CRIMINAL LAW MINIMALISMS

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INTRODUCTION

What is criminal law minimalism? At first blush, minimalism appears to be the sober and sensible cousin of abolition. Where the language of abolition is radical, utopian, and absolute,[1] the language of minimalism suggests moderation, pragmatism, and nuance. As calls for abolition have gained ground in the U.S. legal academy and in activist circles,[2] some scholars have pushed back, arguing that "criminal law minimalism" is a

1. *See, e.g.*, LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 111 (2020) (arguing that abolitionists' "utopian vision of the world and of human nature" should be seen as strengths of the movement); STEFANO HARNEY & FRED MOTEN, THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY 42 (2013) (contending that abolition's goal is "[n]ot so much the abolition of prisons but the abolition of a society that could have prisons"); Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2024 (2022) ("Contemporary abolitionists sometimes sound a similar note, recognizing (perhaps embracing) the utopian and speculative nature of the undertaking.").

2. *See, e.g.*, Naomi Murakawa, *Foreword* to MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 13 (Tamara K. Nopper ed., 2021); *End to All Jails, Prisons, and Immigration Detention*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-jails-prisons-detention/ [https://perma.cc/H8XU-RUGM]; Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 7 (2022); Aya Gruber, Commentary, *Policing and "Bluelining"*, 58 HOUS. L. REV. 867, 933 (2021) ("Such an institutional critique of policing, and the entire carceral state, is a mainstay of abolitionist ideology, which is currently experiencing a renaissance in progressive scholarly circles."); Frampton, *supra* note 1, at 2014 ("In the last two decades . . . prison abolitionism has enjoyed a resurgence, both as a rallying cry for activists and as a focus of sustained scholarly inquiry for geographers, sociologists, philosophers, radical criminologists, and others. Legal academia, however, remained curiously impervious to these developments." (footnotes omitted)); Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199 (2022) (reviewing KABA, *supra*); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

more desirable objective or framework for reform.[3]

I appreciate calls for nuance when it comes to discussion of criminal legal policy and theory. As I've argued at length, conversations about abolition and reform would benefit from greater precision.[4] Common language ("criminal justice reform," "mass incarceration," etc.) often obscures deeper disagreement, putting off necessary and important debates about first principles.[5] And, I worry that the growing popularity of radical rhetoric does not always match radical commitments, or at least that it leaves important underlying questions unanswered.[6] So, there is great value in pushing past rhetoric to confront disagreements about institutional purpose and design.

That said, I'm not sure that "minimalism" as a frame offers more clarity or answers the hard questions about how to address the ills of the U.S. criminal system. We have yet to see a robust U.S. literature on criminal minimalism,[7] and it's not clear to me that there's a generally accepted definition.[8] In a recent essay, though, Máximo Langer describes "criminal law minimalism" as:

> a theory under which there is still a penal system that has armed public law enforcement, punishment, and, for the time being, imprisonment as tools to deal with social harm. However, it uses

3. *E.g.*, Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1722 & n.85 (2023) (arguing that minimalism is a more desirable "normative position" than abolition in part because it "recognize[s] the state's responsibility to protect members of the African American underclass from private violence"); Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020); Christopher Slobogin, Essay, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531 (2024); Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 266, 284 (2023).

4. *See* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899 (2023) [hereinafter Levin, *After the Criminal Justice System*]; Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) [hereinafter Levin, *The Consensus Myth*]; Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381 (2022) [hereinafter Levin, *Criminal Law Exceptionalism*]; Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021).

5. *See generally* Levin, *The Consensus Myth*, *supra* note 4.

6. *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); Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. (forthcoming 2024).

7. Minimalism has attracted greater scholarly attention outside of the United States. *See* Langer, *supra* note 3, at 53–55.

8. It is not even clear to me that minimalism is always defined when it is used, but—to the extent it is—those definitions vary. *Compare* Langer, *supra* note 3, at 53–55, *with* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW, at vi (2008), *and* JEREMY HORDER, ASHWORTH'S PRINCIPLES OF CRIMINAL LAW 79 (10th ed. 2022).

> these tools fairly and only when no other tool could advance the goal of preventing or reducing harm.[9]

In deploying a related approach to his discussion of overcriminalization, legal philosopher Doug Husak notes that "I refer to my theory as criminal law *minimalism*, but I use this term more as a slogan than as the name of a unified account of the criminal law."[10] Indeed, many proponents of minimalism have not necessarily articulated "some general theory which will enable us to tell whether or not certain conduct ought to be criminalized."[11]

Instead of a coherent theory of criminal law minimalism, I see a range of different *criminal law minimalisms*, reflecting a range of focal points, ideological projects, and first-order commitments. In this Essay, then, I begin to tease apart different possible minimalisms and what they might tell us about defensible or desirable criminal policy.

As a theory, label, or position, minimalism raises two major questions: (1) a question of scope;[12] and (2) a question of scale.[13] On the question of scope, what exactly should be minimized? The number of criminal laws? The severity of criminal punishment? The extent of policing? The scope of criminal and quasi-criminal institutions of social control? Something else? On the question of scale, what does minimalism mean? Arguing that society should use criminal law and punishment as little as possible raises the important question of how we know what the minimally acceptable amount of criminal law is. Without a shared understanding of what criminal law is supposed to do, how do we know what properly functioning minimalism looks like?[14] Depending on one's normative vision for criminal law, criminal law minimalism could involve a radical project of decarceration, decriminalization, and de-policing.[15] Or, it could involve a slight recalibration of the status quo.[16] Maybe it even could mean shifting priorities, with more criminal law in some areas offset by less in others.

To be clear, these are not questions that are unique to minimalism. Indeed,

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9. Langer, *supra* note 3, at 57.

10. HUSAK, *supra* note 8, at vi. Husak explains that he "borrow[s]" the term from Andrew Ashworth. *Id.* at 60. Notably, Langer argues that Husak's definition of minimalism differs significantly from the one long deployed by Italian philosopher Luigi Ferrajoli and other scholars "outside the Anglo-American world." Langer, *supra* note 3, at 54–55.

11. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 24 (4th ed. 2003).

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Section II.B.

15. *See* NILS CHRISTIE, A SUITABLE AMOUNT OF CRIME 85 (2004) (arguing that "[w]e cannot abolish the penal institution totally," but that minimalism can take us "a long way in that direction").

16. On debates about how much decriminalization minimalism requires, see Ethan J. Leib, Dan Markel & Jennifer M. Collins, *Voluntarism, Vulnerability, and Criminal Law: A Response to Professors Hills and O'Hear*, 88 B.U. L. REV. 1449, 1459 (2008).

they sound quite similar to questions raised not only by abolition, but also by many projects for criminal justice reform or transformation.[17] In this Essay, though, I raise these questions as they pertain to minimalism. If "criminal law minimalism" is being offered as a theoretical alternative to both abolition and conventional approaches to criminal policy,[18] it is necessary to understand what minimalism entails or what it offers us—what distinguishes minimalism from existing approaches to criminal legal theory and policy. That means answering—or at least grappling with—these fundamental questions of scale and scope.

This Essay takes those two questions in turn. In Part I, I examine the scope of the minimalist project. I offer a range of different targets on which minimalists might focus: (1) the number of substantive criminal laws; (2) the reach of substantive criminal law; (3) the extent of carceral punishment; (4) the amount or intrusiveness of policing; (5) the degree of punitive or violent social control; (6) the subordinating effects of structural inequality; and (7) the ubiquity of punitive cultural impulses that have driven criminal policy. Each target suggests a different understanding of what's wrong with the status quo and also a different understanding of what a desirable or functional criminal system might look like. And, each target suggests a different type of reformist project—for example, reducing the number of criminal statutes on the books is a much more modest goal (both practically and theoretically) than reducing punitive sentiments in society.

In Part II, I ask how much society should minimize whatever-it-is that should be minimized. Articulating what constitutes a minimum acceptable amount of criminal law or punishment is a tremendous challenge that already stymies much theoretical and policy-oriented commentary about criminal justice reform. Without clarity about this baseline, I don't know how minimalism can offer a coherent frame for penal policy (or, for that matter, for penal theory). Indeed, I conclude by arguing that the greatest promise of minimalism as a frame might be less what it offers than the *questions* that it raises. Rather than providing us with a rubric for reform or a set of shared first-principles commitments, minimalism might force each of us to put our cards on the table and articulate our own first-principles commitments.[19]

Before I proceed, though, two caveats are in order. First, contemporary debates that pit abolition against reform often strike me as boiling down to

17. *See generally* Levin, *The Consensus Myth*, *supra* note 4.

18. And perhaps also to more conventional "reform."

19. *Cf.* CHRISTIE, *supra* note 15, at 84–85 (arguing that adopting a minimalist posture "opens up a liberating perspective. It means that we are not captured in a 'penal necessity', but are free to choose").

empirical claims about the effectiveness of tactics or advocacy strategies.[20] Are radicalism and abolitionist rhetoric more likely to mobilize communities and spur decarceration?[21] Might moderate "reformist reforms" legitimate the status quo and thwart radical change?[22] Or, might the backlash to perceived radicalism lead to more punitive policies and harm vulnerable defendants or race-class subordinated populations?[23]

These strike me as important questions that are well worth asking. But, they are a different set of questions than the ones I am asking here. So, if minimalists are making tactical claims (i.e., that minimalism will attract voters, mobilize social movements, or serve as a politically palatable vocabulary for reform), those are not claims that I address here.[24]

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20. *Cf.* Slobogin, *supra* note 3, at 543 (noting that a certain amount of criticism of abolition focuses on "tactics"); Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2507 (2023) ("Social movements highlight the relationships between our understanding of the world around us (criticism), the world we fight for (horizon), and the reforms, strategies, and tactics that might bridge the two (praxis).").

21. *See, e.g.*, DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 111 (2021); JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 179–84 (2023).

22. Abolitionists tend to distinguish between "reformist reforms" and "non-reformist reforms." Abolitionists generally reject reformist reforms, which they see as propping up or legitimating the status quo. Non-reformist reforms might also be incremental, but they are not understood as strengthening existing criminal legal institutions. *See, e.g.*, THOMAS MATHIESEN, THE POLITICS OF ABOLITION REVISITED 231–32 (2015); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 91–93 (2d ed. 2015); Mariame Kaba, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose/ [https://perma.cc/N46F-KD9W]; Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1546–52 (2022).

23. *See generally* Barkow, *supra* note 3.

24. That said, it is worth noting that "criminal law minimalism" and "penal minimalism" seem to be phrases that have appeared exclusively in academic journals and monographs. *Cf.* Gardner, *supra* note 3, at 1722 n.85 (identifying minimalism as a theory "increasingly reference[d]" by "criminal-legal scholars" and in "writings on the moral philosophy of punishment"). And, I view minimalism less as a popular rallying cry than as an academic concept or framework. This is not a knock on minimalism. As a law professor writing a theoretical Essay in an academic journal, I don't necessarily have standing to level such critiques. I see great value in thinking carefully and critically about our theoretical frames; indeed, that is the focus of a lot of my work. And, I see an important relationship between theoretical academic work and criminal policy. *See* Alice Ristroph, Essay, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020); Jeffrie G. Murphy, *"In the Penal Colony" and Why I Am Now Reluctant to Teach Criminal Law*, 33 CRIM. JUST. ETHICS 72, 76 (2014); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 HARV. L. REV. F. 200, 211 (2021). But, I find that some discussion of "abolition versus reform" elides theoretical questions (e.g., would it be good to abolish prisons?) with tactical questions (e.g., does talking about abolishing prisons scare voters?). So, I want to make clear that my engagement with minimalism in this Essay does not include consideration of whether—and to whom—the language of minimalism might be attractive as an advocacy strategy. If I did go down that road, it would be necessary to consider a larger literature and set of contemporary debates about the relationship between elite actors and social movements in U.S. criminal policy. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021); Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798, 805 (2021); John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87

Second, I frequently frame my analysis in terms of U.S. criminal policy and U.S. criminal legal discourse. I am mindful of important recent work that urges greater engagement with non-U.S. approaches to criminal policy and theory in discussions of reform.[25] There certainly are places where my analysis should apply equally across borders—in the context of different legal cultures or political economies. There might be generally applicable minimalist principles or critiques of minimalism that transcend national difference. In such places, an overemphasis on the United States in this Essay, to the extent there is one, is an oversight on my part. That said, much contemporary critical commentary in the United States, both inside and outside the academy, focuses on objectionable features of penal administration as inextricable from U.S.-specific histories of racial subordination. So, I see it as useful to try to put general theories of minimalism in conversation with those U.S. accounts, not only to appreciate what U.S. minimalism might look like, but also to appreciate the places where the nature of a minimalist project necessarily would depend on questions of political economy and social context.[26]

I. WHAT SHOULD MINIMALISTS MINIMIZE?

As a preliminary matter, it is not entirely clear what the direct object of "minimize" is or should be. That is, what exactly should be minimized? Reference to "criminal law minimalism" or "penal minimalism" doesn't necessarily tell us much because "criminal law" and "penal" are conceptually slippery.[27] Again, I don't mean to suggest that such slipperiness is a problem unique to minimalism. Indeed, I see a similar

U. CHI. L. REV. 711 (2020); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021).

25. *See, e.g.*, Langer, *supra* note 3; Alessandro Corda & Rhys Hester, *Leaving the Shining City on a Hill: A Plea for Rediscovering Comparative Criminal Justice Policy in the United States*, 31 INT'L CRIM. JUST. REV. 203 (2021).

26. For that reason, it is conceivable to me that "minimalism" might be understood differently in the United States and Italy. Or, for that matter, in New York and Texas (not to mention city to city or county to county). Indeed, that strikes me as one of the important insights to glean from Langer's work on minimalism and abolition. *See generally* Langer, *supra* note 3.

27. *See, e.g.*, Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 THEORETICAL CRIMINOLOGY 422, 423–24 (2017); David Garland, *Penalty and the Penal State*, 51 CRIMINOLOGY 475, 476 n.2 (2013) ("'Penality' has come to be the standard term used to refer to the subject matter of the sociology of punishment. It refers to the whole of the penal complex, including its laws, sanctions, institutions, and practices and its discourses, symbols, rituals, and performances. As a generic term it usefully avoids the connotations of terms such as 'penal system' (which tend to stress institutional practices but not their representations, and to imply a systematicity that often is absent) or else 'punishment' (which suggests that the phenomenon in question is primarily 'retributive' or 'punitive' in character, thereby misrepresenting penal measures that are oriented to other goals such as control, correction, compensation, etc.)."); Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, 17 CRIM. L. & PHIL. 5, 6 (2023).

dynamic at play in discussions about abolition[28]—abolishing prisons needn't necessitate abolishing police, and vice versa.[29] But defenses and critiques of abolition often strike me as eliding different possible abolitionist projects.[30]

More broadly, contemporary critical scholarship and advocacy reflects little clarity about the scope of the critique or the reformist project.[31] And, many visions of reform and abolition stretch well beyond the traditional boundaries of the "criminal justice system."[32] Does the "criminal justice system" include schools and hospitals?[33] Does "criminal justice reform" necessitate changes to housing policy?[34] Does abolition require an end to capitalism?[35] Depending on whom you ask, the answers might differ. And as a theoretical and practical matter, those differences matter a lot.

Foundational work on minimalism focuses on the scope of substantive criminal law.[36] Yet, to the extent contemporary minimalism is framed in opposition to abolition, it's worth considering minimalism's scope. Because contemporary abolitionist critique and even more mainstream reform focus on police and a range of institutions beyond carceral punishment, minimalism as an alternative to abolition might have something to say about

28. *See* Barkow, *supra* note 3, at 267 ("The term 'abolition' is not the only one that is subject to ambiguity. There is also the question of *what* abolitionists want to abolish, or what we might think of as the *site* of the abolitionist critique.").

29. *See infra* note 78.

30. *See infra* note 78.

31. *Cf.* Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, *in* THE NEW CRIMINAL JUSTICE THINKING 1, 1 (Sharon Dolovich & Alexandra Natapoff eds., 2017) ("If we are to fix the current criminal system . . . we need a complete and nuanced understanding of what exactly this system *is*: What social and political institutions, what laws and policies, does it encompass?").

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

33. *See, e.g.*, Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2647 (2021) (hospitals); Barbara A. Fedders, *The End of School Policing*, 109 CALIF. L. REV. 1443, 1445 (2021) (schools).

34. *See, e.g.*, Dolovich & Natapoff, *supra* note 31, at 13–15 (articulating a capacious vision of the "criminal system" that implicates housing); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 689 (2020) (examining the role of police in preserving residential segregation).

35. Anthony J. Nocella II, Mark Seis & Jeff Shantz, *Introduction: The Rise of Anarchist Criminology*, *in* CONTEMPORARY ANARCHIST CRIMINOLOGY: AGAINST AUTHORITARIANISM AND PUNISHMENT 1, 1–8 (Anthony J. Nocella II, Mark Seis & Jeff Shantz eds., 2018) (articulating an anarchist approach to abolition); Akbar, *supra* note 20, at 2538.

36. *See* ASHWORTH, *supra* note 11, at 24; HUSAK, *supra* note 8; Langer, *supra* note 3.

these other institutions.[37]

So, in this Part, I outline seven possible targets for minimalist critique.[38] To be clear, this list is not exhaustive. And, I don't mean to suggest that these are seven distinct categories—it is quite likely that many minimalists might wish to minimize many things and that many of those things might overlap. But, I think it's worth teasing apart these different minimalist projects as a means of appreciating how different focal points might reflect different commitments and lead to different reformist agendas. In each context, I raise a set of questions about the nature of the theoretical claim that would drive this sort of minimalism and also about how each minimalism might be operationalized.

A. The Number of Substantive Criminal Laws

For some readers, "criminal law minimalism" might appear straightforward, and the label might imply a clear target: the criminal code. Commentators have long decried "overcriminalization" and the unrestrained growth of state and federal criminal codes.[39] Critiques of the number of criminal laws are common across the political spectrum both inside and outside the legal academy.[40] Commentators frequently observe that no one seems to know exactly how many criminal laws are on the books.[41] But, there are at least five thousand federal crimes.[42] And, there are many more at the state level. A significant number of these statutes are not actually enforced, and a significant number are overlapping (i.e., criminalizing conduct that is already criminalized under other statutes).[43]

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37. For example, in his minimalist critique of abolition, Chris Slobogin generally focuses on the need for incarceration, but he also advocates minimalist policing. *See* Slobogin, *supra* note 3, at 556–59.

38. Or, a range of possible direct objects for "minimize."

39. *E.g.*, Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004).

40. *See* Levin, *The Consensus Myth*, *supra* note 4, at 290–307.

41. *See, e.g.*, Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), https://www.wsj.com/articles /SB10001424052702304319804576389601079728920 [https://perma.cc/T3V2-73QH].

42. *See* GIANCARLO CANAPARO, PATRICK A. MCLAUGHLIN, JONATHAN NELSON & LIYA PALAGASHVILI, HERITAGE FOUND., SPECIAL REP. NO. 251, COUNT THE CODE: QUANTIFYING FEDERALIZATION OF CRIMINAL STATUTES 1 (2022), https://www.heritage.org/crime-and-justice /report/count-the-code-quantifying-federalization-criminal-statutes [https://perma.cc/QQ78-AC5P].

43. *See, e.g.*, Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453 (2009) ("We know prosecutors take advantage of overcriminalization . . . . If every law were enforced vigorously, there would be public backlash. But the outrageous laws largely lie in desuetude, for familiar reasons. To be sure, this is not always true, and that's why some overcriminalization—of particular sorts, meaning overlapping or redundant crimes and excessive punishment—are still problems that occur randomly and periodically." (footnote omitted)).

So, perhaps the minimalist simply should minimize the number of criminal laws.

This minimalist project might be the most modest—reducing the number of statutes on the books needn't reduce the number of arrests, prosecutions, or convictions. Some minimalists might justify reducing the number of statutes as necessary to preserve the legitimacy of the criminal law: if we can't possibly know what laws are on the books, how is it fair to say we have notice?[44] But, do we really think that most people could or would memorize five hundred statutes (or even fifty) instead of five thousand?

Scholars have critiqued the impulse to pass new criminal statutes in response to any perceived new threat. And, perhaps a minimalist project focused on reducing the number of criminal statutes would provide a framework for much-needed pushback on such impulses. But, what's to stop legislatures from passing very broad statutes less frequently that reach just as much conduct? For this reason, I see minimizing the number of criminal statutes as a worthwhile target for commentators concerned about good governance, but I am skeptical of the real-world effects. This sort of minimalism strikes me as a sort of bookkeeping endeavor more than a reform project that promises a more just system.

B. The Reach of Substantive Criminal Law

Belief in the need to minimize the reach of substantive criminal law presumably would overlap with a belief in the need to minimize the number of substantive criminal laws. But, these projects and commitments are not exactly the same. As Bill Stuntz famously argued, "[c]riminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over."[45] Addressing the depth of criminal law needn't require us to address its breadth. For example, advocacy focused on repealing "zombie laws,"[46] removing criminal lawmaking authority from agencies,[47] or requiring that criminal statutes be condensed and located in a specific place in the code[48] don't tell us anything about what conduct—or how much conduct—should be criminalized. From

44. *See* Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 652 (2019).

45. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).

46. Zombie laws are statutes that remain on the books, although they are no longer enforced. *See* Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 98 n.17 (2022) (collecting sources).

47. *See Principles for Revising the Criminal Code: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Hon. Edwin Meese III, Chairman, Center for Legal & Judicial Studies, Heritage Foundation).

48. *See id.*

vagrancy laws,[49] to RICO,[50] to U.S. Military law,[51] there are plenty of examples of individual statutes that criminalize enormous amounts of conduct.

So, emphasizing the conduct, rather than the statutes themselves, might allow for a minimalism with more teeth, or a minimalism that is functionalist rather than formalist. Indeed, the account of minimalism that Husak offers focuses almost entirely on the scope of substantive criminal law—paring down the criminal law to reach only the conduct that must be criminally punished.[52] Embracing minimalism, then, means coming up with a set of principled limitations on the state's ability to criminalize and punish.[53]

Of course, as with so many questions of criminal policy, the devil is in the details. How should we go about determining what core function criminal law serves such that we could determine the proper scope of a minimalist criminal law? I will return to this question at greater length in Part II. Here, though, I will note that I don't see this question as fatal to a minimalist theory/project—that different people could arrive at different conclusions doesn't mean that there isn't value in using the language of minimalism or couching questions of criminal policy in terms of the minimal amount of criminal law.[54] But, I see it as essential that minimalists recognize the indeterminacy or contingency of a minimalist vision of substantive criminal law.[55]

It is common in both theoretical and policy discussions to distinguish among categories of conduct and to suggest that we could use those categorizations as a way to address overcriminalization and mass

49. On vagrancy laws and their broad application, see RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016).

50. *See, e.g.*, Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1 & 2), 87 COLUM. L. REV. 661, 662 (1987) ("[P]rosecutors have seized on the virtually unlimited sweep of the language of RICO to bring a wide variety of different prosecutions in the form of RICO indictments.").

51. *See* Parker v. Levy, 417 U.S. 733, 741 (1974) (addressing a vagueness challenge to Articles 133 and 134 of the Uniform Code of Military Justice).

52. Although, Husak still concedes that "even a good-faith implementation of a minimalist theory of criminalization would represent only a small step toward the ideal of principled enforcement." HUSAK, *supra* note 8, at 32.

53. *See id.* at 120. And in his work on overcriminalization, Husak provides a compelling set of such philosophical limitations—both internal and external to criminal law—that might guide an effort to make criminal justice more just. *Id.* at 55–177.

54. *See infra* Part III. Indeed, this observation rings even truer if minimalism is understood less as a grand theory than as a frame or vocabulary for reform. *See supra* notes 10–11 and accompanying text.

55. In noting some uncertainty in applying minimalist principles to substantive criminal law, Husak argues that "criminal law minimalists actually may take comfort from the extent of these difficulties. Because the burden to justify penal laws should be allocated to the state, any problems in applying these four principles will help to retard the growth in the number of offenses of risk prevention." HUSAK, *supra* note 8, at 176.

incarceration.[56] In these accounts, criminal law and punishment have a proper role to play in dealing with some conduct, but they are overused. A central pathology of U.S. criminal law is that it focuses less on the "core" crimes and too much on "everything else.[57] So, a necessary component of the reformist agenda should be defining that proper scope—drawing the line between where criminal law belongs and where it doesn't.[58] Consider a few popular distinctions:

Violent/Non-Violent
Conduct that causes harm/Conduct that does not cause harm
Crimes with victims/Victimless crime
Malum in se crimes/*Malum prohibitum* crimes[59]

In each case, commentators suggest that there is a proper scope of criminal law or a place where criminal punishment might be warranted.[60] And, reformers suggest that on the other side of the line, we could decriminalize—or, at the very least, we could move away from contemporary approaches to punishment that are so punitive.

A minimalist effort to draw these lines more sharply might pay dividends—as a theoretical and practical matter. And, minimalism as a frame might provide a more helpful vocabulary to go about drawing such lines than other theories provide.[61] But, drawing these lines is easier said than done. Critical literature on each distinction shows how contested legal

56. *See infra* notes 57–60, 157–59 and accompanying text.

57. Stuntz, *supra* note 45, at 512. As Stuntz argues:

> [C]riminal law is not one field but two. The first consists of a few core crimes, the sort that are used to compile the FBI's crime index—murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else. Criminal law courses, criminal law literature, and popular conversation about crime focus heavily on the first. The second dominates criminal codes.

Id. (footnote omitted); *see also* HUSAK, *supra* note 8, at 33.

58. *But see infra* notes 157–59 and accompanying text (critiquing this approach to reform).

59. Many judges and academics have long stressed the difference between conduct that is bad in and of itself, or "*malum in se*" (e.g., murder, kidnapping, etc.) and conduct that is bad because it has been criminalized, or "*malum prohibitum*" (e.g., tearing the tag off of a mattress). *See, e.g.*, Morissette v. United States, 342 U.S. 246, 259 (1952) (noting different mental state requirements when dealing with "malum prohibitum" crimes); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910) (noting "the well-recognized distinction between mala in se and mala prohibita"); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1570 (1997); Note, *The Distinction Between Mala Prohibita and Mala In Se in Criminal Law*, 30 COLUM. L. REV. 74, 74–76 (1930).

60. JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 10, 14, 26, 187 (1984); H.L.A. HART, LAW, LIBERTY, AND MORALITY 60–61, 75–77 (1963).

61. *See* HUSAK, *supra* note 8, at 129 ("I do not allege that my minimalist theory of criminalization is unproblematic or unambiguous. Obviously, it is neither. My more modest claim is that [the proposed approach] . . . is far superior to the approach actually taken at the present time."); Slobogin, *supra* note 3, at 544 (arguing that the difficulty in defining "dangerousness" should not necessitate abandoning it as a useful category or abolishing prisons as a means of dealing with "dangerous" people).

concepts like "violence" or "harm" actually are.[62] Each of these efforts to define the core of criminal law strikes me as having a minimalist flavor—they imply that criminal law and punishment are not generally acceptable; they must be cabined. Yet, each of these efforts reveals the difficulty and indeterminacy of minimalism. These categories are not natural and pre-political, and even if we all agreed on the aspirational core of criminal law (which we don't), drawing the boundaries around that core would be difficult.[63]

C. Carceral Punishment

Regardless of what conduct is criminalized, perhaps the minimalist might focus on punishment—particularly carceral punishment. The "minimalist agenda" might focus on "reducing the numbers of persons punished, the severity of their punishments, as well as the reach of the penal sanction generally."[64] Much of what sets criminal law apart from other areas of law is the state's ability to incarcerate.[65] And, much criticism of U.S. criminal policy focuses on the dramatic expansion of jail and prison populations over the latter half of the twentieth century.[66] So, it might make sense for minimalists to focus on incarceration.[67] Overcriminalization might be an evil in and of itself, but if criminalization (and even arrest and conviction)

62. On "harm," see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999); Kimberly Kessler Ferzan, *Prevention, Wrongdoing, and the Harm Principle's Breaking Point*, 10 OHIO ST. J. CRIM. L. 685, 691 (2013) (reviewing A P SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION (2011)); Donald A. Dripps, *The Liberal Critique of the Harm Principle*, 17 CRIM. JUST. ETHICS 3 (1998). On "violence," see Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011); DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021). On "victims," see Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1453 (2021); Benjamin Levin, *Victims' Rights Revisited*, 13 CALIF. L. REV. ONLINE 30, 35 (2022); *see also* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1359 (2001) ("Views of wrongdoing and culpability vary over time and context so that injurious acts that once were *damnum absque injuria* become *malum prohibitum* and even *malum in se* offenses . . . . Our social judgments of when injurious acts become *wrongdoing*, and wrongdoing becomes *culpable*, hinge on contextual and ideological influences." (footnote omitted)).

63. *See* HUSAK, *supra* note 8, at 129 ("No theory of criminalization will yield definitive answers to every difficult case, and the theory I sketch here is no exception.").

64. *Id.* at 178.

65. *See* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1954 (2019) (describing this view as "[b]urdens exceptionalism").

66. *See generally* Nicole P. Dyszlewski, Lucinda Harrison-Cox & Raquel Ortiz, *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U. L. REV. 471 (2016) (collecting sources that diagnose the problem of "mass incarceration" in the United States).

67. *See* HORDER, *supra* note 8, at 79 ("[B]ecause sanctioning processes are a form of public censure—exposing someone to the possibility of hard treatment through punishment—it is especially important that legislatures and courts observe moral 'side-constraints' inhibiting the creation or extension of such processes.").

did not lead to harsh consequences on the back end, perhaps it would be less of a problem.[68]

To the extent that minimalists target carceral punishment, it's worth asking two follow-up questions: (1) what distinguishes incarceration from other sorts of punishment? And (2) do (or should) critiques of carceral punishment extend to *non-punitive* forms of incarceration or restrictions on liberty? These are both tough questions. And, they also are questions for prison abolitionists or anyone concerned about carceral punishment. But, in determining the scope of the minimalist project, it's important to consider each question.

On the first question, the response may boil down to what exactly is so objectionable about incarceration. For example, if the problem is the restriction on liberty, then it would seem that minimalist critiques also should encompass electronic monitoring, in-home confinement, and other "alternatives to incarceration."[69] Or, if the problem is the conditions of confinement, then perhaps minimalists should be concerned more about reforming prison conditions than about reducing incarceration itself.[70] More broadly, articulating the objectionable features should help minimalists (and abolitionists and other reformers) identify what exactly must be minimized, abolished, or reformed.

The second question implicates a live debate in abolitionist circles about the so-called "dangerous few."[71] According to many abolitionists, even if society were to address all of the structural issues that cause crime and lead to carceral punishment, there still would be some people—the dangerous few—who still pose such a danger to society that they must be incapacitated.[72] Generally speaking, the claim is not that these people are

68. *But see* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 612 n.2, 693 (2014) ("The era of mass incarceration might more accurately be called the era of mass conviction and correctional supervision, as parole and probation populations have grown at an even faster rate than the incarcerated population."); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1804–05 (2012) (highlighting the limitations of thinking only about "incarceration" when critiquing "mass incarceration").

69. *See generally* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS (2020) (arguing that alternatives to incarceration replicate troubling features of incarceration); Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022) (making a similar argument with regard to electronic ankle monitoring). This leaves open the question of how minimalists should respond to corporate crime. *Cf.* W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601 (2017) (exploring the relationship between corporate crime and conventional punishment theory).

70. With the important caveat that overcrowding might increase the likelihood of prisons and jails as unsanitary, brutal, and inhumane places. *Cf.* JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014) (describing brutal conditions due in part to overcrowding in California prisons).

71. *See generally* Frampton, *supra* note 1 (describing this debate).

72. *See* Liat Ben-Moshe, *The Tension Between Abolition and Reform*, *in* THE END OF PRISONS:

deserving of *punishment* or that incarceration is the necessary vehicle to hold them accountable.[73] Rather, the argument takes on a quasi-medical tenor—some sort of preventative incapacitation would be necessary to avoid harm to society at large.[74]

The dangerous few are the topic of much critique of abolition.[75] But, the abolitionist characterization of non-punitive incapacitation should raise questions for minimalists, too. That is, if you believe that carceral *punishment* should be minimized, does that also mean that preventative incapacitation should be minimized? If not, then why not? And might that mean a society where widespread incarceration remains, but is motivated by different theories? If so, then minimalists might face similar questions to the ones that abolitionists already do about how to define and address the dangerous few.[76]

D. Policing

Most of the minimalist literature appears more focused on criminalization and punishment than on policing.[77] And as a general matter, I think there can be some important benefits to disaggregating discussions of policing from discussions of prisons.[78] But, it is worth noting that a minimalist project also might focus on minimizing police.

Such a project might emphasize reducing the actual number of police or on reducing their footprint. If the goal is a reduction in numbers, then we would need to answer a massive theoretical and practical question—what is

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REFLECTIONS FROM THE DECARCERATION MOVEMENT 83, 90 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013); Jim Thomas & Sharon Boehlefeld, *Rethinking Abolitionism: "What Do We Do With Henry?" Review of de Haan,* The Politics of Redress, 18 SOC. JUST. 239 (1991) (book review); McLeod, *supra* note 2, at 1171.

73. *See* PRISON RSCH. EDUC. ACTION PROJECT, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 175–76 (1976).

74. *See id.*

75. That is, abolitionists are often asked how a society without prisons can keep people safe and deal with serial killers and other members of the "dangerous few." *See generally* Frampton, *supra* note 1 (describing a set of possible answers to these questions). For a critique of abolitionist responses, see generally Slobogin, *supra* note 3.

76. Indeed, I take discussions of the "dangerous few" to be an area where abolition and minimalism overlap and where similar questions should apply to both. *Cf.* Langer, *supra* note 3, at 55–56 (discussing points of conjuncture between minimalism and abolition).

77. *But see* Slobogin, *supra* note 3, at 556–59.

78. For example, I see prison abolition and police abolition as conceptually distinct (albeit at times overlapping) projects. Discussions about abolition in and outside of the academy often would benefit from breaking apart these two aims—it strikes me as possible to oppose prisons but view police in one form or another as necessary or inevitable features of society. Of course, that is not to say that we could or should try to understand punishment without appreciating the actors and institutions who do the punishing. *See* Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1040 (2014) ("A theory of punishment, or any other form of violence, should include an account of the agents that impose it.").

"the police"?[79] Put differently, there are many people whom we might identify as engaging in some occupation that resembles policing or shares some features with policing (private security guards? TSA officers?). So, reducing the number of "police" requires unpacking who falls in this category. If the goal is reducing the police footprint, we need to answer a similar question to the one about alternatives to incarceration—what's objectionable about policing? For example, if the issue is surveillance, then replacing police with traffic or security cameras shouldn't be a desirable reform.[80]

E. Social Control

More broadly than criminalization, carceral punishment, or policing, perhaps the problem of the contemporary criminal system that must be minimized is *social control*. On some basic level, that seems right—policing, carceral punishment, and substantive criminal law are all institutions of social control. And, many other objectionable features of penal administration that might not fit into any of those categories (e.g., pretrial detention, collateral consequences) might also be understood as forms of social control. As a result, it should come as little surprise that radical commentators increasingly frame their critiques in terms of social control—or, perhaps more precisely, in terms of violent social control that disproportionately targets marginalized populations (e.g., race-class subordinated populations, people with disability, queer people).[81]

Yet, social control is an amorphous and potentially enormous target. Institutions of social control are everywhere. Once we go looking for social control, criminologist Stanley Cohen argues, we might find it anywhere: "teachers in schools, warders in prisons, psychiatrists in clinics, social workers in welfare agencies, parents in families, policemen on the streets, and even bosses in the factories are all, after all, busy doing the 'same'

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79. On the contested nature of the police, see Eric J. Miller, *The Concept of the Police*, 17 CRIM. L. & PHIL. 573 (2023).

80. *Cf.* INTERRUPTING CRIMINALIZATION, THE DEMAND IS STILL #DEFUNDTHEPOLICE 25–26 (2021), https://www.interruptingcriminalization.com/defundpolice-update [https://perma.cc/G39B-FKBJ] (identifying the problem of "cops in new clothing"—the objectionable aspect of the policing function farmed out to other actors and institutions).

81. *See, e.g.*, Clair & Woog, *supra* note 2, at 19 ("Court-ordered social control tools severely constrict defendants' lives outside of the court, with disproportionately harmful implications for poor people of color."); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 34 (2019) ("A large body of social science literature explains criminal punishment as a form of social control of marginalized people."); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 786 (2005) ("Conventional accounts of the criminal justice system tend to obscure its social control agenda behind the idea that its origins and functions lie with the prevention and punishment of crime or even the humanitarian reform of offenders.").

thing."[82] Minimizing social control, then, might—and should—involve looking well beyond the institutions commonly associated with the criminal system.[83] By definition, the state is an institution of social control, so this sort of minimalist project would have to be an anarchist one (or, at the very least, a libertarian one).[84] And, that position would be at odds with progressive or socialist commitments of many critics on the left who call to replace the "carceral state" with a strong welfare state.[85] Further, minimalists concerned with social control and domination would need to confront the role of employers, private universities, and so forth.[86]

A radical and totalizing project of confronting *all* social control might appeal to some minimalists. But, I'm skeptical that it would—what I'm describing is starting to sound like one of the more radical incarnations of abolition.[87] Instead, minimalists concerned with social control presumably would be focused on minimizing a particular and objectionable flavor of social control. In which case, it's less clear to me that the problem of penal administration would be social control in and of itself; it would be the mechanism of social control or the ideology of social control—its relationship to violence, its role in harming marginalized communities, etc. Therefore, perhaps the minimalist would want to focus on minimizing the

82. STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION 2 (1985).

83. *Cf. id.* (arguing that social control "covers not just the obviously coercive apparatus of the state, but also the putative hidden element in all state-sponsored social policy, whether called health, education or welfare"); Michelle Alexander, *Foreword* to SCHENWAR & LAW, *supra* note 69, at ix, xiii ("I kept a running list of the actors who are implicated in the expanding net of mass incarceration. Lawmakers, judges, prosecutors, parole officers, and police officers leap immediately to mind. But what about those we usually trust to serve us and keep us safe, including social workers, emergency room doctors, and landlords . . . ? What about teachers? Pastors who work with police departments to create gang databases? School counselors? Psychiatrists?"); White, *supra* note 81, at 802 (describing "a surrogate relationship between the social welfare system and the criminal justice system" with common "agendas of social control [that] have a shared focus on the lower classes . . . roughly directed to the same key missions: the direct management of surplus labor; the prosecution of an agenda of moral training centered on labor discipline; and the general goal of policing the habits of the poor—all with the aim of socializing, politicizing, and legalizing the dysfunctions of capitalism and the class conflict that is embedded in these dysfunctions.").

84. *See* Levin, *Criminal Law Exceptionalism*, *supra* note 4, at 1428–29.

85. *See* JORDAN T. CAMP, INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE 147 (2016); *cf.* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1844 (2020) (distinguishing between socialist and anarchist abolitionist movements).

86. *E.g.*, ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 63 (2017); ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 103 (2015); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 51–52 (2010); Aya Gruber, *#MeToo and Mass Incarceration*, 17 OHIO ST. J. CRIM. L. 275, 281 (2020); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015).

87. Indeed, this vision would appear to reject any form of governance and therefore would be very different than the one imagined by socialist abolitionists who would favor (non-criminal) regulation and state intervention.

carceral state or *penal state* (however we are defining them),[88] rather than the state itself.[89] Indeed, Langer has argued that minimalists should take to heart the abolitionist argument that

> [i]t is not possible to eliminate mass incarceration if other realms of social life and public policy are not also transformed. . . . The elimination of mass incarceration and the reduction of punitiveness in the United States would require the use of other social and public policy tools such as ensuring that people have access to housing, food, education, health care, jobs and economic security, a healthy environment, and so forth.[90]

So, the goal of a minimalist project actually might involve increasing (or at least preserving) forms of social control that are understood as less punitive and more egalitarian.[91]

F. Structural Inequality

Following from this last point, the growing body of critical commentary on mass incarceration tends to foreground equity concerns and emphasize the role of criminal legal institutions in entrenching inequality along lines of race and class.[92] If we accept that a key problem with criminal institutions—particularly in the United States—is their role in entrenching inequality, then maybe minimalists, like many reformers and abolitionists, should be focused on minimizing inequality.[93]

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88. On these definitional problems, see Rubin & Phelps, *supra* note 27; Garland, *supra* note 27.

89. *See* Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1295 (2021) ("Some advocates of penal divestment advocate shifting funds from policing and the penal system to governmental agencies tasked with community support, service provision, housing, and welfare. This logic draws from a noncontroversial sociological insight that, as the American welfare state has mutated and devolved, the penal system has risen to supplant its intended work.").

90. Langer, *supra* note 3, at 76.

91. Raising the question of whether it makes sense to assume that the pathologies of the "carceral state" wouldn't also extend to the non-carceral state. *See generally* Levin, *Criminal Law Exceptionalism*, *supra* note 4. *See also* Bell et al., *supra* note 89, at 1301–02 ("While the social welfare logic of reinvestment makes sense given larger changes in the social policy landscape, and seems to enjoy relatively widespread support, it also has several potential drawbacks. One is that the state's provision arm has never operated justly, certainly not toward racially marginalized communities. There is a large body of research cataloguing the perils of the welfare state for poor people and communities of color—surveillance, blame and assessments of desert, humiliation and stigmatization, administrative burden, reinforcement of racial hierarchy, and the welfare state's own carceral and neoliberal logics and justifications." (footnotes omitted)).

92. A string cite here can't begin to do justice to the volume of this work. For a few prominent examples, though, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017).

93. *See* Langer, *supra* note 3, at 76.

This strikes me as a worthy goal. But, it also implicates the complicated relationship between criminal policy and broader social welfare policy. For those of us concerned with inequality, minimizing (or abolishing) criminal institutions might be both over- and under-inclusive. On the one hand, criminal policy is hardly the exclusive driver of inequality in the United States, and it's worth asking whether minimizing or abolishing criminal institutions is the best place to start in reversing centuries of structural inequality.[94] On the other hand, not all questions of criminal policy implicate equity concerns, and to the extent that they do, a pure focus on equality might not lead to outcomes consistent with other minimalist ends.[95] Would the goal be to minimize criminal legal institutions, with the assumption that this would have desirable distributive results?[96] Or to minimize inequality, with the assumption that this would have desirable results in terms of decarceration, de-policing, etc.?

Further, for commentators focused on penal administration in other countries or non-U.S. jurisdictions, what would this minimalist project entail? Put differently, if you were a criminal law minimalist in a country or jurisdiction without clear race- or class-based disparities in penal administration,[97] would that mean that your minimalist work was done? Might minimalism focused exclusively on inequality or racial/distributive justice accept harsh punishment and expansive criminal codes if penal sanctions were doled out equitably—or even particularly targeted at the rich, the powerful, the racist, and so forth?[98]

G. Cultural Tendencies

Finally, it is conceivable that the minimalist project should focus on

94. *See, e.g.*, TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION 195 (2022).

95. For example, a concern with the "African American security interest," with remedying victimization in marginalized populations, or with equalizing the treatment of all defendants across race and class lines might lead to harsher results in certain situations—or at least to a resistance to dialing back policing and punishment. *See generally* Gardner, *supra* note 3. *See also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014); Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1383 (2018).

96. *See* Levin & Levine, *supra* note 6.

97. Or disparities that somehow tracked membership in a marginalized or minority group.

98. For an extended exploration of this question, see Levin & Levine, *supra* note 6; *cf.* Gruber, *supra* note 95, at 1383 (examining potential tensions between decarceration and efforts to create a racially equitable system); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 225 (2020) (examining approaches to criminal law that emphasize the relative social status of defendants and victims); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1438 (1988) (describing a potential "[a]ffirmative action" approach to imposing the death penalty).

cultural tendencies ("punitive impulses" and "carceral logics")[99] that transcend the legal system and formal legal institutions. Punitive criminal institutions might be understood as reflective of (or at least deeply enmeshed in) certain popular preferences for punishment.[100] Much recent critical commentary emphasizes not only that the institutions of penal administration are objectionable, but also that the ideologies they reflect are troubling.[101] If the problems of mass incarceration and contemporary criminal politics are cultural as well as structural, then changing laws can only do so much.

For example, if we are worried about exclusion of people with criminal records from the labor market, then "ban the box" laws might be appealing.[102] Yet, prohibiting employers from engaging in formal discrimination does not address broader cultural prejudices or the underlying belief that people with criminal records are more dangerous or are somehow less deserving of full membership in the community.[103] That

99. *See, e.g.*, Steven Arrigg Koh, *"Cancel Culture" and Criminal Justice*, 74 HASTINGS L.J. 79, 83 (2022) ("[T]he downsides of cancel culture's structure reflect deeper, problematic U.S. punitive impulses that characterize our era of mass incarceration."); S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117, 131 (2023) ("'[C]arceral logics' refers to the ways the family regulation system not only intersects with the criminal legal system but mirrors the ways it subordinates marginalized groups to maintain social order. To be sure, the family regulation and criminal legal systems have different purported goals and are governed by separate procedural and substantive rules. Still, much like the criminal legal system, the family regulation system relies on surveillance, coercion, and punishment, instead of support, to achieve the purported goal of child safety."); Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471, 504 (2022) ("No child should go to any kind of institution that is imbued with carceral logics. To abolish youth incarceration is to not only to get rid of the buildings known as prisons or detention centers, it is to abolish the places where we dispose of children when we assume they are broken. Those carceral logics, rooted in racism and ableism, are what must be abolished, and all residential rehabilitative programs are vulnerable to such carceral logics.").

100. *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 80–82 (2003); BARKOW, *supra* note 24; Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577 (2012). *But see* LISA L. MILLER, THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS (2016) (arguing that punitive impulses are overstated and much public support for punitive policies stems from voters' constrained options for non-punitive state intervention).

101. *See, e.g.*, Annamma & Morgan, *supra* note 99, at 504 (critiquing the prevalence of "racism and ableism"); SCHENWAR & LAW, *supra* note 69; Dean Spade, *Keynote Address*, 19 COLUM. J. GENDER & L. 1086, 1107–08 (2010) ("The framing of harm as a problem of bad individuals who need to be exiled is one that appears again and again, not just in our criminal punishment systems, but in schools, employment settings, organizations, neighborhoods, friend groups, activist groups, and families.").

102. On ban-the-box laws, their history, and application, see LINDA EVANS, LEGAL SERVS. FOR PRISONERS WITH CHILD., BAN THE BOX IN EMPLOYMENT: A GRASSROOTS HISTORY (2016), https://www.prisonerswithchildren.org/wp-content/uploads/2016/10/BTB-Employment-History-Report-2016.pdf [https://perma.cc/VGZ2-MJRA].

103. As scholars have shown, the implementation of ban-the-box laws is complicated by existing racial prejudice. *See, e.g.*, Lesley E. Schneider, Mike Vuolo, Sarah E. Lageson & Christopher Uggen, *Before and After Ban the Box: Who Complies with Anti-Discrimination Law?,* 47 LAW & SOC. INQUIRY 749, 755 (2022) ("According to theories of statistical discrimination, employers may fear or assume that

is, the law operates against the backdrop of—and in the context of—a society that has internalized certain norms about culpability, dangerousness, and exclusions.[104] Viewed through this lens, then, perhaps minimalism (or criminal justice reform, or abolition) would need to involve a project of changing hearts and minds, not just changing legal rules and institutions.

Therefore, as in the context of discussions about social control and structural inequality, this sort of minimalist project necessarily would move us outside of traditional criminal policy reform. And, as in many of those areas, the nature of the minimalist project isn't entirely clear. For example, should the minimalist support non-criminal accountability mechanisms (e.g., school and workplace disciplinary systems, deplatforming, and social sanctioning)?[105] On the one hand, these mechanisms or institutions might be desirable—they might serve some of the ends of criminal law (expressing values, imposing accountability, and perhaps also deterring) without turning to the violence of the criminal system. On the other hand, these institutions or mechanisms would still stigmatize and exclude, might still reflect troubling biases (along lines of race, class, etc.), and would do so without the public oversight and accountability of the formal criminal system.[106]

Put slightly differently, one strong form of minimalism might seek to minimize "quasi-criminal" institutions—with quasi-criminal defined in broad terms transcending both the civil/criminal and also public private divides.[107] Another might view quasi-criminal institutions as a desirable alternative to criminal law that might achieve its social functions without the staggering human costs.[108] And, perhaps another might view quasi-

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African Americans possess a criminal record unless they are provided with evidence to the contrary—indicated by a clear 'no' response to a criminal record question."); Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560 (2017).

104. *See* Spade, *supra* note 101, at 1107–08.

105. On school discipline and its relationship to criminal law, see AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 178 (2020) [hereinafter GRUBER, FEMINIST WAR ON CRIME]; Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 897 (2016); Halley, *supra* note 86, at 117. On workplace discipline and its relationship to criminal law, see Ahmed A. White, *My Coworker, My Enemy: Solidarity, Workplace Control, and the Class Politics of Title VII*, 63 BUFF. L. REV. 1061, 1063 (2015); Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 597 (2009); Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2288 (2018). On deplatforming, social sanctions, and their relationship to criminal law, see Hadar Dancig-Rosenberg, Roy Rosenberg & Anat Peleg, *Post or Prosecute? Facebook, the Criminal Justice System and Sexual Assault Victims' Needs*, 2023 U. ILL. L. REV. 1533, 1579; Aya Gruber, *A Tale of Two Me Toos*, 2023 U. ILL. L. REV. 1675, 1752; Koh, *supra* note 99.

106. *See* Levin, *Criminal Law Exceptionalism*, *supra* note 4, at 1420–24.

107. Whether "quasi-criminal" is a useful category at all presumably would depend on whether or to what extent one considers criminal law exceptional from other institutions. *Cf.* Ristroph, *supra* note 65 (describing and critiquing criminal law exceptionalism).

108. I see this question as implicating a larger debate in abolitionist and reformist circles of how

criminal institutions as irrelevant to the project of criminal law minimalism—a distraction from more immediate questions about how to get people out of prison or reduce police violence.[109]

II. HOW MUCH SHOULD MINIMALISTS MINIMIZE?

Deciding what to minimize is only half the battle. The next question for minimalists should be *how much* to minimize. Elsewhere, I have argued that the language of "overcriminalization" implies that there is a correct amount of criminal law.[110] Similarly, the language of minimalism implies that we could identify a minimal acceptable amount of criminal law (or policing, or whatever else we are minimizing).[111] Aiming for either more or less would be undesirable. If you were comfortable with more, then you wouldn't be a minimalist. If you wanted less, then (maybe) you would be an abolitionist.[112]

A certain amount of minimalist writing has been framed explicitly against work that was either supportive of—or at least agnostic toward—the growth of criminal law.[113] That is, the opposite of minimalism would be maximalism. Perhaps the sample size is too small to draw such a conclusion, but I see more recent minimalist writing as reflecting a different foil: abolition.[114]

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to achieve "accountability" without replicating or recreating criminal punishment. *See* Mariame Kaba & Rachel Herzing, *Transforming Punishment: What Is Accountability Without Punishment?*, *in* KABA, *supra* note 2, at 132, 136; Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 449 (2020) ("The challenge for reform is to forge a future in which our legal institution of collective censure promotes both accountability and forgiveness, condemns acts without condemning people, and works to mitigate inequality rather than to drive it.").

109. *Cf.* Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1244–45 (2022) (reviewing GRUBER, FEMINIST WAR ON CRIME, *supra* note 105) (expressing skepticism about whether "prison abolition needs or benefits from connection to other types of discipline and deprivation").

110. *See* Levin, *The Consensus Myth*, *supra* note 4, at 293–94; *see also* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012) ("As the term implies, 'overcriminalization' posits that there are too many criminal laws on the books today. It is, of course, difficult to make such claims without a normative baseline—an idea of what constitutes the 'right' number of criminal laws—and such a baseline is elusive at best.").

111. Or, at the very least, that we could identify a means of identifying how to go about minimizing—an analytic, heuristic, or rubric to deploy to determine how much criminal law to eliminate.

112. Maybe more accurately, if you wanted none at all, you'd be an abolitionist. If you wanted less, then you'd still be a minimalist—just a minimalist with a different (or incorrect?) understanding of the minimum acceptable amount.

113. For example, Husak's writing on the problem of overcriminalization offers minimalism as an alternative frame to conventional approaches that had failed to constrain the growth of the criminal system. *See* HUSAK, *supra* note 8, at 178–206; *cf.* Langer, *supra* note 3, at 54 (discussing the historical roots of Italian penal minimalism as a counterpoint to "'maximalist' conceptions of criminal law").

114. *See, e.g.*, Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 182 n.88 (2021) (characterizing Langer as offering a minimalist critique of abolition); Christoph Burchard, *Criminal Law Exceptionalism as an Affirmative Ideology, and its Expansionist Discontents*, 17 CRIM. L. & PHIL. 17

Minimalism's framing as an alternative to abolition further highlights the need to ask how much minimalists should minimize—what makes minimalism distinct from abolition? Minimalist critiques of abolition often take one of two forms: (1) minimalism is a superior alternative to abolition because it takes seriously the need to prevent or respond to harm;[115] and (2) "abolition" is a misnomer because (most) abolitionists actually are advocating for minimalism rather than true abolition.[116] On the first critique, if what sets minimalists apart from abolitionists is that the former believe that *some* criminal punishment is acceptable, then we should ask how much is "some." On the second critique, it still seems important to ask what this minimum acceptable amount of criminal law (or police or punishment) is—how much of it is there before it ceases to be minimal?[117] On both critiques, how should we go about deciding on what the acceptable minimum amount is?

Whether it actually lives up to its rhetorical promise (and whether some of its proponents actually want it to),[118] abolition offers absolutes: *no criminal laws, no cages, no police*.[119] Minimalism doesn't, and that's the point. But, that also means we need to examine what principles, theories, or commitments would govern the minimalist project—how would they guide us in determining the minimal acceptable amounts? And, do each of us agree with those minimums?

A. Minimalism Everywhere

On some level, I'm not sure who *isn't* a criminal law minimalist—at least when it comes to people who study criminal law in the United States. That's not to suggest that there aren't significant differences among criminal law scholars, nor is it to downplay the important work of self-described minimalists. And, of course it depends on how we define minimalism. Yet, I understand something like commitment to criminal law minimalism as a common feature in criminal-legal scholarship. I appreciate that minimalism

(2023) (identifying minimalism as distinguishable from—and perhaps preferable to—abolition). *But cf.* Langer, *supra* note 3, at 54–66 (noting that minimalism has long been in discussion with abolitionism).

115. *See, e.g.*, Gardner, *supra* note 3, at 1743 n.175 (critiquing abolition's failure to account for the "security interest" of African Americans); Langer, *supra* note 3, at 57–59; TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 249 (2016); SHELBY, *supra* note 94, at 200–01.

116. *See, e.g.*, Langer, *supra* note 3, at 58; Barkow, *supra* note 3, at 265; *cf.* Frampton, *supra* note 1, at 2021 (noting that "ceding . . . ground" on debates about "the dangerous few" casts doubt on the nature and necessity of the abolitionist project).

117. *Cf.* Frampton, *supra* note 1, at 2021 ("Is that which separates the abolitionist, the Brennan Center, and the Koch Brothers simply an empirical dispute about how few 'the dangerous few' really are?").

118. *See supra* note 116 and accompanying text.

119. *But see supra* note 78 and accompanying text (expressing skepticism that these goals or commitments necessarily should be lumped together).

might offer a theoretical alternative (or set of alternatives) to abolition.[120] But, I am less sure that minimalism provides a principled theoretical alternative to much of mainstream criminal legal thought that predominates in the U.S. legal academy. That is, I find myself wondering if minimalism (in at least some recent forms) operates as a rebranding of mainstream criminal legal thought.

As a practical matter, 18 U.S.C. § 3553—the section of the U.S. Code that governs sentencing—directs judges to "impose a sentence sufficient, but *not greater than necessary*, to comply with [the statute's] purposes."[121] Certainly, there's good reason to be quite skeptical of this provision's effect given "the disconnect between § 3553(a)'s least restrictive alternative principle, sometimes known as the parsimony principle, and the severity of the [sentencing] guidelines."[122] Yet, the statutory language suggests an official endorsement of a minimalist principle.[123]

And as Carissa Byrne Hessick observes, "[t]he parsimony principle appears in both formal sentencing law and in punishment theory. The principle requires that any punishment imposed 'should be no more severe than necessary.'"[124] That is, a commitment to some version of minimalism stands as a hallmark of both consequentialist and retributive approaches to criminal law. Deterrence theorists argue for optimal deterrence—criminal law and punishment are justifiable only to the extent that they prevent more harm than they cause.[125] A ten-year prison sentence might deter, but if a one-year prison sentence would deter just as much, the additional nine years are unjustifiable. Similarly, retributivists embrace some sort of proportionality principle—guilty defendants deserve punishment, but that punishment should be proportional to their culpability or the harm that they caused.[126] The person who accidently causes a minor car accident shouldn't be punished the same as a person who masterminds multiple murders.

Put slightly differently, I understand academic accounts of criminal law

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120. *See supra* notes 115–19 and accompanying text. That's assuming, of course, that there isn't actually overlap between minimalism and abolition. *See infra* notes 130–31 and accompanying text.

121. 18 U.S.C. § 3553(a) (emphasis added).

122. Lynn Adelman, *More Law than We Needed: Marvin Frankel on Criminal Sentencing*, 35 FED. SENT'G REP. 220, 224 (2023).

123. One reading of this disconnect might lead us to conclude that sentencing judges (and perhaps members of the Sentencing Commission) are ignoring the parsimony principle. Another reading might suggest that the continued severity of sentences illustrates that many people view those sentences as the "least restrictive" option. *See infra* Section II.B.

124. Carissa Byrne Hessick, *Judges and Mass Incarceration*, 31 WM. & MARY BILL RTS. J. 461, 473 (2022) (footnotes omitted) (quoting Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1336–37 (2006)).

125. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 196 (1968).

126. *See* Jeffrie Murphy, *Mercy and Legal Justice*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162, 164 (1988).

as generally embracing a sort of minimalist commitment. Or, at least that is the case if we define minimalism as a belief in using criminal law (or criminal legal institutions) as little as necessary.[127] The *ultima ratio* principle—that criminal punishment should be the response of last resort—has been a staple of much criminal legal theory for centuries.[128] And for centuries, scholars have sought to define the proper reach of criminal law and—in so doing—have articulated the *limits* of criminal law. We can and should debate whether they have done a good job defining those limits. And, many contemporary critics (myself included) see earlier theories of criminal law as much too capacious. In that respect, criminal law minimalism might be understood less as representing a break from earlier thinking about criminal law and more as representing a recalibration of or revision of earlier accounts.

If I am correct in my characterization, many people are—and have been—minimalists. Most professors I have encountered in the U.S. legal academy would fall into this category, as would most of the authors whose work is included in the leading criminal law casebooks. Indeed, Alessandro Corda recently has argued that

> [a] majority of scholars today advocate, whether explicitly or implicitly, for a *minimalist* account aiming for a criminal law that is (1) primarily concerned with those conducts offensive of the *ethical minimum* of a given society expressing the "shared beliefs of what is truly condemnable" and (2) used only as a *last resort* in contrasting unwanted behavior.[129]

That said, I take it that the minimalist label (however defined) might be inaccurate when applied to four groups of people, three of which I see represented in one form or other in the legal academy. First, abolitionists. Assuming that abolitionists believe that there is no acceptable amount of criminal punishment, then they don't want to minimize; they want to abolish. That said, there is and might be significant overlap between abolition and minimalism in both theory and practice,[130] raising at least

127. To be clear, I understand that different scholars define minimalism in different ways—see Langer, *supra* note 3, at 55–56 for a comparison of definitions—but I take something like this basic statement to be a shared feature of different minimalist accounts.

128. On this principle and its historical grounding, see 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). On its centrality to a minimalist vision for institutional change, see Langer, *supra* note 3, at 72–76.

129. Alessandro Corda, *The Transformational Function of the Criminal Law: In Search of Operational Boundaries*, 23 NEW CRIM. L. REV. 584, 585–86 (2020) (footnotes omitted).

130. *See e.g.*, Langer, *supra* note 3, at 55–56; Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 184 n.96 (2022) ("Accordingly, abolitionism and criminal law minimalism have significant overlap in my analysis.").

some question about where one begins and the other ends. Indeed, despite drawing useful distinctions between minimalism and abolition, Langer also has argued that "these approaches share substantial points in their respective agendas" and that historically (at least in the Argentine context) "criminal law minimalists [and abolitionists] saw themselves as simpatico with each other, rather than as ideological or political opponents."[131]

Second, pragmatic proponents of discretion who see the overbreadth of criminal law as a tool to facilitate decision-making by police, prosecutors, and perhaps judges. Tricky as it might be to define abolition, this group is even harder to define. But, I'd characterize this as a view that it is desirable to criminalize *too much* as a means of greasing the wheels for prosecutors and police. Under this view, we might want legislators to pass statutes that criminalize conduct that we wouldn't actually want to see punished so long as this decision increased the odds that police and prosecutors could successfully apprehend bad actors.[132] Outside of the realm of substantive criminal law, this position might lead people to be enthusiastic about more intrusive policing than otherwise seen as necessary. This view is rooted in faith in discretion—trusting that police will only arrest when they need to, prosecutors will only pursue charges against the right defendants, and judges will punish only the deserving.[133]

It is conceivable to me that this pro-discretion group still could have some minimalist commitment. That is, the faith in discretion implies that there is a right and a wrong way for the state to wield its prosecutorial powers. There certainly wouldn't be a commitment to minimalism on the front end,[134] but it's still common for people to believe that there are proper and improper exercises of discretion. Just because the police could arrest, the prosecution could charge, or the judge could sentence doesn't mean that they must. Put differently, people in this camp might be minimalists when it comes to the actual imposition of punishment, but not when it comes to substantive criminal law.[135]

Third, and perhaps related to the previous group, would be scholars who adopt some general principled position on criminal law, but accept errors or exceptions that lead to excessive criminalization and punishment. A consequentialist who believes that criminal law should produce an optimal

131. Langer, *supra* note 3, at 55–56.

132. *See* J. Harvie Wilkinson III, Essay, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1132 (2014).

133. With clemency or the pardon power as a final discretionary backstop.

134. To use Stuntz's language, more people would be "funnel[ed]" into the system. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782–83 (2006).

135. This point goes to an important takeaway from Part I: Because there are so many different potential targets for minimalists, one could be a minimalist in one area, but not in another. As noted earlier, I also see this as issue for abolition. *See supra* note 78.

rate of deterrence presumably would recognize that it might be difficult to achieve optimal deterrence. So, criminal actors and institutions could err in either direction—punishing more than is necessary or punishing less than is necessary. Consequentialist minimalists would opt for the latter. (This position would reflect some version of the so-called "Blackstone ratio": "[B]etter that ten guilty persons escape, than that one innocent suffer.")[136] Or at the very least, they would reject the possibility that over-punishment or overcriminalization would be acceptable. But, some consequentialists seem to be ambivalent as to which errors they would prefer.[137] To them, erring on the side of "wrongful acquittals" might be better, but not necessarily.[138] Cost-benefit analysis might lead them to conclude that rules that facilitate wrongful convictions actually are more desirable. Without minimalism or other deontological commitments as constraints, they would be willing to over-punish, over-criminalize, or over-police, if they believed that approach would benefit society.

Finally, the fourth group is one that largely falls outside of the academy and the sorts of theoretical conversations in which minimalists are engaged—people who would default to criminal law and police and are largely unconcerned with whether innocent people are convicted or subject to state violence. I suspect that many people who fall in this category still believe in a line between legitimate and illegitimate state conduct in penal administration. I also suspect, though, that they are more inclined to trust law enforcement and to be skeptical of claims that the prosecutorial arm of the state is acting unfairly (e.g., "police wouldn't have stopped the defendant if he weren't doing something wrong").

B. Minimalism for Pluralist Institutions

In suggesting that minimalism is more widespread than it appears, I don't mean to suggest that self-described minimalists necessarily share the same commitments or goals as most other scholars. At least some criminal law minimalists clearly have something particular in mind when they use the language of minimalism; even though their minimalisms might look very different,[139] they are engaged in a project of defining an overarching theory of criminal law or criminal legal reform. And, of course I realize that the

136. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

137. *E.g.*, Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015); Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass R. Sunstein*, 43 TULSA L. REV. 921, 927 (2008); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 336–39 (2002); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

138. *See* Epps, *supra* note 137, at 1094, 1151.

139. *See* Langer, *supra* note 3, at 54–55.

arguments traced above can become absurd in their extreme form—if everyone is a minimalist, that means many people who support harsh criminal policies are, too. But, my claim is that the foundational theoretical arguments that underpin minimalism don't necessarily differ from the theoretical arguments that drive much contemporary thinking about criminal law.

The important question for us to ask isn't whether people are criminal law minimalists; it's what counts as minimal. Or put differently, what is the least acceptable amount of criminal law, punishment, policing, etc. that can be justified by our preferred theory of criminal law? What I've suggested is that we might understand competing theories of criminal law or positions on criminal policy as reflecting competing understandings of what criminal legal institutions are supposed to do and how much criminal law is necessary to achieve those ends. We can—and presumably do—disagree about what is actually a "minimal" acceptable amount of criminal governance. So, the challenge for minimalists is not necessarily defending minimalism as such; it is defending their own particular minimalism—not just what they are hoping to minimize (prisons, police, etc.), but how society should go about determining what the minimally acceptable amount is.

One of the great challenges here, as in many questions of criminal policy, is the lack of a shared vision of what criminal legal institutions are supposed to do.[140] As a society, we look to criminal law to serve many ends.[141] In the United States, criminal law has been used as a "catchall solution[] to social problems,"[142] and the state has used criminal law as a sort of default regulatory framework.[143] Often, criminal "statutes represent[] cheap political reactions to singular events or scandals of the day."[144] As scholars have documented at length, public spending on punishment has come to

140. *See* Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2806 (2022); Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 CALIF. L. REV. 683, 686 (2023) ("Punishment on any scale is often justified through various theories, and mass incarceration has the unique malleability to be many things to many theorists."); Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 82 (2020) (book review) (arguing that a rational, technocratic approach to criminal justice reform is complicated because "the fraught discourse on criminal punishment reveals that there is no overarching agreement on what exactly criminal law is supposed to do").

141. *See generally* Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27 (2020).

142. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 2 (2007).

143. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 17 (2007); Baer, *supra* note 100; Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 672 (2011).

144. Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 238 (2018).

supplant much spending on social services.[145] And, aside from issues of political economy, criminal law is justified in theoretical terms on a host of different fronts—as a means of ensuring public safety, as a response to harm and wrongdoing, as a vehicle for expressing public values, and so forth.[146]

It should come as little surprise, then, that debates about criminal policy in the United States have become the site of much impassioned disagreement about many issues from racial justice to economic inequality.[147] It also should come as little surprise that we lack a shared set of commitments against which to measure minimalist proposals. Put differently, the retributivist might have a very different normative baseline for the minimal amount of acceptable criminal punishment than the consequentialist. Contested values and priorities are features of a pluralist society—and a pluralist criminal system.[148] Again, this lack of general agreement isn't fatal to minimalism; it just means that how to minimize is hardly self-evident.[149] But, it also means that an appeal to minimalism might raise as many questions as it answers. And just how "minimal" minimalism is depends on each minimalist's priors.

For example, in his critique of abolition, philosopher Tommie Shelby suggests that

> [W]e reserve[] prison primarily for those who commit the most serious and egregious crimes. Here I have in mind primarily crimes against the person—murder, rape, kidnapping, child abuse, sex trafficking, and aggravated assault. We might also include arson, great financial crimes (think Bernie Madoff), and cybercrimes that threaten democracy. These acts cannot be justified or excused even under deeply unjust circumstances, and they typically cause lasting trauma or significant and irreparable harm. . . . Other offenses should either be decriminalized altogether or, where criminalization is warranted, carry lesser and non-carceral penalties (for example, fines, home confinement, restitution, temporary loss of privileges,

145. *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–2 (2016); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 41 (2009).

146. On the "traditional" purposes of punishment (retributivism, deterrence, incapacitation, and rehabilitation), see 18 U.S.C. § 3553(a). On expressive theories of punishment, see FORGIVENESS AND MERCY, *supra* note 126; Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

147. *See* SHELBY, *supra* note 94, at 195 (suggesting that "the prison system . . . serves as a microcosm of all that is wrong with existing social arrangements").

148. That is to say a set of criminal legal institutions that reflects a range of different values and priorities.

149. *See supra* notes 54–63 and accompanying text.

> community service, supervised probation, and electronic monitoring).[150]

Does this imagined regime sound better than the status quo? Yes. Does it differ dramatically from abolition? Yes. Is it minimalist? I'm not sure.

Shelby does not use the phrase "criminal law minimalism" or identify as a minimalist in writing about abolition.[151] But, he argues that "[t]o protect the vulnerable from wrongful aggression, it may be necessary to sentence the most violent of these oppressed offenders to prison. This should be done reluctantly . . . only after less harmful measures have been tried but failed."[152] Based on this and his work elsewhere, I think it's fair to characterize his analysis as reflecting a minimalist posture.[153]

That said, it's important to recognize how much criminal law and carceral punishment Shelby argues is necessary. There is an awful lot of conduct (both criminal and non-criminal) that "cause[s] lasting trauma or significant and irreparable harm."[154] And, whether "acts [can] be justified or excused even under deeply unjust circumstances" is a tricky standard to apply.[155] Indeed, the lines that Shelby draws sound relatively similar to the classic *malum in se*/*malum prohibitum* distinction. And the logic of reform that follows from that line is relatively modest: we need criminal law for the bad stuff, and we should decriminalize stuff that's not so bad. I—like most minimalists, abolitionists, and reformers of all ideological stripes—want to see the stuff that's not so bad decriminalized. Jails and prisons shouldn't be full of people who have behaved in ways that aren't really so bad. The problem, of course, is that we don't all agree on what's not so bad (and, of course, on what to do about the bad stuff).

This logic might get us to reforms, but they are the sorts of modest compromise reforms that are already on the table—e.g., decriminalizing possession of small amounts of marijuana or other conduct society has come to view as innocuous.[156] That's not to say that those reforms are

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150. SHELBY, *supra* note 94, at 115–16.

151. *See generally id.*

152. *Id.* at 201 (footnote omitted).

153. Based on Shelby's other work, Trevor Gardner argues that

> Shelby's philosophy of criminal punishment of the underclass does not serve to justify the modern criminal enforcement regime. It instead justifies what criminal-legal scholars increasingly reference as criminal-law minimalism where the state punishes reluctantly, only to prevent unjust and harmful aggression, recognizing that it may be partly at fault for these wrongs.

Gardner, *supra* note 3, at 1722 n.85 (internal quotation marks omitted) (emphasis removed); *cf.* HORDER, *supra* note 8, at 79 (articulating similar concerns as primary features of minimalism).

154. SHELBY, *supra* note 94, at 115.

155. *Id.*

156. *See* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 165–69 (2015) (describing this position).

undesirable;[157] it's that they can only take modest bites out of mass incarceration.[158] They would still allow for harsh punishment and widespread criminalization when it comes to conduct deemed bad, harmful, etc. I'm not sure that we need minimalism, abolition, or any sort of radical new approach to decarceration to justify or achieve these reforms.

Of course, Shelby isn't representative of all minimalists, and his principled limits on punishment aren't the same ones that other minimalists offer. But, I see his analysis as an important example for us to consider in thinking about minimalism and its limitations.

Langer has argued that when faced with questions about the "dangerous few," some abolitionists "backtrack[] to criminal law minimalism."[159] That is, the more willing that abolitionists are to concede that people can be categorized as members of the "dangerous few," the more they cease to be abolitionists—instead, they are minimalists identifying a minimally acceptable province for incarceration.[160] The backtracking formulation strikes me as very helpful in broader discussions of criminal policy, not only in discussions of abolition. Indeed, one way of reading Shelby's minimalist vision of criminal law is that it could quickly backtrack from minimalism to something else. Backtracking should be a concern for any of us concerned about the status quo—it's easy to oppose criminal punishment in theory or when we're imagining the most sympathetic defendants, but it gets harder when we're forced to confront unsympathetic conduct or defendants.[161]

While I do not see minimalism as uniquely susceptible to concerns about backtracking, the worry about backtracking should be an important component of theorizing—and operationalizing—minimalism. In short, how much ground could minimalism cede to criminal law before it ceases to be minimalist?

CONCLUSION: WHAT DOES MINIMALISM OFFER?

My goal in this Essay has been to ask a series of questions that I hope will help those of us who care about criminal policy (minimalist and non-minimalist alike) clarify our commitments and concerns. Ultimately, these

157. *But see* FORMAN, *supra* note 92, at 221–22, 230 (arguing that a reformist rhetoric focused on "nonviolent offenders" might "effectively mark[] this larger group of violent offenders as permanently out-of-bounds"); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 23 (2017) ("[T]he rhetoric and tactics used to push through reforms for lower-level offenses often explicitly involve imposing even harsher punishments on those convicted of violent crimes.").

158. *See* GOTTSCHALK, *supra* note 156.

159. *See* Langer, *supra* note 3, at 58–59 (emphasis removed).

160. *See id.*; *see also* Frampton, *supra* note 1, at 2021.

161. *See, e.g.*, GRUBER, *supra* note 105, at 6 (describing "carve outs" where progressive critics of criminal law embrace punitive policies); Levin & Levine, *supra* note 6 (same).

broad questions asked invite a slightly more pointed question: What does "minimalism" as a label get us? Assuming I'm right that much conventional criminal legal theory, much reformist thought, and even some abolitionist thinking could be classified as "minimalist,"[162] why call it "minimalist" at all? What does adopting the label accomplish?

As noted at the outset, I'm not focused here on whether "minimalism" is a rhetorical frame that might mobilize activists, voters, and policymakers.[163] If the question were whether "criminal justice reform," "abolition," or "criminal justice minimalism" is a more effective framing for advocacy, I would have my doubts about the promise of minimalism (as, to be honest, I have my doubts about "abolition" and many other labels).[164] But, that's an empirical question. And, I don't read the current literature on minimalism as reflecting that focus or goal—instead, I see some scholars who invoke minimalism as seeking greater clarity and precision in the study of criminal policy and in the articulation of reformist objectives. That's why the framing of minimalism as an alternative to abolition strikes me as important: I read some minimalist commentary as suggesting that abolition offers a sort of false clarity. Minimalist critics argue that instead of answering hard questions about the dangerous few or how to ensure safety and accountability, abolition speaks a language of moral certainty.[165]

I agree that there's an important difference between viewing criminal legal institutions as inherently suspect and viewing the institutions as legitimate but in need of re-calibration. Indeed, this is a distinction that I've drawn and defended at length.[166] To that end, I appreciate the move to articulate where one's reformist vision differs from others'.

That said, I remain unconvinced that minimalism offers a clear and unified framework that differs from a range of conventional approaches to criminal justice reform.[167] And, I worry that some less theoretically ambitious minimalism simply might be reactive—a different way of saying "anti-abolition," as opposed to offering a new vision for criminal legal theory and policy.

Therefore, a turn to minimalism raises many of the same questions that conventional approaches to criminal law (not to mention abolition) raise. Indeed, minimalism might be susceptible to one of the same criticisms

162. *See supra* Section II.A.
163. *See supra* note 24 and accompanying text.
164. *See id.*
165. *See supra* notes 115–16 and accompanying text.
166. *See* Levin, *The Consensus Myth*, *supra* note 4.
167. And, to be clear, I do not mean to suggest that all minimalists or minimalisms purport to offer such clarity or to advance a unified approach. *See* HUSAK, *supra* note 8, at vi, 206 (arguing that minimalism has its limits but "will do a better job than its rivals in furthering the cause of justice by combating the problem of overcriminalization").

leveled at abolition: framed in strong terms, it offers a false sense of certainty.[168] The label promises to do more work than it possibly could—or should.[169]

As I have argued, though, the question isn't whether we should minimize; it's *how* to minimize and what first principles should guide that minimizing. Taking that view necessarily brings us back around to my claim that there couldn't be a single "criminal law minimalism" that functions as a generally applicable framework; instead, there could be—and certainly are—a host of criminal law minimalisms, informed by different worldviews, commitments, and ideologies.

In a way, then, I see this indeterminacy as minimalism's greatest strength, rather than a weakness. As criminologist Nils Christie—a scholar associated with both abolition and minimalism[170]—explains, minimalism "takes away the rigidity in seeing punishment as an absolute obligation, but forces us to give some reasons for our choice of punishment versus non-punishment."[171] In this respect, Christie argues, "[a] minimalist position opens up choice" so that "punishment becomes one, but only one, among several options."[172] Minimalism at its best, then, doesn't end discussions; it should begin them.[173] Declaring oneself a minimalist actually tells us little about the correct way to structure a just society or a desirable criminal system. Instead, it should invite follow-up questions that we as a society collectively must answer: What should we minimize? And, how much?

168. This observation doesn't necessarily tell us whether minimalism is a desirable alternative. *Cf.* HUSAK, *supra* note 8, at 178–79 (arguing that rejecting minimalism because it might be susceptible to critiques "will only perpetuate the status quo").

169. *Cf.* Levin, *After the Criminal Justice System*, *supra* note 4, at 942–46 (expressing skepticism about the work that labels can do as a normative matter in the criminal policy context). In this regard, I appreciate Husak's disclaimer as he aligns his work with minimalism: "I resist *isms* generally and the most familiar isms in particular." HUSAK, *supra* note 8, at vi.

170. *See* Sophie Angelis, *Limits to Prison Reform*, 13 U.C. IRVINE L. REV. 1, 5 n.15 (2022).

171. CHRISTIE, *supra* note 15, at 85.

172. *Id.*

173. In this respect, a minimalist frame might be deployed in service of "denaturalizing" criminal legal institutions—treating them not as moral necessities, but as political creations that should be analyzed and critiqued as such. *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 Definitive Article*, 68 U. TORONTO L.J. 140, 150 (2018) (book review); Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777, 1781–88 (2013).