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Redistributing Justice

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ESSAY

REDISTRIBUTING JUSTICE

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

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

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

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INTRODUCTION

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

1. See, e.g., Nathalie Baptiste, Democrats Say They Want to End Mass Incarceration. There's No Way They'll Do What's Needed to Get There., Mother Jones (Sept. 20, 2019), https://www.motherjones.com/crime-justice/2019/09/democrats-say-they-want-to-end-mass-incarceration-why-dont-they-address-the-real-solution [https://perma.cc/SF3L-CABP] (observing that "[s]hrinking the enormous US prison population has become a standard promise from Democrats running for president" but noting that "[i]f Democratic candidates actually want to end mass incarceration, they'll have to talk about reforms that are for *everyone* behind bars, not just the low-level drug offenders").

academics,[2] organizations,[3] organizers,[4] and voters[5] have aligned themselves with moves toward decarceration or police and prison

2. See, e.g., Aya Gruber, The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration 6–9 (2020) [hereinafter Gruber, The Feminist War on Crime] (critiquing carceral feminism from an abolitionist perspective); Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 408 (2018) ("[T]he most imaginative voices within contemporary racial justice movements . . . [are] focused on shifting power into Black and other marginalized communities; shrinking the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transforming the relationship among state, market, and society." (footnote omitted)); Benjamin Levin, The Consensus Myth in Criminal Justice Reform, 117 Mich. L. Rev. 259, 293 (2018) [hereinafter Levin, The Consensus Myth] (describing widespread critiques of the criminal system); Kate Levine, Police Prosecutions and Punitive Instincts, 98 Wash. U. L. Rev. 997, 1003 (2021) [hereinafter Levine, Police Prosecutions] (critiquing carceral solutions to policing problems); Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1161–63 (2015) (envisioning a "prison abolitionist framework" that would "substitut[e] a constellation of other regulatory and social projects for criminal law enforcement" and imagining abolition both as "decarceration and substitutive social—not penal—regulation"); Dorothy E. Roberts, The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 8–11 (2019) [hereinafter Roberts, Abolition Constitutionalism] (arguing that "the only way to transform our society from a slavery-based one to a free one is to abolish the prison industrial complex" and arguing for a new abolition constitutionalism based on engaging the abolitionist history of the Constitution and the modern-day prison abolition movement); Jocelyn Simonson, Police Reform through a Power Lens, 130 Yale L.J. 778, 787–91 (2021) [hereinafter Simonson, Power Lens] (using a power lens to describe movement groups' push to change police governance and arguing that "power shifting is important and necessary to the larger abolitionist project"); India Thusi, Policing Is Not a Good, 110 Geo. L.J. Online 226, 233–34, 249–50 (2022), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/07/Thusi-Policing-Is-Not-a-Good.pdf [https://perma.cc/D4K6-PNGC] (calling for "a macro-level evaluation of policing that centers the history of policing and its continued role in racial subordination" and arguing that such an assessment would weigh in favor of defunding and abolishing the police); Jamelia Morgan, Responding to Abolition Anxieties: A Roadmap for Legal Analysis, 120 Mich. L. Rev. 1199, 1202 (2022) (book review) (exploring how abolitionist theories and methodologies might enrich and transform traditional legal analysis). The recent literature on abolition has begun to draw criticism from prominent legal scholars. See, e.g., Rachel E. Barkow, Promise or Peril?: The Political Path of Prison Abolition in America, 58 Wake Forest L. Rev. 245, 252–55 (2023) (cautioning that calls for prison abolition may alienate politicians and the public and impede reforms to the criminal system); Daniel Richman, The (Immediate) Future of Prosecution, 50 Fordham Urb. L.J. 1139, 1143–44 (2023) ("I think talk of 'abolition' and 'defunding' horribly misplaced—since constitutional policing can be extremely expensive, and adjudicative fairness and reliability only enhanced by better funding of defense lawyers and prosecutors.").

3. Marty Johnson, ACLU Pressing Biden to Stick to Promise of Decarceration With New Ad Buy, The Hill (Jan. 28, 2021), https://thehill.com/homenews/news/536238-aclu-pressing-biden-to-stick-to-promise-of-decarceration-with-new-ad-buy [https://perma.cc/H7UN-DR4G] (describing the ACLU's campaign urging President Joseph Biden to grant mass clemency to people who fit certain criteria).

4. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 824 (2021) ("The Ferguson and Baltimore rebellions, combined with organizing by the Movement for Black Lives (M4BL) and a growing constellation of abolitionist organizations, have made anti-Blackness, white supremacy, and police violence core issues on the liberal-to-left spectrum and redefined the terms of policy debate.");

abolition. Increasingly, many progressive commentators criticize mass incarceration and treat criminal legal institutions as objectionable responses to social problems.[6] Nevertheless, these anticarceral commitments often have their limits. Despite the prevalence of increasingly radical rhetoric on the left, many progressives continue to make exceptions and favor criminal solutions when presented with particularly sympathetic victims or particularly unsympathetic defendants.[7]

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

Our claim is that critical accounts tend to miss the possible explanatory power of distribution (or redistribution) as a way of understanding why otherwise-decarceral progressive activists might favor criminalization in certain situations.[10] Viewed in this light, criminal legal

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Mariame Kaba, Opinion, Yes, We Mean Literally Abolish the Police, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html (on file with the *Columbia Law Review*) (calling for police forces and their budgets to be immediately halved to reduce the number of police interactions and for abolition of the police and redirection of police resources towards other social programs).

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

6. See, e.g., Aya Gruber, The Critique of Carceral Feminism, 34 Yale J.L. & Feminism 55, 59 (2023) [hereinafter Gruber, The Critique of Carceral Feminism] ("For all their differences, the radical institutional and moderate mass-incarceration critiques both frequently feature a cast of conservative villains who progressives would abhor even if mass incarceration never existed: corporate exploiters, unscrupulous prosecutors, and moral majoritarians.").

7. See infra notes 23–27 and accompanying text.

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

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

10. In this respect, we hope to contribute to a larger conversation about the role of distributive arguments in legal thought and practice. See Paulo Barrozo, Critical Legal Thought: The Case for a Jurisprudence of Distribution, 92 U. Colo. L. Rev. 1043, 1052

institutions might be justified as vehicles for redistributing power and resources to marginalized victims and away from defendants based on wealth, race, gender, sexuality, or other privileged societal positions.

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

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

We are not the first to suggest that progressives have a role in the making and maintenance of the carceral state. Indeed, several authors in the past decade have addressed this as a historical phenomenon.[15] Nor is this the first piece of scholarship to highlight critically the individual carceral issues—police violence, economic crimes, hate crimes, and gender-subordinating crimes—we describe in this Essay.[16] What we hope

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(2021) (noting that "a commitment to equality commits critical legal theory to a comprehensive and systematic jurisprudence of distribution").

11. See Deborah Tuerkheimer, Criminal Justice and the Mattering of Lives, 116 Mich. L. Rev. 1145, 1161 (2018) (book review) (articulating an "*antisubordination* theory of criminal justice"); cf. Hadar Aviram, Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends, 68 Buff. L. Rev. 199, 225 (2020) (comparing contemporary "progressive punitivism" to Maoist approaches to criminal law, which considers "the locus of the perpetrator in the class structure" in deciding whether punishment is warranted).

12. See infra Part I.

13. See infra Part I.

14. See generally infra Part III.

15. See generally James Forman, Jr., Locking Up Our Own: Crime and Punishment in Black America (2017) (noting the contribution of the Black community to the War on Crime); Gruber, The Feminist War on Crime, supra note 2 (describing carceral feminism throughout U.S. history); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America (2016) (observing that President Lyndon B. Johnson's war on poverty provided language and ideology for the war on crime); Naomi Murakawa, The First Civil Right: How Liberals Built Prison America (2014) (describing liberals' contribution to the explosion of the penal system in the late twentieth century).

16. On police brutality, see, e.g., Derecka Purnell, Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom 269 (2021) (discussing some progressives' desire to see brutal police incarcerated); Aviram, supra note 11, at 208–09 (identifying trends of "progressive punitivism" in discussions surrounding police violence); Kate Levine, How We Prosecute the Police, 104 Geo. L.J. 745, 748–50 (2016) [hereinafter Levine, How We Prosecute the Police] (arguing that the preferential precharge procedures that prosecutors employ when dealing with police suspects, such as precharge investigations and full

to contribute is a theory for *why* so many progressives still turn to criminal law despite all of the evidence that we as a society have overrelied on police and prisons for far too long. Redistribution certainly isn't the only explanation. Indeed, many scholars and activists appear to justify their selective preference for criminal law in terms of retribution, expressivism, or deterrence.[17] But redistribution appears to have particular purchase in progressive circles as a vocabulary for justifying punitive politics. For scholars and activists committed to dismantling the carceral state, then, it is essential to grapple with these difficult areas and to recognize what does (or doesn't) make them difficult.

We do not seek to suggest how progressives might solve social problems like systemic racism, gender subordination, or income inequality through noncarceral means. It remains to be seen whether the rich and increasing literature describing alternatives to the carceral state can

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evidentiary presentations before a grand jury, should be applied to all suspects); Levine, Police Prosecutions, supra note 2, at 1003 (warning that "a project to increase the harshness of the criminal legal system against police officers will, far from its proponents' goals, legitimize and increase the footprint of our current criminal legal system"); Kate Levine, Police Suspects, 116 Colum. L. Rev. 1197, 1201–05 (2016) [hereinafter Levine, Police Suspects] (arguing that the preferential criminal procedure rights that police suspects have should be extended to all people arrested for crimes).

On economic crime, see, e.g., Pedro Gerson, Less is More?: Accountability for White-Collar Offenses Through an Abolitionist Framework, 2 Stetson Bus. L. Rev. 144, 147 (2023) (arguing that abolitionist responses to white collar crimes "may be better able to guarantee accountability than continuing to use the carceral model"); Benjamin Levin, Mens Rea Reform and Its Discontents, 109 J. Crim. L. & Criminology 491, 551–52 (2019) [hereinafter Levin, Mens Rea Reform] (identifying white-collar crime as an area of "carceral exceptionalism" in mens rea reform); Benjamin Levin, Wage Theft Criminalization, 54 U.C. Davis L. Rev. 1429, 1435–36 (2021) [Levin, Wage Theft] (noting the tension inherent in calls to criminalize wage theft to protect marginalized workers despite the fact that "in calling for criminalization and criminal prosecution, many commentators have embraced the same actors and institutions that have decimated poor communities and used criminal law to construct a hyper-policed, hyper-incarcerated population").

On hate crimes, see, e.g., Aviram, supra note 11, at 209–11 (discussing reactions of "progressive punitivism" in response to hate crimes); Kate Levine, The Progressive Love Affair with the Carceral State, 120 Mich. L. Rev. 1225, 1238–40 (2022) (book review) [hereinafter Levine, Progressive Love Affair] (critiquing the movement to criminalize hate crimes and warning about the likely "actual distributional effect of more criminalization"); Shirin Sinnar, Hate Crimes, Terrorism, and the Framing of White Supremacist Violence, 110 Calif. L. Rev. 489, 509–15 (2022) [hereinafter Sinnar, Hate Crimes] (exploring the limits of the hate crimes frame).

On gender-subordinating crime, see, e.g., Aviram, supra note 11, at 205–07 (noting "progressive punitivism" in the areas of sexual harassment and assault); Aya Gruber, Sex Exceptionalism in Criminal Law, 75 Stan. L. Rev. 755, 824–25 (2023) (critiquing carceral feminism); I. India Thusi, Feminist Scripts for Punishment, 134 Harv. L. Rev. 2449, 2451 (2021) (same).

17. See, e.g., Tuerkheimer, supra note 11, at 1160 ("An unpunished hate crime expresses a devaluation of the victim—not only by the perpetrator, but also by the state. If the successful prosecution of a hate crime is viewed as validating the victim's life and identity, a perceived criminal justice failure accomplishes the exact opposite." (footnotes omitted)); infra note 29 and accompanying text.

ameliorate the pain and fury generated by crimes against marginalized people.[18] Instead, our project here is to surface and theorize the continued progressive commitment to criminal law, and to suggest that it should be recognized as a significant barrier to decarceral projects.[19] If progressives and decarcerationists are to be allies, they must see the fault lines in their alliance.

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

Our argument unfolds in three Parts. In Part I, we trace the limits of anticarceral arguments and highlight the ways in which opposition to mass incarceration and overcriminalization often is heavily circumscribed—exceptions and carveouts abound. We describe a unifying theme in many of these progressive criminalization projects—a focus on redistribution. We examine competing conceptions of what redistribution means in this context (for example, shifting power, reallocating resources, and signaling social inclusion and valuation). In Part II, we offer a series of case studies to illustrate how progressive and left academics, activists, and lawmakers have justified punitive policies on redistributive grounds. Specifically, we examine the cases of police violence, economic crimes, hate crimes, and

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18. See, e.g., Danielle Sered, Until We Reckon: Violence, Mass Incarceration, and a Road To Repair 12–14 (2019) (describing the author's work at Common Justice, "an organization that seeks to address violence without relying on incarceration," and explaining that alternatives to incarceration must be "survivor-centered, accountability-based, safety-driven, and racially equitable" and will require "a fundamental realignment in our values and practice"); Monica C. Bell, Katherine Beckett & Forrest Stuart, Investing in Alternatives: Three Logics of Criminal System Replacement, 11 U.C. Irvine L. Rev. 1291, 1301–02, 1309–10, 1318–23 (2021) (examining how defunding the police and reinvesting in social welfare, safety production, and racial reparations can provide an alternative to the carceral state that considers its harmful effects on racially marginalized communities); Allegra M. McLeod, Envisioning Abolition Democracy, 132 Harv. L. Rev. 1613, 1622 (2019) [hereinafter McLeod, Envisioning Abolition Democracy] (noting how abolitionist projects "call for justice in the aftermath of police shootings in connection with a movement to divest from the criminal arm of the state and invest in other social projects, including reparations and democratic institutions").

19. See infra Part I.

20. See infra Part III.

21. See infra section III.B.3.

22. See infra section III.A.

crimes of gender subordination. Finally in Part III, we step back and offer a critical take on redistributive arguments for criminal law. We argue that many redistributive arguments for criminal law rest on speculative empirical claims that lack real-world support. Further, we contend that the criminal system can't redistribute in the egalitarian ways that some commentators imagine—criminal legal institutions are fundamentally regressive and tied to subordination. And, even if they somehow could advance some of the redistributive ends that their proponents suggest, our carceral system would remain objectionable. That is, the oppressive and inhumane aspects of the carceral state still would be oppressive and inhumane, even if the identity of the defendants or the politics associated with the institutions shifted.

I. REDISTRIBUTIVE CRIMINAL LAW

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

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

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

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23. Douglas Husak, The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law, 23 New Crim. L. Rev. 27, 51–52 (2020) [hereinafter Husak, Price of Criminal Law Skepticism].

24. See, e.g., Gruber, The Feminist War on Crime, supra note 2, at 6 (describing progressive support for criminal law solutions to gender crimes as a carve-out); Aya Gruber, #MeToo and Mass Incarceration, 17 Ohio St. J. Crim. L. 275, 279 (2020) (same).

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

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

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

In this Part, therefore, we identify a specific style of argument and unifying theme among many of these carveouts or progressive exceptions: an attempt to redistribute from relatively powerful defendants to weaker or marginalized victims.[28]

Certainly, there are carveouts and progressive criminalization projects that don't reflect this approach or might be justified better in other terms.[29] Indeed, progressive scholars and activists marshal a range of arguments in support of criminalization, often turning to the language of

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

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

28. What exactly it is that criminal law distributes (Power? Resources? Social status?) isn't always clear or consistent across different movements. See infra Part II.

29. For example, some progressive carveouts might reflect a simple faith in criminal law's deterrent effect. Proponents of harsh "white-collar" enforcement sometimes argue that those defendants are uniquely inclined to engage in cost-benefit analysis that responds to criminal enforcement. See, e.g., Sally S. Simpson, Corporate Crime, Law, and Social Control 161 (Alfred Blumstein & David Farrington eds., 2002) (describing the possible deterrent effect of criminal enforcement); Melissa Sanchez & Matt Kiefer, Wage Theft Victims Have Little Chance of Recouping Pay in Illinois, Chi. Rep. (Aug. 9, 2017), https://www.chicagoreporter.com/wage-theft-victims-have-little-chance-of-recouping-pay-in-illinois/ [https://perma.cc/E7UH-4FY4] ("One of the most celebrated aspects of the reforms elevated repeat offenses to felonies, a change that advocates hoped would be a deterrent."); Terri Gerstein & David Seligman, A Response to "Rethinking Wage Theft Criminalization", On Labor (Apr. 20, 2018), https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization/ [https://perma.cc/F6UH-LUA5] ("[I]ncreased penalties do deter certain types of crimes, . . . [such as] tax evasion, which is similar to wage theft in that it often involves persistent and calculated misconduct committed by those who may think that their crimes are unlikely to be discovered.").

deterrence, expressivism, and retributivism.[30] But we see this redistributive frame as an approach with a lot of purchase, particularly in many contemporary left-leaning circles.

A. *A Theory of Redistribution*

Conventional accounts of criminal law assert that punishment is justified by a handful of "traditional" theories—deterrence, incapacitation, rehabilitation, and retributivism.[31] For decades, as prison populations expanded and racial disparities in enforcement grew harder to ignore, many "legal and academic commentators . . . continued their long engagement in jurisprudential debates about the purposes of punishment."[32] Such traditional accounts "speak the language of morality, of rational actors, or of impersonal, ostensibly apolitical institutional design" and are "a poor fit for structural accounts of criminal law as a political creature, an engine of social control, or a tool of redistribution and oppression."[33] Critical accounts, therefore, increasingly contend that these justifications hardly explain the U.S. carceral state. Instead, critics argue that criminalization and criminal punishment reflect much more nefarious logics—social control, cruelty, and the desire to protect the powerful and subordinate socially marginalized groups.[34]

But pointing to social control and subordination as the core logics of criminal law leaves an important question unanswered: Why do left and

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30. See supra note 17 and accompanying text.

31. See Robert Weisberg, Reality-Challenged Philosophies of Punishment, 95 Marq. L. Rev. 1203, 1204 (2012) (noting academics' "long engagement in jurisprudential debates about the purposes of punishment (retribution, general and specific deterrence, incapacitation, and rehabilitation)").

32. Id.

33. Levin, Wage Theft, supra note 16, at 1476.

34. See, e.g., Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 123 (2020) ("It is imperative to ask, in the context of the prison–industrial complex as well as in the disability context, what rehabilitation means when it is decontextualized from discussions of inequality, inequity, and social justice, or from deconstructing the discourse and materiality of racial criminal pathologization . . . ."); David Garland, Punishment and Modern Society: A Study in Social Theory 3–22 (1990) (focusing on criminal law's role in social control); Georg Rusche & Otto Kirchheimer, Punishment and Social Structure 111 (Routledge 2017) (1939) (arguing that prison labor, and by extension criminal law, advances the interests of capital); Jessica M. Eaglin, To "Defund" the Police, 73 Stan. L. Rev. Online 120, 125 (2021), https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/06/73-Stan.-L.-Rev.-Online-120-Eaglin.pdf [https://perma.cc/G38K-Y5GJ] (highlighting the raced and classed dimensions of criminal enforcement); Roberts, Abolition Constitutionalism, supra note 2, at 33–34 (tracing mass incarceration to slavery, Jim Crow, and white supremacy); Ahmed A. White, Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society, 37 Ariz. St. L.J. 759, 786 (2005) ("Behind the façade of justifications, the criminal justice system is an institution of social control oriented to the management of dysfunctions inherent in capitalist society—unemployment, poverty, and the like—that, if left unchecked, tend to produce untenable levels of social disorder and deviance.").

progressive activists and advocates committed to egalitarian social projects still favor criminal law in some cases? How do people who often see criminal law as unjustified come to justify criminal solutions to social problems? A totalizing critique of criminal law might make sense if one were to reject criminal law and punishment in all instances. But how can we make sense of the continued, selective preference for criminal law among academics and activists who deploy such critiques?[35] Our claim is that the continued allure of criminal law demonstrates that critical accounts need to grapple with what social movements and commentators on the left find promising about criminal law.

Understanding criminal law and criminal legal institutions as in some way distributive isn't unprecedented.[36] For example, Professor Aya Gruber has argued that U.S. criminal legal institutions can be understood not in traditional retributive or consequentialist terms, but as reflecting distribution on a sort of pain–pleasure axis:

> The distributive theory of criminal law holds that an offender ought to be punished, not because he is culpable (as he may not have intended harm) and not because such punishment increases net security in the world (as it empirically may not), but because punishment appropriately distributes pleasure and pain between the offender and victim. . . . [C]riminal rules often distribute punishment to defendants in order to secure a good such as compensation, satisfaction, or "closure" for victims.[37]

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35. There's something to be said here, as well, about the mismatch between radical rhetoric and radical commitments. Or, put differently, it's worth recognizing that as radical critiques and language become more popular, the likelihood that they will be coopted or deployed by people unthinkingly increases. As opposing mass incarceration has entered the pantheon of socially acceptable progressive views or beliefs, it becomes quite probable that people using anticarceral language aren't doing so as a result of some well-considered political project but just because it's understood as the right thing to do. See, e.g., Ruth Wilson Gilmore & Craig Gilmore, Restating the Obvious, *in* Indefensible Space: The Architecture of the National Insecurity State 141, 150 (Michael Sorkin ed., 2008) (arguing that radical language can be "hollow[ed] out"); Benjamin Levin, After the Criminal Justice System, 98 Wash. L. Rev. 899, 944–45 (2023) (similarly noting the "danger in overemphasizing the work that language and labels can do," as they may be "a way of signaling politics without actually taking concrete action or advancing those politics").

36. See, e.g., Paul H. Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? 2–7 (2008) (arguing for "distributive principles" as important to the design of criminal legal institutions); Aya Gruber, A Distributive Theory of Criminal Law, 52 Wm. & Mary L. Rev. 1, 5 (2010) [hereinafter Gruber, A Distributive Theory] (arguing that criminal law operates to distribute pleasure and pain).

37. Gruber, A Distributive Theory, supra note 36, at 5. As Gruber goes on to note, even though this distributive approach pervades the criminal system, it's not at all clear "whether current victim-based laws actually meet their purported distributive goals." Id. at 73. Gruber points out that "[a]lthough touting victim-centered reforms serves prosecutors' and policymakers' interests, it is another question altogether whether such reforms actually improve victims' lives." Id.

Viewed through this lens, distribution operates as a foundational logic of criminal law and punishment.[38] And other scholars have suggested that criminal law should serve to make victims whole or shift *something* from defendants to victims.[39] Indeed, some version of this claim underpins expressive theories of punishment that focus on how punishment signals society's valuation of victims and defendants.[40]

Unlike Gruber, our focus isn't necessarily on pleasure and pain.[41] But we see her articulation of a "distributive theory of criminal law" as helpful to understanding contemporary progressive claims about criminal law as redistributive. The emphasis on how criminal law distributes reflects a broader realist and critical orientation that recognizes that law *is* its effects—what matters is how the law operates on the ground (as opposed to what the law is on the books or in theory).[42] Assessing legal rules and

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38. This move differs from a focus on distribution that treats criminal law as justified on nondistributive terms and implicates distributive questions only in resolving how much to punish individual defendants. Cf. Robinson, supra note 36, at 2 ("This book assumes that one can justify the *institution* of punishment and examines how one might justify one or another *distribution* of punishment.").

39. See, e.g., Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 Yale L.J. 85, 111–12, 148 (2004) (calling for the inclusion of a more restorative process focused on victims and summarizing other scholars' arguments on the issue); Amy J. Cohen, Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States, 104 Minn. L. Rev. 889, 896–97 (2019) (discussing approaches to criminal justice reform grounded in restorative justice).

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

41. See supra note 36 and accompanying text.

42. See, e.g., Laura Kalman, Legal Realism at Yale: 1927–1960, at 3 (1986) (describing this concept of legal realism); John Henry Schlegel, American Legal Realism

institutions is not simply a matter of formal logic or precise readings; it is a question of determining who benefits or who suffers as a result of each arrangement, decision, or interpretation. Therefore, in examining redistributive arguments for criminal law, we borrow from a broader set of critical literatures that deploy "distributional analysis" as a framework for assessing the desirability of legal rules or policies.[43]

At its most basic level, distributional analysis asks "who wins and who loses."[44] Doing a distributional analysis of a proposed law reform "involves meticulous and deliberate contemplation of the many interests affected by the existing criminal law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time."[45] Instead of pointing to grand theories of how criminal punishment should (or shouldn't) work, distributional analysis invites us to "treat[] law as simply another way of doing politics and cuts through metaphysical, culturalist, economicist, and other mystifications of the law and legal discourse."[46]

A redistributive frame for criminal law resonates with calls for criminal law to serve antisubordination goals. For example, Professor Deborah Tuerkheimer has argued that "the state should incarcerate only when and to the extent necessary to vindicate identifiable antisubordination norms."[47] On this view, "an antisubordination approach to criminal justice requires special commitment to the redress of violence suffered by subordinated populations . . . because violence against socially disempowered victims furthers their subordination."[48] By refocusing its

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and Empirical Social Science 1–4 (1995) (discussing the development of and debates over legal realism in America).

43. See Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir, Governance Feminism: Notes from the Field, at xvii (2019) (applying distributional analysis in discussing the consequences of feminism applied in legal systems); Jorge L. Esquirol, Legal Latin Americanism, 16 Yale Hum. Rts. & Dev. L.J. 145, 161–62 (2013) (noting that distributional analysis is "another direction for Latin Americanist legal scholarship"); Aya Gruber, When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing, 83 Fordham L. Rev. 3211, 3213 (2015) [hereinafter Gruber, When Theory Met Practice] (applying distributional analysis in criminal law to "ease the apparent tension between progressives' laudable desire to address crimes against minorities and their deep concern with the U.S. penal state"); Levin, Wage Theft, supra note 16, at 1477 (applying distributional analysis as a lens for evaluating wage theft criminalization).

44. Esquirol, supra note 43, at 162.

45. Gruber, When Theory Met Practice, supra note 43, at 3213; cf. Donna Coker, Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color, 33 U.C. Davis L. Rev. 1009, 1009 (2000) [hereinafter Coker, Shifting Power for Battered Women] ("I argue that every domestic violence intervention strategy should be subjected to a material resources test. This means that in every area of anti-domestic violence law and policy . . . priority should be given to those laws and policies which improve women's access to material resources." (emphasis omitted)).

46. Esquirol, supra note 43, at 161–62.

47. Tuerkheimer, supra note 11, at 1162.

48. Id. at 1163.

prosecutorial attentions, the state "can mitigate the subordinating effects of the crime" and "demonstrate its commitment to equality."[49]

A redistributive theory of criminal law similarly resonates with Professor Jocelyn Simonson's recent work on "power shifting" as a framework for assessing criminal policy.[50] Drawing from social "movement[s'] focus on power shifting in the governance of the police," Simonson has advocated the use of a "power lens" in assessing criminal policy.[51] The power lens does similar work to a distributive analysis—it asks whether a given policy empowers a marginalized or subordinated group.[52] If a policy distributes power to a marginalized community, it might be desirable or defensible. If a policy entrenches the status quo or preserves existing hierarchies, we should be skeptical. Viewed through this lens, the redistribution or reallocation of power via criminal legal institutions could be understood "as reparations, as a method of antisubordination, or as facilitating contestation necessary for democracy."[53]

Notably, although Simonson is a committed abolitionist herself,[54] she argues that left critics should be focused less on substantive outcomes (for example, whether a policy leads to more police or fewer; more convictions or fewer) than on how those outcomes build or diminish political power.[55] While a focus on power shifting has been a hallmark of grassroots abolitionist organizing and activists associated with the Movement for Black Lives,[56] that doesn't mean that this approach necessarily would

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49. Id.; see also Alessandro Corda, The Transformational Function of the Criminal Law: In Search of Operational Boundaries, 23 New Crim. L. Rev. 584, 634–35 (2020) (noting that criminalization, though usually an "instrument[] of preservation of widely shared beliefs and societal norms," may also "exercise, from a normative standpoint, a function of innovation—either by promoting the establishment of brand new norms or by nurturing norms, attitudes, values, and beliefs"); Hampton, Punishment, Feminism, and Political Identity, supra note 40, at 39 (arguing that "[i]t is because [crimes] 'say' something that diminishes the victims' value that we wish to inflict punishment that says something in order to insist on the victim's true (equal) value, and deny the wrongdoer's claim to elevation").

50. Simonson, Power Lens, supra note 2.

51. Id. at 787.

52. See id.

53. Id. at 788.

54. See Jocelyn Simonson, Radical Acts of Justice: How Ordinary People Are Dismantling Mass Incarceration 179–84 (2023) (describing Simonson's personal journey to becoming a carceral state abolitionist).

55. See Simonson, Power Lens, supra note 2, at 789.

56. See The BREATHE Act, Movement for Black Lives 12 (2020), https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf [https://perma.cc/M7NP-K22N] (describing a proposed bill that would, among other things, "hold officials accountable and enhance self-determination of Black communities" (cleaned up)).

advance decarceral ends.[57] Indeed, Simonson is careful to note that "there is no guarantee that a power-shifting arrangement in policing would on its own lead to any particular outcomes."[58] (And some anticarceral critics have expressed skepticism about power shifting precisely because of its capacity to expand, rather than shrink, the carceral state.)[59]

Our claim in this Essay, then, builds on Simonson's observation about the indeterminacy of power shifting. We argue that left and progressive commentators who are otherwise critical of the carceral state have come to embrace criminal law when it is imagined as a vehicle for shifting power. In left discourse, the objectionable corners of the criminal system are framed as regressive—spaces of subordination and marginalization. That's one way of understanding the growing attention paid to "managerial justice" and the mass processing of misdemeanor defendants—it's an area in which criminal law appears to operate as an explicit vehicle for controlling marginalized populations.[60] There, criminal law's distributive project runs counter to left and progressive goals, as it dehumanizes and disempowers the already disempowered.

But the corners of the criminal system that retain some (or even great) allure for left and progressive commentators are understood in different terms. Here, pro-criminalization and pro-prosecutorial policies and their advocates speak the language of power shifting. Criminalization, prosecution, and punishment are framed as a vehicle for redistribution and a means of achieving equality in an unequal society.[61]

Put differently, our suggestion is that many left and progressive commentators don't actually see criminal legal institutions as fundamentally objectionable. Rather, they understand those institutions as

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57. See Simonson, Power Lens, supra note 2, at 789 (noting that "[t]he power lens is rarely going to be, on its own, a complete way of approaching reform of the criminal legal system").

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

59. See, e.g., Trevor George Gardner, By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law, 130 Yale L.J. Forum 798, 805 (2021), https://www.yalelawjournal.org/pdf/GardnerEssay_rsqx8yoi.pdf [https://perma.cc/TF9G-5AV5] ("It would be a categorical mistake to equate the pursuit of an equitable process of crime policymaking—even as it relates to race-class subordinated communities—with the pursuit of equitable crime policy."); Benjamin Levin, Criminal Justice Expertise, 90 Fordham L. Rev. 2777, 2827 (2022) (raising questions about this approach).

60. See, e.g., Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 60–98 (2018) (arguing that low-level criminal courts operate as a vehicle for mass processing of racially and economically marginalized people); Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal 3–18 (2018) (describing the harms caused by the misdemeanor system).

61. See infra Part II.

objectionable when they are deployed in service of particular regressive ends.[62] By recalibrating those institutions or resituating them in an alternate political economy, redistributive advocates contend that criminal law could be a necessary—or even desirable—component of good governance and a just society.

B. *The Structure of Redistributive Arguments*

To the extent that left and progressive arguments for criminal legal solutions speak in redistributive terms, they require us to do a distributional analysis.[63] Or, using Simonson's language, they require us to ask whether and to whom criminal legal institutions shift power. Does criminal law actually distribute the way that its proponents believe that it will? Would a new criminal statute or a decision to prosecute redound to the benefit of and shift power to marginalized communities?[64] Or would criminal solutions to social problems serve to entrench the injustices of the criminal system, empowering police prosecutors and other "criminal justice" actors?[65]

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

The first style of redistributive argument rests on a straightforward claim about distributive consequences: Criminalizing certain conduct or prosecuting a particular defendant (or class of defendants) will benefit a marginalized victim or set of victims. How this benefit will accrue or how

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

63. Cf. Coker, Shifting Power for Battered Women, supra note 45, at 1009 (arguing that proponents of criminal responses to intimate partner violence should perform a "material resources test" to determine if these approaches actually shift material resources to victims—particularly poor women of color); Corda, supra note 49, at 612 ("Unlike a purely symbolic use of the criminal law—not supported by any concrete form of state action aimed at achieving the goal stated on paper—a legitimate and permissible transformational employment of this branch of the law must be inherently outcome-oriented and directed at achieving tangible effects.").

64. See infra Part II (tracking these arguments).

65. See infra section III.A.

individuals and communities will benefit is not always entirely clear.[66] And what is to be redistributed varies—sometimes, advocates appear to imagine a redistribution of power or social standing, while at other times, advocates actually appear to imagine that criminal law might directly shift material conditions by redistributing wealth or access to resources.[67] But regardless, the rhetoric of redistribution, power shifting, and antisubordination is common.[68] The redistributive cases for criminal punishment tend to rely on an imagined dynamic in which the defendant is (relatively) powerful and the victim is (relatively) powerless or subordinated. Criminal law, then, serves as an equalizer.

To be clear, that distributive case for criminal law is highly speculative and contingent. How do we know that defendants charged with a given crime actually will be powerful?[69] And why should we think that criminal law will effectively distribute whatever it is that it's supposed to distribute?[70] But this mode of argument is still less speculative than the second set of redistributive arguments for criminal punishment.

The second model suggests that exposing more powerful defendants to the violence and cruelty of the carceral state will redound to the benefit of marginalized defendants (particularly racially or economically subordinated defendants) via a sort of trickle-down logic. If the rich and powerful are subjected to intrusive policing and harsh sentences, the argument goes, they may come to appreciate the injustice of the criminal system. And, once they appreciate the injustice (and walk a mile in the shoes of the poor, the marginalized, and the subordinated), they will be more likely to favor criminal reform.[71] While wealthy, white voters might be likely to support harsh criminal policies when the imagined defendants

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66. Cf. Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2087 (2017) [hereinafter Bell, Police Reform] ("[I]ncreasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups."); Levin, Wage Theft, supra note 16, at 1494–95 ("[D]espite claims about empowering workers that tend to underpin wage theft activism, this embrace of criminal law does not redistribute power or resources from bosses to workers; it distributes more power to the institutions of the carceral state." (footnote omitted)).

67. See infra Part III.

68. See infra Part II.

69. See infra section III.A.

70. See infra section III.A.

71. See, e.g., Daniel Epps, The Consequences of Error in Criminal Justice, 128 Harv. L. Rev. 1065, 1103–04 (2015) (arguing that the Blackstone principle "concentrates criminal punishment on a more discrete group," which makes that group less popular because "a higher percentage of them will be guilty (or at least *seen as* guilty)," which in turn will lead to more tolerance for harsh punishments for those individuals); William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 781, 782–84 (2006) (arguing that "local police and prosecutors . . . focus too much attention on the crimes of the poor and too little on the crimes of the middle class").

are poor and Black, those voters might change their tune when they see themselves as potential defendants.[72]

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

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

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72. As one of us has previously explained:

> Borrowing from social cognition theory, legal scholars have argued that many policy decisions are shaped by the "fundamental attribution error"—a tendency to view our own bad conduct as "mistakes" caused by situational factors, while we view others' bad conduct as blameworthy and the result of some dispositional flaw. . . . [T]here is good evidence to suggest that people might still have a difficult time identifying with other defendants. And, similarly, other issues of identity (race, class, gender, sexuality, etc.) might continue to make certain defendants less sympathetic and might allow for an identification of certain defendants as more deserving of punishment, less remorseful, etc.

Levin, Mens Rea Reform, supra note 16, at 543–44 n.251 (citations omitted).

73. See, e.g., Steven W. Bender, The Colors of Cannabis: Race and Marijuana, 50 U.C. Davis L. Rev. 689, 695 (2016) (noting how the response to the "epidemic of opiate use among whites" is comparable to the "whitening and lightening of marijuana penalties" because both focused on public health responses instead of criminal penalties); David Cole, As Freedom Advances: The Paradox of Severity in American Criminal Justice, 3 U. Pa. J. Const. L. 455, 467 (2001) (recounting how previously harsh marijuana possession penalties that had primarily targeted nonwhite defendants were reduced or eliminated after "many white high school and college students experimented with marijuana, and an increasing number found themselves in trouble with the law" in the 1960s); andré douglas pond cummings, Reforming Policing, 10 Drexel L. Rev. 573, 624–25 (2018) ("It is almost unthinkable to imagine the War on Drugs being prosecuted on Wall Street, in fraternity and sorority houses, or along the many wealthy beach cities . . . [unlike] in urban communities and upon blacks, minorities, and poor Americans . . . ."); Keturah James & Ayana Jordan, The Opioid Crisis in Black Communities, 46 J.L. Med. & Ethics 404, 412 (2018) ("[T]he marijuana decriminalization movement of the 1970s explicitly revolved around the view that white middle-class Americans should not have their futures ruined by policies designed to protect them from international trafficking and urban drug markets.").

74. See, e.g., Kate Stith-Cabranes, Fear of Discretion, 1 Green Bag 209, 211 (1998) (describing "one of Mayor Ed Koch's favorite sayings . . . that a conservative is a liberal who has been mugged").

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

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

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

II. CASE STUDIES IN REDISTRIBUTIVE PUNISHMENT

Despite a long-running narrative that conservatives are tough on crime and liberals are more concerned about mass incarceration, there are numerous areas in which progressives remain committed to the

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75. See, e.g., Tom Wolfe, The Bonfire of the Vanities 522 (1987) ("A liberal is a conservative who has been arrested." (internal quotation marks omitted)); Craig S. Lerner, Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants, 2004 U. Ill. L. Rev. 599, 603–04 ("[I]f a conservative is a liberal who's been mugged, then a liberal would seem to be a conservative who's been indicted." (footnote omitted)); Jeremiah W. Nixon, Remarks on Racial Profiling in Missouri, 22 St. Louis U. Pub. L. Rev. 53, 56 (2003) ("It has been said that a liberal is a conservative who has just been arrested, and a conservative is a liberal who has just been mugged.").

76. See supra note 72.

77. See Levin, Mens Rea Reform, supra note 16, at 543–44 n.251 (discussing the prevalence of such claims about identification with criminal defendants).

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

A. *Police Crimes*

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

78. See, e.g., Forman, supra note 15, at 47–77 (discussing support among progressive Black activists for harsh criminal gun laws); Gruber, The Feminist War on Crime, supra note 2, at 5–6 (discussing support among feminist activists for criminal prosecution of sex crimes); Justin Marceau, Beyond Cages: Animal Law and Criminal Punishment 20 (2019) (discussing support among progressives for criminal prosecution of animal abuse); Aharonson, supra note 26, at 287 ("Over the last decades, social movements around the globe have increasingly resorted to criminalization campaigns as primary instruments for promoting greater social equality . . . yield[ing] a variety of new offenses specifically aimed at protecting women and minority groups (including hate crime, hate speech, stalking, and sexual harassment).").

79. Aviram, supra note 11, at 224.

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

81. See Levine, Police Prosecutions, supra note 2, at 1005–06 (showing the many ways in which progressives have pushed for increased criminalization of police brutality); Melanie D. Wilson, The Common Prosecutor, 53 Loy. U. Chi. L.J. 325, 362 (2022) ("[A]necdotal evidence is building that all prosecutors are beginning to take police brutality more seriously and that the progressives are leading the way."). Indeed, even leading abolitionist scholars appear to support the prosecution and incarceration of police officers who commit brutal acts against certain citizens. Compare Berkeley Talks: Paul Butler on How Prison Abolition Would Make Us All Safer, Berkeley News, at 15:20 (Jan. 17, 2020), https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler [https://perma.cc/B4DY-Q9QN] (stating that the solution to mass incarceration is abolition, not reform; that alternatives to incarceration "can provide any of the crime control benefits we think prison does now"; and that abolition must be "more than just tearing down the prison walls," but also must "build something up,

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

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

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

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

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too"), with Paul Butler, Opinion, The Most Important Trial of Police Officers for Killing a Black Man Has Not Happened Yet, Wash. Post (Apr. 29, 2021), https://www.washingtonpost.com/opinions/2021/04/29/next-trial-killing-george-floyd-will-be-real-test (on file with the *Columbia Law Review*) [hereinafter Butler, The Most Important Trial] (writing approvingly of the accomplice charges against the three officers who stood by while Derek Chauvin killed George Floyd and stating that "this is a case where any conviction and punishment—even a short prison sentence—would be better than none").

82. Devon W. Carbado, Strict Scrutiny & the Black Body, 69 UCLA L. Rev. 2, 67–68 (2022) (footnote omitted) (quoting Patricia J. Williams, The Alchemy of Race and Rights 163 (1991)).

83. And, Carbado notes, there is the further trauma of knowing that these videos are part of an almost fetishistic interest in violence against Black people that has shaped U.S. culture. See id. at 12 ("[C]onsider the mass circulation of videos depicting the killing or brutalization of Black people. . . . Those images and videos operate not just as iconography; they are, in a very peculiar way, iconic. 'Black bodies in pain for public consumption have been an American national spectacle for centuries.'" (quoting Elizabeth Alexander, "Can You Be BLACK and Look at This?": Reading the Rodney King Video(s), 7 Pub. Culture 77, 78 (1994))).

84. See, e.g., Press Release, ACLU of Kentucky, ACLU Statement on DOJ Charges of Police in the Killing of Breonna Taylor (Aug. 4, 2022), https://www.aclu.org/press-releases/aclu-statement-doj-charges-police-killing-breonna-taylor [https://perma.cc/J4QL-24XQ] ("The Department of Justice's announcement of charges against four law enforcement officers involved in Breonna Taylor's death is a critical step in holding police accountable when they kill those they are sworn to protect, violate our constitutional rights, and inflict lasting trauma upon our communities." (internal quotation marks omitted) (quoting Brandon Buskey, Director, ACLU Criminal Law Reform Project)).

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

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

Chauvin was convicted of state murder and manslaughter charges[91] and federal civil rights violations.[92] While progressive organizations hailed these sentences as "justice" and victory, some felt that twenty-two-and-a-half years in prison was not enough for Chauvin's crime.[93] While Floyd's

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85. Levine, Police Prosecutions, supra note 2, at 1000–02 (describing the tension between progressive support for prison abolition and progressive calls for imprisonment and enhanced sentencing in police prosecutions).

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

87. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, How George Floyd Was Killed in Police Custody, N.Y. Times (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html (on file with the *Columbia Law Review*) (last updated Jan. 24, 2022).

88. Id.

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

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

91. Bill Chappell, Derek Chauvin Is Sentenced to 22 1/2 Years for George Floyd's Murder, NPR (June 25, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder [https://perma.cc/BV72-M8AE].

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

93. See Paul Butler, This Is What Derek Chauvin's Sentence Should Be, Wash. Post (June 24, 2021), https://www.washingtonpost.com/opinions/2021/06/24/this-is-what-derek-chauvins-sentence-should-be/ (on file with the *Columbia Law Review*) (arguing for eighteen years in prison but noting that "[s]ome Black Lives Matter activists, and probably

killing was a particularly high-salience act of brutality, the reactions from progressives were hardly unprecedented; other police killings have spawned similar punitive outcries over the past several years—from lamenting prosecutorial decisions not to charge[94] to decrying sentences as too light.[95]

For some activists and academics, it often is not enough to achieve long sentences for those officers who commit acts of violence against civilians. Progressive scholars have called for criminal punishment for officers who were at the scene of the crime and did not intervene.[96] This reaction once again is exemplified by the killing of George Floyd. Not only was Chauvin prosecuted; so too were the three rookie officers who were on the scene at the time and failed to stop Chauvin.[97] These officers were convicted of federal civil rights violations[98] and were convicted as accomplices to Chauvin's manslaughter charge.[99] Although vicarious liability in other contexts is often critiqued as leading to long sentences for less blameworthy conduct,[100] these convictions were met with approval by criminal justice progressives.[101]

Floyd's family, hope Chauvin receives the 40-year maximum that Minnesota law establishes for Murder 2"); cf. Guyora Binder & Ekow N. Yankah, Police Killings as Felony Murder, 17 Harv. L. & Pol'y Rev. 157, 228 (2022) (lamenting the felony murder charge in this case because it does not express firmly enough the intent Chauvin exhibited).

94. Levine, Police Prosecutions, supra note 2, at 1010 (discussing criticisms of prosecutors who haven't charged police officers after they shoot civilians).

95. See Levine, Progressive Love Affair, supra note 16, at 1235–36 ("Yet, at every turn and with only minor exceptions, progressives look to ratchet up the punishment of police rather than ratchet down the treatment of other people caught in the criminal legal machine.").

96. See Butler, The Most Important Trial, supra note 81 (arguing that the officers who did not intervene when Derek Chauvin killed George Floyd should be convicted of crimes).

97. Id. (noting that the three officers were prosecuted for aiding and abetting Chauvin).

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

99. Holly Bailey, Last of Ex-Officers Implicated in Floyd's Killing Found Guilty on State Charge, Wash. Post (May 2, 2023), https://www.washingtonpost.com/nation/2023/05/02/tou-thao-george-floyd (on file with the *Columbia Law Review*) ("Kueng and Lane[,] [two of the three officers,] . . . pleaded guilty to aiding and abetting manslaughter charges in state court, avoiding a trial."); Amanda Holpuch, Ex-Officer Guilty of Abetting Manslaughter in George Floyd's Killing, N.Y. Times (May 2, 2023), https://www.nytimes.com/2023/05/02/us/tou-thao-verdict-george-floyd-death.html (on file with the *Columbia Law Review*).

100. See Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 716 (2005) (listing vicarious liability as an example of a "legal device[] that can expand criminal liability to individuals who hardly seem blameworthy" and produce "grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime").

101. See, e.g., Press Release, ACLU Minn., ACLU/ACLU-MN Statement on Federal Guilty Verdict in George Floyd Killing, (Feb. 24, 2022), https://www.aclu-mn.org/en/press-releases/mpd3-guiltyverdict [https://perma.cc/QA2D-JU4T] ("Any of these officers could

Much like progressive organizations and politicians, many law professors, who oppose criminalization in general, endorse prosecution and conviction for police in instances in which they do not for other people. Professor Paul Butler, a scholar who has widely advocated for prison abolition,[102] called the case against Chauvin and his colleagues "[t]he most important trial of police officers charged in the killing of a Black man" and hoped for "conviction and punishment."[103]

For other scholars, existing criminal statutes failed in their inability to criminalize officers who didn't intervene to stop their coworkers. For example, Professor Zachary Kaufman has suggested enlarging criminal codes to create a separate crime for non-intervening police officers.[104] Kaufman acknowledges that the Minnesota accomplice law was sufficient to convict the three bystander officers in Floyd's killing, but he argues that these convictions on the state and federal level do not "obviate the need for more—and more effective—avenues of passive-police [criminal] accountability."[105] In proposing new legislation, he argues that it would apply only to police and thus would not "exacerbat[e] the problem of 'mass incarceration.'"[106] This claim is central to many progressives' selective punitive projects—a justification that their target is the real villain and that their punitive proposal will not increase criminalization more broadly.[107]

Notably, Kaufman uses the power-shifting rationale explicitly, framing his policy proposal as directly responsive to police officers' grossly

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have saved George Floyd's life. They had a duty to intervene, and they failed. They all are accountable for his death." (internal quotation marks omitted) (quoting Ben Feist, Interim Executive Director, ACLU Minnesota)).

102. See, e.g., Author and Professor Paul Butler to Deliver McCormick Lecture, Letter of the L. (Univ. of Ariz. James E. Rogers Coll. of L., Tucson, Ariz.), Feb. 1, 2023, https://lotl.arizona.edu/feb012023.htm [https://perma.cc/DGG7-PKUN] (announcing that Butler would deliver a lecture "explor[ing] the movement to abolish prison, focusing on the consequences for racial justice and public safety"); see also Abolition, and a Mule, Rogers Williams Univ. Sch. of L., https://law.rwu.edu/events/abolition-and-mule [https://perma.cc/A7G5-VJC9] (last visited July 30, 2023) (noting Butler's lecture on abolition); Dorothy Wickenden, What Would a World Without Prisons Be Like?, New Yorker (Jan. 27, 2020), https://www.newyorker.com/podcast/political-scene/what-would-a-world-without-prisons-be-like (on file with the *Columbia Law Review*) (noting that the "idea of prison abolition is . . . gaining traction" and referencing a conversation about the movement with Butler).

103. Butler, The Most Important Trial, supra note 81.

104. Zachary D. Kaufman, Police Policing Police, 91 Geo. Wash. L. Rev. 353, 363–64 (2023) [hereinafter Kaufman, Policing Police].

105. Id. at 360. Bloated criminal codes have long been one of the acknowledged drivers of mass incarceration. Cf. Benjamin Levin, The Consensus Myth, supra note 2, at 292–94 (noting the frequency of this argument and arguing that we need a baseline comparison).

106. Kaufman, Policing Police, supra note 104, at 401.

107. See infra section III.A.2.

disproportionate use of lethal force against people of color.[108] The argument sounds in the register of redistribution, appealing to the sentiments of progressives who see a need to take power away from police via criminal punishment.

In many ways, police prosecutions are the most visible example of an imagined redistributive criminal system. Indeed, it is essentially impossible to run as a progressive district attorney without using the prosecution of police officers as a major part of one's platform.[109] Alvin Bragg, now famous for his prosecution of former President Donald Trump, touted his work prosecuting police with the New York State Attorney General's office in his successful bid for Manhattan District Attorney.[110] Others, such as Wesley Bell, the St. Louis County Prosecuting Attorney, ran a campaign that successfully unseated incumbent Robert McCulloch after seven terms by "mak[ing] the election a referendum on the events of Ferguson . . . when McCulloch gained national prominence—and infamy—for his handling of grand jury investigation into . . . the fatal police shooting of Ferguson teenager Michael Brown, which ended in [no charges] against the officer."[111]

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108. Kaufman centers his justification for increased criminal penalties for police officers by highlighting the statistical disparities, stating:

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

Kaufman, Policing Police, supra note 104, at 356–57 (alteration in original) (footnotes omitted).

109. See Benjamin Levin, Imagining the Progressive Prosecutor, 105 Minn. L. Rev. 1415, 1438–40 (2021) (describing these policy positions as a staple of "prosecutorial progressivism").

110. See, e.g., Jonah E. Bromwich, Why Police Accountability Is Personal for This Manhattan D.A. Candidate, N.Y. Times (May 12, 2021), https://www.nytimes.com/2021/05/12/nyregion/alvin-bragg-manhattan-district-attorney.html (on file with the *Columbia Law Review*) ("[P]olice accountability . . . [is] at the center of his campaign to lead one of the most important district attorney's offices in the country.").

111. Danny Wicentowski, Wesley Bell's Win Surprised Everyone—Except His Campaign, Riverfront Times (Aug. 8, 2018), https://www.riverfronttimes.com/news/wesley-bells-win-surprised-everyone-except-his-campaign-22642547 [https://perma.cc/8Q37-7JZZ]. The grand jury's decision not to charge Wilson and similar nonindictments in other cases have also spurred academics to suggest changing the grand jury procedures for (only) police, or even abolishing the grand jury all altogether in cases of police violence. See Claire P. Donohue, Article 32 Hearings: A Road Map for Grand Jury Reform, 59 How. L.J. 469, 478–79 (2016) (arguing for open grand jury hearings in police misconduct cases); Roger A. Fairfax, Jr., Should the American Grand Jury Survive Ferguson?, 58 How. L.J. 825, 826 (2015) ("As a result of widespread outrage in the wake of . . . high-profile cases, politicians,

None of this is to say that left or progressive commentators consistently abandon anticarceral commitments when it comes to police. For example, the Movement for Black Lives has made divestment from the carceral state a hallmark of its proposed federal legislation, the BREATHE Act.[112] But this kind of programmatic divestment from the carceral system is often drowned out by louder calls from those with big platforms.

While police may appear to be an easy and isolated target for progressive punitivism, the several other case studies discussed in this Part will show that the arguments about, and criminal law solutions proposed to deal with, police brutality are repeated in several other contexts.

B. *Economic Crimes*

Intuitively, financial and economic crimes might be one of the more straightforward fits for a redistributive frame. "White-collar" crime has long been an area in which scholars and commentators have focused on inequality and the perceived impunity of the powerful.[113] We live in a country defined by growing economic inequality. Wages have stagnated, worker power has declined, and political and legal institutions that once kept capital *somewhat* in check have fallen by the wayside. Decades of neoliberal economic policy have led to an upward redistribution of wealth.[114] In turn, those policies have spawned a backlash from the left—from Occupy Wall Street to the rise of the Democratic Socialists of America and growing enthusiasm for politicians who explicitly speak in terms of economic inequality and the need for redistribution.[115] Against this

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pundits, scholars, and lawyers alike have renewed calls for an end to the grand jury in the United States."); Jasmine B. Gonzales Rose, Racial Character Evidence in Police Killing Cases, 2018 Wis. L. Rev. 369, 424 (advocating scrutiny of no true bills in police defendant cases). California has taken those suggestions to heart, abolishing the grand jury for police shootings. Allie Gross, California Becomes First State to Ban Grand Juries in Police Shooting Cases, Mother Jones (Aug. 13, 2015), https://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases [https://perma.cc/XRE6-6JS6].

112. The BREATHE Act, supra note 56, at 3–4.

113. See Aviram, supra note 11, at 219–20 (describing inquiries in white-collar crime scholarship, including a more "punitive" vein that "sees the impunity of white-collar criminals as a consequence of the overpowering neoliberal ethos").

114. Wendy Brown, Undoing the Demos: Neoliberalism's Stealth Revolution 213 (2015); David Harvey, A Brief History of Neoliberalism 16–19 (2005).

115. See, e.g., Ross Barkan, In New York City, Occupy Wall Street Got the Last Laugh, Jacobin (Sept. 21, 2021), https://jacobin.com/2021/09/occupy-wall-street-new-york-city-dsa-bloomberg-cuomo [https://perma.cc/6DGQ-VPWQ] (looking at politics in New York as a case study of the "broad revival of the Left in the United States"); Astra Taylor & Jonathan Smucker, Occupy Wall Street Changed Everything, N.Y. Mag. (Sept. 27, 2021), https://nymag.com/intelligencer/2021/09/occupy-wall-street-changed-everything.html [https://perma.cc/VQ3A-VE9W] (describing left organizing and politics after Occupy); Emily Stewart, We Are (Still) the 99 Percent, Vox (Apr. 30, 2019), https://www.vox.com/the-highlight/2019/4/23/18284303/occupy-wall-street-bernie-sanders-dsa-socialism

backdrop, many progressives and leftists have turned to criminal law as a means of disciplining capital, responding to the immorality (or, at least, amorality) of the marketplace, and curbing the perceived lawlessness of the wealthy.[116]

Criminal law—with its heightened penalties and moralistic language—operates as the apotheosis of state financial regulation.[117] The hope for liberal and left proponents of the criminal apparatus is that it might be repurposed to engage in a project of redistributing power and privilege not just through financial regulation but also through criminal punishment.[118] On this view, if the real economic crimes are being committed by the rich against the poor, the answer needn't be doing away with criminal law or punishment; rather, the goal should be altering the political economy such that the *real* crimes are prosecuted. Whether support for aggressive criminal enforcement of economic and white-collar crime comes from a progressive or more radical left perspective, it tends to reflect a view that criminal law is a necessary means of addressing inequality and that criminal law can do important work in recalibrating the balance of power in society. To see that move in action, it's worth considering three examples: liberal and left opposition to mens rea reform, support for wage theft criminalization, and calls for large-scale financial crime prosecutions.

Progressive lawmakers have opposed a number of criminal justice reform bills—particularly so-called "mens rea reform" statutes—because

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[https://perma.cc/6VUF-2SA3] (tracing the rise of the DSA and the popularity of Senator Bernie Sanders to the Occupy moment).

116. See Levin, Mens Rea Reform, supra note 16, at 528–40 (describing this approach).

117. On this view of criminal law as an extension of other regulatory approaches (rather than a distinct entity), see, e.g., Vincent Chiao, Criminal Law in the Age of the Administrative State, at vii (2019) ("[C]riminal law and its associated institutions are . . . subject to the same principles of institutional and political evaluation that apply to public law and public institutions generally."); Alice Ristroph, The Wages of Criminal Law Exceptionalism, 17 Crim. L. & Phil. 5, 15 (2023) ("To abandon exceptionalism is to abandon a perspective in which criminal law is taken for granted . . . . If instead, we focus our inquiries on human flourishing, seeking an honest assessment of criminal law's effects on human flourishing, that turn seems to me a great achievement in itself."); Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1389 (2022) ("I argue that the current moment should invite a de-exceptionalization of criminal law and a broader reckoning with the distributive consequences and punitive impulses that define the criminal system's functioning—and, in turn, define so many other features of U.S. political economy beyond criminal law and its administration."). On criminal law as a distinct entity, see generally R.A. Duff, The Realm of Criminal Law (2018) (aiming to create by reconstruction "a conception of criminal law as a distinctive kind of institution" and noting central features such as criminal law's "declarative definitions of . . . 'public' wrongs," criminal procedure, punishment, and the "processes of criminalization").

118. Cf. Aviram, supra note 11, at 225 (discussing Maoist approaches to criminal punishment grounded in remedying capitalist oppression); Michel Foucault, On Popular Justice: A Discussion with Maoists, *in* Knowledge/Power: Selected Interviews and Other Writings 1972–1977, at 1, 30 (Colin Gordon, Leo Marshall, John Mepham & Kater Soper eds., 1980) (same).

of the possibility that they might aid defendants charged with white-collar crimes.[119] Currently, many criminal statutes don't include clear mental state requirements; these reform bills would require the prosecution to prove that defendants acted purposely or knowingly (and in some cases that they were purposely or knowingly breaking the law).[120] Illinois Senator Dick Durbin has claimed that one such statute (which would benefit defendants of all classes charged with a host of different crimes)[121] "should be called the White Collar Criminal Immunity Act."[122] In the words of former President Barack Obama, criminal justice reform was a laudable goal, but legislation that might impede prosecution of financial crime could "undermine public safety and harm progressive goals."[123] And progressive calls for economic regulation in the wake of the 2008 Financial Crisis were often framed in terms of *criminal* impunity—why had no financial executive gone to prison when so many working class people suffered?[124] The problem wasn't capitalism; it was the failure to prosecute people who hadn't played by capitalism's rules. "White-collar" criminals have gotten rich at the expense of society, the argument goes, and the state should intervene to redistribute the wealth and power that they have unjustly earned.[125] This insistence that the state shouldn't need to meet its

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119. See, e.g., Mike Debonis, The Issue that Could Keep Congress From Passing Criminal Justice Reform, Wash. Post. (Jan. 20, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/ (on file with the *Columbia Law Review*); Carl Hulse, Why the Senate Couldn't Pass a Crime Bill Both Parties Backed, N.Y. Times (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html (on file with the *Columbia Law Review*); C.J. Ciaramella, The Senate Will Try Again on Sentencing Reform This Year, Reason (Oct. 4, 2017), http://reason.com/blog/2017/10/04/the-senate-will-try-again-on-sentencing [https://perma.cc/4RFJ-AG4B].

120. See, e.g., Mens Rea Reform Act of 2017, S. 1902, 115th Cong.; Stopping Over-Criminalization Act of 2015, H.R. 3401, 114th Cong.; Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong.; Mens Rea Reform Act of 2015, S. 2298, 114th Cong. For an extensive discussion of these bills, see Levin, Mens Rea Reform, supra note 16, at 509–17.

121. See Michael Serota, Strict Liability Abolition, 98 N.Y.U. L. Rev. 112, 163–69 (2023) (arguing that mens rea requirements would benefit many classes of defendants).

122. Matt Ford, Could a Controversial Bill Sink Criminal-Justice Reform in Congress?, The Atlantic (Oct. 26, 2017), https://www.theatlantic.com/politics/archive/2017/10/will-congress-reform-criminal-intent/544014 (on file with the *Columbia Law Review*) (internal quotations marks omitted).

123. Barack Obama, The President's Role in Advancing Criminal Justice Reform, 130 Harv. L. Rev. 811, 829 n.89 (2017).

124. See, e.g., Jesse Eisinger, The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives, at xvi (2017) (critiquing the failure to prosecute); Jennifer Taub, Big Dirty Money: The Shocking Injustice and Unseen Cost of White Collar Crime 131–34 (2020) (discussing how criminal punishments for white-collar crime do not provide much deterrence for the "morally flexible," who "clearly see that there would be few consequences for going down a criminal road, and that it pays to participate in a cover-up once caught red-handed").

125. In contrast, socialists, Marxists, and other more radical left-wing activists and commentators might understand the state in its most desirable form as a more explicit vehicle of redistribution. Philosopher Karl Marx's classic writing on "the theft of wood"

burden of proving a culpable mental state effectively scuttled multiple efforts at bipartisan "criminal justice reform" legislation.[126]

Similarly, over the last two decades, activists, academics, and policymakers have keyed on the problem of wage theft—bosses' failure to pay workers the wages they are owed.[127] While some of this activism has focused on civil enforcement or vehicles of worker empowerment (e.g., via unionization or worker centers), much of the work on wage theft has prioritized criminalization and prosecution as the desired vehicle for remedying the problem.[128] Advocates have called for new criminal statutes and increased criminal penalties—turning misdemeanors into felonies and seeking to increase possible jail or prison time have been frequent targets.[129] So-called "progressive prosecutors" and left-leaning DA

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argues not that there's something wrong with criminalization and punishment as such, but rather that criminalization and punishment in a capitalist society reflect (and construct) class oppression. See Karl Marx, Debates on the Law of Thefts of Wood, reprinted in 1 Karl Marx & Frederick Engels, Collected Works 224, 227–35. Criminal law in this account allowed property owners and members of the capitalist class to steal resources, while defining as "theft" the taking of property by the lower classes. See Peter Linebaugh, Stop, Thief!: The Commons, Enclosures, and Resistance 1–10 (2014) (critiquing these concepts of property, theft, and ownership); Pierre-Joseph Proudhon, What Is Property? 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840) (same); Peter Linebaugh, Karl Marx, the Theft of Wood, and Working-Class Composition, *in* Crime and Capitalism: Readings in Marxist Criminology 100, 103–05 (David F. Greenberg ed., 1993) (summarizing Marx's famous arguments about the theft of wood); Ahmed A. White, Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society, 37 Ariz. St. L.J. 759, 788–90 (2005) (noting the contemporary relevance of arguments that frame "criminal law as both reflecting and advancing the institutional and ideological interests of economic elites").

126. See Benjamin Levin, Decarceration and Default Mental States, 53 Ariz. St. L.J. 747, 754–56 (2021) (noting progressives' criticism that mens rea reform statutes "might shield rich, powerful defendants from prosecution, particularly in the realms of environmental and financial crime"); Levin, Mens Rea Reform, supra note 16, at 523–28 (similarly arguing that this criticism reflects a belief that "the wielders of capital and corporate executives" are the "*real criminals* that the system is designed to reach and on whom prosecutors should be focused").

127. See Kim Bobo, Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid and What We Can Do About It 7–15 (2011) (describing the problem of wage theft).

128. See Levin, Wage Theft, supra note 16, at 1446–76 (describing this preference for criminalization and prosecution in responding to wage theft).

129. The move to seek significant carceral penalties is particularly significant for two reasons. First, in a moment of skepticism about incarceration for even "violent" crimes, the turn to greater incarceration here is striking. See Ben Levin, Rethinking Wage Theft Criminalization, OnLabor (Apr. 13, 2018), https://onlabor.org/rethinking-wage-theft-criminalization/ [https://perma.cc/PSE5-LMLP] ("Ultimately, the push to criminalize wage theft provides an important opportunity for labor activists to reexamine their commitments. As I've written elsewhere, the impulse to use criminal law for 'progressive' ends is dangerous; it serves to bolster the carceral state and all of its deep structural flaws."). Second, the actual activism and advocacy for such carceral sentences stand in tension with claims from some on the left that the language of "theft" is more symbolic than literal—that activists want to see workers empowered, not employers incarcerated. See Eric Tucker, When

candidates—from Tiffany Cabán in Queens, to Larry Krasner in Philadelphia, to Chesa Boudin in San Francisco—have created special wage theft units or made prosecuting bad bosses a key component of their platforms.[130]

According to advocates, criminalizing wage theft and aggressively prosecuting bosses "should help send a strong message to employers about the importance of following workplace laws . . . [and] to hard working people that work is a thing of value and that intentionally stealing it is theft."[131] And criminalization proponents frame their advocacy explicitly as redistribution. According to workers' rights attorneys David Seligman and Terri Gerstein, "the threat of serious criminal sanction running . . . against the person who's abused [their] position of power[] helps to correct that power imbalance."[132] That is, employment relationships—particularly in low-wage sectors—are defined by inequality. Bosses hold all the cards and are essentially free to exploit workers. Prosecution and criminal punishment might help level the playing field and operate as a thumb on the scale in favor of otherwise powerless workers.

Prosecuting wage theft, according to criminalization supporters, is easily distinguishable from the objectionable corners of the criminal system. As Gerstein and Seligman argue, "[W]e don't think that bringing the criminal law to bear on predatory employers who take advantage of vulnerable workers exacerbates the injustices of our criminal justice system."[133] As one Chicago worker-center staffer explains his support for criminal law in this area, prison abolitionists "are right to protest the deeply unjust incarceration of poor people and people of color, particularly for nonviolent crimes" but should not "give a free pass to white-collar criminals, especially business owners who systematically

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Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master, 54 Osgoode Hall L.J. 933, 934 (2017) ("[W]hile the rhetoric of wage theft invokes the language of the criminal law, reformers typically stop short of calling for the imposition of criminal sanctions . . . .").

130. See, e.g., Juliana Feliciano Reyes, Philly DA's Office Launches a Unit to Prosecute Employers for Crimes Against Workers, Phila. Inquirer (Oct. 8, 2019), https://www.inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution-wage-theft-20191008.html (on file with the *Columbia Law Review*) ("[T]he Philadelphia District Attorney's Office has launched a unit to investigate and prosecute scofflaw employers. The new office is part of a nascent trend among progressive state and local prosecutors who are putting a priority on crimes committed against workers."); Oren Schweitzer, Tiffany Cabán, a Socialist in the District Attorney's Office, Jacobin (June 26, 2019), https://jacobinmag.com/2019/06/tiffany-caban-socialist-district-attorney-queens-election [https://perma.cc/WVH9-RWZL] (discussing Cabán's policy commitments, which include creating a wage theft unit to "take on hyper-exploitative bosses").

131. Terri Gerstein, Opinion, More States Should Follow New Colorado Policy on Wage Theft, The Hill (May 30, 2019), https://thehill.com/opinion/finance/446199-more-states-should-follow-new-colorado-policy-on-wage-theft [https://perma.cc/2LGM-62BR].

132. Gerstein & Seligman, supra note 29.

133. Id.

exploit workers."[134] And, as Cabán (a former public defender) describes the dynamic, "I represent people who are accused of stealing from their employers when in fact their employers are . . . stealing their wages."[135] According to Cabán, prosecutions of the real thieves (that is, the bosses) should be "prioritized."[136]

The structural issues with the criminal system (for example, unfettered prosecutorial discretion and harsh and dehumanizing punishment) don't seem to worry progressives here. While elsewhere critics rightly note that prosecutorial and law enforcement discretion tends to lead to the punishment of people from marginalized communities, those critiques are rarely heard here.[137] Instead, activists and advocates imagine those same flawed criminal legal institutions as antisubordination tools capable of empowering low-wage workers.[138] At the very least, carceral state critics suggest, if police and prosecutors really took harm seriously, they would focus on wage theft.[139]

The preference for criminal law as the tool of choice to address large-scale financial crime reflects a similar impulse. Much has been written about the United States' preference for white-collar criminal statutes over civil regulation.[140] There certainly might be different explanations for this

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134. César F. Rosado Marzán, Wage Theft as Crime: An Institutional View, 20 J.L. & Soc'y 300, 308–09 (2020) (quoting an email from a worker-center staffer).

135. Ella Mahony, Tiffany Cabán Knows Who the Bad Guys Are (Interview by Ella Mahony with Tiffany Cabán), Jacobin (May 23, 2019), https://jacobin.com/2019/05/tiffany-caban-queens-district-attorney-election [https://perma.cc/78LF-S9FJ].

136. Id.

137. But see Alan Bogg & Mark Freedland, A Framework for Discussion, *in* Criminality at Work 3, 12 (Alan Bogg, Jennifer Collins, Mark Freedland & Jonathan Herring eds., 2020) (noting the need to consider critical takes on criminalization in discussions of using criminal law to remedy workplace wrongs); Stephen Lee, Policing Wage Theft in the Day Labor Market, 4 U.C. Irvine L. Rev. 655, 664–68 (2014) (describing the ways that criminal enforcement might harm immigrant workers); Levin, Wage Theft, supra note 16, at 1481–1505 (arguing that critiques of criminalization should apply to efforts to criminalize wage theft).

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

139. See, e.g., Alec Karakatsanis, The Punishment Bureaucracy: How to Think About "Criminal Justice Reform", 128 Yale L.J. Forum 848, 886, 898 (2019), https://www.yalelawjournal.org/pdf/Karakatsanis_msbotakz.pdf [https://perma.cc/LK7V-VXKL] ("'Law enforcement' could infiltrate boarding-school campuses to bust underage drinking and tobacco use or set up sting operations to fight widespread wage theft by employers. The choices that the bureaucracy makes involve direct tradeoffs, for example, from black families to corporate executives or from drug sellers to sexual abusers.").

140. See, e.g., James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe 7–10, 47, 80–82 (2003) (discussing U.S. preferences for punishment); Miriam H. Baer, Choosing Punishment, 92 B.U. L. Rev. 577, 581 (2012) (same); Darryl K. Brown, Criminal Law's Unfortunate Triumph Over Administrative Law, 7 J.L. Econ. & Pol'y 657, 682–83 (2011) (same).

preference, but prosecuting some imagined class of bankers or executives remains very popular with many liberal, left, and progressive commentators. On the tenth anniversary of the 2008 financial crisis, Senator Elizabeth Warren introduced the "Ending Too Big to Jail Act" as a direct response to concerns that the finance industry's irresponsibility hadn't led to prison sentences.[141] "When Wall Street CEOs break the law, they should go to jail like anyone else. The fraud on Wall Street won't stop until executives know they will be hauled out in handcuffs for [] cheating their customers and clients," announced Senator Warren in a press release.[142]

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

> The Great Recession of 2008 is a telling example of federal prosecutors' inability to punish corporate wrongdoing. Malfeasance on Wall Street produced a financial crisis that extinguished nearly 40% of family wealth from 2007 to 2010, pushing the household net worth back to 1992 levels. Despite these appalling statistics, not even ONE executive at a major Wall Street bank was criminally charged for playing a role in the 2008 global financial collapse. Everyday Americans were forced to pay the price for rampant speculation, mismanagement and fraud on Wall Street.[143]

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

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141. See Press Release, Sen. Elizabeth Warren, On Tenth Anniversary of Financial Crisis, Warren Unveils Comprehensive Legislation to Hold Wall Street Executives Criminally Accountable (Mar. 14, 2018), https://www.warren.senate.gov/newsroom/press-releases/on-tenth-anniversary-of-financial-crisis-warren-unveils-comprehensive-legislation-to-hold-wall-street-executives-criminally-accountable [https://perma.cc/7ULC-59F6].

142. Id. Senator Warren, one of the most vocal supporters of increased financial oversight, frequently has supported criminal law as the right response to the behavior of "Wall Street." See, e.g., Bridget Bowman, Elizabeth Warren Releases Report Showing How Corporate Criminals Get Off Easy, Roll Call (Jan. 29, 2016), https://rollcall.com/2016/01/29/elizabeth-warren-releases-report-showing-how-corporate-criminals-get-off-easy/ [https://perma.cc/92XD-8AMW]; Peter J. Henning, Elizabeth Warren Wants to Make It Easier to Prosecute Executives, N.Y. Times (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/business/dealbook/elizabeth-warren-finance-executives.html (on file with the *Columbia Law Review*).

143. Join Occupy the SEC in Urging the Congress to Oppose H.R.A. 4002 ("Criminal Code Improvement Act of 2015"), Petition2Congress, https://www.petition2congress.com/ctas/join-occupy-sec-in-urging-congress-to-oppose-hr4002-criminal-code [https://perma.cc/5KUY-NWV2] (last visited Feb. 16, 2024).

C. *Hate Crimes*

The criminalization of violence targeted at marginalized communities has long enjoyed support in many progressive circles.[144] Supporters have argued that crimes based on hatred for a particular race, gender, sexuality, or other social identity are worse than crimes without such animus because of the longstanding harms of bigotry and exclusion.[145] Each crime victimizes an entire community and does harm that is amplified by a history of subordination.

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

> One widely cited definition of hate crimes, used by the FBI to collect national hate crime statistics, defines a hate crime as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." While that definition focuses on the defendant's motive, other definitions focus on the intentional selection of victims on account of their identity. For instance, many state law definitions of hate crimes require the targeting of a person or group because of their membership in a legally protected group, while varying as to the range of status groups protected.[146]

It is the second definition—the idea that a person who targets a particular identity group should be liable for a sentence enhancement or specialized prosecution—that sparks progressive support for hate crime legislation and prosecution. Hate crime prosecution is seen as restoring or affirming value to a group that has been historically marginalized. Indeed, to some, not pursuing hate crime prosecution is a remarginalization. As Tuerkheimer writes: "[T]he underenforcement of hate crime laws compounds the subordinating effects of the violence. An unpunished hate crime expresses a devaluation of the victim—not only by the perpetrator, but also by the state."[147]

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144. See, e.g., Jeannine Bell, Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime 1 (2002) (describing the justification for hate crime statutes); Charles H. Jones, Jr., An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment, 21 Harv. C.R.-C.L. L. Rev. 689, 736 (1986) ("The failure of our society to provide adequate redress to the victims of racially motivated violence, and sufficiently punish the perpetrators, serves only to exacerbate the problem, and could lead ultimately to violent response from those victims."); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2380 (1989) (advocating the criminalization of hate speech); Sinnar, Hate Crimes, supra note 16, at 509 ("Supported by civil rights groups but constrained by prevailing law-and-order politics, the hate crimes frame elevated attention to racist violence but construed it as a problem of biased private individuals and prioritized criminal law solutions.").

145. See supra note 144 (collecting sources).

146. Sinnar, Hate Crimes, supra note 16, at 504 (footnote omitted).

147. Tuerkheimer, supra note 11, at 1160; see also Janice Nadler, Ordinary People and the Rationalization of Wrongdoing, 118 Mich. L. Rev. 1205, 1230 (2020)

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

In February 2020, Ahmaud Arbery was jogging in a Georgia neighborhood called Satilla Shores when three white men chased him in a pickup truck before shooting and killing him.[148] Arbery was unarmed and not involved in any altercation with the men.[149] In other words, there was little evidence that the killing could be justified by anything other than racism against Arbery. All three men were convicted of and received life sentences for murder in Georgia.[150] They also were convicted of federal hate crimes.[151]

But many civil rights organizations[152] and progressive academics[153] alike believed that a state murder conviction was not enough or did not express the correct sense of outrage for the racially motivated killing. Thus, they pushed for a state hate crime bill to ensure that such killings were not treated as ordinary murders.[154] Before this killing, Georgia was one of only four states that did not have such a law.[155] The stated goal of

("Underenforcement can signal to members of vulnerable groups that their lives do not matter, that if they are murdered, their killer will not be brought to justice."); cf. Hampton, Punishment, Feminism, and Political Identity, supra note 40, at 39 (making this broader claim about the expressive function of punishment).

148. Richard Fausset, What We Know About the Shooting Death of Ahmaud Arbery, N.Y. Times (Aug. 8, 2022), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html (on file with the *Columbia Law Review*).

149. Id.

150. Id.

151. Id.

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

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

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

155. Angela Barajas, Dianne Gallagher & Erica Henry, Georgia Governor Signs Hate Crime Bill Spurred by Outrage Over Ahmaud Arbery's Killing, CNN (June 26, 2020),

progressives linking this new law to the Arbery case was to ensure that historically dominant groups would be punished for crimes they committed out of hatred for marginalized groups. The ACLU and the NAACP actually withdrew their support for the eventual law because the legislature added "first responders" to the list of potential hate crime victims.[156] In other words, progressives balked at the idea that people already seen as powerful (i.e., police officers) might be treated as hate crime victims.

The Arbery case is hardly unique as an illustration of progressives' desire to respond to racist violence with more punishment. Recently, there has been a push to protect AAPI people through the use of the carceral state. Perhaps spurred by racist rhetoric from former President Donald Trump[157] and other right-wing politicians blaming the COVID-19 pandemic on China and Chinese people, reported crimes against AAPI people surged.[158] In response, the federal government passed the "COVID-19 Hate Crimes Act,"[159] which President Joe Biden signed into law on May 20, 2021.[160] The Act provides funding to streamline prosecutions of crimes against Asian Americans, particularly crimes related to COVID-19.[161] This legislation was supported by the ACLU, which said that the new bill would "bring[] us one step closer to addressing white

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https://www.cnn.com/2020/06/26/us/georgia-hate-crime-bill/index.html [https://perma.cc/PQJ8-2HPF].

156. Ben Nadler, Police In, Then Out, as Georgia Hate Crimes Bill Moves Ahead, Seattle Times (June 22, 2020), https://www.seattletimes.com/nation-world/nation/support-flips-after-police-added-to-georgia-hate-crimes-bill/ (on file with the *Columbia Law Review*).

157. See, e.g., Adam Gabbatt, Republicans Face Backlash Over Racist Labeling of Coronavirus, The Guardian (Mar. 10, 2020), https://www.theguardian.com/world/2020/mar/10/republicans-face-backlash-racist-labeling-coronavirus-china-wuhan [https://perma.cc/H6YM-97RM]; Colby Itkowitz, Trump Again Uses Racially Insensitive Term to Describe Coronavirus, Wash. Post (June 23, 2020), https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html (on file with the *Columbia Law Review*).

158. More Than 9,000 Anti-Asian Incidents Have Been Reported Since the Pandemic Began, NPR (Aug. 12, 2021), https://www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi [https://perma.cc/V9H5-6CS7] (noting that more than 9,000 crimes against AAPI people were reported in the year after COVID-19 began); see also Shirin Sinnar, The Conundrums of Hate Crime Prevention, 112 J. Crim. L. & Criminology 801, 806 (2022) [hereinafter Sinnar, Conundrums of Hate Crime Prevention] ("[H]ate crimes and harassment targeting Asian Americans have soared during the pandemic. Hate crime statistics are notoriously unreliable . . . . Nonetheless, many sources of data suggest a rise that seems unlikely to result simply from increased attention or reporting." (footnote omitted)).

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

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

161. Id.

supremacist violence."[162] The bill received support from progressive politicians and national progressive groups despite opposition by many local and grassroots AAPI organizations.[163]

At the state level, groups are also pushing to enhance hate crime legislation based on crimes against AAPI people. In New York, the Asian American Bar Association's (AABANY) stated mission sounds in progressive themes: "collaboration in the pursuit of social justice . . . ."[164] Recently, AABANY advocated hate crime legislation in a report called *Endless Tide*.[165] The report chronicles crimes against Asian Americans since the start of the pandemic and calls for legislation to amend New York's hate crime legislation to "remove two unduly restrictive requirements and to re-categorize the crime of Aggravated Harassment":

> The requirement that race be a motivating factor in the crime "in whole or in substantial part" should be revised to "in whole or in part" to permit more latitude where a defendant may have targeted a victim based on multiple or shifting motivations. In addition, the restriction of hate crime enhancements to an arbitrary list of offenses should be eliminated. Furthermore, the crime of Aggravated Harassment includes acts targeting persons because of their race, ethnicity, and other protected characteristics. These crimes should be re-categorized under the hate crimes statute.[166]

To ensure that crimes against AAPI people were sufficiently punished, AABANY also supported retrenching on more general criminal procedure laws. New York had passed legislation that ended money bail for many categories of arrestees before trial.[167] AABANY asked that the state reimpose stricter bail requirements and supported new proposed legislation to "permit[] bail determination for serious felonies to consider factors such as criminal history, mak[e] repeat offenses bail eligible,

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162. Press Release, ACLU, ACLU Comment on COVID-19 Hate Crimes Act Being Signed Into Law, ACLU (May 20, 2021), https://www.aclu.org/press-releases/aclu-comment-covid-19-hate-crimes-act-being-signed-law [https://perma.cc/2639-NBD3] (internal quotation marks omitted) (quoting Manar Waheed, Senior Legislative and Advocacy Counsel, ACLU).

163. Sinnar, Conundrums, supra note 158, at 809–10 ("[O]ver 100 local-level Asian and LGBTQ groups objected to the Covid-19 Hate Crimes Act for what they viewed as centering law enforcement solutions.").

164. About AABANY, Asian Am. Bar Ass'n N.Y., https://www.aabany.org/page/A1 (on file with the *Columbia Law Review*) (last visited July 10, 2024).

165. Asian Am. Bar Ass'n N.Y., Endless Tide: The Continuing Struggle to Overcome Anti-Asian Hate in New York 4–7 (2022), https://www.maglaw.com/media/publications/articles/2022-05-31-endless-tide-the-continuing-struggle-to-overcome-anti-asian-hate-in-new-york/_res/id=Attachments/index=0/Endless_Tide_Report_2022_FIN.pdf [https://perma.cc/79Y6-FBVG].

166. Id. at 6.

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

mak[e] hate crime offenses subject to arrest, and mak[e] gun-related offenses bail eligible."[168] The group urged even more restrictive bail conditions, advocating that "[b]ail determinations should consider public safety and whether a person charged poses a danger to the community."[169] That is, people too poor to pay bail became collateral damage in the effort to address anti-AAPI racism via criminal law.[170]

In Atlanta, the killing of several AAPI people in 2021 prompted "progressive" Fulton County District Attorney Fani Willis to reverse her campaign promise never to seek the death penalty.[171] Less than a year after her election, Willis sought the death penalty for a man charged with killing eight people, many of Asian descent, at spas in the Atlanta area.[172] Willis justified her decision in terms of empowering marginalized groups and signaling that the community valued members of the AAPI community. She stated that she would bring such charges to show victims that "it does not matter your ethnicity, it does not matter what side of the tracks you come from, it does not matter your wealth, you will be treated as an individual with value."[173]

D. *Crimes of Gender Subordination*

Much ink has been spilled over the use of criminal law to address gender subordination.[174] Under the banner of feminism, many progressive movements have encouraged the use of the carceral system to respond to nonconsensual sex and intimate partner violence.[175] The current carceral feminist movement appears particularly focused on incarceration as a form of power redistribution—to put men who abuse or harass women in

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168. Asian Am. Bar Ass'n N.Y., supra note 165, at 7.

169. Id.

170. See, e.g., Li Zhou, Hate Crime Laws Won't Actually Prevent Anti-Asian Hate Crimes, Vox (June 15, 2021), https://www.vox.com/2021/6/15/22480152/hate-crime-law-congress-prevent-anti-asian-hate-crimes [https://perma.cc/E24L-V8Y3] (arguing that the focus of anti-AAPI hate crime legislation on policing fails to get at the "root cause" of such racism).

171. Bill Rankin, Fulton DA, Two Challengers Commit to Not Seeking the Death Penalty, Atlanta J.-Const. (May 28, 2020), https://www.ajc.com/news/local/fulton-two-challengers-commit-not-seeking-the-death-penalty/7sfZRVL5ngc3eRf9Xo2MgJ/ [https://perma.cc/54HS-FEZN].

172. Nicholas Bogel-Burroughs, Atlanta Spa Shootings Were Hate Crimes, Prosecutor Says, N.Y. Times (May 11, 2021), https://www.nytimes.com/2021/05/11/us/atlanta-spa-shootings-hate-crimes.html (on file with the *Columbia Law Review*) (last updated May 24, 2021).

173. Id. (internal quotation marks omitted).

174. See, e.g., Gruber, The Critique of Carceral Feminism, supra note 6, at 63 (arguing that feminist carceral support is historical and current).

175. See, e.g., Gruber, The Feminist War on Crime, supra note 2, at 170 ("[P]lenty of feminists, veteran and ingenue, remain committed not just to upholding the existing feminist crime control regimes and closing 'loopholes' in them but also to creating new ones . . . .").

prison to empower women more generally.[176] Men who abuse or harass women are seen (perhaps accurately) as above the law, whether because their crimes are not reported or because the legal system is ill-equipped to deal with intimate violence.[177] Instead of seeing the terrible fit between criminalization and intimate partner violence,[178] however, many progressives continue to advocate the use of the carceral system to right these wrongs.[179]

A few examples from the past several years serve to make the point. The first is the case of Brock Turner, perhaps better known as the "Stanford Rapist," whose relatively light sentence after a conviction for sexual assault of an unconscious woman led not only to mass public condemnation but also to the recall of the judge who passed down this sentence.[180] The second is the successful movement to criminalize "revenge porn" or the dissemination of intimate images without the consent of the sender.[181] The final example is the movement to expand the definition of domestic violence to criminalize "coercive control."[182]

In 2015, Turner, a Stanford student athlete, was in the process of assaulting an unconscious woman when he was confronted by two other students.[183] He was convicted of sexually assaulting the woman, Chanel Miller.[184] As Gruber argues, Turner "represents millennial feminists' archetype of a bogeyman. . . . [H]is bad behavior was . . . a product of wealth, race, and male privilege."[185] Judge Aaron Persky sentenced Turner to six months in prison and a lifetime on the sex offender registry.[186] Given

176. This position is often traced to the structural "dominance" or "antisubordination" feminism of Catharine MacKinnon and other second-wave feminists. See id. at 123–42.

177. See, e.g., Margo Kaplan, Rape Beyond Crime, 66 Duke L.J. 1045, 1062–63 (2017) ("Although reforming the criminal law of rape is necessary, this single step is decidedly insufficient. The words of statutes themselves are unlikely to effect real change in the reporting, prosecution, or prevention of rape without significant change to the underlying culture in which those statutes are interpreted and applied.").

178. See, e.g., Beth E. Richie, Arrested Justice: Black Women, Violence, and America's Prison Nation 17 (2012) (arguing that "women of color from marginalized communities who experience violence are made more vulnerable by the operation of a prison nation").

179. In this respect, we agree with Professor Hadar Aviram that "carceral feminism shares important characteristics with other progressive movements deploying criminal justice for progressive ends—including those that advance the interests of people of color." Aviram, supra note 11, at 207–08.

180. See infra notes 183–194 and accompanying text.

181. See infra notes 195–205 and accompanying text.

182. See infra notes 206–212 and accompanying text.

183. Gruber, The Feminist War on Crime, supra note 2, at 178.

184. Id.; see also Concepción de León, You Know Emily Doe's Story. Now Learn Her Name., N.Y. Times (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/books/chanel-miller-brock-turner-assault-stanford.html (on file with the *Columbia Law Review*) (last updated Sept. 24, 2019).

185. Gruber, The Feminist War on Crime, supra note 2, at 178.

186. Id. at 180.

the possibility of the statutory fourteen-year sentence, however, feminist groups were outraged at this perceived leniency.[187]

Stanford Law School Professor Michele Dauber, whose daughter was a friend of Miller's, called Miller's statement at Turner's sentencing "the manifesto of the Me Too movement."[188] Dauber led a successful and nationally publicized campaign to recall Persky.[189] Her movement won the support of "unions and prominent feminists, including Kirsten Gillibrand, Lena Dunham and Anita Hill."[190] "[A]t least ten prospective jurors . . . refused to serve" in an unrelated trial before then-Judge Persky because of his sentencing in Turner's case.[191]

Dauber argued that the recall campaign was not only about protecting women from the "lenient" judge.[192] As she explained, "The fact that Turner's victim was an Asian-American woman of color made [the recall] . . . even more important, given that research indicates survivors of color may be less likely to be believed."[193] In other words, some recall proponents imagined their campaign as reflecting not only a mission of gendered power redistribution but also a broader intersectional power-shifting project.[194]

While cases like Turner's deal with the meting out of incarceration based on well-established sexual assault laws, progressive scholars and lawmakers also advocate new criminal laws in various areas where gender subordination or intimate partner violence is suspected. One area is "revenge porn," in which a person (stereotypically a male) uses an intimate image sent to him by his (stereotypically female) partner to harm her after a perceived slight, such as a breakup.[195] He does this by

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187. See Julia Ioffe, When the Punishment Feels Like a Crime, HuffPost (June 1, 2018), https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber [https://perma.cc/RL2E-AP7J] (describing the coalition of feminist groups supporting an effort to recall Turner's sentencing judge).

188. Id. (internal quotation marks omitted).

189. Id.

190. Id.

191. Andrew Cohen, Should Jurors Refuse to Serve With the Judge in the Brock Turner Case?, Marshall Project (June 13, 2016), https://www.themarshallproject.org/2016/06/13/mutiny-in-the-jury-box [https://perma.cc/WYW5-AUUL]; Tracey Kaplan, Brock Turner Case Fallout: Prospective Jurors Refuse to Serve Under Judge, E. Bay Times (June 9, 2016), https:/www.eastbaytimes.com/2016/06/09/brock-turner-case-fallout-prospective-jurors-refuse-to-serve-under-judge (on file with the *Columbia Law Review*) (last updated Aug. 15, 2016) (noting that one juror stated, "I can't be here, I'm so upset," in reference to Turner's sentence (internal quotation marks omitted)).

192. Jeannie Suk Gersen, Revisiting the Brock Turner Case, New Yorker (Mar. 29, 2023), https://www.newyorker.com/news/our-columnists/revisiting-the-brock-turner-case (on file with the *Columbia Law Review*).

193. Id. (internal quotation marks omitted).

194. But see infra section III.A.2 (tracking the harms done to defendants of color as a result of the recall).

195. Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 Wake Forest L. Rev. 345, 346 (2014) (defining revenge porn as "interchangeabl[e] with

disseminating the image publicly or sending it to a large group to shame the person in the image.

Criminalizing revenge porn is an area in which progressive scholars and activists have been immensely successful at instituting their agenda.[196] While only three states directly criminalized revenge porn before 2013, just ten years later, forty-eight states had statutes addressing the issue in some manner.[197] Proponents of new criminal laws for revenge porn see it as the best way to punish those who use their possession of intimate material to shame their victims, leaving these (mostly) women[198] powerless to control their own likeness: "Disclosing sexually explicit images without permission can have lasting and destructive consequences. Victims often internalize socially imposed shame and humiliation every time they see them and every time they think that others are viewing them."[199] Indeed, revenge porn is seen as tantamount to a sexual assault crime in that it is "degrading and humiliating for the victim's dignity."[200]

Prominent scholars Danielle Keats Citron and Mary Anne Franks argue that subordinated women are more likely to suffer "degradati[on]" from revenge porn than men: "[S]tereotypes help explain why—women would be seen as immoral sluts for engaging in sexual activity, whereas men's sexual activity is generally a point of pride."[201] They argue that ensuring that the revenge porn perpetrator is prosecuted rather than simply sued gives power back to the female victim by ensuring that men who misuse their images are also permanently "degrad[ed]" by a criminal conviction that "in most cases stay[s] on one's record forever."[202]

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nonconsensual porn," which is "the distribution of sexually graphic images of individuals without their consent," including "images originally obtained without consent . . . as well as images originally obtained with consent").

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

197. Gilden, supra note 196, at 818.

198. Citron & Franks, supra note 195, at 354 (noting that victims of revenge porn tend to be female and noting that "60% of cyber stalking victims are women" and that "[o]f the 3,787 individuals reporting cyber harassment to [Working to Halt Online Abuse] from 2000 to 2012, 72.5% were female, 22.5% were male, and 5% were unknown").

199. Id. at 364.

200. Id. at 362–64 (internal quotation marks omitted) (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 186 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998)) (noting that international criminal law punishes not just physical sexual violence but also sexual abuses that affect a person's "moral integrity" and "dignity," both of which are issues implicated by nonconsensual pornography).

201. Id. at 353 (citing Danielle Keats Citron, Hate Crimes in Cyberspace 21 (2014)).

202. Id. at 349, 353.

Criminal law, according to these authors, is necessary to do the work of gender justice.[203] In response to the anticipated critique that their newly proposed criminal laws would unnecessarily enlarge the criminal codes, Citron and Franks respond: "Only the shallowest of thinkers would suggest that the question whether nonconsensual pornography should be criminalized—indeed, whether any conduct should be criminalized—should turn on something as contingent and arbitrary as the number of existing laws."[204]

This is, in a way, a refreshing acknowledgement that the authors are not concerned with any increase in the number of those incarcerated, so long as prison is also the place for those who degrade subordinated victims through revenge porn.[205]

Finally, there is the recent movement to expand the definition of domestic violence to include the concept of "coercion."[206] Feminists have long argued that domestic violence is not only physical. That intuition is reflected in "battered person syndrome" cases in which no specific act of violence precipitates the killing, but rather a long pattern of abuse instills fear, leading an abused defendant to believe they are in imminent danger.[207]

Recent years have seen a strong push to make nonviolent abuse criminal in and of itself. In 2023, New Jersey expanded the definition of domestic violence in its penal code by adding the term "coercive control"

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203. Id. at 349 ("[A] criminal law solution is essential . . . ."); see also Bobby Chesney & Danielle Citron, Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security, 107 Calif. L. Rev. 1753, 1801 (2019) (proposing criminal liability as one way to punish the creation of "deepfakes"); Mary Anne Franks & Ari Ezra Waldman, Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions, 78 Md. L. Rev. 892, 897 (2019) ("[A]rguing that we should not enact [criminalization of] harmful speech because historical speech restrictions often targeted minority voices is like saying we should not criminalize rape because the criminal law has long been used to subjugate women.").

204. Citron & Franks, supra note 195, at 362.

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

206. Patricia Fersch, A Call to Amend Domestic Violence Laws Nationwide to Include Coercion and Control, Forbes (Dec. 8, 2021), https://www.forbes.com/sites/patriciafersch/2021/12/08/coercion-and-control-update-year-end-2021/ (on file with the *Columbia Law Review*) (warning that the failure to expand the definition of domestic violence to include coercion and control may lead to psychologists, psychiatrists, and courts failing to recognize these issues and deter women from speaking up against abuse).

207. Abigail Finkelman, Note, Kill or Be Killed: Why New York's Justification Defense Is Not Enough for the Reasonable Battered Woman, and How to Fix It, 25 Cardozo J. Equal Rts. & Soc. Just. 267, 284 (2019) ("When BPS is raised . . . an expert testifies about the effects of sustained battering on a victim's psyche . . . . It is then argued that . . . battered women should not be held to the classic 'reasonable man' standard (the objective standard), and that there should be a 'reasonable battered woman' standard . . . .").

to the language of the statute, which had otherwise reserved criminal condemnation for an act of physical violence. Coercive control:

> [M]eans a pattern of behavior against a person protected under this act that in purpose or effect unreasonably interferes with a person's free will and personal liberty. "Coercive control" includes, but is not limited to, unreasonably engaging in any of the following:
>
> (a) Isolating the person from friends, relatives, or other sources of support;
> (b) Depriving the person of basic necessities;
> (c) Controlling, regulating or monitoring the person's movements, communications, daily behavior, finances, economic resources or access to services;
> (d) Compelling the person by force, threat or intimidation, including, but not limited to, threats based on actual or suspected immigration status, to (i) engage in conduct from which such person has a right to abstain, or (ii) abstain from conduct that such person has a right to pursue;
> (e) Name-calling, degradation, and demeaning the person frequently;
> (f) Threatening to harm or kill the individual or a child or relative of the individual;
> (g) Threatening to public information or make reports to the police or to the authorities;
> (h) Damaging property or household goods; or
> (i) Forcing the person to take part in criminal activity or child abuse.[208]

New Jersey isn't alone—at least three other states have seen similar unsuccessful legislative efforts in recent years.[209]

As the language of the New Jersey statute demonstrates, the addition of coercive control opens up a wide swath of behavior that can now be criminalized. This kind of broad discretion to prosecute intimate abuse is exactly what its progressive proponents want. As one expert in the field and the founder of one of the first battered women's shelters put it, coercive control is "oppressive behavior grounded in gender-based privilege."[210] Indeed, enlarging the criminal code for domestic violence to include mental as well as physical coercion has long been a project of

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208. Gen. Assemb. A1475.3.a(20), 220th Gen. Assemb., Reg. Sess. (N.J. 2023).

209. See Courtney K. Cross, Coercive Control and the Limits of Criminal Law, 56 U.C. Davis L. Rev. 195, 224 (2022) ("New York, South Carolina, and Washington each introduced bills that would criminalize coercive control.").

210. Patricia Fersch, Domestic Violence: Coercion and Control Equates to a Loss of Liberty, Sense of Self and Dignity for Women, Forbes (Mar. 19, 2021), https://www.forbes.com/sites/patriciafersch/2021/03/19/domestic-violence-coercion-and-control-equates-to-a-loss-of-liberty-sense-of-self-and-dignity-for-women/ (on file with the *Columbia Law Review*).

carceral feminists.[211] Scholars have advocated protecting victims of domestic violence through criminalizing nonphysical coercion, from proposing a similar expansion to New Jersey's new law, to arguing that the United States should criminalize coercion as a form of fraud, to suggesting a crime of domestic battery that includes behavior that "the defendant 'knows or reasonably should know . . . is likely to result in substantial power or control.'"[212]

In this Part, we have outlined several contexts in which progressives seek to deploy criminal legal institutions as tools of redistribution. Much of this work is siloed—in other words, a carceral feminist may not believe that employee theft should be criminally punished.[213] She may also believe generally that the criminal legal system must be scaled back, even substantially. Yet in the aggregate, these redistributive projects (and the many others we do not detail here) might well strengthen the carceral state and exacerbate inequality. This is the issue we turn to in the next Part.

III. THE LIMITS OF PUNITIVE REDISTRIBUTION

As outlined in the previous Part, progressive lawmakers, activists, and academics have justified the turn to criminal legal institutions in distributive (or redistributive) terms. In this Part, we criticize that turn and the framing of criminal law as a potential engine of redistribution. First, we argue that criminal legal institutions simply can't achieve the redistributive ends that proponents suggest. We contend that a distributive case for criminalization requires empirical support for claims about positive distributive consequences—support that is sorely lacking. Further, we argue that the institutions of the punitive state are inherently regressive and antithetical to the egalitarian vision articulated by many of the commentators who have embraced redistributive carceral projects. Second, we claim that even if criminal law could do some of the redistributive work that proponents claim, the turn to criminal law still wouldn't be justified. Criminal law would do more harm than good, or, at the very least, scholars and activists committed to more radical visions of social change should be unwilling to accept the evils of state violence that any criminalization project entails, even in the name of redistribution.

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211. Gruber, The Feminist War on Crime, supra note 2, at 123–28 (discussing "dominance feminism" and consensual sex as coercion).

212. Cross, supra note 209, at 217–19 (collecting sources) (quoting Deborah Tuerkheimer, Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence, 94 J. Crim. L. & Criminology 959, 1019 (2004)).

213. Cf. Aharonson, supra note 26, at 288 (noting commonalities across different "'pro-minority' criminalization" projects); Aviram, supra note 11, at 207–08 (observing that "carceral feminism shares important characteristics with other progressive movements deploying criminal justice for progressive ends—including those that advance the interests of people of color").

A. *Distributive Objections*

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

1. *Law on the Ground vs. Law in the Cultural Imagination.* — To the extent that many progressives support criminal law for redistributive ends, progressives need to answer an empirical question: Does criminal law actually distribute in the way that they imagine?

Looking to the examples discussed in Part II, our tentative answer is "no." We lack extensive studies mapping, say, who is prosecuted for wage theft or which defendants receive harsher sentences for hate crimes. But the anecdotal evidence that we have (and the actual studies, in some cases) seem to indicate a troubling mismatch between progressive rhetoric and the realities of criminal enforcement. That mismatch hardly should be surprising: Race–class subordinated populations tend to face heavier policing than whiter and wealthier populations,[214] and studies have shown that minoritized defendants tend to face harsher charges and sentences.[215] It's likely that a new criminal statute or program of ramped-up enforcement would reflect similar dynamics.

Of course, the left and progressive advocates discussed in Part II don't see themselves as advocating further criminalization of marginalized communities—just the opposite.[216] Their imagined defendants represent the rich, the powerful, or the socially dominant. The imagined wage thief or rapist might be white, wealthy, and privileged. And pro-punitive advocacy frequently embraces or relies on that image.[217] But there is no

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214. See Monica C. Bell, Anti-Segregation Policing, 95 N.Y.U. L. Rev. 650, 705–09 (2020) [hereinafter Bell, Anti-Segregation Policing] ("[A] larger number of officers may be assigned to 'high-crime,' predominantly Black or Latinx parts of cities, affecting both the statistical likelihood of crime detection and structuring the mental frameworks of the officers assigned to those areas.").

215. See, e.g., Allen J. Beck & Alfred Blumstein, Racial Disproportionality in U.S. State Prisons: Accounting for the Effects of Racial and Ethnic Differences in Criminal Involvement, Arrests, Sentencing, and Time Served, 34 J. Quantitative Criminology 853, 877 (2018) (finding that for drug possession, drug trafficking, and weapons offenses, racial and ethnic disproportionality is "more responsive to police presence and patrol patterns and . . . the most sensitive to implicit or explicit racial profiling"); M. Marit Rehavi & Sonja B. Starr, Racial Disparity in Federal Criminal Sentences, 122 J. Pol. Econ. 1320, 1323 (2014) (describing sentence disparities between Black and white defendants).

216. See, e.g., Tuerkheimer, supra note 11, at 1162–64 (critiquing the War on Drugs and calling for criminal law to do "antisubordination" work instead); Gerstein & Seligman, supra note 29 (arguing that wage theft enforcement is distinct from other objectionable corners of the criminal system).

217. Cf. Thomas Ward Frampton, The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics, 135 Harv. L. Rev. 2013, 2037 (2022) ("Animating much of our

guarantee that the cultural framing of a given law will reflect how the law operates on the ground.[218] Why should we think that the people who are prosecuted or punished will actually be white, wealthy, or powerful?[219]

For example, a 2000 FBI report on white-collar crime enforcement stated that three times more economic crimes were committed at convenience stores (129,749) than at banks (38,364).[220] The mean amount stolen or counterfeited in white-collar incidents was $9,254.75, the median was $210, and the mode was $100.[221] That is, advocacy geared at white-collar crime enforcement appears just as likely to lead to more check fraud prosecutions as it is to mean a focus on executives at the nation's biggest banks.[222] And a rough survey of wage theft prosecutions appears to yield a focus on small, immigrant-run businesses or middle managers, rather than the executives of multinational corporations.[223]

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thinking about criminal law and policy in recent decades is 'the story of an imagined monstrous other—a monster who is not quite human like the rest of us . . . .'" (quoting Sered, supra note 18, at 11)).

218. This potential mismatch should be a cause for concern—or at least introspection and further study—in many ideologically loaded areas of criminal policy. See, e.g., Aya Gruber, Leniency as a Miscarriage of Race and Gender Justice, 76 Alb. L. Rev. 1571, 1572–74 (2013) (noting progressives' criticism of stand-your-ground laws after Trayvon Martin's death); Aya Gruber, A Provocative Defense, 103 Calif. L. Rev. 273, 332–33 (2015) (raising this concern in the context of the provocation defense); Aya Gruber, Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground, 68 U. Miami L. Rev. 961, 1021 (2014) (raising this concern in the context of stand-your-ground laws); Benjamin Levin, Guns and Drugs, 84 Fordham L. Rev. 2173, 2193 (2016) (raising this concern in the context of criminal gun regulation); David E. Patton, Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object, 69 Emory L.J. 1011, 1023 (2020) (same); Yankah, supra note 153, at 704 (raising this concern in the context of hate crimes); Benjamin Levin, Note, A Defensible Defense?: Reexamining Castle Doctrine Statutes, 47 Harv. J. on Legis. 523, 545 (2010) (raising this concern in the context of debates about duty to retreat).

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

220. Cynthia Barnett, FBI, The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data 3 tbl.4 (2000), http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs_wcc.pdf [https://perma.cc/9NJ4-3CZK].

221. Id. at 4 tbl.5; see also Levin, Wage Theft, supra note 16, at 1483–84 ("[T]he scale of the incidents and what they included (low-level property crimes, check fraud, etc.) fails to jibe with the dominant cultural (and legal) imagination of 'white-collar crime.'").

222. For a rare and incisive critique from the left of white-collar crime as a regulatory model, see generally Gerson, supra note 16.

223. See Levin, Wage Theft, supra note 16, at 1481–88 (examining the employers and industries targeted by wage theft prosecutions and noting that "these defendants may not look like the corporate monoliths or captains of industry who are often painted as driving the exploitative employment practices that result in worker exploitation").

Indeed, a recent study by legal economist Stephanie Holmes Didwania suggests that these anecdotal findings are representative of broader enforcement patterns.[224] Didwania's research—"the first comprehensive study of all federal white-collar prosecutions" from the early 1990s to the present—reveals that "the people convicted of financial crimes have fewer resources than the average U.S. adult" and that "[f]inancial crime defendants have attained less formal education than average and frequently rely on appointed counsel."[225] Further, "Black women are more likely to be convicted of a financial crime than any other type of federal crime."[226] As Didwania argues:

> [S]cholarly and public discourse around financial crime, which focuses on the absence of "white-collar" prosecutions (that is, prosecutions of members of the wealthy executive class), paints an inaccurate picture of how financial crime is prosecuted. The United States does, in fact, prosecute a huge number of people for financial crimes—thousands per year. But these defendants are for the most part not wealthy executives. Instead, financial crime prosecutions disproportionately involve people who are low-income and people who are Black.[227]

Put simply, despite its progressive framing, "financial crime is . . . unexceptional in an American criminal system that otherwise consistently reflects class- and race-based hierarchy."[228]

Similar dynamics may well be at play elsewhere. While many incidents of police violence lead to no criminal charges or convictions, a number of recent high-profile cases that have led to charges, convictions, and prison sentences have involved officers of color—Peter Liang in New York;[229]

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224. Stephanie Holmes Didwania, Regressive White-Collar Crime, 97 S. Calif. L. Rev. 105 (2024).

225. Id. at 105–06.

226. Id. at 106.

227. Id. at 105.

228. Id.

229. See Gabriel J. Chin, The Problematic Prosecution of an Asian American Police Officer: Notes From a Participant in *People v. Peter Liang*, 51 Ga. L. Rev. 1023, 1024, 1039 (2017) (providing background on the case, in which Liang, an Asian-American rookie NYPD officer, was "convicted of accidentally killing a twenty-eight-year-old African-American man, Akai Gurley in the stairwell of a Brooklyn housing project" (footnote omitted) and noting that "the case has been called an example of 'white police officer's executing unarmed black men'"(quoting Donald F. Tibbs, Towards an Abolition Democracy: The Death Penalty, Circa 2015, 25 Widener L.J. 83, 96 (2016))); Levine, Police Prosecutions, supra note 2, at 1036–40 (observing that "Liang's race was erased in the rush to criminally condemn a vision of white police brutality").

Mohammed Noor in Minnesota;[230] Nouman Raja in Florida;[231] Tou Thao in Minnesota;[232] and Demetrius Haley, Desmond Mills Jr., Emmitt Martin III, Justin Smith, and Tadarrius Bean in Tennessee.[233] That's not to minimize the harm caused by these officers or to suggest that each case was similar. But given the critiques of policing as a tool of white supremacy and the rarity of criminal charges against police officers, it is striking that police prosecutions appear to reflect—at least in part—the criminal system's broader racial disparities.[234]

Studies also demonstrate that ostensibly antiracist criminal statutes, like the hate crime enhancements proposed by progressives in Georgia or AABANY, often yield unexpected outcomes.[235] "[C]ases of violence between ethnic minority groups in gang-related conflict or low-level graffiti offenses are among the most vigorous uses of hate crime prosecutions."[236] In the early 2000s, sixty-three percent of the people charged under South Carolina's anti-lynching law—explicitly passed in response to the state's history of anti-Black violence—were Black.[237]

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230. See Levine, Police Prosecutions, supra note 2, at 1040–43 (noting that Noor, a Somali-American officer, was convicted of killing a white woman in a racially charged trial and that it was "the first time a Minnesota police officer was convicted of killing someone in the line of duty out of 179 police-involved shootings in Minnesota since 2000").

231. See id. at 1043–46 (stating that "Raja, a Pakistani-American officer, was the first police officer charged in twenty-six years and the first convicted in thirty years for an on-duty killing in Florida" and observing the lack of acknowledgment in statements by groups like the ACLU that Raja was also a person of color).

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

233. See Travis Caldwell & Ray Sanchez, 5 Former Memphis Police Officers Charged in Tyre Nichols' Death Plead Not Guilty, CNN (Feb. 17, 2023), https://www.cnn.com/2023/02/17/us/tyre-nichols-memphis-police-arraignment/index.html [https://perma.cc/6EY5-8GLK] (noting charges against Bean, Haley, Smith, Martin, and Mills for the killing of Tyre Nichols and noting Mills's attorney's call for the public not to judge too quickly, pointing out racially disparate incarceration rates and the fact that "[Mills] is a Black man in a courtroom in America" (internal quotation marks omitted) (quoting attorney Blake Ballin)).

234. See Levine, Police Prosecutions, supra note 2, at 1034–36 ("[F]ar from healing racial inequities present in the system, we see racism and racial tropes abound in the prosecutions of and discussions surrounding police who harm civilians.").

235. See supra section II.C.

236. Yankah, supra note 153, at 704 (citing Marc Fleisher, Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation, 2 J.L. & Pol'y 1, 23 (1994); James B. Jacobs & Kimberly A. Potter, Hate Crimes: A Critical Perspective, 22 Crime & Just. 1, 19 (1997)); see also Dean Spade, Keynote Address: Trans Law & Politics on a Neoliberal Landscape, 18 Temp. Pol. & C.R. L. Rev. 353, 357 (2009) ("Hate crimes laws strengthen and legitimize the criminal punishment system, a system that targets the very people that these laws are supposedly passed to protect. The criminal punishment system has the same biases (racism, sexism, homophobia, transphobia, ableism, xenophobia) that advocates of these laws want to eliminate.").

237. Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, Queer (In)Justice: The Criminalization of LGBT People in the United States 127 (2011).

A growing literature on the costs of "carceral feminism" similarly demonstrates that criminal laws enacted to protect women often harm women or are applied in ways that disproportionately harm other marginalized communities, such as racially and economically subordinated populations and queer people.[238] From "mandatory arrest" policies in the context of intimate partner violence, to the expansion of criminal liability for rape, to the rise of the sex-offender registry, the use of criminal law to respond to gender subordination has expanded the reach of the carceral state—with predictable distributive consequences.[239]

While the results of these studies might be shocking in light of the rhetoric discussed in Part II, they shouldn't be surprising to anyone familiar with the workings of the U.S. criminal system. Any turn to criminal legal institutions ultimately involves ceding power to those institutions—and the people who run them. So progressives who turn to criminal law to advance progressive ends are relying on the same prosecutors, judges, and police officers who are responsible for the day-to-day functioning of the criminal system.[240] To the extent that these institutions and actors are

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238. See Leigh Goodmark, Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence 29 (2018) ("Prisons reinforce and magnify the destructive ideologies that drive intimate partner violence."); Gruber, The Feminist War on Crime, supra note 2, at 87 (discussing carceral approaches to intimate partner violence).

239. As Kimberlé Crenshaw writes:

> [A]s many women of color predicted, mandatory arrest policies appear to have done little to protect women of color against domestic violence. Indeed, some studies seem to suggest that the policies have inadvertently increased the risks of serious injury or death for some victims of domestic violence, including a heightened risk of mortality for Black women in particular. Beyond the heightened risk of death, research suggests that women of color are more likely to be arrested themselves for behavior that may be consistent with self-defense but interpreted through the lens of stereotypes as overly aggressive.

Kimberlé W. Crenshaw, From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control, 59 UCLA L. Rev. 1418, 1454–55 (2012) (footnotes omitted); see also Goodmark, supra note 238, at 20 ("Mandatory policies deprive people of the ability to determine whether and how the state will intervene in their relationships, shifting power from the individual to the state."); Gruber, The Feminist War on Crime, supra note 2, at 87, 145 (noting that mandatory arrest policies "put minority women at disproportionate risk of future violence, homelessness, financial ruin, deportation, and their own incarceration" as well as the danger of affirmative consent laws that would likely "disproportionately affect black men"); Jeannie Suk, At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy 45 (2009) (observing that "[m]andatory arrest and no-drop policies have acclimated prosecutors to the norm of not allowing victims' wishes to control in making decisions in DV" and highlighting how prosecutors may extract protection orders to impose "de facto divorce").

240. One response to this concern might be to bring in different prosecutors to handle these types of cases. For example, Professor César F. Rosado Marzán has advocated for this approach in the wage theft context, arguing that traditional line-level Assistant District Attorneys shouldn't prosecute abusive bosses; instead, attorneys more attuned to the labor movement and worker advocacy should take charge. See Marzán, supra note 134, at 304–13. We are sympathetic to this impulse and Marzán's effort to think beyond traditional

responsible for entrenching inequality and for the injustices of the criminal system elsewhere, why wouldn't they be responsible for similarly troubling outcomes here?[241] That is, the politics and logics of criminal law's administration needn't (and likely do not) change with the politics of the activist or advocate who supports a punitive bill or individual prosecution. There's no reason to assume that police, prosecutors, and correctional officers will share the same values and priorities as progressive activists.

Further, using Simonson's "power-shifting" frame,[242] we are skeptical that carceral progressivism actually lives up to its promise of shifting power to marginalized groups. Pushing for more policing, prosecutions, and punishment directly empowers the state—and, specifically, the state's criminal apparatus.[243] Perhaps marginalized communities or relatively powerless defendants might benefit in some cases as well.[244] Take, for

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criminal legal institutions. That said, eliminating one problematic set of actors can't begin to address widespread institutional problems and pathologies—what about the sentencing judges, the wardens, and the prisons themselves? See Benjamin Levin, Victims' Rights Revisited, 13 Calif. L. Rev. Online 30, 33–34 (2022), https://www.californialawreview.org/s/Levin_Final.pdf [https://perma.cc/6HLM-D6A2] [hereinafter Levin, Victims' Rights Revisited] (explaining the limitations of private prosecutions by noting that prosecutions "would operate against the backdrop of brutal, state-run jails and prisons" and that even "[i]f a victim chose other forms of non-carceral state intervention . . . power would still rest in the hands of the state actors or state-sanctioned institutions" (footnote omitted)).

241. See Benjamin Levin, Response, Values and Assumptions in Criminal Adjudication, 129 Harv. L. Rev. Forum 379, 386 (2016), https://harvardlawreview.org/wp-content/uploads/2016/06/vol129_B-Levin.pdf [https://perma.cc/K3FA-3NJJ] (doubting that simply providing courts with systemic facts to contextualize cases will be sufficient to correct the injustices of the criminal law system, as courts see these systemic facts firsthand daily and yet have not significantly corrected for these inequities).

242. See supra notes 50–59 and accompanying text.

243. See Bell, Police Reform, supra note 66, at 2087 ("In an analysis based on legal estrangement theory, increasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups."); Nils Christie, Conflicts as Property, 17 Brit. J. Criminology 1, 3 (1977) ("[T]he victim[] is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. . . . The victim has lost the case to the state."); Coker, Crime Control and Feminist Law Reform, supra note 40, at 860 ("[I]n developing anti-domestic violence strategies, we must attend to the coercive power of the state. . . .").

244. "Relatively powerless" is also a slippery concept. That is, a poor person who—while armed with a gun—robs a rich person might have more "power" in the moment because of the gun, even if the rich person enjoys more power as a structural matter. So should a power-focused approach to criminal law favor the rich victim (who wields less power in the moment) or the poor defendant (who wields less power in society)? Cf. Máximo Langer, Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then, 134 Harv. L. Rev. Forum 42, 54 (2020), https://harvardlawreview.org/wp-content/uploads/2020/10/134-Harv.-L.-Rev.-42.pdf [https://perma.cc/EA72-ELET] ("[Minimal criminal law] would always protect the weakest: the injured party during the offense, the defendant during the criminal process, and the prisoner during the execution of the prison sentence." (citing Luigi Ferrajoli, Il Diritto Penale Minimo, 3 Dei Delitti e Delle Pene 493, 512 (1985))). Or, to put the problem in broader terms: Many people—regardless of how

example, wage theft cases in which the state is able to collect fines from a boss and distribute that money to workers.[245] But that benefit is vicarious or at least contingent. It depends on the actions of police and prosecutors.[246] Any shift in power is mediated by criminal justice actors, who accrue power at defendants' expense.[247] These state actors might empower marginalized communities. Or they might not.[248] To the extent they do, though, any benefit to marginalized communities depends upon the carceral state growing and amassing further power.

Or perhaps our intuitions are wrong, and the anecdotal evidence that we have isn't actually representative. Perhaps criminal legal institutions *could* shift power in the way that progressive advocates imagine. Perhaps the defendants arrested, incarcerated, and punished harshly would be avatars of white supremacy, heteropatriarchy, and capitalist subordination. What we argue here, though, is that those outcomes would be unexpected and at odds with what we know about the way that U.S. criminal legal institutions generally function. Put differently, the redistributive case for progressive criminalization rests on empirical claims.[249] And those empirical claims strike us as very unlikely to be true.

Therefore, we argue that the burden of proof should fall on academics, activists, and policymakers who remain enthusiastic about using criminal law to advance progressive ends. It should be incumbent on those calling for more punishment to explain why criminal law *in this area* would work differently than criminal law *in other areas*.[250]

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powerful they are on a macro scale—might wield a relative power advantage in the context of interpersonal violence. So even if power shifting were an attractive theory for assessing criminal policy, power is a tricky enough concept that many criminal policy decisions could be justified in power-shifting terms. Cf. Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. Crim. L. & Criminology 109, 193 (1999) (making a similar argument about the use of the "harm principle" in decisions about what conduct to criminalize).

245. See, e.g., Molly Crane-Newman, Manhattan Workers Stiffed by Employers Given New Legal Route to Recoup Stolen Wages, N.Y. Daily News (Feb. 17, 2023), https://www.nydailynews.com/new-york/nyc-crime/ny-worker-protections-stolen-wages-20230217-c77cg7vlrvht7o6efmpd2exu5m-story.html (on file with the *Columbia Law Review*) (discussing efforts to use the Manhattan DA's office as a vehicle for refunding stolen wages).

246. Cf. I. Bennett Capers, Against Prosecutors, 105 Cornell L. Rev. 1561, 1583–1608 (2020) (examining the role of prosecutors in mediating victims' interests).

247. See Levin, Victims' Rights Revisited, supra note 240, at 32–34 (arguing that such a dynamic might well persist in a world of private prosecutions).

248. On this question, see Capers, supra note 246, at 1579–80 (noting possible explanations for the practice of private prosecution in the colonies and pointing out that while perhaps colonists saw them as "a net good," at the same time, "the colonies' turn to public prosecution may have been anything but disinterested").

249. Cf. Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 415–17 (1999) (arguing that ostensibly utilitarian and data-driven arguments often provide cover for what are fundamentally moral or ideological claims).

250. Cf. Tommie Shelby, The Idea of Prison Abolition 148–49 (2022) ("[T]hose who defend the practice of imprisonment must justify it by showing that prisons prevent or reduce crime.").

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

Unlike the distributive questions raised in the previous section, this larger question is harder to answer empirically. It wouldn't be enough to track the race, class, and identity of defendants in hate crimes or police prosecutions.[251] We would need to determine if—say—support for a new hate crime statute had legitimated criminal legal solutions to other social problems,[252] or if advocating weak procedural protections in police prosecutions would harm non-police defendants.[253] Drawing such causal relationships would be difficult, as would designing a study to assess the ripple effects of each pro-punitive advocacy effort.[254]

Nevertheless, we are skeptical at best that punitive impulses and policies can be cabined. Arguments don't belong exclusively to the activists who use them. They can be deployed by people with very different politics and goals.[255] Claiming that prison is the right or the best solution to one social problem invites the question of why it wouldn't be just as desirable

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251. Those are the sorts of data that would be necessary to answer the questions in the previous section.

252. By legitimation, we refer to the Gramscian concept—that is, we are concerned with how people come to perceive unjust institutions as just. See generally Louis Althusser, Ideology and Ideological State Apparatuses (Notes Towards an Investigation), *in* Lenin and Philosophy and Other Essays 85, 124–26 (Ben Brewster trans., 2d ed. 2001); Selections from the Prison Notebooks of Antonio Gramsci (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); Paul D. Butler, Poor People Lose: *Gideon* and the Critique of Rights, 122 Yale L.J. 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 429–32 (1995).

253. See, e.g., Levine, How We Prosecute the Police, supra note 16, at 750 (arguing that if all suspects experienced the "presumed preferential procedures" that police suspects do, "both innocent and guilty-but-harmless suspects might fare better, as would the legitimacy and accuracy of the system itself"); Levine, Police Suspects, supra note 16, at 1205 (arguing in favor of giving procedural protections police enjoy to all citizens).

254. Indeed, this observation has led some to critique the concept of legitimation altogether. See, e.g., Alan Hyde, The Concept of Legitimation in the Sociology of Law, 1983 Wis. L. Rev. 379, 426 (critiquing legal scholarship that relies on legitimation arguments).

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

in another area. Arguing that punishment and justice are synonymous in one context implies that they are in other contexts. And claiming that criminal institutions can empower victims in one class of cases suggests that victims can—and should—look to criminal law as a source of power in other cases.[256]

Our observation finds support in critical scholarship and activism that emphasizes the unintended consequences of strengthening the carceral state.[257] Turning to brutal and repressive institutions tends to redound to the detriment of nondominant social groups.[258] Our observation also finds support in certain liberal or rights-based approaches to law: In order to preserve all of our rights, the argument goes, we need to protect the rights of people we don't like. This, of course, has long been a refrain of civil libertarians who emphasize the importance of helping unpopular defendants or protecting unpopular speech.[259]

Either logic holds for the current societal punitive turn: Empowering or expanding the carceral state poses significant risks for the population at large—and particularly for marginalized communities. In a system marked by discretion, giving new tools and more power to police and prosecutors in one area means that police and prosecutors have more power—full stop. Accepting and advancing pro-punitive arguments here not only serves to legitimate criminal law, but also helps to provide a blueprint for future efforts at criminalization and punishment.[260] Put

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256. Cf. Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy 124–28 (1988) ("I am proposing that retributive punishment is the defeat of the wrongdoer at the hands of the victim (either directly or indirectly through an agent of the victim's, e.g., the state) that symbolizes the correct relative value of wrongdoer and victim.").

257. See, e.g., supra note 43 (collecting sources).

258. See, e.g., Mogul et al., supra note 237, at 123–32 ("Even more disturbing is evidence suggesting hate crime laws can contribute to systemic violence against those they are intended to protect."); Spade, supra note 236, at 357–58 (arguing that concerns about "us[ing] criminal punishment-enhancing laws to purportedly address oppression" are "particularly relevant for trans people given our ongoing struggles with police profiling, harassment, and violence, and high rates of both youth and adult imprisonment").

259. The ACLU's representation of Nazis who marched in Skokie, Illinois, is perhaps the classic example. Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978). See generally Aryeh Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979) (describing the ACLU's work on this case).

260. This concern has led some commentators to argue that the right way to address inequality in criminal administration is to treat everyone better (i.e., treat marginalized defendants more like powerful defendants) rather than treating powerful defendants worse. See, e.g., Aya Gruber, Equal Protection Under the Carceral State, 112 Nw. U. L. Rev. 1337, 1383 (2018) [hereinafter Gruber, Equal Protection Under the Carceral State] (warning that "[c]arceral reforms that ride in on a wave of bipartisan support for disparately treated minority victims may prove difficult or impossible to reverse" and "lead to level-up solutions that render minority defendants vulnerable to increased policing, prosecution, and incarceration"); Levin, Mens Rea Reform, supra note 16, at 540–48 ("[W]hen faced with the specter of inequality (wealthy corporate defendants receiving more protections than poor defendants), opponents of mens rea reform have made the move to level up punishment and prosecution."); Levine, How We Prosecute the Police, supra note 16, at 750

simply, punishment and punitive politics might well trickle down, harming the relatively powerless, not just the relatively powerful.

Again, whether and to what extent harsh policies trickle down are empirical questions. Given the enormous stakes and social costs of the turn to criminal law, we think it's important to try to answer those questions and to grapple with the very real (and—in our opinion—quite likely) possibility that progressive pro-criminalization advocates are wrong. While we lack comprehensive evidence that punitive policies aimed at one class of defendants harm all defendants, one recent study in the wake of the Brock Turner case provides some troubling support for this claim.[261]

In a 2022 study, political scientists Sanford Gordon and Sidak Yntiso tracked California county court sentencing patterns around the time of Judge Aaron Persky's recall election.[262] Gordon and Yntiso examined the claim that the highly publicized recall discouraged judicial leniency and encouraged judges to adopt a "tough on crime" posture.[263] Looking to sentencing data for six counties, Gordon and Yntiso observed "large, instantaneous increases in judicial punitiveness immediately following the announcement of the recall campaign."[264] Sentences increased roughly 30%, and Gordon and Yntiso found that the recall announcement could have been responsible for between 88 and 403 additional years in prison time doled out during the forty-five day window in question.[265] Those increases were "most readily apparent in sentencing for nonsexual violent crime."[266] Despite recall supporters' focus on Turner's race and attempts to distance the recall from discussions of racialized mass incarceration, the harsher sentences harmed defendants across racial lines.[267] The harsher sentences "neither mitigated nor exacerbated any long-term discriminatory treatment in sentencing."[268] And, as Gordon and Yntiso explained:

> [R]ecall campaign critics . . . anticipated a disproportionate racial burden even in the absence of any immediate change in discriminatory treatment by judges. Specifically, these critics emphasized how the overrepresentation of Black citizens in courts and prisons implies that even a race-neutral increase in

("Calls to cabin prosecutors' investigations and grand jury presentations when police are suspects miss an important opportunity to engage in meaningful conversation about why such process is not used for other criminal suspects.").

261. Sanford C. Gordon & Sidak Yntiso, Incentive Effects of Recall Elections: Evidence From Criminal Sentencing in California Courts, 84 J. Pol. 1947 (2022).

262. See id. at 1947–48.

263. See id. at 1960–61 ("The events of the Persky recall campaign and the salience of law and order in the 2016 presidential campaign suggest that elected officials still face strong incentives to appear tough on crime.").

264. Id. at 1960.

265. Id. at 1959.

266. Id. at 1960.

267. See id. at 1957–58.

268. Id. at 1958.

> overall severity will place a disproportionate burden on minority communities. Our findings are consistent with this interpretation.[269]

An advocacy campaign focused on the perceived privilege of an affluent, straight, cisgender, white male defendant actually had sweeping consequences.[270] Perhaps it raised awareness about sexual violence and advanced the goals of activists.[271] But it also had unintended consequences for people who looked nothing like Brock Turner.[272]

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

B. *Decarceration Beyond Distribution*

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

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

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269. Id (footnote omitted).

270. See, e.g., The Recall Reframed (Racing Horse Prods. 2023); Alex N. Press, When a Fight Against Sexual Assault Bolstered Mass Incarceration, Jacobin (Mar. 26, 2023), https://jacobin.com/2023/03/the-recall-reframed-documentary-review-brock-turner-sexual-assault-carceral-feminism/ [https://perma.cc/8ATH-HPWE] (observing that once Persky's recall began, in six California counties, "judges immediately began extending the length of sentences by 30 percent" and noting that those "most likely to already be targeted by the criminal justice system—i.e., not the Brock Turners of the world—bear the brunt").

271. See, e.g., Julie Zigoris, This Judge's Recall Was a Win for #MeToo but a Setback for Prison Reform, New Documentary Argues, S.F. Standard (Mar. 4, 2023), https://sfstandard.com/arts-culture/this-judges-recall-was-a-win-for-metoo-but-a-setback-for-prison-reform-new-documentary-argues/ [https://perma.cc/VU3T-YPR3] (noting that Dauber saw the recall as "a strong statement against rape culture in the legal system" (internal quotation marks omitted) (quoting Dauber)).

272. See, e.g., Gordon & Yntiso, supra note 261, at 1960 (noting that the more punitive sentences were "most readily apparent in sentencing for nonsexual violent crime" and that "the petition announcement neither mitigated nor exacerbated observed longer-term racial disparities in sentencing"); Aya Gruber, Opinion, Was Recalling Brock Turner's Judge Justice?, MSNBC (Mar. 19, 2023), https://www.msnbc.com/opinion/msnbc-opinion/judge-sentenced-brock-turner-was-recalled-california-not-justice-rcna75515 [https://perma.cc/22A9-TYH9] ("A punitive response to injustice that calls for harsher sentences, even when aimed at the privileged, inevitably harms the people against whom the system is already stacked.").

other forms of subordination.[273] Activist and academic accounts rely on narratives of criminal law as an engine of inequality, reflecting prejudice and entrenching the power of socially dominant groups at the expense of marginalized communities.[274] Criminal law and its administration might be objectionable for a host of reasons, but contemporary U.S. movements (both inside and outside the academy) frequently ground their claims in the language of distributive justice—the system enacts institutionalized violence against society's most marginalized.[275]

To the extent that an abolitionist, minimalist, or anticarceral project focuses exclusively on distributive concerns, then the questions raised in the previous sections take on tremendous significance. The relevant inquiry when presented with a new piece of criminal legislation or an alteration to the criminal process is *how it will distribute*.[276] Of course, there

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273. See, e.g., Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World 1–26 (2022) (describing the criminal system and family policing system as interlocking systems that oppress Black communities); Shelby, supra note 250, at 18–52 (tracing the origins of contemporary U.S. abolition to specific strands of the Black radical tradition); Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1818 (2020) [hereinafter Akbar, Abolitionist Horizon] (tracing policing to the work of slave patrols); McLeod, Envisioning Abolition Democracy, supra note 18, at 1622 (identifying abolition as a project of racial and economic transformation); Roberts, Abolition Constitutionalism, supra note 2, at 7 ("First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime." (footnote omitted)); Dylan Rodríguez, Abolition As Praxis of Human Being: A Foreword, 132 Harv. L. Rev. 1575, 1580 (2019) (tracing the rise of the "carceral state" to institutions of chattel slavery).

274. See, e.g., Rachel Herzing, Commentary, "Tweaking Armageddon": The Potential and Limits of Conditions of Confinement Campaigns, 41 Soc. Just. 190, 193–94 (2015) ("Far from being broken . . . the prison-industrial complex is actually efficient at fulfilling its designed objectives—to control, cage, and disappear specific segments of the population."); Critical Resistance, What Is the PIC? What Is Abolition?, https://criticalresistance.org/mission-vision/not-so-common-language/ [https://perma.cc/B4S9-7HFG] (last visited Feb. 16, 2024) (arguing that the prison industrial complex reinforces racial, economic, and other social hierarchies, including by "mass media images that keep alive stereotypes of people of color, poor people, queer people, immigrants, youth, and other oppressed communities as criminal, delinquent, or deviant" (emphasis omitted)); End the War on Black People, Movement for Black Lives, https://m4bl.org/end-the-war-on-black-people/ [https://perma.cc/F4NF-29DZ] (last visited Mar. 18, 2024) (calling for "[a]n end to all jails, prisons, immigration detention, youth detention [a]nd civil commitment facilities as we know them").

275. See, e.g., Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice 13 (Tamara K. Nopper ed., 2021) ("Decades of collective organizing have brought us to this moment: some are newly aware that prisons, policing, and the criminal punishment system in general are racist, oppressive, and ineffective."); Akbar, Abolitionist Horizon, supra note 273, at 1821–22 ("When abolitionist organizers say *the police were never meant to protect us*, they are drawing on the history of police in slave and border patrols, as well as their early history of crushing labor strikes in the North." (footnote omitted)).

276. See supra Part I.

may be a range of important follow-up questions—does criminal law work to advance the desired ends (reducing risk, remedying harm, advancing public safety, etc.)? Are criminal law and criminal punishments necessary to achieve the desired ends? And what are the appropriate or acceptable distributive consequences? But the litmus test for criminal policy depends on who will suffer and who will benefit.

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

That said, it's not at all clear to us that distributive justice must be the sole focus of a project of abolition, penal minimalism, decarceration, or institutional transformation.[277] As Professor Máximo Langer observes, "[n]on-American penal abolitionists have presented a different range of social theories that have varied from author to author and that have included Marxism, humanist phenomenology, localism combined with a position against professionals and their expertise, and Christian thought and categories."[278] Indeed, some commentators have argued that "abolitionists need to turn not only to social, but also to moral theory to make explicit and improve the quality of their own moral judgements and to discuss whether a just society includes punishment."[279]

If certain forms of state violence, social control, and subordination are fundamentally objectionable in and of themselves, then their unequal application isn't exclusively what makes them bad.[280] If prisons should be abolished because it is wrong for the state to put members of the polity in cages, then the case for abolition doesn't depend on finding that the state disproportionately cages members of marginalized or disfavored groups. If penal institutions should be dramatically reduced rather than abolished (to employ a minimalist frame), we should be wary of embracing those institutions as a desired approach to *any* social problem.

In this section, we hardly hope to lay out a comprehensive theory of what makes criminalization and carceral punishment objectionable. But

277. On different movements for and understandings of abolition, see Langer, supra note 244, at 46–57.

278. Id. at 50 (footnotes omitted); see also Thomas Mathiesen, The Politics of Abolition Revisited 31–36 (2015) (describing an "abolitionist stance"); Vincenzo Ruggiero, Penal Abolitionism 105–27 (2010) (describing a Christian abolitionist's perspective).

279. Langer, supra note 244, at 50.

280. See, e.g., Michael J. Zimmerman, The Immorality of Punishment, at vii (2011) ("I doubt that legal punishment—punishment by the state of its subjects—can be justified."); Elisabeth Epps, Amber Guyger Should Not Go to Prison, The Appeal (Oct. 7, 2019), https://theappeal.org/amber-guyger-botham-jean/ [https://perma.cc/G8RY-W8FL] [hereinafter Epps, Amber Guyger Should Not Go to Prison] ("The people for whom we have sympathy don't deserve freedom only because of their innocence—though of course that too—but also because of the improbably divisive contention: *People do not belong in cages*.").

we do hope to articulate several reasons why criminal solutions to social problems might be troubling—even absent clear evidence of criminal law's negative distributive consequences.[281]

1. *The Brutality of Criminal Punishment.* — The distributive concerns articulated above can be understood in consequentialist terms—criminal law actually can't accomplish what its proponents want it to. But not all concerns about criminal legal solutions to social problems are consequentialist.[282] Indeed, perhaps the most basic concern about progressives' turn to criminal punishment is that criminal punishment is awful. It is dehumanizing and imposes great harms on defendants, their families, and their communities.[283]

Arguing that conduct should be criminalized or that a person should be incarcerated isn't an academic exercise. And whatever one's idealized vision of criminal punishment might look like, we know that jails and prisons are sites of violence and degradation. A growing literature focuses on the brutal conditions of jails and prisons.[284] Activists, academics, and

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

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

283. On punishment as degrading or dehumanizing, see generally Chad Flanders, Shame and the Meanings of Punishment, 54 Clev. St. L. Rev. 609 (2006).

284. E.g., Keramet Reiter, 23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement 179–82 (2016) (pointing to the work on solitary confinement by psychologists, psychiatrists, and criminologists, who have "continued to document the extreme mental and physical consequences of even short-term sensory deprivation and isolation"); Jonathan Simon, Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America 109–33 (2014) (describing how "the largest, most expensive prison system in the country had actually decreased public safety by keeping [incarcerated persons] in 'extreme peril' under inhumane conditions"); Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 915 (2009) ("When the state puts offenders in prison, it forces them into close quarters with hundreds and sometimes thousands of other offenders . . . . To force prisoners to live in constant fear of violent assault . . . is to inflict a form of physical and psychological suffering akin to torture." (footnotes omitted)); Frampton, supra note 217, at 2046 (collecting sources on sexual abuse in prisons, most of which is inflicted by staff); Colleen Hackett & Ben Turk, Shifting Carceral Landscapes: Decarceration and the Reconfiguration of White Supremacy, *in* Abolishing Carceral Society 23, 43–48 (Abolition Collective ed., 2018) (describing how the prison "tier" system "exacerbates violent prison culture," including by "enforcing and promoting dehumanizing, degrading, and therefore violent conditions"); Raymond Luc Levasseur, Trouble Coming Every Day: ADX—The First Year 1996, *in* The

policymakers have stressed the broad-reaching challenges associated with having a criminal record.[285] In short, the administration of criminal law is defined by the imposition of significant harm on people accused or convicted of crimes. Those harms have become a source of significant criticism for progressive and left commentators. So why should those harms be acceptable if they are visited against the "right" defendants?

To use a crude analogy, if you oppose the death penalty because you think it is wrong for the state to kill a person (or to kill a person as punishment for a crime), then that rule should hold for all defendants—regardless of how egregious their conduct.[286] You shouldn't be content with a system of capital punishment, regardless of the defendants executed or the process that they receive.[287] On the other hand, if you oppose the death penalty because you believe that it is imposed in a way that reflects racial bias, then your problem isn't with the death penalty; it is with societal and structural racism. It is conceivable that you might accept—or even approve of—certain capital punishment schemes. Perhaps the death penalty would be acceptable if it were imposed in a race-neutral way. Or perhaps the death penalty, as an institution long associated in the United States with racial inequality, would be acceptable if it were used in an explicitly antiracist manner (e.g., as punishment for killing members of a racial or ethnic minority group).[288]

New Abolitionists: (Neo)Slave Narratives and Contemporary Prison Writings 45, 47–48 (Joy James ed., 2005) (recounting the harrowing conditions of the author's solitary confinement in Administrative Maximum (ADX) prison); I. India Thusi, Girls, Assaulted, 116 Nw. U. L. Rev. 911, 913 (2022) (noting the prevalence of sexual violence against poor women and girls in the criminal and juvenile legal systems, which have "managed to normalize pervasive sexual violence and exploitation"); Corey Devon Arthur, I've Been Strip-Frisked Over 1,000 Times in Prison. I Consider It Sexual Assault, Marshall Project (Feb. 4, 2021), https://www.themarshallproject.org/2021/02/04/i-ve-been-strip-frisked-over-1-000-times-in-prison-i-consider-it-sexual-assault [https://perma.cc/E9R4-W62X] (recounting the author's experience of being beaten and sexually assaulted by strip frisks in prison).

285. See, e.g., Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 25–27 (2007) (describing the significance of a criminal record for job seekers); Bruce Western, Homeward: Life in the Year After Prison 26–45 (2018) (describing the challenges faced by previously incarcerated people as they transition to life outside of prison).

286. For a much more extensive discussion of the distinction between consequentialist and deontological objections to the death penalty, see generally Carol Steiker, The Death Penalty and Deontology, *in* The Oxford Handbook of Philosophy of Criminal Law 441 (John Deigh & David Dolinko eds., 2011).

287. See Gruber, Equal Protection Under the Carceral State, supra note 260, at 1356 ("To an abolitionist, the idea of applying barbaric and uncivilized capital punishment based on the racial makeup of a case is particularly repugnant, even if to remedy systemic disparities.").

288. See Randall L. Kennedy, *McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388, 1438 (1988) (describing a potential "affirmative action" approach to the death penalty).

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

For left and progressive critics of the carceral state, we think it is essential to grapple with this distinction—with what's actually so objectionable about criminal legal institutions. As explained above, we don't believe that criminal punishment could distribute in the way that some progressives imagine or could function as an egalitarian institution.[289] But to the extent that a project of abolition or decarceration isn't consequentialist and is instead grounded in a first-principle objection to incarceration or certain forms of criminal punishment, then progressives' redistributive vision of criminal law should be just as indefensible as regressive criminal law.[290]

2. *The Inevitability of Exclusion.* — Even if criminalization and pro-prosecutorial policies didn't have the troubling distributive consequences discussed above, there is reason to worry about how criminal law creates in-groups and out-groups. A long line of penal theory identifies social cohesion as one of the benefits of criminal punishment: By designating a given act as criminal and by punishing the person who has committed the act, a community reinforces its values and solidifies what it means to be a part of the polity.[291] Viewed critically, though, this "social cohesion" function of criminal law means that punishment always works to exclude, to marginalize, and to create an out-group.[292] The community bonds at the expense of the individual who is excluded and identified as deviant or transgressive.

So regardless of the governing ideology that shapes a system of criminal law (capitalist or socialist, racist or egalitarian, etc.), criminal law

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289. See supra section III.B.1.

290. Cf. Epps, Amber Guyger Should Not Go to Prison, supra note 280 ("If you champion abolition for certain people . . . but not others, then yours is not a call for abolition but for sentencing reform. If your strategy . . . is putting more white collar criminals in prison and freeing folks . . . on petty drug offenses, then . . . you just want different people in prison.").

291. See, e.g., Emile Durkheim, The Division of Labor in Society 105–06 (George Simpson trans., Free Press 1933) (1893) (describing this social function of criminal law); Bell, Police Reform, supra note 66, at 2083–84 ("Although the suitability of Durkheim's comprehensive view of law and punishment for modern contexts is questionable, the broadest reading . . . that the legal system is to create a cohesive and inclusive society . . . is at the root of legal estrangement theory."); Bernard E. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 Mich. L. Rev. 291, 349 (1998) [hereinafter Harcourt, Reflecting on the Subject] (describing Durkheim's view of the role of criminal punishment as "social influence" that impacts "the honest person" and "the disorderly" differently).

292. And perhaps also policing. See Bell, Anti-Segregation Policing, supra note 214, at 687–729 (describing policing as doing the work of segregation—protecting in-groups and excluding out-groups).

would be engaged in a project of defining—and punishing—an out-group.[293] Certainly, that project of exclusion, marginalization, and punishment is particularly troubling when it reinforces historical patterns of subordination. That's one reason that distributive critiques of the U.S. criminal system are so compelling. Even absent that unjust distributive dynamic, though, there's reason to worry about such an exclusionary institution and the way that it might invite subordination and the creation of a disempowered and disenfranchised minority.[294]

Framed slightly differently, we might conclude that criminal legal institutions will inevitably have distributive consequences that benefit majorities or socially dominant groups and harm marginalized or disfavored populations—some set of powerful actors will be engaged in disciplining an individual or community with less social capital. So looking to criminal law as a vehicle for advancing equality and creating a more egalitarian society would be a mistake.[295]

3. *Individualizing Structural Problems.* — One feature of the case studies discussed in Part II is that they reflect a concern about some larger structural or institutional failure: state violence against marginalized communities; capital's exploitation of labor; socially dominant groups using violence to subordinate minority populations; and sexually dominant groups using violence to subordinate queer people to enforce heteropatriarchy.[296] These are massive social problems. Indeed, liberal, progressive, and left-wing support for criminal legal interventions in these

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293. See David Garland, Punishment and Welfare: A History of Penal Strategies 255–56 (1985). Criminologist David Garland argues for "the necessity of conceiving penality in its relation to the 'external' social institutions that surround and support it," explaining that "penal institutions are functionally, historically and ideologically conditioned by numerous other social relations and agencies." Id. at viii. Therefore, "[t]hose who wish to see new forms of penal regulation that accord with the values of social equality, democracy and welfare cannot expect such forms to develop automatically or in the train of any general move towards socialism." Id. at 262; cf. Guyora Binder, Punishment Theory: Moral or Political?, 5 Buff. Crim. L. Rev. 321, 321–22 (2002) ("Because punishment is part of a system of institutional authority, it is not amenable to a simple moral analysis. The legitimacy of punishment is bound up with the legitimacy of the norm it enforces and of the institutions promulgating the norm, imposing the punishment, and inflicting it.").

294. Cf. Bernard E. Harcourt, Matrioshka Dolls, *in* Tracey L. Meares & Dan M. Kahan, Urgent Times: Policing and Rights in Inner-City Communities 81, 82–87 (Joshua Cohen & Joel Rogers eds., 1999) (arguing that the presence of sub-minority populations within minority populations makes for a slippery concept of "community" and that minority control of policing might still yield to subordination of those sub-minorities); Gardner, supra note 59, at 809–11 (noting that "just as subordinated racial groups are subject to social closure, these groups often show internal patterns of social closure that inform intraracial stratification").

295. Cf. Harcourt, Reflecting on the Subject, supra note 291, at 389 ("[C]ategories of the disorderly and law abiders, of order and disorder, limit our horizon. When we attempt to think about reducing violent crime—about, in effect, transforming society—we need to question these categories and, if we find them limiting, offer alternative understandings that lead to more innovative policies.").

296. See supra Part II.

areas reflects a belief that there are massive structural issues in need of drastic measures.[297]

But criminal law doesn't necessarily speak the language of structural change. Criminal legal institutions generally operate on the transactional or retail level, rather than systemic or wholesale level.[298] Individual defendants are prosecuted and punished for individual acts of (alleged) lawbreaking. And criminal legal institutions speak in an individualist language. That's one reason that criminal law is often critiqued from the left—it easily serves neoliberal ends by shifting the focus from structural problems and social programs to individual wrongdoing.[299] Therefore, there's good reason to worry about whether an individual prosecution could achieve the broader structural goals that progressive advocates have in mind when they call for addressing inequality along lines of gender,

297. See supra Part II.

298. See, e.g., Andrew Manuel Crespo, Systemic Facts: Toward Institutional Awareness in Criminal Courts, 129 Harv. L. Rev. 2049, 2051 (2016) ("[C]ase-by-case adjudication naturally focuses judicial attention on the case-specific details of individual claims, presented by individual litigants, one case at a time."); Tracey L. Meares, Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident, 82 U. Chi. L. Rev. 159, 164 (2015) (critiquing the Supreme Court's "individual-level" approach in assessing Terry stops, which do not account for the "systematic[]" and "deliberate[]" nature of stop-and-frisk programs); Daphna Renan, The Fourth Amendment As Administrative Governance, 68 Stan. L. Rev. 1039, 1041–42 (2016) (critiquing the "transactional" model for Fourth Amendment analysis, which focuses on "one-off" encounters between law enforcement and citizens despite the fact that surveillance often occurs programmatically and systemically). But cf. Dorothy E. Roberts, The Social and Moral Cost of Mass Incarceration in African American Communities, 56 Stan. L. Rev. 1271, 1301 (2004) ("[T]he current sentencing regime that generated the enormous prison population is far from individualized. Indeed, the prison explosion is largely attributable to sentencing changes that made punishment *less* individualized.").

299. See, e.g., Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 204–08 (2011) (making this historical claim); David Harvey, A Brief History of Neoliberalism 2, 47–48 (2005) (describing how in the 1980s and 1990s, following the devastation of racism, a crack cocaine epidemic, and the AIDS epidemic, "[r]edistribution through criminal violence became one of the few serious options for the poor, and the authorities responded by criminalizing whole communities of impoverished and marginalized populations"); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America 1–3 (2016) ("Even if their legislative language never evoked race explicitly, policymakers interpreted black urban poverty as pathological—as the product of individual and cultural 'deficiencies.' This consensus distorted the aims of the War on Poverty and also shaped the rationale, legislation, and programs of the War on Crime."); Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity 41–42 (2009) (describing the "gradual replacement of a (semi-) welfare state by a police and penal state" that criminalizes marginalized communities and noting that programs for marginalized groups view poverty as "a product of the individual failings of the poor"); Nicola Lacey, Differentiating Among Penal States, 61 Brit. J. Soc. 778, 779 (2010) ("The 'neoliberal' impetus to economic deregulation, welfare state retraction, and individualization of responsibility . . . has, paradoxically, gone hand in hand with the burgeoning of state powers, state pro-activity, and state spending in the costly and intrusive business of punishment.").

race, class, or ability.[300] And the institutional design of the criminal system means that an assignment of criminal liability all too easily does the exact opposite—scapegoating an individual and suggesting that problems involve bad apples rather than rotten barrels or blighted orchards.[301]

4. *Criminal Law as the One-Size-Fits-All Answer.* — Putting the prior concerns together, we worry that criminal law in all its brutality is an extreme response to social problems. One of the troubling aspects of the progressive criminalization projects discussed in Part II is that they reflect a willingness to default to the most restrictive or brutal means imaginable. Even if prosecutions and prisons worked to deter bad actors and to accomplish broader distributive goals,[302] they also impose tremendous costs on individuals and communities.

We don't mean that the answer to major theoretical and practical questions about criminalization is to turn to some sort of formalist or mechanical proportionality analysis. But one troubling feature of the progressive embrace of criminal law is that it often seems to dispense with considerations of proportionality or alternatives. There's a strand of argument that suggests that when there is a big problem, criminal punishment is the right response. Rather than arriving at criminalization after an exhaustive search for other solutions,[303] commentators appear to accept the logic of reflexive criminalization and criminal punishment: Wrong has been done or harm has been caused, so criminal law must be the right response.[304]

In each of the cases discussed in Part II, we agree that the problems are tremendous and the harms to individuals, communities, and society at large are massive. But that hardly means that the only way, or the *best way*, to respond to those problems is by looking to police, prosecutors, and prisons.[305] To return to the death penalty analogy, capital punishment

300. See, e.g., Corda, supra note 49, at 612 ("[P]enal legislation cannot successfully promote social change acting as a solitary trailblazer and should not be delegated tasks beyond its abilities."); Justin Marceau, Palliative Animal Law: The War on Animal Cruelty, 134 Harv. L. Rev. Forum 250, 251 (2021), https://harvardlawreview.org/wp-content/uploads/2021/03/134-Harv.-L.-Rev.-F.-250.pdf [https://perma.cc/9YAM-W49B] ("Rather than catalyze change in American values, however, these war-on-crime approaches create a distracting sideshow that diverts public scrutiny away from matters of the most urgent concern.").

301. See, e.g., Levine, Police Prosecutions, supra note 2, at 1035 (making this claim about police prosecutions); Akbar, Abolitionist Horizon, supra note 273, at 1821–22 (same).

302. To be clear, we do not believe that they do.

303. Cf. Mike C. Materni, The 100-Plus-Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law), 18 New Crim. L. Rev. 331, 347 (2015) (describing the "classical" principle of "extrema ratio," which "establishes that the criminal law should be the option of the last resort—that the government is legitimized to use the criminal sanction only as a matter of necessity").

304. Cf. Levin, Mens Rea Reform, supra note 16, at 534–40 (critiquing the use of criminal law as a sort of regulatory default).

305. Cf. Douglas N. Husak, Overcriminalization: The Limits of the Criminal Law 186 (2008) [hereinafter Husak, Overcriminalization] ("A minimalist theory of

certainly would ensure that a defendant could no longer cause harm; yet that hardly means that the death penalty is the right or only option for preventing an individual from causing harm in the future.[306] Unless one were comfortable executing an awful lot of people, it would be important to consider alternatives.[307]

For over half a century, commentators with different ideological commitments have critiqued overcriminalization and the common impulse in the United States to treat criminal law as the regulatory tool of choice—the right way to respond to a pressing problem.[308] Using "criminalization and cages as catchall solutions to social problems" isn't inevitable,[309] but it has become the common institutional and advocacy vocabulary in the United States.[310] We share the concerns about this model of governance and think that—regardless of how criminal law distributes—it should be incumbent upon criminalization proponents to explain why the state must resort to its most restrictive and violent set of tools to respond to a given social problem.[311]

CONCLUSION

Recent years have seen a welcome rise in anticarceral sentiment among progressives and leftists. In this Essay, we have examined the limits of progressive opposition to criminal law—places in which academics and

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criminalization . . . precludes punitive sanctions when a less extensive alternative is available.").

306. Cf. Shelby, supra note 250, at 181 ("I doubt that there are legitimate means that would prevent all serious crime.").

307. Cf. Allegra M. McLeod, Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives, 8 Unbound: Harv. J. Legal Left 109, 132 (2013) (describing the importance of "unfinished alternatives" to criminal punishment). Of course, it's possible that one might find such alternatives unsatisfactory. Cf. Husak, Price of Criminal Law Skepticism, supra note 23, at 58 (arguing that criminal law skeptics have failed to explain what institutions could replace criminal law).

308. See, e.g., Husak, Overcriminalization, supra note 305, at 4–11 (describing and critiquing overcriminalization); Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear 17 (2007) (same); Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 909 (1962) (same); Ellen S. Podgor, Overcriminalization: The Politics of Crime, 54 Am. U. L. Rev. 541, 541 (2005) (same).

309. Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 2 (2007).

310. See Miriam H. Baer, Sorting Out White-Collar Crime, 97 Tex. L. Rev. 225, 238 (2018) ("Many of these statutes represented cheap political reactions to singular events or scandals of the day."); supra note 140 and accompanying text.

311. A certain amount of work on "criminal law minimalism" reflects this position—that criminal punishment should only ever be acceptable as the response of last resort. See Langer, supra note 244, at 76 ("Under the conception of minimal criminal law . . . this conception of justice and way of looking at harmful situations should also be adopted as a last resort, only when other conceptions of justice and ways to look at these harmful situations would not suffice to adequately address them.").

activists support prosecution and punishment as vehicles for advancing progressive ends. While it is tempting to treat these exceptions or carveouts as evidence of hypocrisy, we have argued that they may reflect a particular vision of criminal law as a tool of redistribution. We remain concerned about that vision. There is little evidence that criminal legal institutions can achieve the redistributive ends that progressives desire. Instead, we fear that redistributive criminal law will backfire, harming marginalized communities and entrenching the carceral state.

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