look very different than the agency-like ones that tend to be envisioned in the classic bureaucratizer or technocratic literature—accountability is hardly the province of hyper-rationalism or the vocabulary of the person with advanced social science training.

juries and democratic processes are important ways to ensure the criminal justice process is aligned with "popular ideals of justice and fairness").

175. Of course, it also would make sense to ask the people what "safety" means or how they would want to ensure public safety. *See infra* notes 177–78 and accompanying text.

176. *See, e.g.*, Levin, *supra* note 25, at 2830 (arguing that "movement, community, and experience are fraught, heterodox, uncertain, and perhaps conflicting" concepts); Bernard E. Harcourt, *Matrioshka Dolls*, in TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES 81, 81–84 (Joshua Cohen & Joel Rogers eds., 1999) (highlighting competing views within communities); Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798, 808–09 (2021) (same).

Similarly, it's conceivable that democratizers might focus on public safety. Indeed, this move shows up increasingly in literature on abolition and criminal justice reform.¹⁷⁷ For example, academics and activists argue that members of race–class subordinated communities are better equipped than—or just as well equipped as—conventional experts when it comes to figuring out how to make a community safe or to define “safety.”¹⁷⁸ I think that’s a fair point, and determining who defines safety (or accountability, for that matter) strikes me as an important component of any reformist, transformative, or abolitionist project.

But, my basic claim is that by disentangling discussions about public safety and discussions about accountability, we might be able to resolve—or at least clarify—a certain number of debates about bureaucracy vs. democracy. That is, debates, and the terms of debate, might be more straightforward and might have clearer answers if we could disentangle the two functions. Figuring out how to allocate, build, or constrain power might be easier in a world where we had, say, a public safety agency and some sort of accountability mechanism that were functionally distinct. To be clear, those institutions might be state or private; they might retain features of the “criminal justice system,” or they might not. But figuring out how to govern, regulate, or design each institution would be a more manageable task than figuring out how to allocate decision-making authority in a world where those functions were elided or housed in a single institutional home (our “criminal justice system”).

B. CRIMINAL LAW EXCEPTIONALISM

Conventional treatments of U.S. criminal law tend to rely on a claim that criminal law is exceptional—that it is distinct from other areas of law or other regulatory approaches.¹⁷⁹ *Criminal law exceptionalism* might be explained on a number of grounds,¹⁸⁰ but perhaps the most common in academic and judicial writing is the claim that criminal law has a unique moral force.¹⁸¹ Scholars

177. See, e.g., Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 857 (2021) (“Organizers . . . redefine concepts of harm, community, and public safety, as they directly contest the racialized logic of criminal law enforcement.”).

178. See, e.g., Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 721 (2019) (describing alternate ways of conceptualizing “safety”); Kaba & Ritchie, *supra* note 70 (“For the majority of people and communities affected by violence, our sense of safety is often informed by the safety we didn’t get—from police, or anyone else—when we did face harm.”); Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2050–52 (2022) (arguing that marginalized communities should serve as knowledge sources for making criminal policy).

179. Some theorists might distinguish “exceptional” from “distinct.” See generally R.A. Duff & S.E. Marshall, *Is Criminal Law ‘Exceptional’?*, 17 CRIM. L. & PHIL. 39 (2023).

180. For discussion of different types of exceptionalism, see Christoph Burchard, *Criminal Law Exceptionalism as an Affirmative Ideology, and Its Expansionist Discontents*, 17 CRIM. L. & PHIL. 17, 25–26 (2023); and Alice Ristorph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1972–73 (2019).

181. See, e.g., 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

contend that what “makes criminal law a unique form of law is that it operates as a mechanism of collective condemnation. It is a body of law and legal practice that censures particular acts in the polity’s name.”¹⁸² For example, criminal legal theorist R.A. Duff argues “that censurable wrongfulness is integral to criminal law in a way that it is not integral to a system of non-criminal regulation” because criminal “punishment is intended to communicate or to express censure.”¹⁸³

In recent years, some scholars (myself included) have critiqued claims about “criminal law exceptionalism.”¹⁸⁴ These critics have embraced a “political theory turn” in their approach, treating criminal law as an unexceptional corner of “public law.”¹⁸⁵ Not only have they argued that criminal law isn’t exceptional, or at the very least isn’t that different from noncriminal law, but some also have argued that criminal law exceptionalism has contributed to mass incarceration and overcriminalization.¹⁸⁶ By treating criminal law as exceptional, the argument goes, commentators and policymakers have granted criminal law a certain sort of privilege. Assumptions about what criminal law is for or what it might accomplish go untested and become articles of faith.

[C]laims of exceptionalism can . . . be used to entrench or expand criminal interventions, such as the “nothing else will do” line of argument that has been raised in the United States both about the death penalty in particular but also about criminal sanctions as a response to myriad other social problems.¹⁸⁷

(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”); Francesco Viganò, *The Remains of Exceptionalism in Criminal Law*, 17 CRIM. L. & PHIL. 71, 72 (2023) (“Punishment is different from other penalties—so the argument goes—because it conveys a special *stigma*: i.e., a formal, solemn disapproval by the community as a whole of the conduct for which punishment is imposed. And this social disapproval is thought to profoundly affect the moral status of the person within the community. Which, in its turn, calls for a special justification.”).

182. Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 449 (2020).

183. DUFF, *supra* note 46, at 19.

184. See, e.g., Ristroph, *supra* note 88, at 7; Viganò, *supra* note 181, at 80–81; Levin, *supra* note 26, at 1385, 1388; S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117, 127 (2023).

185. See, e.g., CHIAO, *supra* note 169, 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, *The End of Criminal Law?*, NEW RAMBLER REV. (Oct. 15, 2020), <https://newramblerreview.com/book-reviews/law/the-end-of-the-criminal-law> [<https://perma.cc/DB8N-8P2T>] (reviewing CHIAO, *supra* note 169) (describing this tension in the literature).

186. E.g., Ristroph, *supra* note 180, at 1955.

187. Ristroph, *supra* note 88, at 7.

Despite glaring evidence that criminal law is a creature of politics,¹⁸⁸ the ubiquitous language of morality often creates the impression that criminal law is somehow prepolitical—reflecting and, in some cases, steering community values. Where conventional “public law” generally might be assessed in straightforward utilitarian terms via cost-benefit analysis, criminal law often seems to avoid such scrutiny.¹⁸⁹ Further, repeating claims about criminal law’s necessity and moral force might have foreclosed important discussions about the injustices of the criminal system and essential debates about whether—or to what extent—criminal law is actually necessary.

These critiques of criminal law exceptionalism strike me as quite compelling when we look at criminal law in practice.¹⁹⁰ It would be hard to argue that our bloated criminal code actually reflects reasoned determinations about what conduct is uniquely deserving of public condemnation. Further, it would be difficult to claim that criminal adjudication sends a particular message to the public when the vast majority of cases are resolved via plea bargain with no public trial or jury determination of guilt.¹⁹¹ And, dramatic disparities in enforcement across lines of race and class undercut claims to criminal law’s moral force. As a descriptive matter, then, criminal law probably could only be described as exceptional in narrow terms (i.e., that carceral punishment is on the table).¹⁹²

As a normative matter—or as a matter of ideal theory—criminal law exceptionalism also doesn’t make a lot of sense if the criminal system is understood as a constellation of institutions devoted to ensuring public safety. If we adopt a capacious enough conception of public safety, an enormous number of governmental institutions could be understood as advancing public safety. From roads to schools to hospitals to many civil regulatory authorities, we

188. And of course, how could it not be? Criminal statutes are passed by legislators and enforced by elected prosecutors (at least at the state level). So, even if one believes that substantive criminal law and law-enforcement decision-making generally reflect the public will, that hardly means the institutions do so because of some prepolitical moral force or content. It simply means that state actors have acted in a way that accurately reflects (a significant enough percentage of) public opinion. Cf. Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 114 (2013) (“[I]f we were to accept an understanding of criminal prosecutions as fundamentally apolitical, we would need to deny that the actors involved in any given prosecution—the police, the prosecutor, and (more controversially) the judge—have political agency and are embedded in a deeper structure of governmentality.”).

189. See CHIAO, *supra* note 169, at 1–2; see also Matt Matravers, *On the “Specialness” of the Criminal Law*, 17 CRIM. L. & PHIL. 49, 50 (2023) (“[I]gnoring criminal law as a ‘political institution’ . . . is dangerous because it provides a basis on which to exempt criminal law from the usual tests of both public justification and public policy.” (quoting CHIAO, *supra* note 169, at 28)).

190. Indeed, I’ve taken this position before. See generally Levin, *supra* note 26.

191. For critiques of this state of affairs from different political perspectives, see BIBAS, *supra* note 168, at xv–xvi; CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL 32–34, 157–59 (2021); and Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2174–75 (2014).

192. See Levin, *supra* note 26, at 1430.

might see public safety as a core function of much of what the state does or what governance looks like. So, if the ideal criminal system were imagined as a sort of public safety agency, it would be just another flavor of governance—not different in kind from the Environmental Protection Agency or a state’s board of health.¹⁹³

As a matter of ideal theory, though, criminal law exceptionalism would be significantly more defensible if the criminal system were understood as an accountability-focused “justice” system. If criminal legal institutions actually *were*’t just another vehicle for the state to achieve regulatory ends, manage risk, and determine how to ensure general social safety or stability, then these institutions might be unusual. To be clear, I am not suggesting that current criminal legal institutions reflect the criminal law exceptionalists’ moral weight or focus on accountability and public values. Rather, my suggestion is that *if* such a criminal legal system could be devised, then perhaps criminal law and the institutions of penal administration in such a system might be exceptional—and perhaps also deserving of the exceptional interest, criticism, and study that such a set of exceptional institutions would warrant.

But, for exceptionalism to be defensible, we would need to have a very different criminal system, and criminal legal institutions would need to be focused clearly on ends and functions other than ensuring public safety. As a corollary, the critique of exceptionalism has the greatest punch when the institutions of criminal law and its administration drift furthest from the language of accountability or moral judgment. So, perhaps the exceptionalism debates aren’t simply disagreements about the institutions that we have; they’re also disagreements about the institutions that commentators imagine—the criminal system that we as a society might have, not the one that we do have.

C. PENAL WELFARE

For decades, commentators have observed that the retrenchment of the U.S. welfare state has coincided with the rise of mass incarceration.¹⁹⁴ Although the details vary, leftist critiques of U.S. criminal policy often advance some version of this neoliberal penalty thesis—over the last fifty years, the War on Poverty gave way to a War on Crime that replaced spending on social services for poor and low-income people with spending on policing and punishing those same

193. Adopting this frame, Ed Rubin and Malcolm Feeley offer a thoughtful account of how to go about designing such an agency (or set of agencies). See Rubin & Feeley, *supra* note 84, at 269–70.

194. See, e.g., Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 74 (2010) (tracing the “concomitant downsizing of the welfare wing and upsizing of the criminal justice wing of the American state”); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005); Bell et al., *supra* note 107, at 1295 (“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.”).

populations.¹⁹⁵ Contrary to libertarian and neoliberal claims about ending “big government,” this approach to criminal policy has retained a massive state apparatus but shifted its focus and priorities—the welfare state morphed into the carceral state.¹⁹⁶

Against this backdrop—or perhaps in response to these broader patterns in political economy—a number of reformers and jurisdictions have embraced criminal institutions as potential sites for nonpunitive state intervention.¹⁹⁷ By design or by necessity, many “criminal courts today administer ‘ordinary’ welfare, including basic services, material goods, and other social safety net items.”¹⁹⁸ If a jurisdiction is willing to spend on criminal courts but not health care, the argument goes, why not use criminal legal institutions as vehicles for providing better health care to at-risk populations?¹⁹⁹ Drawing from a broader sociolegal literature, Aya Gruber, Amy Cohen, and Kate Mogulescu describe this phenomenon of “welfare administration through criminal law” as “penal welfare.”²⁰⁰

This account of penal welfare provides yet another window into how debates about criminal policy often rest on competing understandings of institutional functions—or, how disagreements about different reform measures reveal the costs of a system that frequently elides these competing functions.

Our orientation toward penal welfare, I suggest, depends at least in part on the first-principles question of whether we imagine the criminal system as a public safety agency or a set of institutions designed to do justice and ensure accountability.²⁰¹ If the criminal system is simply understood as a set of

195. See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 1–2 (2016); see also Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 55 (2001).

196. For an extended articulation of this thesis, see BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS 27–31 (2011); and see also GOTTSCHALK, *supra* note 161, at 7–8.

197. See generally Levin, *supra* note 57 (describing and critiquing this position).

198. Gruber et al., *supra* note 31, at 1337 n.15.

199. See Note, *Welfarist Prosecution*, 135 HARV. L. REV. 2151, 2152 (2022) (“[E]ven if the current system of welfarist prosecution is inherently conflicted, it is nonetheless a mitigatory step in the right direction — and certainly preferred to the criminal justice-involved receiving *no* services, from the penal or welfare states alike.”).

200. Gruber et al., *supra* note 31, at 1393. As Gruber, Cohen, and Mogulescu note, their definition of “penal welfare” is not the only one. *Id.* at 1337 n.15. Indeed, they note that their definition “overlaps” with the “most well-known” one used by criminologist David Garland. *Id.* Garland distinguishes “penal welfarism” from the “culture of control” that came to replace it and argues that penal welfare was defined by “its unquestioning commitment to social engineering; its confidence in the capacities of the state and the possibilities of science; and its unwavering belief that social conditions and individual offenders could be reformed by the interventions of government agencies.” GARLAND, *supra* note 31, at 40.

201. Once again, there’s a follow-up question of whether that imagining is descriptive (i.e., “this is how criminal institutions actually operate”) or normative (i.e., “regardless of how they may operate, this is how criminal institutions *should* operate”). And, there’s yet another follow-up question of how people perceive of those institutions—if the cultural meaning of an arrest or conviction carries a certain weight or stigma. On the difference between the technical, legal

institutions designed to promote public safety, then penal welfare might not be objectionable—indeed it might be desirable, if not necessary. That is, a capacious definition of public safety would include housing, health care, and a range of social services. So, promoting or preserving public safety would include advancing these ends. In short, the criminal system would be largely indistinguishable from other aspects of the welfare state in its overarching purpose, so why shouldn't criminal legal institutions serve the same essential functions as other aspects of the welfare state?²⁰²

Of course, we might still ask why it's necessary to have criminal legal institutions if they serve the same function as noncriminal institutions. Or, at least, we might want to know more about institutional competence: Are criminal justice actors actually well situated to serve social welfare ends? Do they have the same access to resources or ability to set policy at a high enough level to accomplish their goals? Does delivering social services via criminal legal institutions decrease the possibility of better, more effective forms of social welfare?²⁰³ So, the important questions would involve assessing the relationship among a set of institutions (including criminal legal ones) that promote public safety.

This analysis would jibe with recent commentary that seeks to treat criminal law as another species or variant of “public law”—treating it as unexceptional and subjecting it to the same sort of cost-benefit or distributive analysis that might be deployed when assessing other policy areas.²⁰⁴ The methodology, values, or ideology shaping that analysis certainly might vary. But the foundational claim remains—penal welfare might be understood as accepting criminal institutions as yet another avenue for advancing the interests of the welfare state.

In contrast, if the criminal system is understood as a vehicle for public morality and a means of achieving accountability, penal welfare should cause grave concerns. Indeed, much contemporary criticism of penal-welfare policy

meanings of arrests and convictions, versus their rhetorical or cultural meanings, see generally Anna Roberts, *supra* note 133; and Anna Roberts, *Convictions as Guilt*, 88 *FORDHAM L. REV.* 2501 (2020). This issue—the potential disconnect between legal and cultural meaning, or between how criminal institutions operate and how they are understood—recurs in many corners of U.S. criminal legal policy and discourse. For extensive discussions of this tension, see generally Anna Roberts, *Criminal Terms*, 107 *MINN. L. REV.* 1495 (2023); and Anna Roberts, *Victims, Right?*, 42 *CARDOZO L. REV.* 1449 (2021).

202. For one argument in favor of doubling down on criminal legal institutions' role in providing social services, see Hadar Dancig-Rosenberg & Tali Gal, *Guest Editors' Introduction: Multi-Door Criminal Justice*, 22 *NEW CRIM. L. REV.* 347, 347 (2019).

203. See Gruber et al., *supra* note 31, at 1394–95 (“Once such investments are made, it can become difficult for the state and individuals to divest and put their monetary, political, and expert capital elsewhere. The risk is that law- and policy-makers, facing scarcity of resources, then dismiss proposals that address problems outside of the criminal system as wasteful or duplicative, or worse, reject them because of ‘turf’ concerns.”).

204. See *supra* Section III.B.

adopts some version of this critique—why subject people to stigma and state violence if the goal is to provide them with services?²⁰⁵

This concern often rears its head in the context of diversion programs or “problem-solving” courts—institutions that formally fall under the ambit of the criminal system, but are heralded by supporters as punishment alternatives that provide services like mental health or drug treatment.²⁰⁶ To critics, though, these programs often widen the reach of criminal law, sweeping more people under state control, and potentially subjecting them to violence, surveillance, and stigma.²⁰⁷

For example, Gruber, Cohen, and Mogulescu examined a diversionary program—Human Trafficking Intervention Courts (“HTICs”)—in New York that supporters characterized as a means of providing services, rather than punishment, to sex workers.²⁰⁸ Based on a number of interviews with alleged sex workers and HTIC participants, Gruber, Cohen, and Mogulescu argue that the HTICs are hardly a nonpunitive response.²⁰⁹ Instead, they argue that “[u]sing the criminal system to provide those services is . . . neither a necessary nor a particularly efficient way to reach this population, given the economic costs of policing, prosecution, defending, and court administration and the social and human costs of arrests, court appearances, and incarceration.”²¹⁰ And this critique of HTICs isn’t unique. Leftist critics of other diversion programs and “problem-solving” courts have emphasized the way that these institutions—which purport to provide social services and make everyone, including defendants, safer—actually extend the punitive reach of the state.²¹¹

To be clear, my claim isn’t that these critics of diversion and problem-solving courts are advocates of an accountability-focused model for criminal

205. See Gruber et al., *supra* note 31, at 1402.

206. For a discussion and critical take on these courts, see Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1582–83 (2021); and Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 633 (2016).

207. See Collins, *supra* note 206, at 1628; Eaglin, *supra* note 206, at 597–98 (“[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, 440–41 (2019) (describing this dynamic in the context of policing the “opioid crisis”); 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.”); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 427 (2009) (“My claim is that the current therapeutic orientation of the drug court stifles that debate by discounting social forces outside the individual’s control. In other words, a strategy focused on individual responsibility and self-esteem cannot engage with the wider perspective of governmental and social failure that is the backdrop against which many drug addicts live their lives.”).

208. See Gruber et al., *supra* note 31, at 1393–95.

209. See *id.*

210. *Id.* at 1393–94.

211. See *supra* note 209 and accompanying text.

adjudication. They aren't.²¹² Rather, my claim is that their critiques recognize the problem with appending a social welfare project to institutions that speak the language of guilt, blame, and moral condemnation. To do social welfare policy or provide services via a criminal system that is publicly understood as levying moral judgments is to attach dangerous and damaging strings to the provision of needed services. That is, "the welfare comes with a human price tag involving demeaning and invasive arrests, criminal processing, and the threat of incarceration."²¹³ There's simply no great way to do penal welfare via the criminal system as long as the system is, well, *penal*. If it weren't (or if it weren't understood as such),²¹⁴ I'd still have a lot of questions about why the public safety agency (or whatever one might call the non-accountability-focused set of institutions) were the proper locale to deliver social services. But that discussion would make more sense and be more in line with broader conversations about how best to construct a welfare state—or even the fraught relationship between a welfare-providing model of governance and a command-and-control model of governance.²¹⁵

IV. THE LIMITS OF DISENTANGLING

I've argued that disentangling the accountability and public safety functions in debates about criminal policy might help clarify ideological fault lines and also provide insight into where and how U.S. society could move away from criminal legal institutions. In this Part, though, I consider three possible objections to this project. First, I consider the claim that safety and accountability are necessarily overlapping such that any attempt to disentangle them would be futile. Second, I address claims that the relationship between safety and accountability is essential—that each function or aspirational objective limits the other in desirable fashion. Finally, I consider larger ideological and methodological concerns about this sort of theoretical engagement with the criminal system and institutional design.

212. Although, of course, one might be. Outside of the legal academy, plenty of opponents of problem-solving courts and diversion criticize those institutions as insufficiently punitive. As should be clear, though, that's a very different line of critique than the one coming from anti-carceral commentators on the left.

213. Gruber et al., *supra* note 31, at 1402; see also Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953, 1967 (2022) ("Social workers, case managers and not-for-profit agencies are enlisted in the service of providing alternatives to incarceration and in monitoring and reporting individuals who fail to accept their services. Prosecutors' offices and courts have also hired their own social workers and case managers to coordinate supervision and monitor compliance. These tend to expand rather than shrink the labor pool of those contributing to the criminal punishment system." (footnotes omitted)).

214. See *supra* notes 201.

215. That is, it's worth asking whether this is a distinction that could truly be drawn—whether the noncarceral state could ever truly be disentangled from the carceral state. Cf. White, *supra* note 10, at 802 (describing "a surrogate relationship between the social welfare system and the criminal justice system").

A. INEVITABLE OVERLAP

Perhaps the most straightforward objection to a project of disentangling the safety and accountability functions of the criminal system is that it's an impossible task—the two functions aren't actually distinct, so how could we expect to tease them apart? As discussed at greater length in Part I, I think there's some real merit to this objection. Attempting to draw this sort of grand, categorical distinction necessarily has its limits—any distinction grows fuzzy at the margins.

To be clear, then, I don't mean to suggest that the categories are clean. There aren't two buckets, and we can't sort all arguments, policies, or institutions as falling into one or the other. As discussed above, accountability might be seen as instrumentally desirable for commentators primarily focused on public safety.²¹⁶ Similarly, public safety might be understood as one of the benefits or byproducts of holding people accountable for harm, risk creation, or wrongdoing.

On a broader level, though, “safety” and “accountability,” like deterrence and retribution, often serve as little more than alternative vocabularies for making the same arguments.²¹⁷ It's hardly an earth-shattering insight to suggest that people don't always say what they mean. But particularly in the highly stylized world of legal, academic, and policy arguments, there might be good reason to think that alternative functions or frameworks serve as ready-made tools to appeal to different audiences or respond to different critiques.

Dan Kahan famously argued that deterrence arguments often aren't really deterrence arguments at all—they are rhetorical vehicles for making values- or morals-based claims.²¹⁸ Lawyers, legal academics, and other professional- or managerial-class political actors become accustomed to framing their arguments in utilitarian terms supported by evidence.²¹⁹ But that doesn't mean that the evidence is necessarily conclusive or that the evidence is really what leads the speaker to their conclusion—rather, motivated reasoning and a reliance on ideology, priors, or values might lead them there.²²⁰ To use Kahan's example, a preference for a duty to retreat in the self-defense context

216. See *supra* notes 75–81 and accompanying text.

217. See *infra* notes 236–37 and accompanying text; cf. H.L.A. Hart, *The Presidential Address: I—Prolegomenon to the Principles of Punishment*, 60 PROC. ARISTOTELIAN SOC'Y 1, 8 (1959) (arguing that retributivist arguments are a “disguise[d] form[] of Utilitarianism”).

218. See Kahan, *supra* note 96, at 415 (“I will suggest that the real value of deterrence — its secret ambition — is to quiet illiberal conflict between contending cultural styles and moral outlooks.”).

219. See *id.* at 417 (describing the “disembodied idiom of costs and benefits” as a means of “cool[ing] these expressive disputes” over highly contested terrain); see also Brown, *supra* note 24, at 1324 (“Deterrence rhetoric cools passions—it sounds like rational policy talk. Expressive rhetoric heats passions—it is a tool in the battle over which political and moral values criminal law will serve.” (footnote omitted)).

220. See Kahan, *supra* note 96, at 486 (“[T]he liberal defense of deterrence as a strategy for managing public discourse gives us a program not for *extricating* contentious expressive valuations from the law but only for *concealing* their influence.”).

might be justified as deterring unnecessary violence (i.e., even if I think someone poses a danger to me, I might be deterred from resorting to violence when I could avoid a conflict by running away).²²¹ In contrast, opposition to a duty to retreat might be justified as deterring unlawful aggression (i.e., if I don't have to retreat before resorting to lethal force, other people might be deterred from harassing me or behaving in a way that I might perceive as threatening).²²² Which position each of us prefers may say much more about our worldview than it says about the results of a study on the relationship between crime rates and self-defense standards.²²³

And, Kahan is hardly alone in claiming that ostensibly “rational” or “evidence-based” arguments tend to be deeply embedded in—if not inextricable from—politics, ideology, values, and assumptions. Indeed, that view is central to much critical legal scholarship, not to mention critical work in science and technology studies and in much post-structural thought more broadly.²²⁴

I find this claim convincing, but I still see real value in appreciating how we argue or support our claims. That's in large part because surfacing underlying assumptions and values might make it easier to identify the real sources of disagreement and to work toward real solutions to social problems.²²⁵

For example, advocates who argue that criminalization, prosecution, and punishment are necessary to curb workplace abuses by employers might couch their arguments in terms of deterrence—a prison or jail sentence for a boss who underpays might send a message to other bosses about the danger of

221. See *id.* at 430–31.

222. See *id.*

223. See *id.* at 483–84.

224. E.g., Sheila Jasanoff, *A Field of Its Own: The Emergence of Science and Technology Studies*, in *THE OXFORD HANDBOOK OF INTERDISCIPLINARITY* 173, 177–78, 184–85 (Robert Frodeman et al. eds., 2d ed. 2017); KENNEDY, *supra* note 162, at 29–32, 110–11 (2016).

225. In this respect, my argument resembles one advanced by critical scholars who still see value in the use of “empirical” evidence not because it is determinate or uncontroversial, but because it might be a means of showing one's work and therefore revealing the places where assumptions or logical leaps were made. See, e.g., BERNARD E. HARCOURT, *LANGUAGE OF THE GUN*, at xi (2006) (“Rather than use the research to *draw* law and policy inferences, use the research to *expose* the assumptions about human behavior that . . . underlie the law and policy proposals.”); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000) (“Judicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decision-making.”); Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1287 (1999) (“[E]mpirical knowledge is most useful in unmasking the theoretical assumptions that undergird constitutional law . . .”). As Tracey Meares and Bernard Harcourt argue in the context of constitutional criminal procedure, the “use of empirical evidence will produce a *clearer* picture of the existing constitutional landscape and spotlight the normative judgments at the heart of criminal procedure cases.” Meares & Harcourt, *supra*, at 735; see also Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379, 386–87 (2016) (making a similar claim about empiricism as offering some potential for surfacing normative priors and preferences).

committing wage theft.²²⁶ But what if studies showed that incarceration failed to deter or had no greater deterrent effect than harsh civil punishments?²²⁷ Would that lead advocates to abandon their support for carceral punishments?²²⁸ If so, that might mean that workers' rights advocates could try to figure out what institutions and regulatory approaches would best deter wage theft, improve workers' lives, and yield the desired social arrangement. If not, though, that would tell us that the basis for wage theft criminalization wasn't really deterrence at all.²²⁹ And a decision to criminalize and incarcerate would need to be justified on other terms.

B. NECESSARY LIMITING PRINCIPLES

Even if we could disentangle the functions of criminal justice, would we really want to? Some criminal legal theorists and legal philosophers might argue that attempting to disentangle the safety function and the accountability function would be a mistake because they each serve a critical role in limiting state power. Viewed through this lens, public safety might be an essential social function, but without accountability as a limiting principle, we might wind up in an authoritarian nightmare.²³⁰ Risk prevention would run amok, with the state locking up people deemed dangerous, even though they'd done nothing wrong.²³¹ (Indeed, this theory—*limiting retributivism*—has been endorsed

226. See, e.g., Amy Traub, *Wage Theft and Shoplifting: Same Cost, Different Deterrents*, AM. PROSPECT (June 23, 2017), <https://prospect.org/economy/wage-theft-shoplifting-cost-different-deterrent> [<https://perma.cc/9LK7-Y3Wg>] (asserting that “[t]he fines imposed by the federal Fair Labor Standards Act often amount to a slap on the wrist; they’re too weak to act as an effective deterrent” and that prosecution is a better deterrent); Anna Boiko-Weyrauch, *Wage Theft Rampant in Colorado*, DURANGO HERALD (Jan. 24, 2015, 1:46 PM), <https://www.durangoherald.com/articles/wage-theft-rampant-in-colorado> [<https://perma.cc/CZ8E-UEPT>] (quoting a clinical professor for employment law as arguing that “increased criminal enforcement of the wage laws would provide significant deterrent effects”); Gus Bova, ‘Landmark’ Wage Theft Conviction Overturned by Texas Appeals Court, TEX. OBSERVER (Sept. 6, 2018, 6:38 AM), <https://www.texasobserver.org/landmark-wage-theft-conviction-overturned-by-texas-appeals-court> [<https://perma.cc/FC67-G56R>] (“Convicting the worst wage thieves is supposed to act as a deterrent . . .”).

227. On this question, see generally Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759 (2019).

228. On this broader question of the justifications for wage theft criminalization, see Levin, *supra* note 88, at 1506.

229. On the broader question of what actually justifies progressive turns to criminalization, see generally Levin & Levine, *supra* note 72.

230. For a classic account of “desert” as a “limiting principle,” see Norval Morris, *Desert as a Limiting Principle*, in *PRINCIPLED SENTENCING* 201, 201–06 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

231. See Ristroph, *supra* note 96, at 1327–34 (collecting sources for—and ultimately critiquing—this claim); cf. Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1129 (2011) (“A hybrid ‘limiting retributivism’ approach, recently recommended by the American Law Institute, involves setting a range of punishment according to desert, but allowing a risk assessment at the front end of the process to determine the period of confinement within that range.”).

by many commentators and the U.S. Supreme Court.²³²) Alternatively, or in addition, ensuring accountability without any regard for public safety could lead to situations where people were forced to suffer in ways that didn't actually benefit society.²³³

These are familiar arguments in part because they sound like classic critiques of pure-form utilitarianism or retributivism.²³⁴ And, both arguments may have some appeal when applied to single-purpose philosophical justifications for criminal punishment.²³⁵ But, I don't find these limiting-principle arguments compelling here for two reasons.

First, it's not at all clear that these limiting principles actually are doing the limiting work that theorists hope they will. As Ristroph argues, "justifying punishment has served no better to limit punishment than the focus on justifying war served to limit war."²³⁶ Rather, ostensibly conflicting theoretical frames provide alternative vocabularies to entrench and expand penal institutions—they provide people with a "vocabulary to dignify any prior punishment intuitions they may hold."²³⁷

232. See *Graham v. Florida*, 560 U.S. 48, 71 (2010); see also Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 592 (2005) ("[L]imiting retributivism appears to be the approach that the Supreme Court has applied when it has invoked retributive principles. This approach, emphasizing limits on excessive measures, is consistent with both the text of the Eighth Amendment and the role of constitutional guarantees—as protectors of human rights and bulwarks against unfairness and abuse of governmental power."); Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1054 (2014) ("Limiting retributivism is not simply popular among theorists; practitioners and law reformers have also endorsed it. Some commentators have suggested that it is an implicit principle of the Eighth Amendment's prohibition of cruel and unusual punishments. In fact, the Supreme Court does sometimes seem to apply principles of limiting retributivism . . ." (footnote omitted)).

233. Cf. Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 363 (1997) ("Norval Morris's theory of punishment is a theory of 'limiting retributivism,' in which concepts of 'just deserts' set upper and occasionally lower limits on sentencing severity; within these broad outer limits, other purposes and principles provide the necessary 'fine-tuning.'"). For a broader critiquing of "limiting retributivism," see generally Jacob Bronsther, *The Limits of Retributivism*, 24 NEW CRIM. L. REV. 301 (2021).

234. See, e.g., Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 668 n.401 (1998) ("At the end of the day, moreover, the best conclusion is that our system of criminal liability is a 'mixed' regime in which courts and legislatures draw on both retributive and utilitarian principles to justify criminal punishment."); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1050 (1978) ("There is a popular 'mixed' approach to the justification of punishment, most often associated with H.L.A. Hart and Herbert Packer, but which was originally adumbrated by John Rawls, holding that punishment, as a general practice, may be justified teleologically, but that the application of punishment to specific individuals may be justified deontologically." (footnotes omitted)).

235. Cf. Husak, *supra* note 44, at 28 ("I believe it is simplistic to allow the fate of the criminal law to stand or fall depending on how well it achieves a single objective."). But see *infra* notes 237–38, 242–44 and accompanying text.

236. Ristroph, *supra* note 232, at 1037.

237. Ristroph, *supra* note 8, at 1661.

As a practical matter, an enormous number of people are stopped by police, arrested, incarcerated, or subject to state surveillance without ever being found guilty of a crime.²³⁸ In other words, if accountability is supposed to serve as a check on a police power focused on public safety, it seems to be doing a pretty bad job.²³⁹ On the flip side, substantive criminal law is extraordinarily broad, and people are arrested, convicted, and punished for a range of conduct that has no clear victim or that many in the community probably don't view as wrong or dangerous at all.²⁴⁰ In other words, if a concern for public safety is supposed to serve as a check on the desire to punish or hold people accountable, then it also seems to be doing a pretty bad job.

Rather than checking one another, the concern about public safety and the concern about holding people accountable often appear to operate in tandem, leading to more—not less—state violence and intrusion in peoples' lives.²⁴¹ The most attractive feature of pluralist theories of punishment is that they offer potential limits on the excesses of a given rationale—retributive limits check deterrence, rehabilitationist concerns check retributivism, and so forth.²⁴² But the contemporary landscape of U.S. penal policy suggests that pluralism may be operating as a sort of multiplier of punitive sentiments, rather than a check.²⁴³

Second, this vision of theoretical limiting principles might make more sense when we're talking about punishment than when we're considering other aspects of the criminal system.²⁴⁴ That's in part because we have a host of other possible limiting principles or checks on state power that come into play in other contexts, so it's not clear why they can't do similar work when it comes to criminal justice actors. Put differently, fears of arbitrary, unjust, and abusive

238. The policing and processing of misdemeanor defendants in urban courts stands as a striking example of this dynamic—guilt and innocence and the processes commonly associated with criminal adjudication and truth-seeking are conspicuously absent. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316 (2012).

239. Instead, much criminal process is described as representing a mode of “managerial justice”—less focused on accountability than on social control and the management of populations. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614–15 (2014).

240. Indeed, this is a foundational claim in the literature on overcriminalization where critics emphasize trivial or laughable criminal offenses. See Benjamin Levin, *Decarceration and Default Mental States*, 53 ARIZ. ST. L.J. 747, 747–48 (2021).

241. See *supra* Part II.

242. See, e.g., Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 138 (2010) (“As a result of the deficiencies of any single justification for punishment and the absurd conclusions reached by relying on any single rationale, most scholars contend that punishment should be limited by a combination of punishment rationales — most commonly, by both retributive and deterrent concerns.”).

243. Ristroph goes so far as to describe the traditional justifications of punishment (deterrence, incapacitation, rehabilitation, and retribution) as “the four horsemen of the carceral state.” Ristroph, *supra* note 8, at 166o.

244. To the extent it actually makes sense in the context of punishment. But see *supra* notes 237–38, 242–43 and accompanying text.

state power might apply in any context where there's state power. A host of constitutional and sub-constitutional mechanisms exist (at least in theory) to check state power in those other contexts—procedural and substantive due process, narrow tailoring, and so forth. So, why should we think that accountability is the best—or even a necessary—check on state power in the criminal context?

C. WHO IS DISENTANGLING WHAT?

There's a troubling feature of much legal scholarship, particularly scholarship that adopts a theoretical approach to some question of policy or institutional design: The author writes as though there were a wise and rational policy designer. The author makes many claims about what society—or the state, or “we”—should do and offers many exhortations to think differently about an issue. But it's often unclear who's the subject of the verbs—who should *reimagine* or *reconceptualize* or just *do things differently*.²⁴⁵ It's often unclear who *we* are. And, it's not clear how any of the theoretical insights or reframings would interact with the politics on the ground—with the day-to-day behavior of line-level actors, with the demands of activists, with the preferences of voters, or with the complicated landscape of elected and appointed officials.²⁴⁶ Put simply, normative legal scholarship often adopts an ostensibly practical posture while remaining woefully impractical.²⁴⁷

I worry that this Article might give some readers a similar impression. Maybe I've convinced you that U.S. criminal justice would be more just if the accountability and public safety functions could be disentangled. But even if I have, who's supposed to do that disentangling? And what would disentangling

245. This pathology is also reflected in much theoretical work on criminal punishment. See Ristorph, *supra* note 232, at 1021 (“[T]he philosopher’s focus tends to be on the target of punishment—rather than on the agent of punishment.”).

246. Cf. Maria Ponomarenko, *Our Fragmented Approach to Public Safety*, 59 AM. CRIM. L. REV. 1665, 1677 (2022) (“[O]n a practical level, the fragmentation of responsibility among multiple agencies, service providers, and levels of government has made it considerably more difficult to develop a comprehensive understanding of the problem, and to mount a coordinated response.”).

247. This is one of my recurring frustrations with the “policy proposal” that often comprises the final part of a law review article. Solving a major policy problem requires grappling with local and national politics, with interest groups, with public opinion, with funding, and with a host of other questions that hardly could be addressed satisfactorily in a few paragraphs or law review pages.

There's a larger point to be made here about the disconnect between the form and content of law review articles—the way that the genre and its conventions often find themselves at odds with the subjects and approaches that many contemporary authors choose. For example, the “policy proposal” might make more sense in a world of more traditional “doctrinal” scholarship focused on judicial decision-making. Were I arguing that judges should read a specific bit of constitutional text differently, it might be more plausible that I could do so successfully and succinctly in the confines of Part IV (or whatever later part of a law review article houses such proposals). In a world (or more accurately, a legal academy) where authors increasingly produce scholarship focused on broader policy questions, the “solution” involves a lot more moving parts and a lot more analysis. But, I digress.

look like in a world where people and institutions have many competing interests and intentions—where the rationale for any decision is overdetermined?

These are both fair and important questions. To be clear, I'm not offering some straightforward analytic framework for policymakers or judges to deploy that I believe will suddenly curb the brutalities of U.S. criminal policy or that will yield clear solutions to pressing questions of institutional design.²⁴⁸ Rather, my hope is both much more modest and perhaps also unrealistically ambitious: that those of us who study, work on, or care about how society polices and punishes might be more explicit in our first-order commitments—that we might recognize when we are making *accountability* arguments and when we are making *safety* arguments. And in setting out to work toward the reform, transformation, or abolition of criminal legal institutions, we do so with an eye toward how we might advance, or satisfy public desire for, these dual functions.

For those who would prioritize public safety, how do radical or reformist projects interact with demands for accountability or with institutions grounded in stigma and moral condemnation? For those who would prioritize accountability and moral condemnation, how do radical or reformist projects interact with the language of public safety and with institutions that reflect a focus on risk prevention?

In this respect, this Article is a part of a larger project of trying to surface or excavate the values and assumptions that underpin contemporary debates about criminal policy. At its worst, theoretical work can become untethered from reality.²⁴⁹ And in the realm of criminal policy, there's good reason to worry whether bigger-picture philosophical or theoretical discussions might distract from or obscure the harsh realities of people's daily interactions with crime, prisons, and police.²⁵⁰ That said, I think part of what makes debates about criminal policy so difficult is that many of us have very strong intuitions about what criminal law should (or shouldn't) look like, what it means to do

248. Cf. Hart, *supra* note 217, at 2 (“No one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making (or unmaking) laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things.”).

249. Cf. Murphy, *supra* note 7, at 74 n.7 (“I began to wonder if my rather abstract philosophical preoccupations (even if correct) had perhaps indeed blinded me to some important realities of punishment in the United States.”).

250. See *supra* notes 7–13 and accompanying text; see also Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 521–22 (2019) (“Against that backdrop of staggering state violence, discussions about the ‘rule of law’ and the proper way of assessing moral blame might become yet another debate about how many angels can dance on the head of a pin.”); Matravers, *supra* note 189, at 50 (“Such [criminal law] theory, it is said, is ahistorical, insensitive to other disciplines, and (most importantly) apolitical. It is, to borrow a phrase from the realist debate in political philosophy, mere applied moral philosophy.” (internal quotation marks omitted)).

justice, and what it might mean to respond fairly to risk or harm. And those intuitions aren't shared universally.²⁵¹

Criminal legal institutions are often seen as doing some of the most important work in society.²⁵² And critics increasingly argue that criminal legal institutions also cause some of the greatest harms and injustices in society.²⁵³ So, navigating any path forward necessarily depends on pragmatism—on harm reduction and figuring out practical solutions to both day-to-day problems and larger political pathologies.²⁵⁴ But grappling with first principles also strikes me as essential: “Without a clear diagnosis of the disease, how can anyone propose a cure? And, without appreciating differences in normative commitments and goals, how can we tell if a proposed reform is making the problem worse or moving the system in the right direction?”²⁵⁵

CONCLUSION

Writing in 2007, legal philosopher Jeffrie Murphy declared that “the whole American system of so-called ‘criminal justice’ has to a great degree become a moral and administrative mess—a great bloated monster driven by competing and sometimes inconsistent values, and sometimes by no values at all but simply by cruelty or indifference or institutional inertia.”²⁵⁶ Over a decade and a half later, Murphy’s words ring no less true. But the intervening years have seen increased public and academic interest in the injustices of U.S. penal administration—and increased interest in addressing those injustices.

251. See Levin, *supra* note 25, at 2805 (“[W]hen it comes to criminal law and its administration, there is hardly an agreement as to what the system is supposed to do.”); Levin, *supra* note 159, at 81–82 (arguing that technocratic approaches to criminal justice reform would be difficult to implement because “the fraught discourse on criminal punishment reveals that there is no overarching agreement on what exactly criminal law is supposed to do”).

252. See, e.g., Ristorph, *supra* note 180, at 1972 (“[E]ven if Americans are perpetually unhappy with criminal law in operation, they are also near-unanimous in their enthusiasm for the idea of criminal law—in their belief that a carefully crafted and properly administered criminal law is exactly what the word ‘justice’ means. We cling to the dream that criminal law will solve various social problems, even after decade upon decade of disappointment.”); Friedman, *supra* note 11, at 934 (“Everyone wants to be safe—so much so that many people listen, almost with a sense of wonder, to modern proponents of ‘defunding’ the police, as well as ‘abolition,’ the movement to get rid of the police altogether.”); Friedman, *supra* note 22, at 728 (“Public safety is the first duty of government. So it has been said, from at least the Enlightenment onwards, by many of history’s greatest thinkers, among them the founders of the American republic. Today, politicians and pundits regularly extol the central role of government in assuring we are safe.” (footnotes omitted)).

253. See Levin, *supra* note 26, at 1396–1408 (collecting sources).

254. For thoughtful accounts of the relationship between short-term harm reduction and more ambitious long-term projects, see Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. 1847, 1871–78 (2024); and Jamelia Morgan, *Abolition in the Interstices*, LPE PROJECT (Dec. 14, 2023), <https://lpeproject.org/blog/abolition-in-the-interstices> [<https://perma.cc/AGN2-VBB6>].

255. Levin, *supra* note 87, at 268.

256. Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 452 (2007).

In this Article, I've hardly argued that the greatest problem of U.S. criminal policy is the presence of "competing and sometimes inconsistent values."²⁵⁷ Faced with staggering racial disparities, widespread police violence, significant public distrust, and an ever-growing population of people marked with criminal records, that would be an extremely difficult claim to make. Many of these problems run very deep, implicating issues of culture and political economy well beyond the realm of criminal policy, such that rationalizing or recalibrating would hardly do the trick.²⁵⁸ And, I certainly would be hard-pressed to identify another area of law or set of institutions that weren't also "driven by competing and sometimes inconsistent values."²⁵⁹

But as activists, advocates, and academics strive to address the injustices of the criminal system, it's important to ask what values they seek to advance. It might be hard to identify all of the functions that U.S. criminal legal institutions serve as a descriptive matter, or that they are seen as serving as a normative matter. Nevertheless, I've argued that by disentangling two core functions (the accountability function and the public safety function), we might get closer to a much-needed reckoning—to asking why we need criminal legal institutions in the first place and whether criminal legal institutions actually are the only (or the right) sites to advance foundational social needs.

257. *Id.*

258. Levin, *supra* note 87, at 263 ("The issue [with U.S. criminal policy] is not a miscalibration; rather, it is that criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities." (footnote omitted)).

259. Murphy, *supra* note 256, at 452; *cf. In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) ("Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize . . ."); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 933–34 (2016) ("The legislative history of most federal statutes is extensive, and debate on the House and Senate floor often produces competing statements about a statute's meaning.").