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An Intellectual History of Mass Incarceration

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ALICE RISTROPH

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ALICE RISTROPH*

Abstract: There is much criticism of America’s sprawling criminal system, but still insufficient understanding of how it has come to inflict its burdens on so many while seemingly accomplishing so little. This Article asks, as Americans built the carceral state, what were we thinking? The Article examines the ideas about criminal law that informed legal scholarship, legal pedagogy, and professional discourse during the expansion of criminal legal institutions in the second half of the twentieth century. In each of these contexts, criminal law was and still is thought to be fundamentally and categorically different from other forms of law in several respects. For example, criminal law is supposedly unique in its subject matter, uniquely determinate, and uniquely necessary to a society’s well-being. This Article shows how this set of ideas, which I call criminal law exceptionalism, has helped make mass incarceration possible and may now impede efforts to reduce the scope of criminal law. The aim here is not to denounce all claims that criminal law is distinct from other forms of law, but rather to scrutinize specific claims of exceptionalism in the hopes of better understanding criminal law and its discontents.

INTRODUCTION

“Crisis” is an easy label to use, but a harder concept to define. Sometime in the early twenty-first century, commentators seemed to reach a consensus that American criminal law was in crisis.¹ One typical and influential formulation claims that criminal law in the United States has “unraveled,” or “run off the rails,” or “collapsed.”² But the police still patrol, the courthouses remain

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¹ See, e.g., Deborah Tuerkheimer, *Criminal Justice for All*, 66 J. LEGAL EDUC. 24, 24 (2016) (“It is not hyperbolic to assert that our criminal justice system is very much in crisis. . . . [T]his crisis is widely acknowledged outside of the legal academy—so much so that, notwithstanding meaningful variation in how the problem is diagnosed, we see almost universal agreement throughout scholarly, popular, and political discourse: The criminal justice system needs fixing.”).

² See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1, 2, 5 (2011) [hereinafter STUNTZ, *COLLAPSE*]. Each of the quoted terms comes from the early pages of *The Collapse of*

open and keep producing convictions, and prisons and jails still take and keep custody of the bodies they are asked to contain. What, exactly, constitutes the crisis?

The case for crisis often begins with recitations of high incarceration rates, but it does not stop there. Other “pathologies” of criminal law include the breadth of substantive criminal laws, wide enforcement discretion, the influence of partisan politics on both substantive criminalization and enforcement practices, pronounced race and class disparities at nearly every stage of enforcement, excessive severity in both police practices and formal punishments, and poor conditions in jails and prisons.³ It would be tempting to characterize the crisis of criminal law as just the condition of too much criminal law—but complaints of inadequate criminalization, underenforcement, and intolerably high crime rates coexist with the complaints of overuse and severity. Indeed, the failure to address crime adequately is itself part of the crisis diagnosis.⁴

The language of crisis has obvious rhetorical appeal. It has long been used to grab readers’ or listeners’ attention in contexts far beyond criminal law.⁵ Somewhat less obviously, but much more importantly, crisis discourse about criminal law has an ideological mission: it implicitly asserts that the ugliest aspects of criminal law are exceptional and temporary. The crisis paradigm asserts the possibility of egalitarian, just, and effective criminal law. To characterize overcriminalization, or uneven enforcement, or racial disparities as pathological is an effort to distinguish these phenomena from our conceptions of normal, healthy criminal law. In other words, crisis implies a state of exception.⁶ The label of crisis, applied to the present, conjures a lost past when

American Criminal Justice. *Id.* at 1 (saw America’s criminal justice system “unravel”); *id.* at 2 (“the rule of law collapsed”); *id.* at 5 (“the criminal justice system has run off the rails”).

³ See *infra* Part I.

⁴ See, e.g., RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 29 (1997) (explaining how intentionally “underprotect[ing]” African Americans against criminality is historically one of America’s greatest failures); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3213–14 (2015) (noting that commentators worried about crimes against minorities and women have identified a “crisis” of underenforcement); Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1715 (2006) (arguing that the problem of underenforcement needs more attention).

⁵ See Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 *CONST. COMMENT.* 431, 431–32 (2009) (discussing “crisis” rhetoric employed by scholars in the context of constitutional law).

⁶ For critiques of “crisis” discourse, see Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419, 1425 (2016); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 *UCLA L. REV.* 1418, 1466 (2012). For a related critique of the inattention to historical continuities in American criminal law, see MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 74 (2006).

criminal law was not in crisis. It suggests that we could yet make criminal law great again.

If, in fact, American criminal law never was great, our analysis of the present—and our plans for the future—may need reevaluation. This Article places the twenty-first century discourse of mass incarceration⁷ and criminal law crisis in historical and intellectual context, identifying continuities that have gone underemphasized and clarifying the changes that did take place in the past half century. The changes are already familiar: incarceration rates, arrest rates, and other measures of the scale of criminal law increased rapidly in the last decades of the twentieth century. But other key phenomena associated with a contemporary crisis have in fact been attributes of American criminal law since the early days of the republic.⁸ Substantive criminal prohibitions have always sprawled broadly, reaching many forms of trivial misconduct. The actual fate of any defendant has always depended upon the vagaries of enforcement, the discretion of individual officials, and the social and class position of the particular defendant. Moreover, racialized enforcement is not a recent development; enforcement practices have shown patterns of racial bias at least since the end of the Civil War. Finally, each generation of Americans has apparently viewed crime rates as too high and criminal law as an ineffective disgrace.

To observe these continuities is not an invitation to complacency or an effort to undermine criminal law reform efforts. To the contrary, this Article argues that to figure out where we might want criminal law to go, we need a better understanding of where we have been and where we are now. Asking how criminal justice came to be seen as a crisis invites a broader investigation of the ideological structures that shape the way we think about criminal law—and that limit the possibilities for change. If an ideology is a contingent and contestable description of the world that serves a particular power structure, then one can identify many ideologies that will, so long as they persist, make meaningful change to American criminal law extremely unlikely.⁹ Chief among those ideologies is the idea that criminal law is uniquely just, important, and

⁷ “Mass incarceration” is sometimes used to refer specifically to America’s high imprisonment rates, but the term has increasingly been used to describe the frequency of American criminal interventions even beyond the prison—police stops, arrests, misdemeanor convictions, the use of criminal records, noncustodial sanctions, and so on. For more on the meaning of “mass incarceration,” see *infra* Part III.B.

⁸ See *infra* Part I.

⁹ The term ideology is itself sometimes contested; “ideological” is occasionally wielded as an epithet. I strive to use “ideology” as political scientists and sociologists have often used it, to describe “public justifications for political activity” without necessarily embracing or denouncing those justifications. See KENNETH W. GRUNDY & MICHAEL A. WEINSTEIN, *THE IDEOLOGIES OF VIOLENCE* 4–6 (1974). Grundy and Weinstein note that an ideology could be used to defend an existing normative order, to challenge it, or to attempt to build a new one. *Id.*

necessary. This Article focuses on various claims of criminal law exceptionalism—beginning with the claim of historical exceptionalism that underlies crisis discourse, but then moving to more conceptual claims that criminal law is fundamentally different from other types of law.¹⁰

It is helpful to identify the different strands of exceptionalism separately, and then to consider them in relation to one another. *Historical exceptionalism* begins with a descriptive claim about present practices—namely, that criminal law is now very different from what it used to be. Alongside the descriptive claim is usually a normative assessment that things have changed for the worse, and very much so. In the twentieth century, on this account, America went from a just and functional system of criminal law into an unjust and dysfunctional one.¹¹ Claims of historical exceptionalism often focus on the well-documented growth in American incarceration rates in the twentieth century, but it is not only incarceration rates that are portrayed as historically exceptional. After all, an increase, even a sharp one, in incarceration rates would not itself be seen as a crisis without some theory of how, and how much, we should use prison sentences. Accordingly, the historical exceptionalism of most interest here is the argument that links the increase in prisoners to a misuse or perversion of criminal law that began sometime in the twentieth century.

The idea that criminal law is presently being misused requires, in turn, an account of how it should be used. There are many competing answers to that question, but we can identify three recurring claims, each asserting a kind of exceptionalism, each mixing normative aspirations with descriptive statements. One standard point of departure is the claim that the burdens of criminal law—stigma and punishment—are distinctive.¹² This claim, which I will call *bur-*

¹⁰ Scholars have identified claims of exceptionalism in various legal fields, usually to reject the claim that a given field should be governed by different principles or institutions than our default rule of law model would dictate. *See, e.g.*, Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1542 (2006) (arguing against tax exceptionalism); Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1413 (2016) (arguing that the Supreme Court has been eliminating “patent exceptionalism”); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 583 (2017). Of course, a claim that a given legal field is or is not exceptional is also a claim about what is normal, and the very proliferation of claims of exceptionalism may simply illustrate the lack of a single conception of legal normality. Given that the term exceptionalism is most often used by those critical of the supposed exception, it is notable that “criminal law exceptionalism” is not a widely used term. The few usages of the phrase I have found are uncritical. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006) (“The case for what might be called criminal law exceptionalism starts with the text and structure of the Constitution itself.”).

¹¹ *See* STUNTZ, *COLLAPSE*, *supra* note 2, at 2 (arguing that “for much of American history . . . one might fairly say that criminal justice worked” but “[i]t doesn’t anymore”).

¹² *See, e.g.*, W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 142–45 (2011) (arguing that criminal convictions carry a unique stigma that distinguishes them from civil sanctions); Henry M. Hart,

dens exceptionalism, holds that criminal and civil laws should not be treated as interchangeable, and criminal sanctions require special justification. That justification is often supplied through two more claims of exceptionalism: *subject-matter exceptionalism*, which claims that criminal law addresses, or should address, a discrete set of particularly harmful or wrongful behaviors, and *operational exceptionalism*, a term I use to capture a set of claims about the unique mechanics of criminal law. For example, operational exceptionalism encompasses the claim that criminal law both requires and provides a degree of determinacy and predictability that is lacking in other areas of law.¹³ These three exceptionalist claims come together to produce an account of criminal law's legitimacy: the unique burdens of criminal law are (or should be) imposed only in response to uniquely harmful or wrongful acts, and those burdens are (or should be) imposed only via determinate laws that give adequate notice of prohibited conduct and pursuant to careful procedures that ensure the actual guilt of the condemned.

This Article scrutinizes these claims of criminal law exceptionalism. Some fare better than others. *Burdens exceptionalism* can be exaggerated, but there is nonetheless good reason to see criminal law's impositions of physical force and social stigma as distinctive. Claims of *subject-matter* and *operational exceptionalism*, in contrast, are contradicted by empirical realities in varying degrees. Criminal sanctions are not reserved for a narrow subset of human behavior, but rather are used nearly everywhere that law regulates. And criminal law is at least as prone to indeterminacy as any other area of law; outcomes are at least as dependent on enforcement discretion here as anywhere else. Real life doesn't match the exceptionalist paradigm, and that mismatch fuels the perception of crisis: the practices and institutions of criminal law are nowhere close to the expectations we have been taught to hold.

To close that gap between expectation and practice, we could change our expectations, or we could change our practices. This Article argues that we should do both. Indeed, it suggests that we probably must do the former before we can do the latter. Paradoxically, the ideology of criminal law exceptional-

Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405-06 (1958) [hereinafter Hart, Jr., *Aims*] (arguing that criminal sanctions carry a distinctive moral condemnation).

¹³ The idea that criminal law is, and must be, especially concerned with determinacy and fair warning finds expression in various doctrines, including the rule of lenity and void-for-vagueness due process principles. See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985) (describing the ideal of legality, or clear ex ante definitions of crimes, as only "slightly unrealistic"). Operational exceptionalism presumes a sharp substance-procedure distinction, in which substantive guilt is something prior to and independent of the enforcement process. Critiques of the substance-procedure distinction are common to other fields of law, and the very fact that criminal law thinking has not seriously considered those critiques is itself a kind of exceptionalism. See *infra* Parts II and III.

ism has likely helped make mass incarceration possible. A nationwide, multi-decade war on crime requires foot soldiers: it requires the participation of thousands of law enforcement officials. Mass incarceration requires mass prosecutions, and thus this Article investigates the ideas about crime and criminal law that seem to have informed prosecutors—and other legal professionals—as they sought conviction after conviction. A penal system as large as America's also requires money and other resources, which in turn require the support of the public and their representatives. The very belief that criminal law is exceptional—uniquely necessary, uniquely determinate, and uniquely circumscribed in its content—may have fueled the expansion of a system that is in fact none of those things.

Moreover, our conceptual paradigms may hinder present efforts to understand or reverse mass incarceration by shaping where scholars choose to look and what seems important. Across a large literature that investigates how America's prison population, and other criminal law interventions, grew so dramatically in the twentieth century, there has been too little attention to history, and almost no attention to intellectual history. Indeed, scholars sometimes depict American criminal law as intellectually empty—a chaotic jumble of populist emotion and unprincipled politics. Many studies examine public opinion on issues of crime and punishment, but measures of general public punitiveness cannot provide a full account of how or why experts, political officials, and legal professionals built a carceral state.¹⁴ Scholars have not scrutinized closely the models and expectations of criminal law held by the most influential actors in the criminal legal system, perhaps because scholars hold the same models and expectations. This Article undertakes that inquiry into the ideologies behind mass incarceration.

Accordingly, the Article begins with an attempt to expand our fields of vision by placing the current crisis of criminal law in a somewhat broader historical context. To that end, Part I investigates claims of historical exceptionalism. It demonstrates that, with the important exception of incarceration rates, a topic deferred until Part III, many of the features of American criminal law that trouble us today have been present throughout the life of the country. Part II then asks how overcriminalization and irregular enforcement, if so familiar across American history, could come to be seen as features of a crisis. This Part examines the mid-twentieth-century development and promulgation of a par-

¹⁴ See, e.g., PETER ENNS, *INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD* 73–98 (2016) (offering an analysis of the political and social processes that have led to the United States becoming the most punitive nation in the world); LORD WINDLESHAM, *POLITICS, PUNISHMENT, AND POPULISM* 30–45 (1998) (conducting a 1998 study of federal crime legislation in the United States that predates the embrace of the phrase “mass incarceration,” but highlights similar themes of populist punitiveness).

ticular normative vision of criminal law based on further claims of exceptionalism. Part III then moves to the last decades of the twentieth century, when scholars, jurists, advocates, and practitioners educated in this normative vision initially embraced policies that dramatically expanded the reach of criminal law. How that initial embrace turned into a sense of crisis in the early twenty-first century is a still-evolving story. But one point of continuity, thus far, is worth noting: criminal law exceptionalism still governs public and professional discourse. If indeed this intellectual framework helped us build the carceral state, we should question whether it will allow any significant reform. The Conclusion examines some risks and potential payoffs of resisting criminal law exceptionalism.

I. THE NIGHTMARE

Criticisms of American criminal justice are abundant and varied, and it is certainly possible to overstate the degree of consensus about what, exactly, is wrong.¹⁵ All the same, a few recurring points are raised so often that one can fairly characterize them as the main ingredients of the perceived crisis. First, and perhaps easiest to verify, is the U.S. incarceration rate, which increased rapidly during the last three decades of the twentieth century, and which remains about five times higher than it was in 1970.¹⁶ The U.S. incarceration rate is exceptional not only in terms of this country's own history, but also in comparison to other developed nations.¹⁷ Still, if one believes that criminal laws should produce *some* prisoners, then an increase in prisoners is not itself obviously a crisis or even a problem—do we punish too many people now, or did we punish too few in the past? To buttress the claim that current levels are too high, other attributes of criminal law are identified alongside incarceration rates as evidence of crisis: overcriminalization, or the prohibition of conduct that should not be treated as criminal at all;¹⁸ severe punishments; wide en-

¹⁵ See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 259 (2018) (identifying distinct critiques of the United States' criminal justice system notwithstanding the appearance of a "purported consensus" on criminal justice reform).

¹⁶ See, e.g., Derek Neal & Armin Rick, *The Prison Boom and Sentencing Policy*, 45 J. LEGAL STUD. 1, 1–3 fig.1 (2016).

¹⁷ See PETER WAGNER & WENDY SAWYER, PRISON POLICY INITIATIVE, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2018 fig.1, <https://prisonpolicy.org/global/2018.html> [<https://perma.cc/SX2P-UGNM>] (comparing the U.S. incarceration rate of 698 per 100,000 to other founding NATO countries, none of which have an incarceration rate greater than 139 per 100,000).

¹⁸ See, e.g., DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 1 (2008); Ellen S. Podgor, Symposium, *Foreword, Overcriminalization 2.0: Developing Consensus Solutions*, 7 J.L. ECON. & POL'Y 565, 565 (2011); Symposium, *Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525 (2012).

forcement discretion, especially that of prosecutors and police officers;¹⁹ and race and class disparities throughout the system.²⁰ Together, these phenomena produce a world in which criminal law appears not as a salutary component of a stable society, but rather as an instrument for the privileged and the dominant to suppress the weak, especially poor people of color.²¹ That suppression often takes the form of imprisonment, but it takes other forms as well, including noncustodial sanctions, police harassment and brutality, and social and civil disabilities associated with criminal records.²²

To label these phenomena as a crisis is to suggest that they are anomalous or unprecedented. It is to suggest a background condition of criminal law not plagued by these current afflictions. At least some commentators have made these suggestions explicitly. For example, one common narrative holds that a political backlash to constitutional criminal procedure decisions by the Warren Court led American legislatures to expand substantive criminal prohibitions dramatically.²³ This expansion of substantive criminal law then gave police and prosecutors discretion that they had not previously known, and that discretion was exercised in racially biased ways that increased inequities in the sys-

¹⁹ See, e.g., ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5–7 (2007) (discussing the wide discretion afforded to prosecutors and police in the American criminal justice system); David Thacher, *Channeling Police Discretion: The Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533, 533, <http://chicagounbound.uchicago.edu/uc1f/vol2016/iss1/13> [<https://perma.cc/6VG3-DKHZ>] (“The breadth of the criminal law and the unfettered discretion it creates are among the most significant challenges facing American criminal justice today.”).

²⁰ See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 8–9 (1999) (discussing the disparities that are “built into the very structure and doctrine of our criminal justice system”); MARC MAUER, *RACE TO INCARCERATE* 12 (1999) (discussing the impact of incarceration on African American communities); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1207–13 (2018) (discussing racial disparities in criminal sentencing and plea bargaining); Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 649 (2017) (discussing how the criminal defense bar is “complicit” in the “racial disparities” and injustice in the American criminal justice system).

²¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLOR-BLINDNESS* 7 (rev. ed. 2012).

²² See *id.* at 13 (defining the term “mass incarceration” to refer “not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison”).

²³ This claim was central to much of William Stuntz’s work, though Stuntz softened his causal assertion in the book he completed just before his death. Compare William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) [hereinafter Stuntz, *The Political Constitution of Criminal Justice*] (“The constitutional proceduralism of the 1960s and after helped to create the harsh justice of the 1970s and after.”), with STUNTZ, *COLLAPSE*, *supra* note 2, at 242 (“The Court’s decisions probably exacerbated both crime and punishment trends, but the trends themselves had other causes. . . . But if the Justices did not cause the backlash, they made a large contribution to it.”).

tem.²⁴ Another critique argues that professionalization and bureaucracy caused American criminal justice to lose its essential connections to the morality of local communities; this critique is similarly premised on a vision of a just and happier past.²⁵

Aside from incarceration rates, however, other features of American criminal law associated with a contemporary crisis have been present from the earliest days of the republic. First, the range of conduct defined as criminal has always been extremely broad, reaching far beyond the prototypical acts of violence and property offenses now associated with the core of criminal law.²⁶ Criminal law has long been widely used to punish idleness, immorality, and nonconformity; it was and still is also used to enforce “regulatory” matters such as commercial operations. Second, whether a given act will lead the actor to be classified as criminal is a question that has long been determined over the course of an erratic and often arbitrary enforcement process. Substantive crime definitions, whether statutory or judicial, have never disciplined enforcement very closely. Moreover, the racial and socioeconomic biases that have long shaped official decisions in other areas of law have mattered just as much, if not more, in criminal law.

I develop these historical claims in more detail below, but two initial caveats are in order. First, though this Part highlights continuities across time, it does not deny that much has changed in American criminal law since the founding of the country. The point is simply that some of the specific features of criminal law that seem so terrible today have a much longer history than we have so far acknowledged. Second, I have not attempted to reconstruct these details of American legal history by wading into primary sources myself, but rather have relied on the work of widely cited legal historians.²⁷ This Part con-

²⁴ See STUNTZ, *COLLAPSE*, *supra* note 2, at 2. The nostalgia for a lost era is explicit in Stuntz’s introduction: “For much of American history [outside the South,] criminal justice institutions punished sparingly, mostly avoided the worst forms of discrimination, controlled crime effectively, and for the most part, treated those whom the system targets fairly.” *Id.*

²⁵ “Criminal justice used to be individualized, moral, transparent, and participatory but has become impersonal, amoral, hidden, and insulated from the people. . . . Appreciating what we have lost can inspire reforms to revive these classic values in the modern justice system.” STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE*, at xviii (2012). Bibas does acknowledge the existence of racial and other biases in early American criminal law, but celebrates the period regardless. “True, punishments could be brutal, procedural safeguards were absent, and race, sex, and class biases all clouded the picture. Nonetheless, the colonists had one important asset that we have lost: members of the local community actively participated and literally saw justice done.” *Id.* at xix.

²⁶ Notwithstanding the frequent framing of “overcriminalization” as a twentieth-century phenomenon, at least some scholars have observed that sprawling substantive prohibitions have characterized American criminal law from its earliest years. See, e.g., Darryl K. Brown, *History’s Challenge to Criminal Law Theory*, 3 *CRIM. L. & PHIL.* 271, 273–74 (2009).

²⁷ The classic grand histories of American law and legal thought have mostly neglected criminal law, suggesting that criminal law exceptionalism is influential even outside the field of criminal law

solidates themes that run across many different historical studies but remain overlooked by criminal law scholars: the breadth of American criminal law even in earlier eras, the importance of enforcement decisions from the nation's earliest days, and the longstanding influence of race and class.

A. Conduct Defined as Criminal

To evaluate the depiction of overcriminalization as a recent phenomenon, this Section examines “substantive” American criminal law in earlier periods.²⁸ That task faces this challenge: early in the country's history and throughout its first century or so, crimes were defined by both common law and numerous statutes and codes.²⁹ Common law crimes included not only traditional and judicially defined offenses such as murder and burglary, but also conduct determined after the fact to be sufficiently injurious to the public.³⁰ The nineteenth century saw movements toward codification in many areas of law, and by the mid-twentieth century, most U.S. jurisdictions had expressed a prefer-

itself. *See, e.g.*, GRANT GILMORE, *THE AGES OF AMERICAN LAW*, at vii–viii (1977) (noting the author's expertise in commercial law and relative inattention to criminal law); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at xii (1977) (noting the book's focus on private law); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 4–5 (1992) (detailing focus on private law). *But see* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 204–07 (discussing various challenges to the public-private distinction, including Progressive thinkers' argument that property law is in fact public law). Meanwhile, influential book-length histories of American criminal law have tended to focus on a particular jurisdiction in a specific time frame, rather than surveying all of U.S. history like Gilmore or Horwitz. *See generally* LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910* (1981); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* (1989); MARY E. VOGEL, *COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS, AND THE MAKING OF POLITICAL AUTHORITY*, at vii–viii (2007). One notable exception, a panoramic survey of American criminal legal practices from the colonial period through the twentieth century, is LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 3–6 (1993) [hereinafter FRIEDMAN, *CRIME AND PUNISHMENT*]. For another broad overview, albeit one far less detailed, see ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1939* (2011).

²⁸ It is somewhat anachronistic to speak of “substantive criminal law” in the seventeenth or eighteenth centuries, as the conceptual distinction between substantive law and procedure developed only in the late eighteenth and nineteenth centuries. *See infra* note 100 and accompanying text. Nevertheless, one of criminal law's functions—the classification of conduct as criminal—preexists the substance-procedure dichotomy and is worth examining across different eras of American law.

²⁹ *See, e.g.*, FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 20–21 (noting the settlers' initial adoption of the English common law of crimes); *id.* at 32–34 (discussing colonial criminal codes); *id.* at 63–65 (discussing codification movements and growing disapproval of common law crimes throughout the nineteenth century). A separate challenge arises from the fact that the modern concept of “substantive law,” distinct from procedure, arose only in the nineteenth century. In the colonies and in the first years of the new republic, there is little evidence of any delineation of “substantive criminal law” as an independent field. *See infra* Part I.B.

³⁰ *See* *Commonwealth v. Mochan*, 110 A.2d 788, 790 (Pa. Super. Ct. 1955).

ence or an outright requirement that crimes be defined by statute. From our perch in today's statutory world, one must remember that any attempt to measure growth in substantive criminal law over time must take into account the flexibility of earlier common law standards. In other words, we cannot simply count statutes.³¹

With a closer look at what has been defined as criminal, whether by judges or legislators, it is clear that American criminal law has always reached much farther than the purportedly paradigmatic crimes of homicide, rape, and robbery.³² Those specific offenses shape many discussions of crime, and of crime rates, but they comprise only a tiny fraction of the conduct formally identified as criminal or actually prosecuted.³³ What sort of conduct has been the usual concern of criminal prosecutions? Drunkenness, vagrancy, and other so-called "public order" offenses, along with property crimes, have long generated a substantial majority of criminal prosecutions, under both common law and statutory regimes, and especially as public officials took over primary responsibility for initiating criminal cases.³⁴ "For much of our history, drunken-

³¹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–15 (detailing the increase in the number of statutes in state and federal penal codes). Interestingly, some of the specific statutes cited by Stuntz to illustrate the purportedly recent phenomenon of overcriminalization were in place long before the Warren Court issued the criminal procedure decisions that, according to Stuntz, triggered a legislative backlash and expansion of substantive criminal law. See, e.g., FLA. STAT. § 877.16 (2000) (prohibiting the exhibition of deformed animals, and enacted at least as early as 1921).

³² It would be useful to have a separate label for murder, rape, and robbery—murdroppery?—given that these offenses are the very epitome of criminality in the public imagination, and even in expert analysis. The FBI's Uniform Crime Reports classify murder, nonnegligent manslaughter, rape, robbery, and aggravated assault together as "violent crime," and legal scholars frequently use this statistic to determine "crime rates" more generally. See, e.g., Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U.L. REV. 685, 716 (2017) (determining "crime rates" using UCR "violent crime" data). On the breadth of early American criminal law, see David J. Rothman, *Perfecting the Prison*, in THE OXFORD HISTORY OF THE PRISON 100, 101 (Norval Morris & David J. Rothman eds., 1995) (noting that seventeenth- and eighteenth-century Americans viewed "an exceptionally wide range of conduct" as criminal).

³³ See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 573 (2011); Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 565 (2018) [hereinafter Ristroph, *Farewell to the Felonry*] (arguing that enforcement choices play such a significant role in defining conduct as criminal that it is misleading to identify statutes or judicial opinions as the "substance" of criminal law); see also *infra* Part I.B.

³⁴ Allen Steinberg's study of Philadelphia's criminal courts in the nineteenth century illustrates this shift. "Nonindictable offenses—primarily drunkenness, disorderly conduct, and vagrancy—were most often state-initiated. Indictable offenses—mostly assault and battery and petty larceny—were usually private prosecutions. Before the professionalization of the police, nonindictable offenses were probably only a minority of the cases heard by aldermen. Afterwards, they were undoubtedly the majority." STEINBERG, *supra* note 27, at 29. A major theme of Steinberg's study is the strategic use of criminal prosecutions to deal with an array of social problems, including resolution of private disputes. In that vein, Steinberg identifies disorderly conduct as a possible exception to the general rule

ness was the single most frequently punished crime—the plankton of the criminal sea.”³⁵ The criminalization of alcohol-related offenses reached its apex in 1920 with Prohibition, when the United States went so far as to amend the Constitution to prohibit the manufacture, sale, and distribution of liquor, and to empower the federal government to enforce the ban.³⁶ This experiment lasted only fourteen years; in 1933, the Constitution was amended again and the appropriate regulation of liquor was left to the jurisdiction of individual states.³⁷ States did and do maintain extensive criminal statutes related to liquor, but over the twentieth century the basic crime of public intoxication became less frequently enforced.³⁸ Meanwhile, as the automobile became increasingly important to Americans’ daily lives, traffic offenses “replaced drunkenness and loitering as the basic fodder of justice.”³⁹

Vagrancy and similar offenses claimed a large share of actual prosecutions until the 1970s, when the Supreme Court limited states’ ability to criminalize vagrancy.⁴⁰ A flurry of recent scholarship has emphasized the degree to which misdemeanor cases overwhelm felony prosecutions, but it is the scholar-

that state prosecutors were more likely than private citizens to pursue minor charges. “Disorderly conduct was a vague and complicated category,” which may have made it especially fruitful “as a source of manipulation for aldermen, policemen, and private citizens alike.” *Id.* at 31; see also SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 71 (2d ed. 1998) (noting that over the course of the nineteenth century, private prosecutions were increasingly limited to murder or other major crimes).

³⁵ FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 2. In nineteenth-century Philadelphia, drunkenness prompted the overwhelming majority of police arrests both before and after police professionalization in the city. See *id.* at 121–22; STEINBERG, *supra* note 27, at 30; see also William C. Carriger, Comment, *The Law of Public Drunkenness*, 34 TENN. L. REV. 490, 490–97 (1967) (discussing the variety and breadth of public intoxication crimes).

³⁶ See U.S. CONST. amend. XVIII; Volstead Act, 41 Stat. 305 (1919) (enacted to provide for enforcement of the Eighteenth Amendment).

³⁷ See U.S. CONST. amend. XXI.

³⁸ See, e.g., Margaret Raymond, *Penumbral Offenses*, 39 AM. CRIM. L. REV. 1395, 1395, 1411–15 (2002) (defining “penumbral offenses” as acts formally prohibited yet widely practiced and tolerated by public officials, and discussing public intoxication and other alcohol-associated crimes such as underage drinking, as examples of such offenses).

³⁹ FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 278. See generally SARAH SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* (2019).

⁴⁰ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (declaring a Jacksonville vagrancy ordinance unconstitutionally vague). See generally RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016) (providing an overview of vagrancy law and constitutional challenges to it in the twentieth century). *Papachristou v. City of Jacksonville* constrained states’ ability to convict for vagrancy, but this limitation has proven relatively inconsequential, in part because other enforcement tactics have allowed police to accomplish through other means many of the functions of vagrancy arrests. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 2–3 (1968) (authorizing police to stop, frisk, and question individuals on the basis of “reasonable suspicion” of criminal activity).

ly attention to misdemeanors that is new, not their prevalence.⁴¹ Among the ostensibly more severe offenses punished as felonies, property crimes generated the plurality of cases until the late twentieth century, when drug offenses began to compete for status as the most common felony. Narcotics trafficking, manufacturing, and possession certainly grew in importance as alcohol offenses faded; first states and then the federal government adopted increasingly detailed and far-reaching prohibitions.⁴² Importantly, narcotics offenses are now very often charged as felonies, punishable with prison time or other severe collateral consequences, whereas many alcohol-associated offenses were and are misdemeanors.⁴³ One should not minimize the impact of this shift and other consequences of the War on Drugs, which helped fuel the expansion of enforcement discussed in Part III. But nor should we forget that the use, possession, or distribution of intoxicating substances was seen as worthy of criminal intervention long before the War on Drugs began.

I have mentioned crimes of intoxication, traffic and public order offenses, property crimes, and offenses involving interpersonal violence. That list covers much of what has been criminalized in the United States over time, but it is hardly comprehensive. In almost any field of conduct subject to state or federal regulation, criminal sanctions can be found. "Crime" is a category defined by the state's labels and the state's responses; it is not a category that is limited to a particular kind of conduct.⁴⁴ But it is worth noting two more broad categories of offenses that have existed in American criminal law since its earliest years: "morals" offenses and "regulatory" offenses. By morals offenses, I mean prohibitions of acts that do not fall within traditional categories of "crimes against persons" or "crimes against property," yet are nonetheless condemned as im-

⁴¹ See JOHN H. LINDQUIST, MISDEMEANOR CRIME: TRIVIAL CRIMINAL PURSUIT 17 (1988) ("Clearly misdemeanor offenses are the most dominant theme of the statutes of the states. They are the basic means of controlling behavior and of identifying the moral standards expected of the citizens. This same situation held true in colonial America."). As Lindquist notes, the very definitions of misdemeanor (and felony) have not been static, and a great deal of conduct is chargeable as either a felony or a misdemeanor. See *id.* at 11–13. All the same, it is clear that the great majority of criminal prosecutions involve misdemeanor charges, and that appears to have been true throughout American history. See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 117–18 (observing percentages of misdemeanor arrests in Alameda County from 1872–1910); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012) (noting that, although misdemeanor cases are "radically underdocumented" in comparison to felony cases, a variety of sources compiled over several decades indicate that misdemeanors constitute between seventy-five to ninety percent of state criminal dockets).

⁴² See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 354–56.

⁴³ See generally Ristroph, *Farewell to the Felony*, *supra* note 33, at 590–99 (discussing the sectorial shift from charging misdemeanors to charging felonies and the discretion involved in those decisions).

⁴⁴ See Glanville Williams, *The Definition of Crime*, 8 CURRENT LEGAL PROBS. 107, 107 (1955).

moral.⁴⁵ Sexual activity figures prominently in this category: for much of U.S. history, sexual activity outside of marriage (including same-sex intimacy) was classified as criminal.⁴⁶ Criminal law was also used to censor obscene books, art, and even profane speech. Gambling and prostitution have been, and still are, often prohibited as an affront to morality. The colonies and the newly formed states punished an array of other offenses against morality, many related to religious offense: failure to attend church; disturbing church services or reviling church ministers; engaging in commerce, sport, or other prohibited activities on the Sabbath.⁴⁷

Moreover, American criminal law has punished regulatory offenses from its earliest decades. As with morals offenses, the concept of a regulatory offense is not precisely defined, but it is now commonly used to describe criminal laws that address “matters within the purview of federal, state, and local administrative agencies, such as the environment, product and workplace safety, labor and employment, transportation, trade, the issuance of securities, the collection of taxes, housing, and traffic and parking.”⁴⁸ Regulatory offenses are frequently presented as a twentieth-century development, especially by their critics, many of whom endorse subject-matter exceptionalism and suggest a lost age of narrowly tailored criminal law.⁴⁹ But such offenses have been common since the colonial period.⁵⁰ Even before the proliferation of federal

⁴⁵ Crimes against persons—typically, acts of interpersonal physical violence—and crimes against property are, of course, frequently characterized as immoral. But the phrase “morals offenses” is most often used to describe a different category of crime: acts that frequently do not harm a specific victim but rather offend widely shared moral sensibilities. See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 126 (noting the difficulty of defining “moral crimes” as a category, but offering a description akin to mine here).

⁴⁶ See *id.* at 127–32 (describing criminal regulation of sexual behavior in the nineteenth century); *id.* at 325–34 (same, but in the twentieth century).

⁴⁷ See BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660, at 137 (1983); FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 34–35; *id.* at 127 (giving examples of nineteenth-century “Sunday laws”); VOGEL, *supra* note 27, at 33 (listing a random sample of cases from the Boston Police Court from 1830 to 1860, including such offenses as “retailing spirits on Sunday” and “secular business on Lord’s Day”). Vogel’s list also includes one prosecution for “humming tunes,” but there is no indication of the day of the week on which the offensive humming occurred. VOGEL, *supra* note 27, at 33.

⁴⁸ Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1544 (1997). But see ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 104 (3d ed. 2014) (noting that although “technical” or “regulatory” offenses “can often be identified sociologically, attempts to comprehend the distinction from a legal point of view are fraught with difficulty”).

⁴⁹ See, e.g., Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1074–76 (2014) (claiming, without citation, that before the twentieth century, regulatory or “public welfare” offenses were limited to the sale of impure food or alcohol).

⁵⁰ VOGEL, *supra* note 27, at 33. A random sample of cases from the Boston Police Court between 1830 and 1860 includes an array of crimes that would today be classified as regulatory: “remaining

administrative agencies, state and local authorities used criminal sanctions to address problems from the quality of goods and food to the safety of public spaces to the protection of free markets.⁵¹ Regulatory offenses illustrate well the dynamism of criminal law: criminal sanctions have often been introduced to deal with new coordination problems and other challenges that arise with increased urbanization or other broad societal changes. Today, the U.S. government regulates almost every area of life, and wherever it regulates, it creates some options to charge criminal offenses. The reach of the regulatory state has expanded, to be sure, but the choice to use criminal law as a regulatory device is not new.

Criminal law has itself been dynamic, but it has frequently been deployed to preserve existing social hierarchies and to resist broad social change. Criminal law was used to protect the institution of slavery, of course, and it has been used to enforce ideas about proper social ordering many times since the Civil War and Reconstruction.⁵² Consider several canonical cases of constitutional equality and the laws at stake in each one. When Homer Plessy was removed from the East Louisiana Railway train for sitting in a car reserved for white passengers, he was subject to criminal prosecution and punishment.⁵³ When Robert Meyer spoke German, rather than English, to teach Nebraska schoolchildren, he was convicted of a misdemeanor criminal offense.⁵⁴ When Estelle Griswold distributed contraception in Connecticut, she violated a criminal law and was criminally prosecuted.⁵⁵ When Yick Wo, a Chinese immigrant, operated a laundry in a wooden building without special permission from the city of San Francisco (permission that was consistently granted only to non-Chinese applicants), he committed a misdemeanor offense and was jailed and fined.⁵⁶ These cases from the equality canon are unusual in that the criminal sanctions were eventually declared impermissible by the Supreme Court, but the de-

open past 10 p.m.," "removing house offal against by-laws," "keeping swine in street," "driving horse to left of center," "horse at large," "sidewalk iced more than 6 hrs.," and so on. *Id.*

⁵¹ See FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 113–18 (discussing regulatory crimes from the colonial period to the nineteenth century); *id.* at 282–85 (explaining the expansion of the regulatory state in the twentieth century, and the concomitant proliferation of regulatory crimes); see also Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 658 (2011); Ronald F. Wright & Paul Huck, *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860–1940*, 36 LAW & SOC'Y REV. 51, 56 (2002) (noting that authorities relied on criminal sanctions even more than civil law to ensure safe milk, and using milk-related crimes to develop the history of regulatory crimes more generally).

⁵² See generally THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860* (1996). In Virginia, even to criticize the institution of slavery was a criminal offense at one time. See FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 89.

⁵³ *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896).

⁵⁴ *Meyer v. Nebraska*, 262 U.S. 390, 396–97 (1923).

⁵⁵ *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

⁵⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 357–60 (1886).

ployment of criminal sanctions to accomplish whatever general goals the state wants to pursue—including the enforcement of racial hierarchies or other inequalities—is not unusual at all.⁵⁷

Against the historical exceptionalism that posits broad criminal prohibitions as a late-twentieth-century development, a more careful study reveals that criminal prohibitions have always reached a vast range of conduct, including very ordinary acts.⁵⁸ Moreover, physically violent offenses have been a small minority of all crimes prosecuted.⁵⁹ Of course, there are some changes amidst the continuities. For example, the subcategory of offenses categorized as felonies has likely grown in the twentieth century, so that many offenses previously classified as misdemeanors are now chargeable as felonies.⁶⁰ With more opportunities to charge felonies, the discretion of enforcers increases—but the increase has only magnified already substantial discretion, as the next Section shall show.

B. Enforcement Choices

So far, I have detailed the wide range of conduct defined as criminal without focusing much on who does the defining. Criminal law as a common-law field gave judges considerable power to define crime; the move toward

⁵⁷ In Lawrence Friedman's grand survey of the history of American criminal law, three consecutive chapters identify three enduring and overlapping themes that shaped choices to define conduct as criminal through the end of the nineteenth century. Criminal laws were designed to protect existing allocations of power, both racial and economic; more narrowly, they were designed to vindicate particular property rights; and more generally, they were designed to prohibit acts that offended prevailing but contingent conceptions of morality, such as sexual impropriety or drunkenness. See FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 83–106 (“Power and Its Victims”); *id.* at 107–24 (“Setting the Price: Criminal Justice and the Economy”); *id.* at 125–48 (“Morals, Morality, and Criminal Justice”).

⁵⁸ *Cf.* Rothman, *supra* note 32, at 101 (noting that seventeenth- and eighteenth-century Americans viewed as criminal “an exceptionally wide range of conduct”); see also JEROME HALL, *THEFT, LAW AND SOCIETY* 68–70 (1935).

⁵⁹ See FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 2. Friedman characterizes America in the second half of the twentieth century as a world of rising serious crime, but even in his snapshot year of 1990, he reports 2.3 million victims of “violent crime” among 34.8 million total incidents of crime. *Id.* at 451. To be sure, physically violent offenses occur much more frequently in the United States than other countries, and one should not minimize the harm of these crimes. See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997) (arguing that it is rates of lethal violence, rather than rates of all criminal offending, that distinguish the United States from other developed nations). But the point remains: by the numbers, criminality in America is not primarily a matter of physical violence.

⁶⁰ See Ristroph, *Farewell to the Felony*, *supra* note 33, at 598–601; see also David T. Hardy, *District of Columbia v. Heller and McDonald v. City of Chicago: The Present as Interface of Past and Future*, 3 NE. U. L.J. 199, 210–11, 210 n.71 (2011) (noting that “fighting a duel, drawing a deadly weapon, running an opium den, and selling cocaine” were misdemeanors under the 1939 Arizona criminal code).

codification shifted significant power to legislatures. It is a mistake, however, to conceive of criminal law strictly in terms of legislatures and courts. Criminal law means relatively little until it is enforced, and enforcement agents have a great deal of power to decide what, or who, is criminal. That is a common complaint about American criminal law today, but it is not a new state of affairs.⁶¹ Indeed, complaints about insufficient, selective, or arbitrary enforcement extend back to the earliest days of American criminal law.⁶²

1. From Private to Public Enforcement

Until the latter half of the nineteenth century, the United States did not have much of a public enforcement apparatus. Early American communities lacked professional police forces and relied on lay volunteers, or conscripts called to service, as constables and watchmen.⁶³ Public prosecutors were introduced relatively early, but they lacked the funding and staffing to enforce all of the sprawling criminal codes.⁶⁴ Initially, the public prosecutor of a given jurisdiction was likely to be a part-time official working without administrative assistance. Early prosecutors were often “moonlighters,” better paid for the legal services they provided to private clients, and thus they faced considerable incentives to minimize the hours allocated to public work.⁶⁵ There was another avenue of enforcement, though; until the second half of the nineteenth century, many criminal cases were brought by private parties.⁶⁶ If anything, a system of private enforcement seems likely to produce even more sporadic and unpredictable enforcement than one of public prosecution, and indeed that is the story reported by numerous historical studies. It was in part the perceived inefficiencies and arbitrariness of private prosecutions that led the United States to

⁶¹ Nor is it a complaint limited to the United States. Various studies document selective enforcement in other countries across various time periods. See, e.g., Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 21–59 (Douglas Hay et al. eds., 1975) (analyzing strategic selective enforcement in eighteenth-century England); Teemu Ruskola, Note, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2564 (1994) (discussing selective enforcement in the People's Republic of China regarding various sex offenses).

⁶² The irregularities of criminal law enforcement led Elizabeth Dale to characterize criminal law in America's first 150 years as “far more a government of men than one of laws . . .” DALE, *supra* note 27, at 5. But Dale's very formulation assumes the idealized conception of criminal law that developed over the twentieth century. See *infra* Part II.

⁶³ See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 28–29.

⁶⁴ See generally JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY (1980).

⁶⁵ See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 42–43 (2003); Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 446 (2009).

⁶⁶ See, e.g., Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQUENCY 568, 570 (1984).

establish public prosecutors earlier and much more widely than other western democracies.⁶⁷

As private prosecutions waned, selective enforcement changed its form but did not disappear. First, even as staffing and resources for public prosecution increased, full or near-full enforcement remained impossible, given the breadth of substantive prohibitions and the frequency with which they are violated.⁶⁸ Second, as criminal law became increasingly codified in the nineteenth and early twentieth centuries, the sources of discretion shifted. As emphasized in the previous Section, it is important both to note criminal law's transition from a (partly) common-law field to one in which almost all offenses are defined by statute, and also to avoid overemphasizing the consequences of that transition. Common law gave both prosecutors and courts discretion. Codification may limit judicial discretion to a degree, but it has not limited prosecutorial discretion much, and may have expanded it. Statutory offenses have long been so numerous, and have reached so much ordinary conduct, that law enforcement agents do not need common-law crimes to enjoy wide discretion about who to prosecute.⁶⁹ In 1940, in the waning years of common-law crimes but well before any supposed legislative backlash to the Warren Court could have expanded criminal codes, then-Attorney General Robert Jackson observed that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."⁷⁰

2. Expansions of Capacity

The introduction and expansion of municipal police forces also increased both enforcement capacity and opportunities for discretion. This particular expansion of discretion was likely deliberate, because American police forces developed in response to perceived needs for crisis management and social coordination, not strictly problems related to the detection and investigation of substantive offenses. Immigration and industrialization brought rapid changes to American cities in the early decades of the republic, and by the 1820s and 1830s, the upheavals were manifest in frequent riots, racial and ethnic con-

⁶⁷ See, e.g., GOTTSCHALK, *supra* note 6, at 92–93; JACOBY, *supra* note 64, at 3–43.

⁶⁸ See Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 775 (1996) (“[T]here has been no time in our history when we had . . . sufficient resources for police, prosecutors, and judges.”).

⁶⁹ See VOGEL, *supra* note 27, at 33 (providing a sample of cases from the Boston Police Court between 1830 and 1860 that reflect the criminalization of the following ordinary activities: “remaining open past 10 p.m.,” “removing house offal against by-laws,” “keeping swine in street,” “driving horse to left of center,” “horse at large,” “sidewalk iced more than 6 hrs.,” and so on). See generally GOLUBOFF, *supra* note 40.

⁷⁰ Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

flicts, and sometimes violent protests by laborers.⁷¹ Police forces were introduced to address these problems, with a focus on prevention.⁷² The new police departments undoubtedly increased enforcement capacity far beyond a system reliant on private complaints.⁷³

From the outset, policing was highly discretionary and selective, sometimes due to strategic choices to focus on particular problems and ignore others, sometimes due to officers' biases or lack of enthusiasm.⁷⁴ American police forces have never been subject to the top-down constraints that are common in other countries.⁷⁵ Policing was highly politicized, and controversial, throughout the nineteenth century.⁷⁶ Calls to reform the police emerged early, with an initial focus on professionalization that evolved into other themes, such as increased democratization, as police forces grew and changed.⁷⁷ Through each era of American policing, discretion has played a significant role. Police officers have long been expected to manage an array of problems, not all of which are captured in criminal statutes, and they have never been expected to detect every violation and apprehend every violator.⁷⁸

Enforcement capacity grew as prosecutors and police forces grew in number and in professionalization, and with this increased capacity came more exercises of discretion. But it is important to see that it is the increased capacity, rather than any profound change in the content of criminal law, that ex-

⁷¹ See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 68–69; WALKER, *supra* note 34, at 50–52.

⁷² See WALKER, *supra* note 34, at 52 (“The major change was that preventive patrol now became the central focus of law enforcement.”); Eric H. Monkkonen, *History of Urban Police*, 15 CRIME & JUST. 547, 553 (1992) (tracing development of police to “a growing intolerance for riots and disorder, rather than a response to an increase in crime”).

⁷³ See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 70 (“Under the police regime . . . law enforcement became much less random, less haphazard. Prosecution, in the past, had depended very much on victims who made complaints. . . . [The police] became the real complainants—the prosecuting witnesses. This was very notably the case for ‘victimless crimes . . .’”); ALEX S. VITALE, THE END OF POLICING 38 (2017) (“It was the creation of the police that made the widespread enforcement of vice laws and even the criminal code possible for the first time.”).

⁷⁴ See, e.g., FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 70; VITALE, *supra* note 73, at 38–39; WALKER, *supra* note 34, at 57–60; see also WALKER, *supra* note 34, at 66 (“It is unlikely that the police did much to prevent crime and disorder There were simply too few officers, spread too thin, spending too much of their time avoiding work.”).

⁷⁵ See GOTTSCHALK, *supra* note 6, at 53–54; see also *infra* Part III.

⁷⁶ See WALKER, *supra* note 34, at 64–65 (discussing the failure of nineteenth-century reform efforts); *id.* at 131–37 (discussing police professionalization in the first decades of the twentieth century).

⁷⁷ See generally DAVID A. SKLANSKY, DEMOCRACY AND THE POLICE (2008).

⁷⁸ See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 150 (“[T]he basic function of the police [was] to keep order in public places, [and] to deter crimes of disorder by patrolling urban spaces. People think of the police as crime-fighters; but order is, and probably was then, their prime goal.”); WALKER, *supra* note 72, at 58 (“Exercising broad discretion, [the nineteenth-century police officer] acted as a ‘roving local magistrate,’ settling disputes and solving other problems through his personal mediation.”).

panded the occasions for enforcement discretion. Here the country's experiment with Prohibition may be particularly instructive. Liquor manufacturing and distribution laws were selectively enforced in ways that were obvious to the American public; indeed, arbitrary enforcement was a major theme of the critiques of Prohibition that led to its eventual repeal.⁷⁹ But several historians emphasize that Prohibition left a legacy far more important than any substantive criminal statute: the institutional foundations of the federal carceral state.⁸⁰ It vastly expanded federal enforcement capacities, including surveillance and policing, and it led to the creation of the Federal Bureau of Prisons. Prohibition also provided the occasion for many of the Supreme Court's foundational Fourth Amendment decisions, which (in this era) nearly inevitably ruled in favor of the government's asserted search and seizure authority and against individual defendants.⁸¹ In Lawrence Friedman's memorable terms, "Prohibition is often described as a dead letter, but it was an extremely lively corpse."⁸² It certainly illustrates that expansions of enforcement authority can magnify, rather than reduce, practices of selective or arbitrary enforcement.

3. The Elusive Jury and the Endurance of Guilty Pleas

I have so far emphasized police and prosecutors, but adjudication is also part of the enforcement process. Contemporary critiques often emphasize prosecutorial discretion in the context of plea negotiations, contrasting conviction by guilty pleas with the seeming gold standard of criminal adjudication: an adversarial trial before a jury. In that light, it is worth noting that convictions secured through pleas are not a new development, and *jury* trials have never been the norm. In the early years of the republic, a substantial number of criminal convictions did result from trials, but these trials were very short proceedings in which defendants were typically unrepresented by counsel and determinations of guilt were often made by a magistrate or other judicial offi-

⁷⁹ See LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* 71 (2016) (discussing how Prohibition was enforced disproportionately in African American, poor, and immigrant communities); *id.* at 100–02 (describing the link between selective enforcement and opposition to Prohibition).

⁸⁰ See GOTTSCHALK, *supra* note 6, at 59–63; see also MCGIRR, *supra* note 79.

⁸¹ See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that wiretapping defendant's phone under suspicions of his illegal importation of alcohol did not violate defendant's Fourth Amendment rights), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. State of New York*, 388 U.S. 41 (1967); *Marron v. United States*, 275 U.S. 192, 199 (1927) (affirming conviction for conspiracy to violate the National Prohibition Act, and rejecting Fourth Amendment challenge); *Carroll v. United States*, 267 U.S. 132, 147 (1925) (rejecting Fourth Amendment challenge to search of automobile for contraband liquor).

⁸² FRIEDMAN, *CRIME AND PUNISHMENT*, *supra* note 27, at 266.

cial.⁸³ As defense counsel have become more prevalent, and even after defendants have been afforded a constitutional right to counsel, jury trials have grown ever more rare.⁸⁴ Guilty pleas produce almost all criminal convictions today, but they are not a recent development; they have produced the majority of criminal convictions for well over a century.

4. Inequality Past and Present

A final point of continuity is worth noting: enforcement discretion has long produced racial and socioeconomic disparities. The burdens of criminal law—police intrusions, arrests, convictions, and formal sanctions—have been directed disproportionately toward racial minorities and the poor throughout American history.⁸⁵ Many factors contribute to these patterns, some solely a matter of enforcement and some related also to the content of substantive prohibitions: it is easier for a wealthy person than a poor one to avoid both public drunkenness and detection of one's public drunkenness.⁸⁶ The magnitude and precise patterns of racial and socioeconomic disparities vary with time, and so

⁸³ See *id.* at 237–41. As a number of scholars have emphasized recently, common narratives of criminal law are based on a felony adjudication model, where jury trials are somewhat more common. But even for felonies, guilty pleas far outnumbered jury convictions at least by the end of the nineteenth century. See, e.g., Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. L. & SOC. SCI. 131, 131–32 (2005).

⁸⁴ The introduction of defense counsel appears to have caused a brief uptick in the frequency with which defendants elected to go to trial, at least in some jurisdictions. But the increase was short-lived, as more frequent prosecutions and more crowded dockets counteracted the influence of defense counsel. See James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681–1837*, 40 AM. J. LEGAL HIST. 455, 464 (1996); see also Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 97 (1928) (discussing the marked decline in the frequency of criminal trials). And for much of this country's history, even when cases did go to jury trial, the jury became just another agent with discretion to decide outcomes, a maker (or "finder") of law rather than a mechanical functionary of it. See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 423 (noting that early American juries were understood to have the power to determine questions of law, and arguing that this law-finding function lasted much longer in criminal cases than in civil ones). The view that a jury is permitted to determine facts but not law, and is strictly bound to apply preexisting law, was introduced throughout the nineteenth century and finally triumphed only in the twentieth century. *Id.* at 434–35.

⁸⁵ See, e.g., FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 84; WALKER, *supra* note 34, at 6. On a now standard account, the Supreme Court's first major efforts to develop doctrines of constitutional criminal procedure were efforts to address racial bias in enforcement. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000).

⁸⁶ See, e.g., Martha A. Myers, *Inequality and the Punishment of Minor Offenders in the Early 20th Century*, 27 LAW & SOC'Y REV. 313, 313–16 (1993); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1265–67 (1999) (discussing ways in which Fourth Amendment doctrine provides greater protection for the wealthy and encourages heavier policing of poor people and people of color).

too must the explanations.⁸⁷ But it is important to recognize that evidence of great disparities can be found in every era in American criminal law.⁸⁸ Racialized enforcement is not a late twentieth-century invention.

I have detailed the wide scope of substantive law and the importance of enforcement discretion as two separate phenomena, but of course they are related. It seems likely that the United States has been able to tolerate the broad substantive prohibitions described in the previous Section only because enforcement has been so incomplete. And it is certainly possible that the broad substantive prohibitions have sometimes been adopted precisely to give enforcers great leeway to choose their targets.⁸⁹ But whatever the intentions behind broad substantive law and very partial enforcement, this combination is the American criminal law tradition. The exceptionalist paradigm, in which criminal law is targeted to address a narrow range of especially serious problems, and in which substantive laws rather than enforcement agents determine who will be labeled a criminal, has never been a reality. Political scientist Marie Gottschalk has suggested that “more than in other areas of American history and politics, we have incredible amnesia when it comes to the history of crime and punishment.”⁹⁰ I do not know if the amnesia is in fact worse with respect to crime and criminal law than in relation to other unpleasant aspects of our past, but it is certainly true that discussions of criminal law are often deeply ahistorical.⁹¹ As Part II shows, discussions of criminal law are sometimes as resistant to present realities as they are to lessons from the past.

⁸⁷ For example, African Americans have long constituted a greater percentage of the prison population than of the overall American population. But the degree to which African Americans are overrepresented among prisoners increased over the twentieth century. See GOTTSCHALK, *supra* note 6, at 169–70.

⁸⁸ For one useful anthology of historical studies spanning almost three centuries, see 8 RACE, LAW, AND AMERICAN HISTORY 1700–1990: RACE AND CRIMINAL JUSTICE (Paul Finkelman ed., 1992). The fifteen articles in this volume range across jurisdiction and time period, and none provides any reason to believe that criminal law was ever egalitarian. As Paul Finkelman puts it in the introduction to the volume, “these articles show how since the colonial period criminal prosecutions, discrimination in trial practices, and police activities have been used as mechanisms for racial control and subordination.” *Id.* at vii. Again, the relationship between race and crime varies with time, even if racially disparate enforcement is common across eras. Khalil Gibran Muhammad has traced ways in which criminality became increasingly dissociated from white immigrants and increasingly linked to black Americans after the Civil War. See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010).

⁸⁹ Discretionary, selective enforcement of criminal laws is a model of governance that can stabilize political authority under conditions of great economic or social inequality. This is Douglas Hay’s interpretation of the selective use of capital punishment in eighteenth-century England, and it is Mary Vogel’s reading of the emergence of plea bargaining in the United States. See Hay, *supra* note 61, at 29–51; VOGEL, *supra* note 27, at vii–viii.

⁹⁰ GOTTSCHALK, *supra* note 6, at 74.

⁹¹ *Cf.* Brown, *supra* note 26.

II. THE DREAM

Given the realities of criminal legal practices discussed in Part I, it is perhaps unsurprising that the institutions of criminal law have never produced much satisfaction.⁹² There is always too much crime, in popular perception, but also too many prohibitions of the wrong things; and there is never adequate enforcement. References to “failure,” “crisis,” or more interestingly, “collapse,” suggesting a previously functional system, long predate the explosion of conviction and incarceration rates in the late twentieth century.⁹³ But even 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.

In this Part, I shift my focus from legal practices to legal ideas, with the ultimate goal of better understanding the relations between practices and ideas. In undertaking an intellectual history of mass incarceration, I aim to identify and examine the ideas about criminal law that informed the people who built the carceral state.⁹⁴ Dissatisfied with actual practices but also confident in the

⁹² This Article is focused on the United States, which surely faces unique criminal justice challenges. But other countries have their own reasons for complaints about criminal law. In a 1907 essay on the “general and well-grounded dissatisfaction with the administration of punitive justice in America,” Roscoe Pound discussed comparable critiques in European nations that extended back several centuries. See Roscoe Pound, *Inherent and Acquired Difficulties in the Administration of Punitive Justice*, 4 PROC. AM. POL. SCI. ASS’N 222, 222 (1908). “It is manifest, therefore, that dissatisfaction with criminal law and administration is not wholly a matter of time or place, but that there are inherent difficulties which must be reckoned with.” *Id.* at 223–24.

⁹³ See, e.g., STUNTZ, *COLLAPSE*, *supra* note 2, at 2; Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 453 (1928) (noting public interest in “the outcome of an alleged collapse of the administration of criminal justice in the American city”); see also JOHN BARKER WAITE, *CRIMINAL LAW IN ACTION* 9 (1934) (referring to “the spectacular failures of criminal law in action,” and emphasizing the role of various enforcement agents). The critiques also came from outside the legal academy. In 1837, years before he became President and before the Civil War, a young Abraham Lincoln decried rampant violence and an “increasing disregard for law which pervades the country.” Mark E. Steiner, “*The Sober Judgement of Courts: Lincoln, Lawyers, and the Rule of Law*,” 36 N. KY. L. REV. 279, 285 (2009). In 1909, President Taft declared that “[t]he administration of criminal law in this country is a disgrace to our civilization.” Eugene A. Gilmore, *The Need of a Scientific Study of Crime, Criminal Law, and Procedure—The American Institute of Criminal Law and Criminology*, 11 MICH. L. REV. 50, 50 (1913). Herbert Hoover’s inaugural address began with a discussion of “the failure of our system of criminal justice.” TONY PLATT, *BEYOND THESE WALLS: RE-THINKING CRIME AND PUNISHMENT IN THE UNITED STATES* 207 (2019).

⁹⁴ In this already long Article, I do not have space to discuss legal scholars’ lively discussions of the uses and possible abuses of intellectual history. I use the term intellectual history roughly as William Fisher defined it: “Intellectual history refers, broadly, to the history of what people have thought about and believed—inferred, most often, from what they have written.” William W. Fisher III, *Texts*

possibility of rational reform, American scholars began to develop and refine a new conceptual account of criminal law, description mixed with aspiration, asserting the unique function and operation of this area of law. That framework was articulated most clearly around midcentury, and it has structured the pedagogy and scholarly analysis of criminal law ever since. This Part examines the birth of the dream of a noble and just criminal law.

A. Out of the Backwater

There is always too much crime, but one curiosity of America's "long nineteenth century," roughly 1789 to 1920, is that crime appeared to decline steadily for many decades—and nonetheless, at the end of that period, experts and political leaders were especially critical of the state of criminal law.⁹⁵ Perhaps the relatively low crime rates enabled the criticisms; perhaps commentators became embarrassed by punishment precisely because the country seemed to have more of it than necessary. In any case, in the early twentieth century criminal law was a particular embarrassment to the burgeoning American legal academy. Influential legal thinkers such as Roscoe Pound, John Henry Wigmore, and James Barr Ames envisioned important functions for legal scholarship in tackling historical, empirical, and conceptual questions that practitioners and judges were ill-equipped to answer, and in "illuminating and simplifying the law."⁹⁶ There were men ready to take on these tasks in many fields of private law, but criminal law was an "intellectual backwater," an ugly stepsister in the law school curriculum and among leading legal scholars.⁹⁷ As Roscoe

and Contexts: The Application to American Legal History of the Methodologies of Intellectual History, 49 STAN. L. REV. 1065, 1065 (1997). One question raised by intellectual historians does have particular import for this Article: can or should this methodology make causal claims about past events? See Charles Barzun, *Causation, Legal History, and Legal Doctrine*, 64 BUFF. L. REV. 81, 81–82 (2016). I address the question of whether and how ideas about criminal law may have contributed to mass incarceration in Part III.

⁹⁵ C.f. THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY, 1789–1920 (Michael Grossberg & Christopher Tomlins eds., 2008). Crime data from this period is limited, but Samuel Walker synthesizes several historical studies that suggest "a U-shaped pattern in which crime rates were very high in the early nineteenth century as a consequence of the initial disruptive impact of industrialization and urbanization but then declined steadily over the next century." WALKER, *supra* note 34, at 68. Crime rates rose again after World War II, thus creating the U-shape. *Id.*

⁹⁶ JAMES BARR AMES, THE VOCATION OF THE LAW PROFESSOR (1901), reprinted in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 354, 366–67 (Humphrey Milford ed., 1913).

⁹⁷ According to one (very opinionated) survey of American criminal law scholarship from the colonial period through 1966, Harvard Law School took a "negative attitude" toward Joel Prentiss Bishop, author of early comprehensive studies of American criminal law, and toward criminal law more generally in the nineteenth century, perhaps delaying the development of this field. See GERHARD O.W. MUELLER, CRIME, LAW AND THE SCHOLARS 69 (1969). Mueller identifies Joseph Beale,

Pound saw it, the field had been “all but left . . . to charlatans,”⁹⁸ and America needed someone to “do for the substantive law of crimes what Wigmore did for the law of evidence and Williston for contracts.”⁹⁹

To emphasize, it was something called *substantive* criminal law that Pound and others identified as the site of intellectual neglect and scholarly opportunity. That itself was an innovation. Beyond criminal law and in early twentieth-century legal thought more generally, a separation of substantive law from procedure was still a relatively recent conceptual development.¹⁰⁰ With the separation came a subordination: whereas substantive law had previously been merely “secreted in the interstices of procedure,” in Henry Maine’s famous formulation, late nineteenth- and early twentieth-century jurists often asserted the normative and conceptual priority of substantive law.¹⁰¹ In the newly developed vision, procedure was supposed to serve as a handmaid to,

Jr. of Harvard as “the first criminal law professor who aspired to scholarly accomplishment,” but finds that Beale left criminal law woefully undertheorized, as we would say today. “[Beale] gave an inordinate amount of attention to the specific offenses and tended to avoid the general principles. . . . His articles were logical but, frankly, lacked imagination.” *Id.* at 59. Meanwhile, over at Northwestern, Dean Wigmore was a successful “organizer of American criminology” but less successful in generating sophisticated studies of criminal law. *Id.* at 78–81; see also David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 642 (2016) (“American substantive criminal law in the 1930s was considered an intellectual backwater.”).

⁹⁸ Roscoe Pound, *What Can Law Schools Do for Criminal Justice?*, 6 AM. L. SCH. REV. 127, 132 (1927).

⁹⁹ Sheldon Glueck, *Roscoe Pound and Criminal Justice*, 10 CRIME & DELINQUENCY 299, 300 (1964). Glueck is paraphrasing Pound, *supra* note 98, at 128. Herbert Wechsler would later repeat the theme, also invoking Wigmore and Williston as inspiration, when he volunteered himself as the intellectual architect of substantive criminal law. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952). Though Roscoe Pound wrote extensively on criminal law (and many other subjects), he wrote primarily about enforcement and administration, and called for someone else to reexamine the underlying conceptual structure of substantive prohibitions. See, e.g., Pound, *supra* note 98, at 129 (“[C]riminal law is substantially the only important branch of American law which has not been affected powerfully and affected for the better by some textbook written by a great teacher of law and embodying the results of his teaching and of his study.”); see also MUELLER, *supra* note 97, at 111 (“Mephistopheles-like, Dean Pound had to shout three times at America’s criminal law professors before he succeeded in tearing them away from their preoccupation with producing dry copies of case reports . . .”).

¹⁰⁰ Several scholars trace the roots of a substance-procedure dichotomy to William Blackstone, who did not rely on those precise terms but who did separate legal rights and wrongs from methods of enforcement. See, e.g., LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW* 66 (2016) (identifying Blackstone as the first thinker to develop “a freestanding account of the substantive [criminal] law as a body of rules divorced from procedural technicalities”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 929–30 (1987). Blackstone’s student, Jeremy Bentham, articulated more clearly a distinction between substantive law and “adjective law.” See JEREMY BENTHAM, *OF LAWS IN GENERAL* 308 (H.L.A. Hart ed., 1970). The works of both men, published late in the eighteenth century, were influential throughout nineteenth century America.

¹⁰¹ HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1891).

and not the mistress of, substantive law, and substantive law was itself equated with justice.¹⁰²

The calls for a new intellectual framework for substantive criminal law eventually produced significant changes to both pedagogy and scholarship, which then influenced legal doctrine and practice as the field became populated with attorneys and judges educated under the new framework. One important step was an influential textbook first published in 1940 and widely used for decades after, notwithstanding the authors' failure to issue a second or subsequent edition.¹⁰³ *Criminal Law and Its Administration* by Jerome Michael and Herbert Wechsler was actually not much about "administration;" the book was explicit in its efforts to conceptualize substantive law independently of procedure, to subordinate procedure to substance, and to combine positive description with more evaluative reflections.¹⁰⁴ The authors used the term "administration" to describe enforcement procedures, and they made clear that administration was simply the means to achieve substantive ends.¹⁰⁵ In this

¹⁰² The handmaid/mistress formulation appeared in a 1938 speech by Charles Clark, Dean of Yale Law School and author of the Federal Rules of Civil Procedure, but Clark borrowed the mistress and handmaid juxtaposition from a 1907 British opinion. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 297 (1938). For further discussion of the conception of procedure as handmaid to substance, see *infra* notes 236–237 and accompanying text. Stephen Subrin suggests that the elevation of substantive law over procedure was partly a result of changes in legal education: As "treatises and law schools replaced apprenticeship as the preferred method of learning to practice law," legal thinking became "disembodied . . . from practical considerations that are more obvious when one learns by doing." Subrin, *supra* note 100, at 929.

¹⁰³ See Lloyd L. Weinreb, *Teaching Criminal Law*, 7 OHIO ST. J. CRIM. L. 279, 279 (2009) (reporting that when he started teaching in 1965, he thought Jerome Michael and Herbert Wechsler's 1940 casebook was the "obvious" choice and adopted it, even though it was twenty-five years old). For a detailed account of the origins of the Michael and Wechsler casebook and its effect on criminal law pedagogy, see Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217 (2009). Michael died in 1953, and Wechsler was asked to oversee the drafting of the Model Penal Code around the same time, so plans for a second edition were abandoned. *Id.* at 236–37. The new approach in the casebook had helped establish Wechsler's reputation and almost certainly influenced the American Law Institute's selection of him as the Chief Reporter for the Model Penal Code. See *id.*

¹⁰⁴ See generally JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, AND COMMENTARIES (1940). Anders Walker's history of this book and its legacy focuses on the authors' hostility toward the Langdellian case method, which Michael and Wechsler saw as overly formalistic and deferential to judges, and insufficiently engaged with broad policy questions and insights from social science. See Walker, *supra* note 103, at 226–30. Without contesting those aspects of the book's new approach, I think the authors' conceptualization of the substance-procedure relationship was equally if not more important. Moreover, Walker portrays the book's embrace of normative questions as primarily a turn toward critique that invited students to identify weaknesses of existing law. As I explain in this Section, however, the book is designed as a normative justification for criminal law—perhaps not in its existing form, but in some not-too-distant model.

¹⁰⁵ The authors acknowledged that administration was sometimes "collaterally" relevant to substantive criminal law, but only collaterally. MICHAEL & WECHSLER, *supra* note 104, at v. The last

vision, substantive law was not something that emerged from the interstices of enforcement procedures; instead, procedures operated in the shadow of and in the service of a vision of substantive justice.

When this book appeared in 1940, criminal law was still a disfavored subject in law schools, a “grimy” (and not profitable) field that few students wanted to enter and few law schools wanted to encourage their students to enter.¹⁰⁶ Notably, Michael and Wechsler did not aspire to encourage or prepare students to practice criminal law.¹⁰⁷ Instead, they thought that a criminal law course could serve as a vehicle to raise broad questions about statecraft and public policy. They wanted to bring dignity to the criminal law course, but that dignity was not to be found in prosecuting or representing criminal defendants—defendants whose essential griminess, it must be said, was not much questioned by these authors.¹⁰⁸ Instead, Wechsler stepped away from the details of enforcement and articulated a more abstract vision of criminal law as the backbone of civilized society. In the casebook and in other works, he advanced a vision more utilitarian than retributive, one that emphasized both the risks and benefits of criminal law.¹⁰⁹ But Wechsler was sure that these risks were worth taking. He depicted criminal law as neither intellectual backwater nor the messy management of grimy wrongdoers, but as the most important law of all:

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. . . . If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in

section of the last chapter addressed “administrative problems,” spanning search and seizure, entrapment, third degree, fair trial, and double jeopardy in less than 100 pages of a textbook over 1200 pages long. *Id.* at 1178.

¹⁰⁶ See generally Walker, *supra* note 103.

¹⁰⁷ See *id.* at 218–19. Contemporaneous reviews of the Michael and Wechsler casebook praised its orientation away from the concerns of practitioners. Ironically, Roscoe Pound was one of the book’s few vocal critics.

¹⁰⁸ Michael and Wechsler allowed that empirical research did not yet “enable us to distinguish criminals from non-criminals in terms of their essential characteristics,” but expressed hope for progress in this area. MICHAEL & WECHSLER, *supra* note 104, at 24. No one else has yet discovered these “essential characteristics,” but that has not stopped the development of an essential view in which criminality is a property of an individual rather than a status bestowed by the state.

¹⁰⁹ Wechsler, *supra* note 99, at 1098 (“Its promise as an instrument of safety is matched only by its power to destroy.”).

the entire legal field is more at stake for the community or for the individual.¹¹⁰

This passage, published in 1952 as Wechsler introduced his plans for the Model Penal Code, reflects the basic vision that I characterize as criminal law exceptionalism.¹¹¹ In this model, criminal law targets a narrow set of specific problems (“the deepest injuries”) with a distinctive set of interventions, and society has no other recourse for these problems than criminal law. Wechsler was hardly the first person to proclaim the fundamental social importance of criminal law and punishment. But as an influential scholar, teacher, and drafter of a model code, he was able to deploy that normative vision as both critique of and apology for actual legal institutions. He identified many ways in which existing law was irrational, but he tried to demonstrate that the problems could be fixed; criminal law could be made into the grand and essential instrument that society so desperately needed. And importantly, this reform project began with substantive law, or, still more strongly, counted as *law* only the substantive definitions of crimes and not the enforcement process. Wechsler acknowledged that under existing practices, enforcement discretion determined outcomes. But much like today’s critics of prosecutorial and police discretion, he saw “domination by administration” as a curable illness, not as the usual, juristypical state of affairs.¹¹² This vision was premised on the assumption that once we chose well what to criminalize and defined crimes properly, enforcement procedures could be designed to vindicate rather than defeat those substantive choices.

At the risk of making the Michael and Wechsler textbook seem itself the turning point, rather than one example of a broader intellectual shift, it is worth highlighting a few aspects of the book beyond its substance-procedure distinction. In promulgating a conceptual architecture through which to understand American criminal law, Michael and Wechsler made a few key choices that should sound familiar to anyone who has taken or taught a substantive criminal law course since 1940. Whereas the prior leading textbook had covered an array of specific offenses, Michael and Wechsler chose homicide as the primary crime through which to teach criminal law concepts and devoted the first and

¹¹⁰ *Id.*

¹¹¹ The quoted passage is Wechsler alone, without his casebook coauthor, which could explain its stronger claim of criminal law exceptionalism. The casebook coauthored with Jerome Michael is more skeptical about the unique importance of criminal law: “[T]he criminal law can not be viewed in proper perspective unless it is remembered that making behavior criminal and treating criminals are only one of many methods that the state can and does employ in order to regulate social life; that the criminal law must not be considered in isolation of other methods of social control, especially education” MICHAEL & WECHSLER, *supra* note 104, at 20.

¹¹² Wechsler, *supra* note 99, at 1101–02.

longest chapter to this topic.¹¹³ They then gave brief attention to a few other physically violent offenses and to serious property offenses, and they all but ignored misdemeanors, petty offenses, and regulatory crimes.¹¹⁴ Drunkenness—the “plankton of the criminal sea,” according to historians¹¹⁵—was addressed primarily as a potential defense, and barely warranted mention as a crime.¹¹⁶ Indeed, the chapter on intoxication was just one instance of the book’s extensive analysis of mental states and volitional capacity, topics still central to the first-year criminal law course as it is usually taught. All told, the book depicted criminal law as a matter of carefully crafted, individualized judgments about dangerous and ill-intentioned persons who inflicted grave social harms—much as Wechsler would later describe the field as he launched the effort to write a model code, and much as casebook authors see the field today.¹¹⁷

Indeed, though other academics would develop new casebooks over subsequent decades, they nearly invariably “built on [the] basic model” established by Michael and Wechsler, often with open acknowledgment of their debt.¹¹⁸ At most American law schools, substantive criminal law is a required first-year course, and judging by the casebooks in use, students are still taught that the substance of criminal law resides in judicial opinions and statutes, not the decisions of enforcement officials such as police and prosecutors. Beyond the casebooks and classrooms, criminal law scholarship did indeed escape its

¹¹³ MICHAEL & WECHSLER, *supra* note 104, at 25–289 (Chapter 1: Homicide). Before Michael and Wechsler published their book, the leading criminal law textbook was JOSEPH H. BEALE, A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW (4th ed. 1928), which has been criticized as giving “an inordinate amount of attention to the specific offenses and tend[ing] to avoid the general principles.” MUELLER, *supra* note 97, at 59.

¹¹⁴ In a chapter called “Social Protection Against Dangerous Persons,” the book did include a section on “vagrants, disorderly persons, and ‘public enemies.’” MICHAEL & WECHSLER, *supra* note 104, at 1008–54. I am grateful to this section for bringing to my attention Thurman Arnold’s remarkable article on the concept of “law enforcement,” discussed below. Michael and Wechsler include a long passage from Arnold’s article, but do not add their own comments or questions. *See id.* at 1051–53.

¹¹⁵ *See* FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27.

¹¹⁶ *See* MICHAEL & WECHSLER, *supra* note 104, at 903–20 (Chapter 9: The Significance of Intoxication). *But see id.* at 1054 (reproducing an Italian statute on the sentencing of “habitual drunkards”).

¹¹⁷ *See, e.g.*, Jens David Ohlin, Essay, *The Changing Market for Criminal Law Casebooks*, 114 MICH. L. REV. 1155, 1155 (2016) (“Criminal law is a nasty business. The field takes as its point of departure the indignities that human beings visit upon each other—each one worse than the one before. A book or article about criminal law often reads like a parade of horrors, an indictment of humanity’s descent into moral weakness. . . . Neither the business disputes of contract law nor the physical injuries described in a torts casebook can compare with the depravity of what we teach in criminal law.”). Ohlin’s essay reviews existing casebooks and introduces his own, which purports to offer “a fresh but flexible approach” through shorter chapters and more summaries of doctrine, but which otherwise replicates the structure and topics of existing casebooks. *See id.* at 1168–72.

¹¹⁸ Walker, *supra* note 103, at 238–44.

reputation as an intellectual backwater, flourishing to span a wide range of topics and methodological approaches. But that otherwise wide-ranging scholarship rarely questions or transcends the pedagogy in which the scholars were trained. Thus, the dominant account of criminal law remains the one portrayed in Michael and Wechsler's textbook: a firm substance-procedure distinction in which process is supposed to serve the ends defined by substantive law, not vice versa; the reliance on homicide as the paradigm offense; and a deep sense that criminal law is both fundamentally important and capable of being made rational and just.¹¹⁹

Readers who themselves subscribe to these principles may believe that they have dominated scholarly thought because they are right, or because they are the most empirically or normatively defensible accounts of criminal law. In that light, it is worth recalling another way of seeing things. Even as the substance-procedure distinction became increasingly influential in the first half of the twentieth century, it was attacked by legal realists. In a pair of 1932 articles, Thurman Arnold, then a Yale Law School professor who would go on to serve in Roosevelt's administration and then to found the firm Arnold & Porter, mocked the substance-procedure distinction and hierarchy and the related "creed" of Law Enforcement.¹²⁰ Arnold argued that the difference between substantive law and procedure existed "only in attitude."¹²¹ The creed that un-

¹¹⁹ An exception may prove the general point. Consider Lloyd Weinreb's explanation of the central way in which his own casebook, otherwise inspired by Michael and Wechsler, differs from their project:

[T]he Michael and Wechsler casebook is premised on the assumption that the criminal law is—or should be and could be—a product of reason, that it is possible to shape the law to achieve ends that commend themselves to reasonable persons, by means that are likewise rationally defensible. Michael and Wechsler did not suppose that either ends or means were uncontroversial, still less self-evident. But they believed that careful, conscientious reflection, unswayed by blinkered vision or special pleading, would lead to an outcome that reasonable people generally would—and should—regard as acceptable. The casebook was intended to set students on that path. I do not share that confidence in the power of reason. On the contrary, I believe that the proper aims of the criminal law do not fit easily together and that no amount of ratiocination will overcome their ill fit The solutions that we adopt are inevitably a product not of reason but of experience ratified by convention.

Weinreb, *supra* note 103, at 284. Weinreb's casebook was indeed less laudatory of criminal law than other books—"I see no value in presenting the criminal law 'without its warts,'" he wrote—but his book has never dominated American pedagogy, and Weinreb stopped updating it after the 2003 edition. *See id.* at 291; *see also* LLOYD L. WEINREB, *CRIMINAL LAW* (7th ed. 2003).

¹²⁰ Thurman Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 *YALE L.J.* 1, 1 (1932) [hereinafter Arnold, *Law Enforcement*]; Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 *HARV. L. REV.* 617, 643–47 (1932) [hereinafter Arnold, *The Role of Substantive Law*].

¹²¹ "Substantive law is canonized procedure. Procedure is unfrocked substantive law." Arnold, *The Role of Substantive Law*, *supra* note 120, at 645.

delay continual calls for better and more complete law enforcement was based on “a feeling that criminal justice is both impartial and impersonal—that principles instead of personal discretion control the actions of judges and prosecutors.”¹²² This ideal had “no objective truth,” Arnold announced, though it did have “emotional value.”¹²³ Arnold was a realist and not a dreamer, but he could see the dream’s psychological appeal.

Legal realism would, of course, have a profound influence and lasting legacy across most fields of law. The significance of enforcement discretion, both judicial and executive, would become a major inquiry among the Legal Process school, arguably heirs to the realists.¹²⁴ But Arnold and other realists would leave little impact on criminal law. At a time when other doctrinal areas were leaving formalism behind, criminal law found dignity at midcentury by adopting the formalist claim that “the law” resides in substance, not enforcement, and that the law can be fixed and determinate prior to enforcement decisions.¹²⁵

B. *Between Reality and Dream*

There was, of course, still the inconvenient reality of actual criminal law practices, which stubbornly refused to conform with the vision articulated by Wechsler and others. But that reality proved no obstacle, because criminal law exceptionalism has always condemned specific practices even as it justifies the institutions of criminal law in the abstract. Indeed, the dualism with which we speak and think about criminal law, sliding perpetually between descriptive claims and normative aspirations, is part of what has made the intellectual framework discussed here so enduring. Criminal law exceptionalism has prov-

¹²² Arnold, *Law Enforcement*, *supra* note 120, at 6.

¹²³ *Id.*

¹²⁴ See generally Geoffrey C. Shaw, *H. L. A. Hart’s Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 728 (2013) (analyzing H.L.A. Hart’s lost essay about discretion).

¹²⁵ In the past few decades, other scholars have occasionally made this same observation about criminal law. Unfortunately, their insights have not much disrupted the noble dream. See, e.g., Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1269–72 (1996); Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 103 (1996) (“[A]lthough realism’s lessons for criminal law seem obvious, formalism continues to dominate criminal jurisprudence.”); Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 522 (1992) (“The common law discourse of criminal law scholarship has not yet sufficiently suffered critiques supplied by positivism or realism to be a ready object for the postmodern critiques directed at positivism or realism.”). Seidman sees efforts to escape criminal law formalism as futile. “[I]f the criminal law became realist, it would no longer be the criminal law. Criminal law is that portion of our legal system defined by the practice of blaming. That practice, in turn, necessarily entails a formalist world view complete with its emphasis on individualism, freedom of choice, and adjudicatory models of justice. To give up on this world view is to give up on criminal law altogether and to replace it with something else.” Seidman, *supra*, at 160.

en immune to historical or empirical contradiction, because the failures of actual practices to conform to the model are repeatedly diagnosed as isolated pathologies. Criminal law's dignity is preserved by continual intellectual efforts to divide, prune, and purge, to label any troublesome features or areas of law as missteps or distortions. The underlying assumption is that there is some "core" of criminal law that is true and good and noble, if we would but clear away the overgrowth and disease.

A paradigm example of this effort, and a classic statement of criminal law exceptionalism, is also apparently the most-cited substantive criminal law article of all time: *The Aims of the Criminal Law* by Henry M. Hart, Jr.¹²⁶ First published in 1958, the article was based on mimeographed materials prepared for first-year law students, and as such, it proclaimed both to be "elementary" but also not obliged to engage much with "competing views."¹²⁷ Henry Hart was a canon-builder in other areas of public law. He coauthored a celebrated federal courts casebook with Wechsler that is still credited with defining the field. He also prepared with Albert Sacks the Legal Process teaching materials that educated a generation of lawyers and framed a major jurisprudential school.¹²⁸ Hart's overall reputation rests more on those materials than on this single essay, which seems to have been more quietly but no less profoundly influential.¹²⁹ The Michael and Wechsler casebook had introduced an intellectual paradigm that brought dignity to criminal law; Hart would refine that paradigm by developing the principles of criminal law exceptionalism. Both the Michael and Wechsler casebook and Hart's article were written and widely used as teaching documents, a fact of no small import. A few generations of

¹²⁶ Hart, Jr., *Aims*, *supra* note 12, at 401. This article is sixty-sixth on a 1996 list of most-cited law review articles of all time; it is one of only a few criminal law articles on that list, and the only one to focus on substantive criminal law rather than criminal procedure. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 tbl.1 (1996).

¹²⁷ Hart, Jr., *Aims*, *supra* note 12, at 401 n.8.

¹²⁸ HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953). This book is still updated and in print, now as RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (7th ed. 2015). The Legal Process materials were published only posthumously. HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Arguably, Hart was the most influential American legal scholar of the twentieth century: he has the most pieces on the list of the most-cited law review articles, and as the compiler of that list notes, Hart's influence extends beyond the articles to include the federal courts and legal process casebooks. See Shapiro, *supra* note 126, at 761.

¹²⁹ To say it has been influential is not necessarily to claim that it was original. Given Hart's work with Herbert Wechsler and other midcentury legal scholars, I have not attempted to discover which specific individuals are most to credit, or to blame, for the vision of criminal law expressed in *The Aims of the Criminal Law*. Whether one believes that article to be the origin or a mere reflection of criminal law exceptionalism, it is an especially clear illustration.

American lawyers—practitioners, judges, and academics—were taught to think of criminal law within this paradigm.

Strikingly, Hart began with a pluralist and seemingly anti-exceptionalist vision of criminal law, emphasizing the wide array of purposes motivating criminal laws and the continuities between criminal law and other types of law.¹³⁰ That introduction turned out to be a red herring. After less than two pages articulating this pluralist view, Hart proceeded over the next forty pages to explain the ways in which criminal law was distinct, and the specific and limited purposes served by this distinctive form of law. In other words, after the introduction, Hart advanced a vision of criminal law exceptionalism. Beginning with positive description, Hart noted that criminal law was constituted of generally applicable commands backed by sanctions, but that alone did not distinguish it from much of civil law.¹³¹ Still, criminal law had to be distinguished from civil law, Hart seemed to believe. To say that “a crime is anything which is called a crime” would be a demonstration of “intellectual bankruptcy.”¹³² Setting up a subtle transition from straight description to a normative theory of justification, Hart found the distinctive attribute of criminal law to lie in “the moral condemnation of the community” that was expressed in a criminal sanction—and in the tendency of criminal sanctions to involve the threat or imposition of “unpleasant physical consequences.”¹³³ This is a claim of burdens exceptionalism that initially sounds descriptive, but Hart married it to a normative claim. “What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies *and justifies* its imposition.”¹³⁴

The emphasis on the language of justification is mine, not Hart’s. Throughout *The Aims of the Criminal Law*, Hart moved between description and aspiration, between an often critical assessment of existing practices and a grand vision of properly ordered criminal justice, and he rarely flagged his

¹³⁰ See Hart, Jr., *Aims*, *supra* note 12, at 401 (“A penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes . . .”); *id.* at 402 (“In the criminal law, as in all law, questions about the action to be taken do not present themselves for decision in an institutional vacuum.”). In the latter passage, Hart implicitly invoked the idea of “institutional settlement” that is central to Legal Process theory. Holding fast to the Legal Process framework might have led Hart to a very different account of criminal law, one that understands “law” as what emerges from a complex process extending across several institutions, including enforcement institutions. As Louis Bilionis has observed, however, Hart abandoned the Legal Process approach as an account of criminal law after the first pages of this article. Bilionis, *supra* note 125, at 1275.

¹³¹ Hart, Jr., *Aims*, *supra* note 12, at 403.

¹³² *Id.* at 404.

¹³³ *Id.* at 404–05.

¹³⁴ *Id.* at 404 (emphasis added).

transitions.¹³⁵ After identifying the unique condemnation attached to a criminal conviction—which, I should be clear, seems clearly accurate as a sociological description of typical practice—Hart proceeded to describe criminal conduct as uniquely blameworthy, and criminal law as uniquely necessary. I have characterized these latter claims as subject-matter exceptionalism.

In sweeping language, Hart claimed that criminal law was uniquely essential to society's very existence. He suggested that criminal law performed the necessary task of teaching humans how to coexist peacefully: "[T]he criminal law has an obviously significant and, indeed, a fundamental role to play in the effort to create the good society. For it is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility."¹³⁶ Hart compared the operation of criminal law to "the training of a child in the small circle of the family," but otherwise did not seem to take seriously the possibility that caregiving relationships, schools, churches, civic associations, social movements, speech in the public sphere, literature, art, cultural institutions, political institutions, friendships, business relationships, workplaces, and of course civil laws might be as or more important in defining and communicating humans' shared expectations of one another.¹³⁷ In a footnote, Hart acknowledged the existence of what he called obliquely "other agencies of social discipline," but he did not specify the agencies he had in mind, and he then proclaimed that "the criminal law is the only one which speaks to the individual formally and solemnly in behalf of the whole society."¹³⁸

Even when Hart's article was first published, its purportedly descriptive claims were inconsistent with existing practice in several ways. In reality, criminal law does not speak to individuals at all, except through its enforcers: as Hart acknowledged elsewhere in the article, ordinary citizens do not read

¹³⁵ With a specific emphasis on Hart's call for constitutional limitations on substantive criminal law, Louis Bilonis has noted how much Hart glossed or edited existing practices to defend his purportedly descriptive claims, and also has noted that many followers have adopted Hart's approach:

Hart's argument offers an exercise in what might be called "perfectionist generalizing," by which I mean the kind of legal argument that claims to extract a fundamental principle from a milieu held relevant to constitutional law—[such as] text, history and tradition, or precedent—but that cannot make the principle and milieu fit without generalizing the former and idealizing the latter. This style of argument later came to dominate legal scholarship concerned with the relationship between the Constitution and the criminal sanction

Bilonis, *supra* note 125, at 1277; *see also id.* at 1278 ("[A]s a descriptive matter, Hart's picture [of criminalization limited to acts of moral blameworthiness] resembles the evolving practice and experience of criminal law only if you set aside the countless occasions when the precept is not observed.").

¹³⁶ Hart, Jr., *Aims*, *supra* note 12, at 410.

¹³⁷ *Id.*

¹³⁸ *Id.* at 410 n.24.

criminal statutes and the operation of criminal law does not pretend that they do.¹³⁹ Contra Hart, no criminal statute intones, “do not murder, rape, or rob.”¹⁴⁰ Instead, criminal statutes are nearly always framed as decision rules directed at enforcement agents: they specify conditions under which public officials are authorized to initiate prosecution and impose punishment.¹⁴¹ And as Part I illustrated, criminal sanctions had long been applied to a wide range of conduct, much of it not terribly socially harmful. What was new at midcentury was the characterization of those broad prohibitions as “overcriminalization.” Though Hart did not coin that term, it emerged around the same time as his paper and reflects a similar subject-matter exceptionalism.¹⁴²

Enforcement realities also required special agility from Hart. His normative account required enforcement discretion “to be reduced to the minimum,” but he did not deny the wide discretion held by actual enforcers, which gives them “the *de facto* power of determining what the criminal law in action shall

¹³⁹ See *id.* at 421 (discussing ignorance of law, and observing that “the criminal law as a device for getting people to know about statutes and interpret them correctly is a device of dubious and largely unproved effectiveness”).

¹⁴⁰ *Id.* at 403 (“Mostly, the commands of the criminal law are ‘must-nots,’ or prohibitions, which can be satisfied by inaction. ‘Do not murder, rape, or rob.’ But some of them are ‘musts,’ or affirmative requirements, which can be satisfied only by taking a specifically . . . described kind of action. ‘Support your wife and children,’ and ‘File your income tax return.’”). Hart cited to his own Legal Process materials, but to no actual statute. Here is a typical robbery statute: “A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon A person convicted of the offense of armed robbery shall be punished by death or imprisonment for life or by imprisonment for not less than ten nor more than 20 years.” GA. CODE ANN. § 16-8-41 (2019). The provision for capital punishment is unconstitutional and not enforceable under current Eighth Amendment doctrine. But the basic structure of this law—identifying the acts or omissions, mental state, and other conditions that constitute an offense, and then authorizing state officials to impose a penalty—is typical of criminal statutes. The same structure characterizes omission offenses, such as the willful failure to file tax returns. See, e.g., N.Y. TAX LAW § 1801 (McKinney 2009).

¹⁴¹ See *supra* note 140 and accompanying text. Meir Dan-Cohen’s famous article on decision rules and conduct rules began with a cursory rejection of Hans Kelsen’s claim that all laws were effectively decision rules. Kelsen had pointed out that in a law formulated as “One shall not steal; if [one] steals, he shall be punished,” it was the second provision that does all the work. In Dan-Cohen’s view, H.L.A. Hart had already effectively refuted Kelsen’s argument: “[B]y eliminating the independent function that the substantive rules of the criminal law have in guiding behavior, Kelsen’s view fails to account for the difference between a fine and a tax.” Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627–28 (1984). It is not clear from Dan-Cohen’s brief discussion why he thought this was an effective response to Kelsen. Taxes, like fines, are often used to try to guide behavior; both require enforcement to achieve that end. There may well be noteworthy differences between a fine and a tax, but the concepts of conduct rules and decision rules do not identify the distinction.

¹⁴² Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 74 HARV. L. REV. 904, 909 (1962). Erik Luna points out that although Kadish apparently coined the term “overcriminalization,” critiques of the broad scope of substantive criminal law had been made for decades, by Roscoe Pound and others. See Erik Luna, *Prosecutorial Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 785–86 (2012).

be.”¹⁴³ In other words, Hart’s normative account needed operational exceptionalism: it needed criminal law to operate without the opportunities for discretion, and resulting indeterminacies, that were becoming increasingly widely recognized in other areas of law.¹⁴⁴ But Hart couldn’t plausibly assert operational exceptionalism as empirical fact. Hart mostly left the problem unresolved—“this is not the place to pursue these questions in detail”—but did claim that when criminal prohibitions were properly narrow in scope, focused only on securing “the basic obligations of responsible citizenship,” police and prosecutorial discretion could be sufficiently limited.¹⁴⁵ Hart used the empirical reality of wide enforcement discretion selectively, to criticize the parts of criminal law he most wanted to prune away: regulatory crimes that involved “conduct which is not intrinsically wrongful,” and strict liability offenses.¹⁴⁶

The vision of criminal law that Hart labeled “elementary” in 1958 thus combines aspiration and description to set forth an exceptionalist paradigm: it claims that criminal law is uniquely essential and narrowly targeted to address distinctive social harms; it asserts a substance-procedure dichotomy that privileges substantive law; and it assumes that enforcement procedures can be disciplined by, and made to serve, substantive law. These ideas have dominated criminal law pedagogy and scholarship for more than half a century, and the next Part will trace ways that the exceptionalist paradigm is linked to the growth of the carceral state.

In suggesting relative consensus around the exceptionalist paradigm, I have said little about the main debate that occupied criminal law theorists in the latter half of the twentieth century: that between consequentialism and deontological theories. That debate plays out across a number of issues, most frequently criminalization (should criminal law target harms or wrongs?) and punishment (should punishment focus on desert or deterrence?). I have said little about arguments between consequentialists and retributivists because, quite simply, those arguments occur within the conceptual framework I have

¹⁴³ Hart, Jr., *Aims*, *supra* note 12, at 428.

¹⁴⁴ See *infra* notes 150–164 and accompanying text.

¹⁴⁵ Hart, Jr., *Aims*, *supra* note 12, at 428. Hart claimed that the “evils” of enforcement discretion were in fact “common in the enforcement of most minor crimes”—which are, as discussed in Part I, most crimes. *Id.* at 429. This line of argument—that a properly narrow substantive criminal law would solve the problem of enforcement discretion—is a common refrain of criminal law scholarship in the early twenty-first century, especially scholarship criticizing present racial disparities and present incarceration rates. The argument is often made alongside a historical claim that recent expansions to substantive criminal law have created discretion that did not exist in earlier eras; it is thus useful to see that the fact of broad substantive laws and broad enforcement discretion was familiar by 1958, before the explosion of America’s prisoner population.

¹⁴⁶ See *id.* at 423 n.56, 429. A reader could delete every appearance of the adjective “strict” from Hart’s list of the problems with strict criminal liability, and the resulting analysis of criminal liability *per se* would be no less accurate. See *id.* at 423.

identified; they do not challenge or unsettle it. Though particular thinkers seemed to favor one account or another (the Michael and Wechsler textbook rejected retributivism, whereas Hart criticized deterrence and consequentialist approaches), criminal law exceptionalism can accommodate either view. That is probably one key to its longevity. Indeed, it could be that, united under the thrall of exceptionalism, criminal law theorists needed something to argue about, and so they have argued over which specific theories of the nobility and justice of criminal law and punishment are most compelling, never seriously contemplating the possibility that the actual institutions of criminal law cannot live up to any of the professed frameworks of justification.¹⁴⁷ Utility or retribution, public safety or just deserts: the familiar pairings are typically framed by scholars in opposition to one another, but in operation they function as two pistons in one pump, each taking over from the other when one framework seems to have temporarily exhausted its ability to legitimize our penal practices.¹⁴⁸

Thus, after the sprawling, disorganized, and often arbitrary reality of criminal law placed the field in some disrepute among legal scholars in the late nineteenth and early twentieth centuries, a vision of dignity and reform was born. This vision was developed both to gain respectability for criminal law in the academy and to influence legal change beyond the academy. And it was, and still is, promulgated through the classroom. Most law schools still require first-year students to take a course in substantive criminal law, and though of course individual teachers vary in their approaches, most teach through casebooks built on the Michael and Wechsler model.¹⁴⁹

C. *Between Nightmare and Dream*

In many ways, the exceptionalist paradigm responds to what could be called the embarrassment of punishment: the uncomfortable reality of the coerciveness and arbitrariness of criminal sanctions in a legal system presumably designed to protect liberty. It was not only criminal law specialists who were embarrassed by punishment: discomfort with the coerciveness of criminal law shaped midcentury modern general jurisprudence as well. This Section continues the effort to expand our understanding of mass incarceration by placing the criminal law theory that emerged midcentury in the context of contemporane-

¹⁴⁷ Cf. Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1039–47 (2014).

¹⁴⁸ Cf. Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 413 (1999).

¹⁴⁹ See *infra* Part II.A. One widely used casebook now includes a chapter on discretion at the end, a welcome addition that nonetheless underscores the fact that the standard doctrines covered in most of the book are still presented as though the doctrinal rules, and not the discretion of enforcers, were what mattered. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1179–1262 (10th ed. 2017).

ous claims about law-in-general. Two points are key. First, criminal law exceptionalism was not unique to criminal law specialists. Second, even as other legal fields increasingly recognized discretion and indeterminacy as intrinsic to law, criminal law thinking would resist that view.

On the first point, consider the concern among midcentury legal thinkers, and later ones, to resist Austinian positivism and its portrayal of law as commands backed by sanctions. Around the same time that Henry Hart published *The Aims of the Criminal Law*, another Hart, Herbert (H.L.A.) of Britain, advanced an influential new strand of legal positivism. Coercive sanctions were not in fact a necessary characteristic of law, H.L.A. Hart argued, pointing to contract law as one instance of a form of law that conferred powers without threatening sanctions.¹⁵⁰ The British Hart certainly did not deny that criminal law typically involved a threat of negative sanction, but he argued that criminal law could not serve as the paradigm for general jurisprudence—for a broad theory of law that was not subject-matter-specific. By treating criminal law as a special case, Hart and many followers have been able to offer an account of law-in-general that denies its essential coerciveness. In short, criminal law exceptionalism was attractive both to scholars of criminal law and scholars of general jurisprudence, and the latter group has mostly ignored criminal law as it searches for the definitive answer to the question, “what is law?”¹⁵¹

But even if general jurisprudence mostly ignored criminal law, it did tackle a more general issue central to the inquiries of this Article: the extent to which law can be fixed or determinate prior to its implementation by human interpreters and enforcers. That question has been central to American legal theory, H.L.A. Hart suggested in a 1977 essay.¹⁵² Hart’s point of departure was the observation that American legal thought was singularly focused on courts rather than other legal actors. This focus was understandable, given the distinctive place of judicial review in the United States.¹⁵³ In the United States, Hart said, no one could deny that the courts were doing something other than their usual task in other legal systems, which was “the impartial application of determinate existing rules of law in the settlement of disputes.”¹⁵⁴ In other words, the unusual role of U.S. courts prompted questions about judicial discretion and legal indeterminacy.

¹⁵⁰ See H.L.A. HART, *THE CONCEPT OF LAW* 42–43 (1961).

¹⁵¹ See, e.g., SCOTT SHAPIRO, *LEGALITY* 3 (2011). A recent intervention by Frederick Schauer attempts to renew attention to law’s coerciveness, and thus may erode this form of criminal law exceptionalism. FREDERICK SCHAUER, *THE FORCE OF LAW* 1–6 (2015).

¹⁵² H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 990 (1977).

¹⁵³ *Id.* at 973.

¹⁵⁴ *Id.* at 971.

In a vivid image, Hart wrote that American legal thinkers seeking to explain the power of courts had “oscillated between two extremes[:] . . . the Nightmare and the Noble Dream.”¹⁵⁵ The Nightmare was the claim that “in spite of pretensions to the contrary, judges make the law which they apply to litigants and are not impartial, objective declarers of existing law.”¹⁵⁶ Hart found the Nightmare expressed especially powerfully in legal realism.¹⁵⁷ At the other extreme, Hart identified as the Noble Dream “the belief, perhaps the faith, that, in spite of . . . appearances to the contrary . . . still an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them”¹⁵⁸ The Noble Dream, which Hart found expressed in Roscoe Pound’s voluminous writings, was characterized by both “particularism and holism:” a sense that “the specific ends and values pursued through law in a particular society” would, if taken as a whole and properly understood, provide adequate guidance to courts in moments of seeming legal indeterminacy.¹⁵⁹

H.L.A. Hart did not fully endorse either the Nightmare or the Noble Dream, and neither have most legal scholars—the images are, again, two extremes along a continuum.¹⁶⁰ But it is important to see that most of the continuum characterizes at least some legal indeterminacy as unavoidable. Human languages just don’t allow us to fix legal standards so precisely that we can avoid all disagreements, or even avoid reasonable disagreements, about the correct interpretation. Thus, the content of law will sometimes depend on the (contestable) judgment of the particular official or institution empowered to interpret and enforce the law. These insights—made in the most extreme form by legal realists, on Hart’s account—have permeated most legal fields, including general jurisprudence itself.¹⁶¹ Without suggesting that jurists have

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 973.

¹⁵⁷ *Id.* at 977–78. Hart suggested that legal realism had not advanced legal theory all that much, but he acknowledged that it had instilled valuable awareness of possible legal indeterminacy and a call for honesty about extra-legal considerations that factored into legal outcomes. *Id.*

¹⁵⁸ *Id.* at 978.

¹⁵⁹ *Id.* at 978–79. Hart did not think that the Noble Dreamers had adequately answered concerns about judicial lawmaking; indeed, he used his discussion to take aim, one more time, at his longtime interlocutor and critic Ronald Dworkin, “the noblest dreamer of them all.” *Id.* at 982.

¹⁶⁰ “Like any other nightmare and any other dream, these two are, in my view, illusions, though they have much of value to teach the jurist in his waking hours. The truth, perhaps unexciting, is that sometimes judges do one and sometimes the other.” *Id.* at 989. Of course, the very labeling of others’ ideas about law as illusions put Hart in good company with the legal realists. See *supra* notes 120–123 and accompanying text.

¹⁶¹ By the 1980s, scholars began repeating the refrain “we are all legal realists now,” though with some quibbles about what exactly it meant to be a legal realist. See, e.g., Joseph Singer, Review Essay, *Legal Realism Now*, 76 CALIF. L. REV. 465, 503–32 (1988). One legacy of legal realism is attention to legal indeterminacy and official discretion. Much of this scholarship focuses on *judicial* discre-

achieved consensus about how precisely to answer the question, *what is law?*, one may note that the very lack of consensus is partly a product of their ongoing efforts to make sense of indeterminacy and discretion.¹⁶² In other words, outside of the field of criminal law, it is widely thought that legal indeterminacy and opportunities for official discretion are part of what must be explained when we attempt to explain the term “law.”¹⁶³ Criminal law, the exceptional field, managed to resist these insights and retain a paradigm in which a properly drafted statutory code will supposedly provide determinacy and eliminate discretion.

If we step back from the dogged focus on *judicial* decisionmaking and think more broadly of all the institutions and officials who shape legal outcomes in particular cases, we can conceive the contrast between the Noble Dream and the Nightmare as a contrast between the rule of law on one hand,

tion. *See, e.g.,* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 386 (1975) (“Discretion exists so long as no practical procedure exists for determining if a result is correct, informed lawyers disagree about the proper result, and a judge’s decision either way will not widely be considered a failure to perform his judicial responsibilities.”). But the pervasiveness of agency or individual officials’ discretion is also a recurring theme of administrative law scholarship. *See, e.g.,* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1494 (1983) (“All students of administrative law know . . . that elements of what was, and often still is, called discretion are also liberally scattered through administrative adjudication and rulemaking; there are often a number of alternatives, no single one of which is dictated by the law and the facts.”). Both sorts of discretion are addressed in another H.L.A. Hart essay, recently discovered, which claims that we must accept discretion in a legal system “because we are men not gods.” H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 661 (2013).

¹⁶² As Frederick Schauer has recently pointed out, “the boundary between law and not-law is a shifting one,” and “[t]he shift has not been unidirectional.” Frederick Schauer, *Law’s Boundaries*, 130 HARV. L. REV. 2434, 2435 (2017). When Christopher Columbus Langdell first began teaching English judicial opinions as part of his case method, students complained that what Langdell taught “was not law.” *Id.* at 2434. Among Schauer’s objects of examination is Roscoe Pound, who saw discretion as part of “the realm of law.” *Id.* at 2445–46 (citing ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 112 (1922)).

¹⁶³ A caveat: concerns about agency discretion, and a conception of “law” that disallows such discretion, motivate some criticisms of the administrative state and bear some comparisons to criticisms of criminal law. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). There is much to be gained by thinking of criminal law as administrative law, as Rachel Barkow has argued in much of her work. *See* Rachel Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 316 (2014). Nevertheless, the worries about discretion, and conceptions of law that resist rather than accommodate discretion, are much more acute in criminal law scholarship than in administrative law scholarship. It is very common for criminal law scholarship to present discretion as pathological, whereas it seems that Hamburger’s view that administrative law is in fact “unlawful” is a minority view. *See* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547 (2015) (reviewing HAMBURGER, *supra*); *see also* Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 934–37 (2017). Beyond administrative law, scholars in other fields often discuss the lawmaking inherent in enforcement decisions. *See, e.g.,* Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1679–80 (2013) (discussing lawmaking power inherent in enforcement in the context of tax law).

and on the other, the rule of man (or rather, the rule of humans). The Noble Dream expresses the view—or the faith, as H.L.A. Hart suggested—that the content of law can be fixed sufficiently to ensure that legal outcomes will not depend on the personal judgments of the men and women who operate the legal system. The Nightmare denies the very possibility of the rule of impersonal law, claiming that legal decisions always and inevitably reflect the subjective choices of the individual men and women who occupy positions of power. This juxtaposition is of obvious relevance to contemporary discussions (and older discussions) of criminal law, where critics despair that actual substantive crime definitions fail to discipline *executive* enforcement decisions and thus fail to guarantee the rule of law, but commentators overwhelmingly assume that a better set of statutes could achieve that end.¹⁶⁴ Criminal law has been dominated by its own noble dream, and the nightmare of empirical realities has now reached a crisis. The next Part asks whether this noble dream—criminal law exceptionalism—might have contributed to the development and persistence of a criminal justice system that is (in its numbers, if not its operation) indeed exceptional.

III. THE CRISIS THIS TIME

The story told thus far is one of both continuity and change. Part I emphasized the continuity across U.S. history of broad substantive prohibitions and wide enforcement discretion. Part II traced an intellectual and pedagogical shift at midcentury that sought to claim a new dignity for criminal law by portraying “overcriminalization” and enforcement discretion as curable flaws rather than endemic features, and by portraying criminal law itself as a unique and uniquely necessary form of law. Those two plot lines intersect in this Part, which examines how criminal law came to be in crisis. This inquiry could take two forms. First, how and why did the criminal legal system change, especially with regard to the number of people incarcerated or otherwise subject to criminal sanctions? Second, how did our perceptions change, so that a system bearing many features of prior eras is now seen as “in crisis”?

The first question has already produced volumes of scholarship, much of which focuses on politics, policies, and institutions. My modest contribution, in Part III.A, is an examination of ideas and their influence on individuals: I

¹⁶⁴ See, e.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 638–39 (2005). Dale’s study of American criminal law from the founding to 1939 also contrasts “a government of men” with “one of laws,” though she does not explicitly name enforcement discretion and indeterminacy as the central factors distinguishing the two realms. DALE, *supra* note 27, at 5. But, her characterization of American criminal law until the 1940s as a system governed “by men,” and her intimation that the rule of law was finally attained in the 1940s, is consistent with the Nightmare / Dream dichotomy discussed here.

suggest that criminal law exceptionalism initially led many to seek, and others to acquiesce in, substantial expansions in criminal law enforcement. One dimension of exceptionalism—the claim that criminal law should be used sparingly—was eclipsed by another—the claim that criminal law served unique functions that could not be achieved by other measures. Part III.B argues that as enforcement capacity and prison populations grew, the sheer scale of the system made it increasingly difficult to muddle normative aspirations and descriptive claims in the way that Henry Hart and other midcentury exceptionalists did. Exceptionalism remains today the dominant conceptual account of criminal law, but the gap between that account and our practices is too large and obvious to ignore. Reality overtook the dream, and thus was born a crisis.

A. The Incarceration Investment

In the last few decades of the twentieth century, American criminal law enforcement acted against a far greater portion of the country's population than this country, or any other, had previously known. The increase in the prison population from about 100 per 100,000 in 1970 to a high of about 750 per 100,000 in 2008 may be the most widely publicized indicator of this change, but most convicted persons do not go to prison, and incarceration rates do not capture the full extent of the transformation.¹⁶⁵ From the 1970s through 2010, the number of persons serving sentences of probation or community supervision more than quadrupled; the number of persons under parole supervision after a prison sentence increased by almost the same order of magnitude.¹⁶⁶ It is likely, though the data is not readily available, that misdemeanor convictions and criminal interventions not resulting in conviction, such as an arrest followed by dismissal, also increased steadily in the second half of the century.¹⁶⁷

All of these burdens have been imposed disproportionately often on persons of color and the poor. For many persons in these demographic groups,

¹⁶⁵ See Neal & Rick, *supra* note 16, at 34–37.

¹⁶⁶ See Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1018 (2013) (also citing incarceration rate data).

¹⁶⁷ The nationwide arrest rate was estimated at 3,640 per 100,000 in 1960. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1960, at 90 tbl.15. It climbed slowly but steadily over the next few decades, to 4,287.7 per 100,000 in 1970, 4,652.8 per 100,000 in 1980, and 5,804.6 per 100,000 in 1990. See U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1970, at 120 tbl.23; U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1980, at 192 tbl.25; U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1990, at 175 tbl.25. An important recent article reports that arrest rates for misdemeanors were roughly flat throughout the 1980s and have been declining since 1990, but this article does not analyze misdemeanor arrest data prior to 1980. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 749 (2018). As Stevenson and Mayson emphasize, arrests are not always classified consistently or recorded reliably, and the available arrest data does not give a complete picture of police interventions. See *id.* at 749–50.

criminal law now structures state-citizen interactions to such a substantial degree that it seems a defining characteristic of the polity, even for those not presently imprisoned—prompting the proliferation of the label “the carceral state.”¹⁶⁸ And while a few commentators defend the interventions and call for still more, there is considerable dissatisfaction with the scale, distribution, and results of all this criminal law. The whole mess is seen as a crisis.

Scholars have offered several different explanations for mass incarceration and other expansions of criminal law. Some studies point to too much democracy, or not enough; broad political and economic changes; shifts in political culture; and efforts to preserve and reinforce racial hierarchy.¹⁶⁹ Other work tries to identify the specific legal mechanisms that have most directly led to new convictions and more prisoners, such as prosecutorial decisions or sentencing policies.¹⁷⁰ Many of these explanations are not mutually exclusive, and there is a sense in which today’s carceral state is overdetermined.¹⁷¹ With one exception, I do not contest any specific causal account of mass incarceration or

¹⁶⁸ The phrase “carceral state” appears to have been popularized by Marie Gottschalk. *See, e.g.*, GOTTSCHALK, *supra* note 6; Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235, 235 (2008). The phrase was only rarely used by American criminal law scholars before the late 2000s, but seems a direct outgrowth of Michel Foucault’s earlier concept of “the carceral archipelago” or just “the carceral,” which describes a society that disciplines and punishes not only through prisons but also in schools, factories, the military, and other extrajudicial institutions. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 297 (Alan Sheridan trans., 1977) (describing a home for “juvenile delinquents” as “the most famous of a whole series of institutions which, well beyond the frontiers of criminal law, constituted what one might call the carceral archipelago”).

¹⁶⁹ *See* ALEXANDER, *supra* note 21; ENNS, *supra* note 14, at 73–98; GOTTSCHALK, *supra* note 6, at 10; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–26 (2016); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 113–14 (2014).

¹⁷⁰ *See, e.g.*, JOHN F. PFAFF, LOCKED IN 11–15 (2017) (identifying prosecutorial charging decisions as a central factor driving prison growth); STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? (2013) (identifying sentence length as a central factor); Neal & Rick, *supra* note 16, at 1 (also focusing on sentencing policy).

¹⁷¹ The most compelling accounts attend to the interaction of many different factors, as reflected in the following observation made by Marie Gottschalk:

[W]e need to look at more than just the ideological and electoral relationship between state power and penal policies. We need to consider the resources, the discourses, and the expertise that political elites employ to promote certain policies. . . . [R]esources, discourses, and expertise are best understood by examining them in the context of specific state and nonstate institutions and certain interest groups and social movements that can serve as facilitating or countervailing forces.

GOTTSCHALK, *supra* note 6, at 10. Gottschalk does not reject outright political culture or ideology as a factor contributing to the carceral state, but she does observe that a long history of law-and-order rhetoric coincided with a relatively limited penal state for much of America’s history, simply because states and the federal government lacked any substantial enforcement capacity. *Id.* at 15.

mass criminalization.¹⁷² But I do think one line of inquiry, about the conditions for legal transformation rather than its causes, has not received sufficient attention. As Marie Gottschalk has observed, among political leaders and professional elites, there was little opposition to the rapid expansion of criminal law enforcement in the latter decades of the twentieth century.¹⁷³ Indeed, a few recent studies emphasize that liberals and progressives, no less than conservative proponents of law and order, actively sought ever more enforcement.¹⁷⁴ This is curious for many reasons, not the least of which is the money: building the carceral state was a very expensive endeavor, and in a country often wary of big government and increases in public spending, one might have thought that the cost of so much enforcement would have drawn more opposition from fiscal conservatives, if no one else. What made this investment seem obviously necessary and worthwhile? The first Subsection below considers the role of criminal law exceptionalism in the context of advocacy for expanded criminalization and enforcement policies; the second considers the exceptionalist paradigm in the context of individual prosecutions and case adjudications. The third Subsection examines how exceptionalism influenced a nascent sense of crisis in criminal law toward the end of the twentieth century, leading legal professionals to call for doubling down on the investment in the carceral state.

1. Nothing Else Will Do

As we have seen, American criminal law has long had broad substantive prohibitions, but the capacity to enforce these prohibitions expanded dramatically in the twentieth century. Prohibition cemented a role for the federal government not only in enacting and enforcing a federal criminal code, but also in

¹⁷² My analysis is directly at odds with the claim advanced in some of William Stuntz's work, and in some other scholars' work, that the Supreme Court constrained enforcement procedures and thereby triggered a backlash in which legislatures dramatically expanded the scope of substantive criminal law. See *supra* notes 11, 19, 20, 27, 81 and accompanying text.

¹⁷³ GOTTSCHALK, *supra* note 6, at 2 (“[W]hy didn’t the rise of the carceral state face more political opposition? The absence of such opposition . . . provided permissive conditions for political elites to construct a massive penal system.”). As Gottschalk’s book later makes clear, there was substantial resistance to penal expansion from those most directly affected, such as prisoners themselves. Community groups and grass-roots organizations also resisted the growth of the carceral state. But these forms of resistance were able to do little to slow mass incarceration given the convergence of elite and professional opinions in favor of penal expansion. See *infra* Part III.A.1.

¹⁷⁴ See HINTON, *supra* note 169, at 8; MURAKAWA, *supra* note 169, at 12, 13, 67. Notwithstanding Murakawa’s provocative subtitle—“How Liberals Built Prison America”—her book does not actually deny the influence of conservative law-and-order politics as a major contributing factor. Instead, she aims to correct a “master narrative of conservative ascendance” in which liberals were “virtuous losers” on issues of crime policy. See MURAKAWA, *supra* note 169, at 112.

coordinating and assisting state-level law enforcement efforts.¹⁷⁵ The end of Prohibition in 1933 did not mean the end of these projects; instead, over the subsequent decades, the federal government continued both to extend its own criminal jurisdiction and enforcement efforts, and also to fund and assist local and state law enforcement. A few recent studies emphasize the importance of the Safe Streets Act of 1968, which initially allocated 400 million dollars to build law enforcement capacity and created the Law Enforcement Assistance Administration (LEAA) to disperse the funds.¹⁷⁶ The LEAA remained in place for not much more than a decade, but during that period it distributed about 25 billion dollars, with about three quarters of that money going to policing.¹⁷⁷ Even after the LEAA was unwound, states managed to find the money for increases in criminal justice spending that continued for decades.¹⁷⁸

Criminal law exceptionalism was the intellectual framework in which most of this expansion took place. Experts were hardly unaware that enforcement was increasing and prison populations were climbing.¹⁷⁹ Some commentators continued to raise the perennial complaints about overcriminalization, but these critics most often argued against strict criminal liability and regulatory offenses, which rarely result in prison sentences. Few commentators argued for the decriminalization of the types of offenses that actually put large numbers of people in prison—property offenses, drug trafficking (rather than mere

¹⁷⁵ See, e.g., FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 27, at 269–72; GOTTSCHALK, *supra* note 6, at 59–65; WALKER, *supra* note 34, at 158–63; see also *infra* notes 61–91 and accompanying text.

¹⁷⁶ See e.g., GOTTSCHALK, *supra* note 6, at 85–86; HINTON, *supra* note 169, at 2–3. See generally Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212 (current version at 18 U.S.C. § 2511 (2012)). Gottschalk characterizes the LEAA as “Santa Claus to hard-pressed state and local law enforcement agencies,” but also argues that its focus on crime victims’ interests “provided a way out of the impasse between conservatives and liberals over crime policy,” ensuring bipartisan support for more law enforcement. GOTTSCHALK, *supra* note 6, at 86.

¹⁷⁷ HINTON, *supra* note 169, at 2.

¹⁷⁸ See BUREAU OF JUSTICE STATISTICS BULLETIN, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, at 4 tbl.4 (2006) [hereinafter 2003 BJS BULLETIN] (reporting per capita expenditure of state governments in 2003 and noting a total expenditure of \$66,114,297,000 by state governments); BUREAU OF JUSTICE STATISTICS BULLETIN, JUSTICE EXPENDITURE AND EMPLOYMENT, 1990, at 2 (1992) (reporting that “[s]tate government expenditure for building prisons [alone] increased 612% in actual dollars” since 1979); JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS: 1980 AND 1981, DATA FROM THE ANNUAL GENERAL FINANCE AND EMPLOYMENT SURVEYS 2 (1985) (reporting an “increase in total justice expenditure by [s]tate governments . . . reflected in all justice sectors”).

¹⁷⁹ The Bureau of Justice Statistics has been publishing its reports on the total U.S. prisoner population yearly, or almost yearly, since at least 1980. These reports typically document the percentage change in prisoners since the prior year, and frequently give comparison data over a five or ten-year period.

possession), and crimes involving some threat or use of violence.¹⁸⁰ Though criminal law exceptionalism implies that criminal law should be used sparingly, it offers no criminalization theory that would foreclose the codification of the offenses for which prison sentences are actually imposed.

Indeed, criminal law exceptionalism can actually fuel the expansion of criminal law insofar as it claims that criminal sanctions serve unique functions. The precise nature of those functions may vary from one commentator to another: some assert that criminal sanctions are the only way to appropriately condemn wrongful behavior; others assert that criminal sanctions achieve consequences, such as deterrence or moral education, that are not attainable by other means.¹⁸¹ In some instances, commentators simply insist that criminal sanctions are necessary without specifying what exactly the sanctions are expected to accomplish. But the common suggestion is that for some types of social problems, nothing else but criminal punishment will do.

The perception that criminal law serves functions that cannot be served in any other way may help explain how diverse interests and advocacy groups converged in their support for expanded penal power. For example, feminists and women's groups concerned about domestic abuse and sexual assaults saw increased prosecutions and punishment as necessary responses. Forms of resistance that did not embrace criminal law or state institutions, such as vigilantism, self-help, or public shaming became eclipsed by calls for greater criminalization and increased state power.¹⁸² At the same time, black political majorities in some urban areas also supported "tough-on-crime" measures that contributed to mass incarceration.¹⁸³ Unlike the women's rights advocates who wanted criminal sanctions to be directed against a different demographic group, these black majorities pushed for increased enforcement against members of their own communities. They often did so out of a sense of desperation in a time of high crime rates. Not all of the black leaders and advocates who supported increased criminal enforcement were exceptionalists; many of them also sought social welfare measures, employment assistance, and other non-criminal policies to address violence and other problems in their communities.¹⁸⁴ These other sorts of reforms were never broadly implemented, though, and black support for criminal sanctions and enforcement was only too eagerly accepted by other political leaders.

¹⁸⁰ Doug Husak is a notable exception; he has been arguing for the decriminalization of drug offenses for years. *See, e.g.,* Douglas Husak, *Four Points About Drug Decriminalization*, 22 CRIM. JUST. ETHICS 21, 22 (2003).

¹⁸¹ *See generally* Hart, Jr., *Aims*, *supra* note 12.

¹⁸² GOTTSCHALK, *supra* note 6, at 137–38; Gruber, *supra* note 4.

¹⁸³ *See generally* JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 9 (2017); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY* (2015).

¹⁸⁴ *See* FORMAN, *supra* note 183, at 76–77.

In both the advocacy for increased criminalization of offenses against women and the quest by black leaders to expand enforcement in their own communities, two related themes are striking. The first is a poignant apparent inconsistency: recurring skepticism about whether criminal interventions would actually keep women, or black communities, safer was coupled with the insistence that the criminal interventions were nonetheless necessary.¹⁸⁵ In other words, the contradiction between aspirations for criminal law and its empirical realities that has long characterized pedagogy and scholarship was alive and well among advocates who might otherwise have opposed penal expansion.

A second theme may help explain the endurance of the apparently paradoxical view that criminal law is both ineffective and necessary. Here I have in mind the specific argument for criminal law's necessity: In pro-criminalization arguments of both women's rights advocates and black communities, one finds often the suggestion that criminal law provides a distinctive form of condemnation for which there is simply no substitute. In its most extreme form, the suggestion is that to decriminalize an action (or fail to criminalize it) is to endorse and approve it. So, for example, advocates for domestic abuse victims argued that a failure to arrest and prosecute domestic abusers constituted an implicit approval of the abuse.¹⁸⁶ Similarly, black political leaders in Washington, D.C. and elsewhere sometimes rejected drug decriminalization proposals or other efforts to mitigate the impact of criminal law on black communities—not because the leaders failed to see how criminal interventions could be harmful, but because they worried that decriminalization would be understood as an endorsement of the previously prohibited activity.¹⁸⁷ These arguments are manifestations of criminal law exceptionalism, which cultivates the conviction that a failure to criminalize is an expression of indifference or even approval.

2. One Defendant at a Time

As discussed in Part II, criminal law exceptionalism asserted a substance-procedure hierarchy in which the “law” resides in substantive crime definitions, and enforcement procedures are supposed to serve merely as a handmaid to substantive law.¹⁸⁸ This way of thinking about criminal law renders substantive guilt—the fact of having violated a substantive prohibition—as the most important criterion to evaluate criminal law outcomes. It encourages the view that procedural missteps are technicalities, especially if they are unlikely to

¹⁸⁵ See, e.g., *id.* at 9–11.

¹⁸⁶ Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 741 (2007).

¹⁸⁷ FORMAN, *supra* note 183, at 41; see Gruber, *supra* note 186, at 145–46.

¹⁸⁸ See *infra* notes 92–164 and accompanying text.

have affected the determination of guilt or innocence.¹⁸⁹ And it discourages assessments of aggregate outcomes, such as evaluations of criminal law that focus on the overall demographics of those convicted. In other words, criminal law exceptionalism asks us to take one defendant at a time. If that defendant is in fact substantively guilty, his conviction is appropriate—perhaps even if there were procedural missteps, and even if aggregate conviction data shows systemic racial disparities.

With that individualist framework in mind, consider now the concept of “mass” incarceration.¹⁹⁰ Unlike *mass* media or *mass* communication, concepts that refer to the exposure of ideas or messages to many individuals all at once, *mass* incarceration didn’t reach millions of undifferentiated individuals in a single instant. Indeed, former federal prosecutor and FBI director James Comey once objected to the term “mass incarceration” precisely because it denied the individualized adjudication of each criminal defendant. After noting that “mass incarceration” first arose as a term to describe World War II internment camps where large groups were held without any individualized adjudication, Comey relayed how he tried to explain to then-President Barack Obama the problems with the phrase:

I thought the term was both inaccurate and insulting to a lot of good people in law enforcement who cared deeply about helping people It was inaccurate in that there was nothing “mass” about the incarceration: every defendant was charged individually, represented individually by counsel, convicted by a court individually, sentenced individually, reviewed on appeal individually, and incarcerated. That

¹⁸⁹ That is, criminal law exceptionalism sees guilt as prior to process, both temporally and normatively. It tells us that there is a truth of the matter about a defendant’s guilt before any investigative or adjudicative procedures have taken place, and it envisions the function of procedure as simply the sorting of the already-guilty from the innocent. One implication of this view is that seeming violations of procedural protections may be recharacterized as non-violations if they do not disturb this sorting function. For a vision of procedural rights along these lines, see AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997).

¹⁹⁰ Benjamin Levin offers an insightful comparison between, on one hand, criminal law critiques that focus on “over”-criminalization or other measures of excess, and, on the other hand, critiques that emphasize “mass” incarceration and the ways that criminal laws operate as part of a larger system of governance:

The *over* frame treats criminal justice problems as a matter of degree that can be remedied by recalibrating Where the *over* frame emphasizes scope, the *mass* frame prioritizes structure. The *mass* critique asks why criminal law has replaced other regulatory models and what the consequences of criminal regulation are [T]he *mass* frame is more (or at least more explicitly) an ideological critique.

Levin, *supra* note 15, at 270–73. Levin’s “*over* frame” is consistent with reform arguments advanced by criminal law exceptionalists, whereas what he calls the “*mass* frame” rejects many exceptionalist claims.

added up to a lot of people in jail, but there was nothing “mass” about it, I said. And the insulting part . . . was the way it cast as illegitimate the efforts by cops, agents, and prosecutors—joined by the black community—to rescue hard-hit neighborhoods.¹⁹¹

It is not clear how much of this perspective Comey retained after hearing President Obama’s response, but the fact that Comey made this critique at all (and then chose to replay his argument in what would be a much-publicized memoir) illustrates the influence of the exceptionalist paradigm.¹⁹² Comey is right that unlike the mass detentions of persons of Japanese ancestry during World War II, the state of affairs we now call mass incarceration was, in fact, achieved through millions of separate legal proceedings, albeit very few trials.¹⁹³ But millions of separate proceedings can nonetheless add up to a mass phenomenon. As noted at the outset of this Article, mass incarceration requires mass prosecutions. To put one percent of the nation’s population in prison (and impose convictions on a still larger fraction of the population), prosecutors, the most powerful actors in the criminal enforcement process, needed to decide to pursue charges, to pursue severe charges, and to pursue severe sentences—again and again, *ad infinitum*.¹⁹⁴

Criminal law exceptionalism helps explain how this could happen. The vision of criminal law advanced by Jerome Michael, Herbert Wechsler, Henry Hart, and others justified the heavy burdens of criminal interventions by emphasizing, among other things, the unique necessity and operations of criminal law. A wise legislature would take care to define substantive prohibitions with precision, identifying those who posed grave threats to society. The enforcement process should then serve as handmaid to substantive law, identifying the actually guilty and bringing them to justice. Prosecutors know that actual substantive prohibitions span broadly, of course, and they know also the reality of enforcement discretion.¹⁹⁵ But they could use one of these departures from the exceptionalist paradigm (enforcement discretion) to cure the other (overcrimi-

¹⁹¹ JAMES COMEY, *A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP* 150 (2018).

¹⁹² On Comey’s retelling, President Obama then explained “how black people might experience law and the courts very differently.” *Id.* Comey continues, “[w]hen we were done, I was smarter. And I hoped that in some small way I’d helped him see things from a different perspective as well.” *Id.*

¹⁹³ Whether those proceedings, most of which involve a relatively quick guilty plea, comport with due process is another question. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611, 686 (2014) (arguing that New York courts processing misdemeanor cases in large volume are not simply disregarding due process values, but operating under a fundamentally different model “in which factual adjudication is ancillary to managerial goals”).

¹⁹⁴ See PFAFF, *supra* note 170, at 11–16 (tracing growth in prison population to prosecutorial charging decisions).

¹⁹⁵ After all, it was the nation’s top prosecutor who observed that a prosecutor has “more control over life, liberty, and reputation than any other person in America.” Jackson, *supra* note 70, at 3.

nalization); each prosecutor could use his or her own discretion to focus on the defendants most worthy of prosecution. Schooled in this vision, a couple of generations of American prosecutors put millions of defendants in prison, likely believing in each case that public safety was being protected and the individual defendant was simply getting what he or she deserved.¹⁹⁶

It is also worth recalling here that the vision of criminal law developed in the United States in the middle of the twentieth century was an explicit effort to claim dignity and nobility for criminal law after decades in which it had been viewed as a grimy and unprincipled field. American law schools increasingly began to teach law students that prosecution is indeed a higher calling, and one can hear the echoes of that training in Comey's indignation at the "insulting" suggestion that his efforts, and those of other prosecutors, might now be viewed as illegitimate. Comey is, of course, but one example. Ex-prosecutor literature is a genre that includes many similar tales of a belief that to be a prosecutor is to be on the side of the angels, protecting society and "doing justice" even while providing due process to each individual "douchebag" or "cretin."¹⁹⁷

The American judiciary has been trained in the same vision of criminal law as American prosecutors, and one can see a similar emphasis on the individual defendant's substantive guilt, to the exclusion of systemic considerations, in many areas of legal doctrine.¹⁹⁸ This Article cannot accommodate a full survey of these doctrines, but one particular line of judicial decisions is worth noting. As racial inequalities in law enforcement became better documented and more pronounced in the latter decades of the twentieth century, some defendants and civil rights advocates attempted to use constitutional guarantees of equality to challenge these racial disparities in the growing carceral state.¹⁹⁹ Courts responded by denying the relevance of statistical evidence of systemic disparities in the absence of more specific indications of intentional discrimination by enforce-

¹⁹⁶ Some research suggests that new prosecutors are more aggressive than more experienced ones, but even the more experienced ones often express the exceptionalist views described here. See Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1067–69 (2014).

¹⁹⁷ PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 116–17 (2009). Butler's writing is unusual in the ex-prosecutor literature in that he eventually abandoned the idea that prosecution is a noble calling. See *id.*

¹⁹⁸ Harmless error doctrine and Fourth Amendment exclusionary rule jurisprudence are two other fields in which procedural rules are regularly subordinated to a conception of substantive guilt. For further discussion on this, see Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017).

¹⁹⁹ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (rejecting defendant's Equal Protection claim of selective prosecution); *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987) (rejecting defendant's argument that Georgia's capital sentencing process was discriminatory in violation of the Eighth and Fourteenth Amendments).

ment officials.²⁰⁰ The implication was that criminal sentences were to be assessed in isolation from one another, and individual guilt was the paramount consideration in reviewing a sentence. A defendant who was in fact substantively guilty could not avoid conviction, or a harsh sentence, merely because people of color were more often prosecuted, convicted, or sentenced than similarly situated white defendants. By prioritizing substantive guilt over enforcement choices, and by denying or obscuring the scope of enforcement discretion and the racialized patterns in which that discretion was exercised, criminal law exceptionalism discouraged or foreclosed systemic critiques. Instead, it offered an ideological framework that allowed prosecutors to keep pursuing convictions, one at a time, without noticing that they were producing outcomes that would add up to mass incarceration.

3. Doubling Down

Today, criminal justice reform is associated with downsizing, but in the 1980s and 1990s, making criminal law “better” did not mean making it smaller. In these two decades during which prison populations exploded most dramatically, the sheer numbers of prisoners were not seen as a crisis. To the contrary, in the last years of the twentieth century, criminal justice experts identified a different crisis: the failure to expand enforcement capacity *enough*. A 1988 American Bar Association (ABA) report may have been the first source to identify a criminal justice crisis once the extraordinary increase in prisoners was underway.²⁰¹ Like the Michael and Wechsler textbook and Henry Hart’s *The Aims of the Criminal Law*, this 1988 report, fittingly titled *Criminal Justice in Crisis*, provides a useful window into expert opinion about criminal law at a particular historical moment. The report suggests some fracturing of exceptionalist claims among persons (other than prosecutors) involved in the daily operation of criminal law. But it also suggests that in the midst of construction of the carceral state, professional elites could not imagine any reform other than still more expansion.

Intriguingly, though the number of people in prison had approximately doubled in the decade preceding the 1988 ABA report, that increase was neither the motivation for the report nor one of its central themes.²⁰² Instead, the

²⁰⁰ As the *McCleskey* Court famously put it, “Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.” 481 U.S. at 313.

²⁰¹ See generally AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE (1988).

²⁰² See BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1988, at 1 (1989) (noting that the total U.S. prison population had increased by slightly over ninety percent from 1980 to 1988).

Criminal Justice Section of the ABA commissioned and funded a committee “to study the impact of constitutional rights on crime and crime control in the United States.”²⁰³ Specifically, the committee was asked to investigate the basis, if any, for an apparently widely held public perception that the Fourth, Fifth, and Sixth Amendments prohibited the criminal system from functioning effectively—that is, from identifying the substantively guilty and convicting them. After two years of interviewing or hearing testimony from police officers, prosecutors, defense attorneys, and judges, the committee concluded that the public perception of constitutional law that “handcuffed the cops” was unfounded, and that professionals throughout the system saw constitutional protections as relatively inconsequential.²⁰⁴ Aside from some of the defense attorneys interviewed, most of the report’s sources and the authors of the report themselves seemed to view this lack of constitutional interference as good news.²⁰⁵ Process remained a subservient handmaid, just as she should.

But that was only one finding of a report titled *Criminal Justice in Crisis*. If constitutional constraints had little effect on efforts to convict and punish, and if that constitutional impotence was cause for relief rather than regret, what was the crisis? The rest of the report emphasized two major themes. First, all institutions of criminal law, from police to prosecutors and public defenders to courts to prisons, were inadequately funded: “The entire system is starved.”²⁰⁶ Second, the public did not understand the capacities of criminal law well, and in particular did not appreciate that no amount of criminal prohibition and enforcement could “eliminate the crime problem.”²⁰⁷

²⁰³ AMERICAN BAR ASSOCIATION, *supra* note 201, at 1. The committee was chaired by Samuel Dash, a Georgetown law professor and a former Watergate prosecutor. It included two other academics, a federal judge, one private and one public defense attorney, the Washington, D.C. police chief, and two prosecutors (including Janet Reno, then a county prosecutor in Florida, who would go on to become the first female Attorney General). *Id.* at 1–2.

²⁰⁴ For example, one police officer said of search and seizure law, “Frankly, I don’t think it presents a big problem to us.” *Id.* at 15. A prosecutor explained that only a very small number of cases were not prosecutable due to a search issue or a *Miranda* issue. *Id.* at 16.

²⁰⁵ The ABA committee did not recommend strengthening constitutional protections or other changes to constitutional law. Nor did the law enforcement officials they interviewed, though it is notable that the police officials seemed opposed to efforts to abolish the exclusionary rule. “After more than two decades with the exclusionary rule in place, the police have a considerable investment in the rule in its current form. They are not eager to replace it with different sanctions . . .” *Id.* at 20.

²⁰⁶ “[T]he major problem for the criminal justice system, identified by all criminal justice respondents to the Committee, is lack of sufficient resources.” *Id.* at 5.

²⁰⁷ The report differentiated drug offenses from crime more generally, but included separate findings that criminal law was an ineffective response in both cases. *See id.* at 6 (identifying “the inability of the criminal justice system to control the drug problem in the Nation through the enforcement of criminal law”); *id.* at 7 (“the public mistakenly looks to the criminal justice system to eliminate the crime problem”).

Take the second theme first, which may seem remarkable as a summary of enforcement professionals' views, but which in fact echoes earlier nationwide studies of the criminal legal system.²⁰⁸ The ABA's own two-year effort to figure out how professionals within the criminal system perceived its problems found many judges and law enforcement officials repeating this refrain: we are not the solution to the problem of crime, not because we don't have enough money (though we don't), but because we are the wrong kind of response.²⁰⁹ Notably, prosecutors are not among those that the report quotes as expressing this view, which is consistent with the account of prosecutorial ideology in the previous Subsection. But to many others who worked in the criminal legal system every day, the grander claims of criminal law exceptionalism were neither credible nor helpful. The exceptionalist promise that criminal law (and only criminal law) could solve profound social problems created expectations that many insiders knew would never be fulfilled.

But it is possible to hold the seemingly paradoxical view that criminal law is both ineffective and necessary, as discussed above.²¹⁰ And thus the ABA coupled its finding that insiders viewed criminal law as inevitably ineffective in eliminating crime, rather than merely temporarily flawed, with a denouncement of the underfunding of criminal legal institutions, and a call for more money.²¹¹ Criminal justice expenditures had been climbing substantially nationwide for several years prior to the report,²¹² and it seems that it would have been worth asking why still more money should be put into legal responses that do not and cannot accomplish what the public hopes they will accomplish. If the members of the ABA committee had addressed this question directly, some of them may have argued that criminal sanctions achieve sufficient deterrence to make the interventions worthwhile, or some may have argued that

²⁰⁸ As the ABA report noted, "the major crime commissions of the 1960s and 1970s cautioned that too much was expected of the criminal justice system." *Id.* at 50.

²⁰⁹ Some enforcement officials emphasized the inefficacy of criminal law with regard to drug use in particular. *See id.* at 45 ("[T]here is no law enforcement solution to the [drug] problem . . . It is ultimately a social problem.") (quoting a police inspector). Other survey participants expressed similar skepticism about the effects of criminal law on crime more generally. For example, one trial judge described "the public attitude that we ought to be able to make the streets safe" as "an appealing and simplistic analysis: 'If you lock this guy up, he can't hit me over the head.'" *Id.* at 71 n.113. But, this judge continued, the simplistic view didn't consider the causes of criminal behavior: "I don't think I'm doing anything about the crime problem and I don't know how to convince the public that they ought not to be looking to me to do something about the crime problem." *Id.*

²¹⁰ *See infra* Part III and accompanying text.

²¹¹ AMERICAN BAR ASSOCIATION, *supra* note 201, at 5-9.

²¹² *See* BUREAU OF JUSTICE STATISTICS BULLETIN, JUSTICE EXPENDITURE AND EMPLOYMENT, 1988, at 4 ("Expenditure for justice activities by all governments increased by 21% in the past decade . . . [C]orrections expenditures increased at a greater rate, 65%, than other justice activities from 1979 to 1988 in constant dollars."). This report included prosecution, public defense, criminal courts, policing, probation, and prisons in its calculation of "justice expenditures." *Id.*

prosecution and punishment serve retributive ends even if they do not reduce or eliminate crime.²¹³ Instead, the committee simply pronounced criminal justice as “important” and worthy of further investment.²¹⁴ This approach is illustrative of the function of criminal law exceptionalism, as described in Part II: it posits the importance and necessity of criminal law as a self-evident truth, without requiring any close scrutiny of what criminal law accomplishes. It allows retributive and consequentialist theories to function as two pistons in one pump, but always assumes that some theory is available to justify criminal interventions.²¹⁵ The report’s final recommendation on funding should draw a smile, or else chagrin: “The ABA and other bar associations must use their influence to alert the public and legislatures to the fact that quality criminal justice costs a great deal more than we are spending today. It should be emphasized, though, that quality will not necessarily improve with the expenditure of additional monies.”²¹⁶ Indeed.

In the academy, the professionals’ pessimism about what criminal law could accomplish seemed not to register. Legal scholars cited the ABA report for its finding that constitutional rights didn’t impede prosecutions, and for its call for increased investment across criminal justice institutions.²¹⁷ The “crisis” in the report’s title, at least as perceived by many readers and seemingly as intended by its authors, was a crisis of underfunding—a problem of not enough policing, prosecutions, and punishment, rather than a problem of excess.²¹⁸ And so the country doubled down on its investment, continuing to increase criminal justice spending, and over the fifteen years that followed the ABA’s declaration of crisis, the prison population more than doubled again.²¹⁹

²¹³ The ABA committee explicitly disclaimed any position on “the deterrence capability of the criminal justice system.” AMERICAN BAR ASSOCIATION, *supra* note 201, at 51.

²¹⁴ *Id.*

²¹⁵ See generally *id.*

²¹⁶ *Id.* at 44.

²¹⁷ See, e.g., Israel, *supra* note 68, at 761 n.2 (noting that the ABA report called for “more resources” to be “allocated to the criminal justice system”); Louis Michael Seidman, Brown and Miranda, 80 CALIF. L. REV. 673, 677 n.13 (1992) (citing the report for its conclusion that *Miranda* did not impede law enforcement efforts).

²¹⁸ Of course, the ABA report also called for more indigent defense funding, which theoretically could reduce the number of convictions. But giving defendants more or better lawyers still takes for granted a criminal law response. What many defendants need is not a better lawyer, but social services entirely outside of criminal law. Cf. Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019).

²¹⁹ See 2003 BJS BULLETIN, *supra* note 178, at 2 (reporting a 418% increase in criminal justice expenditures by the U.S. government from 1982 to 2003); Neal & Rick, *supra* note 16, at 1 (discussing rapidly increasing incarceration rates).

B. Buyers' Remorse

Back in 1988, a little over a decade into a vast prison expansion, the first glimmer of crisis was the concern that we were not putting enough money into the project. But after another decade of prison expansion, murmurs of a very different critique began to arise. The term "mass incarceration," which had previously been used to describe specific carceral efforts such as the World War II internment of Japanese Americans, began to creep into scholarly discourse as a description of U.S. sentencing policy more generally.²²⁰ Major newspapers began to report on climbing incarceration rates, noting both that they were historically unprecedented and globally exceptional.²²¹ On the eve of a new century and indeed a new millennium, a few efforts to take stock of the criminal system began to question both the overall scale and the racial distribution of American punishment.²²² Those critiques gathered momentum and drew more adherents, so that today there is an apparent consensus that American criminal law is too severe, too inequalitarian, and in need of substantial contraction.²²³ Instead of putting more money into criminal enforcement, a wide array of experts and commentators now call for scaling back.

Several developments seem to have contributed to this shift in opinion, though it is probably impossible to ascertain precisely which factors were most important. First, the simple collection and publication of data may have forced a reckoning that exceptionalists would have otherwise avoided. The sheer numbers command attention—the oft-recited statistics about prison populations and rates of incarceration, both overall and among specific racial groups. The numbers also command investigation: are all these prisoners really committing acts that threaten society's very existence? Are racial minorities and poor people committing such acts at disproportionate rates? Investigations of racial disparities have in turn drawn considerable attention to the prevalence of enforcement discretion. That discretion was always there, of course, but now it is being used to build something so big we cannot look away. As I suggested above, criminal law's noble dream is being overtaken by reality. That dream—the exceptionalist paradigm—combines aspirational claims with descriptive

²²⁰ See, e.g., Marcus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 719 (1995) (describing "the arational policy of mass incarceration of the past fifteen years or so"). A 2001 book on "mass imprisonment" identified two attributes of the phenomenon: a rate of imprisonment that is historically and comparatively exceptional, and the concentration of prison sentences on particular demographic groups. David Garland, *Introduction to MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1–2 (David Garland ed., 2001).

²²¹ See, e.g., Linnet Myers, *Prison Population Is Soaring in U.S.: Record Is Set, Surpassing Russia*, CHI. TRIB., Dec. 4, 1995, at 3.

²²² See, e.g., COLE, *supra* note 20; MAUER, *supra* note 20.

²²³ *But see* Levin, *supra* note 15.

ones without taking much care to distinguish them, but that works only as long as we are not forced to confront the facts too closely.

Shifts in opinion are also partly a product of the steady resistance to the carceral state from the communities most burdened by criminal law interventions. Defendants and prisoners, and their families, have long resisted both individual prosecutions and broader carceral policies, sometimes through litigation and sometimes outside of it.²²⁴ But as more and more Americans encounter police interventions and live with criminal convictions, there are more participants in, and greater opportunities for, collective resistance through activism, advocacy, and public discourse.²²⁵ It should also be noted here that the carceral state is increasingly in public view, partly because of technological changes such as ubiquitous cameras, and because it has become too big to hide, but also because of influential works designed for popular, rather than elite, audiences. Mass incarceration reached mass culture. Efforts to highlight the continuities between the contemporary criminal system and historical institutions of racial oppression such as slavery or Jim Crow have been particularly effective, it seems.²²⁶

Again, many factors have contributed to a sharp increase in the frequency and intensity of critiques of American criminal law, and I do not attempt to identify all or rank the most influential. For purposes of this Article, it is more important to notice what is so far missing from the changed discourse: any major modification of the intellectual paradigm used by academics and professionals to teach, study, and evaluate criminal law. Criminal law exceptionalism is alive and well in scholarly literature, and it is alive and well in reform proposals. And so long as it is also alive and well in the criminal law classrooms where the next generation of legal professionals are trained, its influence is not likely to wane.

Criminal law exceptionalism continues to distort scholarly efforts both to explain and to reverse the growth of the carceral state. Because exceptionalism conceptualizes criminal law in terms of substantive crime definitions and the punishments they authorize, it invites the conclusion that prison populations

²²⁴ Many American prisoners, including especially those affiliated with black nationalist Muslim organizations, participated in a sustained and sometimes effective prisoners' rights movement from the 1960s through the first decades of American penal expansion. See, e.g., James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960–80*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 429, 433–35 (Norval Morris & Michael Tonry eds., 1980); John Pallas & Bob Barber, *From Riot to Revolution*, 7 ISSUES IN CRIMINOLOGY 1, 1–15 (1972).

²²⁵ See, e.g., Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1609 (2017).

²²⁶ See generally ALEXANDER, *supra* note 21; 13TH (Kandoo Films 2016). 13TH is an Emmy-winning and Oscar-nominated documentary by Ava DuVernay on the continuities from slavery to mass incarceration.

expanded because substantive criminal law either covered more conduct, or authorized longer sentences, or both. There is little evidence for the first claim, as Part I suggests. There is indeed evidence that changes in sentencing policy fueled prison growth, but prosecutorial choices also played an important role.²²⁷ Academics were slow to acknowledge prosecutors' influence on mass incarceration, and this is likely because, again, exceptionalism excludes enforcement choices from its conception of "law."²²⁸ To the extent that changes in the enforcement process have figured in the prevailing explanations of mass incarceration developed by legal scholars, one recurring claim has been that *constraints* on the enforcement process imposed by the Supreme Court in the 1960s triggered legislative backlash and the expansion of substantive criminal law.²²⁹ That argument has influenced many legal scholars, but it has fared less well in other fields. In history, political science, and disciplines less shaped by criminal law exceptionalism, studies of twentieth century criminal law identify a vast *expansion* of enforcement capacity and resources as a key driver of increased incarceration.²³⁰

Indeed, a focus on enforcement is important not just to explain prison growth, but to describe the full scope of contemporary criminal law, in which incarceration is just the tip of a very big iceberg. As scholars increasingly realize, mass incarceration is an imperfect term if it is understood strictly in terms of prisoners.²³¹ If we wish also to address criminal convictions that do not result in prison sentences, the burdens of collateral consequences on those with criminal records, and the independent burdens imposed by police interventions, something like "the carceral state" or "mass criminalization" better captures the full reach of late twentieth and early twenty-first century criminal law.²³² Criminal law is not simply a collection of statutes and liability doc-

²²⁷ PFAFF, *supra* note 170, at 11–15; Neal & Rick, *supra* note 16, at 3 fig.1 (displaying rising incarceration rates in the United States from 1970 to 2013).

²²⁸ See John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265, 270 (2014).

²²⁹ See, e.g., Stuntz, *The Political Constitution of Criminal Justice*, *supra* note 23, at 780.

²³⁰ See, e.g., GOTTSCHALK, *supra* note 6; HINTON, *supra* note 169; MURAKAWA, *supra* note 169. These works all emphasize the money allocated to law enforcement, and give less attention to constitutional criminal procedure. There are, however, occasional references to the Supreme Court's authorizations of expansive police and prosecutorial authority. See, e.g., GOTTSCHALK, *supra* note 6, at 62–63 (noting that during the 1920s, "the courts granted the police new wide-ranging search-and-seizure powers that long outlasted Prohibition"); HINTON, *supra* note 169, at 326 (noting the Supreme Court's refusal to restrict police and prosecutorial discretion in cases of alleged racial profiling).

²³¹ See generally ALEXANDER, *supra* note 21.

²³² For more on "the carceral state," see GOTTSCHALK, *supra* note 6, at 1. "Mass criminalization" is often used to call greater attention to misdemeanors; scholars vary on whether the term refers only to minor offenses or all types of criminal interventions. See, e.g., Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 548–52 (2016) (defining mass criminalization as "the criminalization of relatively non-serious behavior or activities, and the multiple ways in which criminal justice actors,

trines, but also a wide array of enforcement practices. The story of contemporary American criminal law is a story of radical growth in the enforcement apparatus.

Criminal law exceptionalism continues to shape understandings of the past and present, but also proposals for the future. Some reform proposals are openly nostalgic, trying to recover a prior golden age of criminal law, trying to make criminal law great again.²³³ We should be wary of calls to restore local control in criminal law, or to reinvigorate the jury (which, of course, never played the role that the dreamers imagine), or to pursue the same narrow decriminalization efforts that failed at midcentury.²³⁴ We should not try to go backwards in criminal law. There never was a golden age of criminal law, nor even a gilded one.²³⁵ Over the last half century, America made its criminal system much bigger, but neither “over”-criminalization, nor discretion, nor race and class disparities were invented in that time period. These features of criminal law are just features, not bugs. That reality should be front and center as we decide whether and how to use criminal interventions.

CONCLUSION

The problems of American criminal law are deep and structural, and “carceral” is an adjective now reasonably applied not just to discrete institutions but to the American state itself. But to advance a structural critique does not require us to overlook the various seemingly small decisions that contributed to present incarceration rates.²³⁶ Among those small decisions are political leaders’ choices to adopt more severe sentencing policies, prosecutorial choices to charge more severe crimes and seek more severe sentences, and judicial

norms, and strategies shape non-criminal welfare state processes and policies, including the governance and administration of schools,” and discussing its implications); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325–26 (characterizing the fact that about one in three Americans has some type of criminal record as “mass criminalization”).

²³³ See, e.g., BIBAS, *supra* note 25.

²³⁴ See, e.g., Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1483–85 (2017) (calling for increased local control and more criminal jury trials).

²³⁵ See STUNTZ, *COLLAPSE*, *supra* note 2, at 130–31 (characterizing the period from Reconstruction to mid-twentieth century as the “Gilded Age” of criminal law, and arguing that criminal law functioned relatively well during that period); Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1428 (2012) (reviewing STUNTZ, *COLLAPSE*, *supra* note 2) (“Stuntz treads lightly over the irony that his model era is called the Gilded Age—indeed, he is surely wary of inviting complaints that he has fallen prey to sentimental Golden Ageism.”); see also GOTTSCHALK, *supra* note 6, at 75 (cautioning against evaluating current criminal law “against the yardstick of some precious ‘golden age’ that never existed in the United States”).

²³⁶ Cf. FORMAN, *supra* note 183, at 45 (“Mass incarceration is the result of small, distinct steps, each of whose significance becomes more apparent over time, and only when considered in light of later events.”).

decisions to uphold prosecutors' decisions and to reject defense challenges. There is considerable evidence that prosecutorial decisions have been particularly important: again, mass incarceration requires mass prosecutions. The individual political officials, judges, and prosecutors who have made the decisions that contributed to mass incarceration are not automatons, or so this Article has assumed. Prosecutors and judges—legal professionals—made similarly punitive decisions across thousands and thousands of cases, but they did not do so unthinkingly, or again, so I have assumed. In seeking to develop an intellectual history of mass incarceration, my quest has been to better understand what frames of thought have informed the decisions that produced the carceral state.

Criminal law exceptionalism is the framework in which American law schools have educated legal professionals for more than half a century; it is the primary framework in which legal academics analyze and evaluate criminal law. As this Article has shown, it is a framework that claims a special status and importance for criminal law, arguing that for certain kinds of problems, criminal law is necessary and there simply is no alternative response. It is a framework that recognizes the great burdens imposed by criminal law but nonetheless proclaims the nobility and dignity of those imposing those burdens. It is a framework that assuages normative concerns about criminal law burdens by asserting the distinctive operation of criminal law. The exceptionalist paradigm teaches that the burdens of policing and punishment can be limited to the deserving (or the sufficiently suspicious) by well-designed substantive law. Or, in the phrase Charles Clark popularized almost a century ago, procedure is to serve as the handmaid and not the mistress of substantive law.²³⁷

We would do well to remember, though, Clark's subsequent caution: "A handmaid, no matter how devoted, seems never averse to becoming mistress of a household should opportunity offer."²³⁸ In practice, enforcement is and has long been the mistress, in the sense that enforcers make key decisions and wield substantial power. This is increasingly acknowledged in other areas of law.²³⁹ Perhaps it is time to reassess criminal law exceptionalism—to seek a more honest account of the ways in which criminal law is special. As I have emphasized, the burdens of criminal law are indeed distinctive. But it is a mistake to assume that criminal law can operate in a way that ensures those burdens are imposed only when necessary.

²³⁷ Clark, *supra* note 102, at 297. The agents of criminal procedure are, of course, armed and powerful handmaids, but our prevailing model can accept that fact as a necessary condition of seeing justice done.

²³⁸ *Id.*

²³⁹ See Lemos, *supra* note 163, at 929.

Were we to seek a different paradigm, the first step would be to describe criminal law more accurately. We might acknowledge that criminal law involves an array of procedures and practices, each providing officials with considerable discretion at various points. It is not a set of determinate substantive prohibitions, nor an orderly system.²⁴⁰ Criminal law involves a range of different authorized interventions, some of them indistinguishable from “civil” interventions except by label, and some of them more physically coercive or stigmatizing than any civil sanction.²⁴¹ The everyday work of criminal law is a series of enforcement decisions about when and how to deploy these various interventions, and the outcomes of these decisions are often unpredictable.

Criminal law is best understood as a process through which the state manages an array of perceived problems. These problems targeted by criminal law are not themselves exceptional; there is no natural or pre-legal content to the terms crime or criminality.²⁴² Criminals have no “essential characteristics.” Instead, criminality is a concept long used by governments to manage a range of different putatively troublesome people and acts, from acts of interpersonal violence to violations of property rights to various forms of risk creation to trivial manifestations of unproductivity, recalcitrance, or nonconformity. Many of the problems targeted by criminal law are identified by written statutes, but not all—enforcers often adapt statutes to new purposes, and some enforcement

²⁴⁰ See Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018); Sara Mayeux, *The Idea of “the Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 94 (2018).

²⁴¹ It is not difficult to identify the physically coercive interventions of criminal law: arrest, detention, incarceration, capital punishment. The range of other interventions I have in mind is far too unwieldy to be covered adequately in one article, but by way of illustration, these interventions include: police interventions both as investigative measures and as regulatory measures in their own right, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 868 (2015); the “drunk tank” and various uses of pretrial detention; the (adjudicative) “process as punishment,” e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURT* (1979); dismissals of vagrancy or other public order offenses in exchange for the defendant’s promise to leave the jurisdiction; other forms of deferred adjudication; drug courts and other specialized courts; charging pretext offenses; misdemeanor case processing as a regulatory measure, e.g., Kohler-Hausmann, *supra* note 193, at 611; deferred prosecution or non-prosecution agreements in the corporate context; and supervision through probation and parole. Some of these interventions were developed in the twentieth century; others are older. The key point is that to conceive criminal law as the definition and formal punishment of specific crimes is to ignore vast swaths of “the law in action,” which, from my perspective, is the law worth studying. Issa Kohler-Hausmann makes similar arguments in developing a “managerial model” of criminal justice in contrast to the adjudicative model. Cf. Kohler-Hausmann, *supra* note 193, at 611; see also Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in SHARON DOLOVICH, *THE NEW CRIMINAL JUSTICE THINKING* 246, 246–72 (Sharon Dolovich & Alexandra Natapoff eds., 2018) (arguing that it is time to retire the distinction between law on the books and law in action).

²⁴² See Williams, *supra* note 44, at 107.

interventions don't even require evidence of a particular statutory violation.²⁴³ Substantive criminal law is broad, but it is not distinctive: Nearly every kind of behavior addressed through criminal law could be, and often is, addressed also through civil law. Moreover, substantive criminal law does relatively little to discipline process or determine outcomes; instead, decisions in the enforcement process determine who will become a criminal.

I have just offered only a brief sketch of a non-exceptionalist account of criminal law. There is much more work to be done. The study of criminal law, far from being a backwater, is full of opportunities to move beyond exceptionalist ideology; it is full of opportunities to work out the practical details of a different relationship between state and citizen. To take advantage of these opportunities, though, one must reject the exceptionalist conflation of aspiration and description.²⁴⁴ Human imperfections, private and public, are the point of departure for criminal law. Our questions should be ones about how to manage and mitigate imperfection, including the imperfections of law itself. One key question: In a world without constraints on substantive criminal law, is it wise to seek as much enforcement as possible? Unwinding the carceral state probably means limiting both the capacity and the legal authority of enforcers, and it will probably require that we imagine civil law responses to many of the problems at which we now throw criminal sanctions.

Again, as soon as we contemplate the possibility of criminal interventions, we are speaking of an imperfect world, a world in which not only individuals but various social institutions have failed. And as we contemplate criminal interventions, it is crucial to keep in mind that they will be administered by humans. The rule of law always is the rule of men and women, which is not a reason to avoid law, but it may be a reason to avoid the most coercive and violent forms of law. If criminal law is seen as exceptional only for its violence and inequality, not in its very nature or subject matter, then the substitution of other interventions for criminal ones becomes much more possible.

²⁴³ For example, police officers do not need to suspect a specific criminal offense to make the seizure known as a *Terry* stop. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (holding that “[to justify] the particular intrusion[,] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion”).

²⁴⁴ In other words, criminal law theory should not be ideal theory. John Rawls characterized *A Theory of Justice* as “ideal theory,” but conceded that his theory presumed conditions of “full compliance.” JOHN RAWLS, *A THEORY OF JUSTICE* 7–8 (rev. ed. 1999). On subjects such as war or punishment, which necessarily involve “partial compliance,” he could provide no answers. See *id.* 8–9. But where he stopped is where criminal law scholarship should begin.