CRIMINAL LAW'S HIDDEN CONSENSUS

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ABSTRACT

American criminal law is facing a crisis of meaning. On one hand, the "traditional school" invokes the archetype of the violent criminal—a murderer, rapist, or thief—who must be prosecuted and punished. On the other hand, the "critical school" invokes the archetype of the low-level drug offender, sentenced to a draconian prison term for mere possession of low levels of marijuana. On this account, the criminal legal system is itself systemically pathological, perhaps even warranting abolition. Like ships passing in the night, the two schools appear irreconcilable. This Article helps break this impasse and builds toward a justification for criminal law minimalism. It shows that, in fact, both schools share a hidden consensus: redressing wrongs. For the traditional camp, the wrong is harmful human conduct. For the critical camp, the wrong is the criminal legal system.

Furthermore, such consensus extends to deep, shared values in American society. It includes fair elections, public integrity, and law enforcement equity—counterintuitively, evident in polarized debates about prosecution of January 6th insurrectionists, Congressman George Santos and Senator Robert Menendez, and Officer Derek Chauvin. Thus, criminal law is not and should not be confined to the archetypes of the murderer or low-level drug offender—it also concerns itself with the election insurrectionist, corrupt politician, and deadly police officer. Finally and prescriptively, this Article will show that this hidden consensus is both a sword and shield for the existing system, guiding us toward a justification for criminal law minimalism.

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INTRODUCTION

American criminal law is facing a crisis of meaning. In our mass incarceration era, most argue that we are prosecuting too many, too often, for too much conduct.[1] Spurred by this policy crisis, scholars and policymakers have fractured into two schools, each implicitly motivated by an archetype.[2] First, the "traditional school" invokes the violent criminal archetype: a murderer, rapist, or thief. On this account, criminal justice is useful and necessary. It evinces a reformist sensibility, arguing for paring back positive law and enforcement around traditional notions of retribution and deterrence. Second, the "critical school" invokes the archetype of the

1. *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 71 (2017); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 90 (2001); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 58 (2008); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 17–18 (2007).

2. As will be discussed further in Part I, the description of the two schools and analysis of their intellectual assumptions affirms and builds on the work of Benjamin Levin and Trevor Gardner. *See generally* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018); Trevor George Gardner, *Multidimensional Criminal Law* (unpublished manuscript) (on file with author).

low-level drug offender, sentenced to a draconian prison term for mere possession of low levels of marijuana. From this vantage point, criminal justice is of limited—or even no—utility. Some in this camp even call for abolition of police, prisons, or other carceral architecture.

The traditional and critical schools offer divergent policy prescriptions reflecting their seemingly irreconcilable assumptions. Calls to defund the police, abolish prisons, decriminalize conduct, or impeach a progressive prosecutor all reflect a deeper notion of how criminal justice should function. The stakes in this space are high: almost two million people are incarcerated in America today.[3] The specter of election interference looms large over the forthcoming 2024 election. Police violence regularly goes viral online, prompting defunding calls and underscoring challenges in training for the 18,000 discrete police departments nationwide.[4] States are holding referenda to decriminalize or legalize various forms of conduct, such as drug-related offenses.[5] Other municipalities are engaging in reforms at the prosecutorial or police department level.[6]

In this debate, each school often sees the other as engaging in bad faith—either perpetrating the pathologies of a structural system or excusing harmful individual conduct. This Article breaks this impasse and builds toward a justification for criminal law minimalism. It argues that the seemingly fractured schools of criminal law debate share a hidden consensus around deep values. First, both sides are concerned with the same fundamental issue: *redressing wrongs*. For the traditional camp, the wrong is harmful human conduct. For the critical camp, the wrong is the criminal legal system. Both articulate a social harm that society must meaningfully redress. Second, this Article will show that this hidden consensus reveals *deeper values* in criminal prosecutions. It will then show how such deep

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3. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/Y3NA-8X3D].

4. *See* Dan Keating & Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter than the People They Serve*, WASH. POST (June 4, 2020), https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/ [https://perma.cc/K2KF-WNLT]; U.S. DEP'T OF JUST., POLICING 101 https://www.justice.gov/d9/policing_101_content.pdf [https://perma.cc/9AGW-YGNS].

5. *See, e.g.*, *Drugs on the Ballot: 2022*, OHIO ST. UNIV.: MORITZ COLL. L., https://moritzlaw.osu.edu/faculty-and-research/drug-enforcement-and-policy-center/research-and-grants/cannabis-on-the-ballot-2022 [https://perma.cc/ECV3-G3NX].

6. For example, in Camden, New Jersey, the police department was dissolved and reincorporated under a county policing system. Michelle M.K. Hatfield, Comment, *Can Police Unions Help Change American Policing?*, 5 UCLA CRIM. JUST. L. REV. 211, 241 (2021). Hundreds of officers were fired and had to reapply with new training and psychological evaluations. Sidney Fussell, *What Disbanding the Police Really Meant in Camden, New Jersey*, WIRED (July 1, 2020, 3:03 PM), https://www.wired.com/story/disbanding-police-really-meant-camden/ [https://perma.cc/5QR4-YJCW].

values function as both a sword and a shield for contemporary U.S. criminal justice.

Part I surveys the critical and traditional schools of criminal legal thought. Part II reveals a hidden consensus in both schools: redressing wrongs. For the traditional camp, the wrong is harmful human conduct. For the critical camp, the wrong is the criminal legal system. Both articulate a social harm that society must meaningfully redress. Part III shows that redress of wrongs centers on deep collective values. After analogizing to the example of a plagiarizing law school 1L, this Part will show three prosecutorial categories that—counterintuitively—underscore deep consensus, despite seemingly polarized critique: January 6th prosecutions, indictment of Republican Congressman George Santos and Democratic Senator Robert Menendez, and prosecution of Officer Derek Chauvin. This Part also considers both historical and recent developments in the Emmett Till case, which revealed the dangers of underenforcement of criminal law. Part IV completes the analysis by underscoring that such values are integral to preservation of the American civil sphere. From this perspective, law is integral to demarcating wrongdoing and facilitating civil repair. Part V turns to reform, showing how this framework is both a sword and a shield for contemporary U.S. criminal justice—committing to less criminal law and alternative redress mechanisms while simultaneously cautioning against cutting away an inner core necessary to prevent corrosion of the social fabric. In so doing, it builds toward a justification for criminal law minimalism.

This Article thus contributes to two major threads of recent criminal law scholarship. First, some criminal legal scholars have squarely recognized a sociological, values-driven dimension to criminal law. Monica Bell has engaged the concept of *anomie* to describe how Black American communities feel legal estrangement from the police, thus complicating the dominant contemporary American reform narrative that better procedural justice will resolve the perception of police illegitimacy in such communities.[7] Meanwhile, Angela Onwuachi-Willig, drawing on cultural sociological theory, has noted that the failure to prosecute crimes may lead to collective trauma in instances where public or official government entities reaffirm inequities for historically or systematically subordinated

7. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2084 (2017) (citing the work of Robert Merton, Robert Sampson, and Dawn Jeglum Bartusch, each of whom further refined the concept of Durkheimian anomie). For example, some Black Americans in Baltimore hold the social representation that both network news and social media are untrustworthy because they advance problematic racial tropes. In so doing, Bell builds to a theory of legal estrangement, rooted in procedural injustice, vicarious marginalization, and structural exclusion. *Id.* at 2111.

groups.[8] Joshua Kleinfeld asserts and recognizes a reconstructivist tradition in criminal law, a theory of criminalization serving a distinctive community role by reconstructing the moral basis of a social order in the wake of an attack on its ethical life.[9] And I have recently called for a reconceptualization of criminal law in light of the complexity of fragmented societal response to criminal prosecutions.[10] Second, this Article builds on scholarship inspecting scholars' and policymakers' assumptions about criminal justice. In particular, Benjamin Levin has described how the seeming consensus around criminal justice reform is illusory due to a cleft between overcriminalization and mass incarceration.[11] And Trevor Gardner has noted the assumptions made about security interests and theories engaged by those diagnosing the ills of the criminal justice system.[12]

Finally, I wish to clarify that this Article is neither a defense of the current criminal justice system nor a wholesale rejection of it. I share in the broad consensus that mass incarceration in America is problematic. As I argue below, the critical school is suited to just that—critique of our current system—while the traditional school evaluates individual punishment. Any discourse requires various perspectives to fully grasp the nature of its object of study. This Article provides a new, constructive view of criminal law—one that shares in the critical schools' structural view and the traditional school's emphasis on individual wrongdoing.

I. THE IMPASSE: THE TRADITIONAL AND CRITICAL SCHOOLS

Legal assumptions are important. What does criminal law do? When is it appropriate? When is it not? Such questions immediately cut to the heart of scholars' and policymakers' fundamental beliefs about criminal law. And yet, often, such assumptions are under-explored. For example, law students are rarely—if ever—asked in law school the simple question "what is law?" or "what does law do in society?" This reproduces in policymaking: legal actors and commentators make claims about criminal justice's nature and function in the world—but their deeper, sometimes implicit assumptions

8. *See* Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 344 (2016).

9. *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1489 (2016).

10. *See* Steven Arrigg Koh, *How Do Prosecutors "Send a Message"?*, 57 U.C. DAVIS L. REV. 353, 360 (2023) [hereinafter *Send a Message*]. In a related symposium contribution, I have also maintained that criminal justice may trigger polarization due to the diverse social representations of various communities. Steven Arrigg Koh, *Prosecution and Polarization,* 50 FORDHAM URB. L.J. 1117 (2023) [hereinafter *Prosecution and Polarization*].

11. *See* Levin, *supra* note 2, at 263.

12. *See* Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1725–57 (2023); Gardner, *supra* note 2.

about criminal law cement their perspectives and recommendations from the start.[13] As Samuel Moyn has recently noted, "law is a social phenomenon reflecting society's meanings and purposes" and "[a] general social theory is the indispensable setting for any credible legal theory."[14]

This Part inspects a contemporary schism in assumptions about criminal law. On one hand, traditional criminal law scholars argue for a recalibration of criminal justice, drawing on the Anglo-American common law tradition. On the other hand, critical scholars leverage notions of hegemony and subordination to argue for criminal law's oppressive capacities. This Part argues that, at their core, both sides are concerned with the same fundamental issue: redressing wrongs. For the traditional camp, the wrong is harmful human conduct. For the critical camp, the wrong is the criminal legal system itself. Both articulate a social harm that society must meaningfully redress.

The older, traditionalist school is familiar to every American criminal lawyer. It is centered in the Anglo-American common law tradition, which is itself informed by moral and political philosophy. In the traditional school, the archetype is the violent criminal.[15] Murderers, rapists, and thieves engage in morally condemnatory conduct, warranting prosecution and punishment by the state. Blackstone famously called criminal law "[t]he body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders."[16] Meanwhile, Henry Hart called criminal law "the judgment of community condemnation which accompanies and justifies [the criminal sanction's] imposition."[17] Relatedly, as every first-year criminal law student learns, two classical theories animate state punishment. First, Kantian deontological philosophy calls for retribution on the ground that individuals must be punished in proportion to their actions.[18] Second, Benthamite deterrence theory demands that individuals be punished either to disincentivize recidivism

13. *See generally* Steven Arrigg Koh, Essay, *Teaching "Is This Case Rightly Decided?"*, 108 MINN. L. REV. HEADNOTES 125 (2024).

14. Samuel Moyn, *Reconstructing Critical Legal Studies*, 134 YALE L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531492 [https://perma.cc/8JLN-CF5K].

15. While this archetype exemplifies the traditional school's focus, this school would also invoke other quintessential conduct as worthy of prosecution (e.g., rape, theft, white collar offenses, etc.). In all such cases, the traditional school identifies what it views as plainly wrongful conduct warranting prosecution.

16. *Criminal Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

17. Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

18. *See* JENS DAVID OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE 25 (3d ed. 2022).

(individual deterrence) or decrease overall perpetration in the broader public (general deterrence).[19]

Meanwhile, critical scholars argue that criminal law is "working the way it is supposed to" in order to oppress historically marginalized and under-represented races and classes.[20] The archetype for this camp is the possessor of low-level amounts of marijuana prosecuted under draconian laws and sentenced to a disproportionate prison term.[21] Abolitionists, mindful of racial and class disparities in the criminal justice system and American society more generally, call for a complete reconceptualization of law enforcement, including abandoning state-sponsored violence in favor of community enforcement.[22] For example, some currently envision an "abolitionist horizon," wherein police are removed from the architecture of the American political economy.[23] Others, in recent years, have developed a vision of prison abolition.[24] And others have conceptualized a more robust version of restorative justice, which considers institutions of accountability outside of traditional, adversarial, prosecutorial process.[25] At its most imaginative and conceptually ambitious, abolitionists question the carceral

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19. *See id.* at 25–26.

20. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 125. I have also explored such questions as part of my broader exploration of transnational and international criminal law. *See generally* Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L.J. ONLINE 161 (2021); Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737 (2021) [hereinafter *Criminalization of Foreign Relations*]; Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019) [hereinafter *Foreign Affairs Prosecutions*].

21. While this archetype exemplifies the critical school's focus, this school could invoke any number of minor offenses (e.g., misdemeanor offenses such as petty larceny) but, in its maximalist form, all human wrongdoing is unworthy of prosecution under orthodox contemporary criminal process.

22. *See, e.g.*, Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2509–11 (2023); BUTLER, *supra* note 1, at 25 (reviewing the extent to which the U.S. criminal justice system is institutionally constructed to control African American men); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 128–30 (2017) (discussing the use of Fourth Amendment jurisprudence to empower police to take violent actions against the Black community); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1193–215 (2017) (reviewing the use of current Supreme Court seizure doctrine as justification for police violence).

23. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787 (2020).

24. *See generally* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022) (summarizing prison abolitionism and commonly used responses to its challengers, as well as proposing alternative responses to such challenges).

25. *See* Gerry Johnstone & Daniel W. Van Ness, *The Idea of Restorative Justice*, *in* HANDBOOK OF RESTORATIVE JUSTICE 1, 1 (Gerry Johnstone & Daniel W. Van Ness eds., 2007); Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020); Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 637 (2021); Leo T. Sorokin & Jeffrey S. Stein, *Restorative Federal Criminal Procedure*, 119 MICH. L. REV. 1315, 1327 (2021) (book review). While such scholars may not all label themselves abolitionists, they are part of a broader intellectual movement reconceptualizing mechanisms of accountability.

logics underlying the entire criminal law system, imagining futures without the punishments that modern criminal justice systems carry.

Each school offers valuable analytical power but underspecifies an aspect of criminal law. The traditional school concretely focuses on theories of punishment and the related doctrine designed to safeguard individual liberties. On this account, the state must be vigilant about its justifications for punishment (e.g., deontological or utilitarian) and construct relevant doctrines (e.g., the principle of legality and burden to prove a case beyond a reasonable doubt). But the traditional school is individualized, underspecifying structural considerations. Most scholars and practitioners lack a deep societal theory. The aforementioned conceptual architecture—retribution, deterrence, rule of law, and proportionality when debating punishment in criminal law—fails to trenchantly theorize collective effects.[26] In practice, prosecutors proceed one defendant at a time.[27] Formally, they make individual determinations about criminal responsibility in each case, focusing on the individual guilt of each defendant. But prosecutors cannot gauge such relationships and are often caught off guard when communities feel solidarity with the individual defendant. For example, former Deputy Attorney General and FBI Director James Comey exhibited this when disapproving of the term "mass incarceration" on the ground that prosecutors proceed on a case-by-case basis.[28] As a result, the traditional school may overlook both criminogenic societal conditions leading to perpetration of wrongdoing and mass incarceration's downstream, collective effects.

Seen through a historical-philosophical lens, the traditionalist's individualized focus is unsurprising. Law in modern society foregrounds the individual. Political theorists and sociologists such as Alexis de Tocqueville, Émile Durkheim, Eugen Ehrlich, and Roger Cotterrell have long noted that contemporary Western democracies have prioritized conceptualizations of the state and the individual, often to the detriment of

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26. As Kleinfeld has noted, theories justifying state punishment derive from a moral philosophical preoccupation with suffering. Kleinfeld, *supra* note 9, at 1497–98 ("This fixation on justifying punishment also lends criminal theory a certain Enlightenment-humanist emotional flavor, for its spiritual root is revulsion at suffering — all suffering, even that of offenders, or perhaps especially that of offenders, as their suffering is inflicted by deliberate social choice."); *see also* PHILIP SMITH, PUNISHMENT AND CULTURE 2 (2008).

27. *Cf.* Gardner, *supra* note 12, at 1719 ("Criminal punishment [is] . . . premised on the culpability of the individual, while this culpability is itself premised on the principle of agency." (footnote omitted)).

28. *See* Michael S. Schmidt, *James B. Comey, Unlike Other F.B.I. Directors, Takes on Controversial Issues*, N.Y. TIMES (Oct. 29, 2015), https://www.nytimes.com/2015/10/30/us/politics/james-b-comey-fbi-director-says-focus-on-brutality-brings-less-police-enforcement.html [https://perma.cc/Z5KA-4NSK].

the "middle tier" of communities.[29] Indeed, the "triumph" of individualism in Western law has rendered "autonomous organisations based on solidarity, such as communities . . . largely invisible to the law . . . [and] insignificant for many purposes as between the individual and the state."[30] In this contemporary legal conception, "individuals are the makers of their own destiny" and "bear responsibility for the acts or omissions attributed to them."[31] In so doing, legal individualism often dismisses the socio-cultural factors that drive human action.[32] Given this contemporary legal reality, criminal law emphasizes individual criminal responsibility—and undervalues systemic effects.[33]

Meanwhile, the critical school similarly has analytical power. The critical school is deeply rooted in social theory and thus highly structural. It is expertly suited to critiques of law and society, and it is laudably conceptually ambitious, forcing many to reflect on and reevaluate fundamental questions of power and inequality in society. But the critical account underspecifies a constructive, affirmative account of law. Often, on this account, law oppresses. Thus, the critical assumption is often that "everything would be better with less criminal law." Indeed, owing to a general skepticism of reform as perpetuating structural inequality, critical accounts often lack a concrete account of what follows in the absence of criminal law and related enforcement.[34] Because the theory of law in this conceptualization is tied to social conflict and oppression, the assumption is that without punitive laws, human welfare for communities would improve. This underspecifies three issues. First, this largely overlooks the social reality in which laws function. Without criminal legal regulation and enforcement, a vacuum may emerge in which different social or economic forces take the place of such regulation. It is an open question whether or not this will be good or bad. As Tommie Shelby has recently noted in *The Idea of Prison Abolition*, "we don't really know how human beings would conduct themselves in the post-capitalist utopia."[35] Relatedly, even without

29. Koh, *Send a Message*, *supra* note 10, at 385; *see also* ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 119 (2d ed. 1992).

30. COTTERRELL, *supra* note 29, at 131.

31. *Id.* at 119.

32. *Id.*

33. *See* Kleinfeld, *supra* note 9, at 1496 ("[R]etributivism is so individualistic that the very problem of mass racial incarceration is in a sense *invisible* to it.").

34. *See* Akbar, *supra* note 22, at 2520 ("Reformism becomes an essential strategy of the ruling class to reestablish its rule; to do as little as possible to quell revolt that might force deeper changes and self-rule." (footnote omitted)).

35. TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION 194 (2022).

punitive laws, power dynamics will inevitably persist.[36] Power dynamics emerge in any micro, meso, or macro social setting, from a family to a classroom to a society—regardless of whether law formally structures or mediates such relationships. Third, an emphasis on less state authority risks engendering inconsistency: oftentimes, many on the left argue in favor of more government to ensure human welfare—more government regulation, for example, is a common prescription. And myriad canonical moments in American law—the Bill of Rights, the post-Civil War Constitutional Amendments, the Civil Rights Act, Warren Court jurisprudence, the Affordable Care Act—are examples of legal prescriptions that are normatively desirable.

The underspecification of constructive prescription in critical theory is similarly unsurprising given its intellectual origins. The critical legal studies tradition flows primarily from both legal realism and the Marxist tradition. Mark Tushnet—a founder of the critical legal studies movement—has noted the movement's indebtedness to Marxist thought, particularly Antonio Gramsci's notions of hegemony and humanist Marxism.[37] On his account, critical theory's central contribution was to combine ("sometimes awkwardly," in his retrospective admission) a modernized legal realist rule skepticism with social theory, specifically "a phenomenological account of social action with elements of the humanist rather than determinist Marxism that had become fashionable on the left in the 1960s and early 1970s."[38] Related schools include feminist legal theory (e.g., Catharine MacKinnon) and critical race theory (e.g., Derrick Bell).[39] Much of this discourse draws on social conflict theory—the view that individuals and groups are locked in perpetual conflict over limited societal resources.[40]

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36. Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 64 (2020) ("[E]ven if prisons can be abolished, power regimes cannot."); *see also* BERNARD E. HARCOURT, CRITIQUE AND PRAXIS 525 (2020) (arguing that an animating legal mission is to continuously tear down power hierarchies).

37. *See* Mark V. Tushnet, *Critical Legal Theory*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 83 (Martin P. Golding & William A. Edmundson eds., 2005).

38. *Id.* at 81.

39. *See, e.g.*, Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 515 (1982) ("Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away."); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364 (1992) ("By viewing the law—and by extension, the courts—as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people, [Black people] can refine the work of the [Legal] Realists.").

40. *See, e.g.*, Akbar, *supra* note 22, at 2564 ("Campaigns for non-reformist reforms seek to create social conflict among and between classes in order to build class consciousness and force people to pick a side."); SHAUN L. GABBIDON, CRIMINOLOGICAL PERSPECTIVES ON RACE AND CRIME 121 (3d ed. 2015) ("Theories that focus attention on struggles between individuals and/or groups in terms of power differentials fall into the general category of *conflict theory*." (quoting J. ROBERT LILLY, FRANCIS T. CULLEN & RICHARD A. BALL, CRIMINOLOGICAL THEORY: CONTEXT AND CONSEQUENCES 149 (4th ed. 2007))).

In sum, the traditional and critical schools diverge in assumption and intellectual origin. They also underspecify different aspects of law. Consider the following:

TABLE 1: TWO SCHOOLS OF CRIMINAL LEGAL THOUGHT

	Assumption	**Philosophical Origin**	**Under-Specification**
Traditional School	Individuals should be punished for wrongdoing	Moral and political philosophy (e.g., Kant, Bentham)	Structural considerations (i.e., criminogenic societal conditions and mass incarceration's downstream effects)
Critical School	With less criminal law, human communities will flourish	Legal realism and Social theory (e.g., Holmes, Marx, Gramsci, Foucault)	Law and legal institutions' affirmative role in society

II. THE HIDDEN CONSENSUS: REDRESSING WRONGS

The traditional and critical schools are like ships passing in the night. One school asks, "but what about the violent criminal?" while the other asks "but what about the low-level drug offender?" They appear irreconcilably preoccupied by different questions, rooted in different assumptions and implicitly animated by two divergent archetypes.

In fact, the traditional and critical schools reveal a hidden consensus: both call for redressing wrongs. According to this hidden consensus, both schools agree that "society must redress a serious wrong that has occurred." For the traditional school, the wrong is individual human conduct. The violent criminal, for example, has engaged in immoral and/or harmful conduct. For the traditionalists, this wrong must be redressed through formal punishment within the criminal justice system. Criminal process and constitutional procedural protections, rooted in notions of deontological and deterrence reasoning, dictate how subsequent criminal process should unfold. Meanwhile, for the critical school, the wrong is the contemporary criminal legal system. Redress must center on dismantling mass

incarceration, disproportionate effects on historically marginalized communities, and criminalization for failure of other options. The following table shows this hidden consensus:

TABLE 2: THE HIDDEN CONSENSUS

	Model	**Archetype**	**Wrong for Redress**
Traditional School	Individualistic	Violent criminal	Human wrongdoing
Critical School	Structural	Low-level drug offender	The criminal legal system

A focus on redressing wrongs unifies seemingly distinct wings in the criminal justice movement. Crucially, this resolves the irreconcilability between the two schools and resolves ambiguities in criminal law discourse.

Take one central question: should criminal law be *victim-centered* or *defendant-centered*? The traditional school claims to be victim-centered, focusing on the harm that defendants perpetrate on victims.[41] Sir Pollock and Maitland of traditional English law emphasized the ties between defendants in criminal law and victims, quoting, "He who breaks the law has gone to war with the community; the community goes to war with him."[42] In response, many critical accounts have noted that victims play no role in criminal prosecution, and sometimes victims do not even wish for orthodox criminal prosecution.[43] As a result, some critical accounts instead substitute a defendant-oriented focus: the criminal legal system is itself the harm and oppresses defendants themselves.[44] The accounts are, in fact,

41. *See* George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51 (1999).

42. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 447f § 1, at 447 (1895). Politicians and policymakers have often invoked victim-related language as well. *See, e.g.*, Proclamation No. 4831, 46 Fed. Reg. 21339 (Apr. 8, 1981) ("[T]he protection of our citizens—to guard them from becoming victims—is the primary purpose of our penal laws. Thus, each new victim personally represents an instance in which our system has failed to prevent crime. Lack of concern for victims compounds that failure.").

43. *See* JAMES DIGNAN, UNDERSTANDING VICTIMS AND RESTORATIVE JUSTICE 5 (2005) (finding that the traditional definition of "restorative justice" does not define the role of the victim, either in type or degree of participation); Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 572 (2011) (arguing that, under the original guidelines set by the Constitution, there are "strong guarantees for the rights of the accused, but no corresponding protection for the rights of victims"); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 69 (1987) (acknowledging that, because the state assumes the victim's role in prosecuting a criminal case, the victim traditionally becomes dehumanized and has their interests ignored).

44. *See* JOANNA SHAPLAND, GWEN ROBINSON & ANGELA SORSBY, RESTORATIVE JUSTICE IN PRACTICE: EVALUATING WHAT WORKS FOR VICTIMS AND OFFENDERS 15 (2011) (noting that recent

parallel: they identify an individual wronged (victim vs. defendant) and call for redress of such wrong (prosecution vs. abolition).

Or let us take another question: should criminal law be analyzed through an *individualist* or *structural* framework? The traditional school centers on individual wrongdoing, interpersonal harm, retribution, and specific deterrence.[45] Alternatively, the critical school invokes a structural framework that catalogs the pathologies of contemporary American criminal justice. In fact, each side leverages the theories (moral/political philosophy vs. critical theory) that best identify and redress the wrong that has occurred (interpersonal harm vs. structural injustice).

Third and finally, is the transnational and international legal system a *positive* or *negative* phenomenon? Today, the world is developing a system of cross-border and international law enforcement mechanisms.[46] Consider the title of Kevin Davis's recent book, *Between Impunity and Imperialism*. From the traditional account, Foreign Corrupt Practices Act prosecutions, cross-border extraditions, and the International Criminal Court desirably "close impunity gaps," preventing criminals from taking advantage of territorial borders to perpetrate crimes.[47] From the critical account, the proliferation of the global criminal justice system is another front of oppression, triggering critiques from the global South and/or the school known as Third World Approaches to International Law.[48] Again, both sides focus on particular harm in the world (international crime vs. international prosecutions) and work toward redressing it (prosecution vs. abolition).

The hidden consensus unveils the parallel logics of the traditional and critical schools, rectifying an "either/or" quality in criminal legal discourse. Once scholars, policymakers, and practitioners understand that both are focused on redressing wrongs, such actors may recognize the deeper, parallel logics about crime and criminal law enforcement. Any criminal legal system must grapple with *both* defendants and victims, as well as *both* individualist and structural perspectives. Meanwhile, the international and

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themes in criminal justice have focused on just deserts and increasing punitiveness as well as "treating offenders as different from the 'law-abiding citizen'"); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1500 (1974) (finding that present criminal law may be described as "vengeance" and "crude retaliation theory"); Laura I Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91, 94 (2015) (arguing that the recent modern shift from jury trials to criminal guilty pleas has overwhelmingly harmed defendants and benefitted prosecutors).

45. General deterrence, often introduced in criminal law casebooks, is the most structural subspecies of classical criminal punishment theory.

46. *See generally* Koh, *Foreign Affairs Prosecutions*, *supra* note 20; Koh, *Criminalization of Foreign Relations*, *supra* note 20.

47. *See* Koh, *Foreign Affairs Prosecutions*, *supra* note 20.

48. *See generally* Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. ANN. MEETING 31 (2000); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3 (2006); A. A. Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783 (1964).

transnational criminal legal system must likewise be scrutinized for how it *both* closes impunity gaps and systematically oppresses.[49] The underlying normative commitment is the same: identifying and redressing wrongdoing.

III. FURTHER CONSENSUS: DEEPER VALUES

Redressing wrongs is the central, hidden consensus animating the traditional and critical schools. But this is not their only hidden consensus.

This Part will show a consensus regarding *deeper values*: certain values are shared almost universally within American society, and violating such values warrants socially meaningful redress.[50] This is a counterintuitive argument. At first glance, criminal prosecutions trigger polarized critique or criticisms of the cases based on the given cases' racial, cultural, and/or political valence. For example, many of the individual cases below may trigger partisan objection—some conservatives may object to January 6th prosecutions, while some liberals may object to prosecution of Senator Robert Menendez. But, crucially, these prosecutions affirm an implicit, deep consensus around several central values. Virtually all agree on fair elections, public integrity, and equitable law enforcement. In other words, criminal law is not and should not be confined to the archetypes of the murderer or low-level drug offender—it also concerns itself with the election insurrectionist, corrupt politician, and deadly police officer.

A. Analogy: The Plagiarizing 1L

To introduce this notion of deeper values, let us consider a law school student analogy.[51] Imagine you and members of your 1L section learn that a classmate plagiarized his final law exam and earned a grade of "A+".

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49. From this perspective, analysis of criminal law may exhibit a distinctively neo-pragmatic approach, wherein various theories are leveraged toward the study of a given object. This epistemological pluralism yields various insights overlooked through study via only one posture. *See* Koh, *supra* note 13 (discussing the benefits of this approach in legal pedagogy).

50. The methodology in this Part draws on sociology, specifically the "strong program" in cultural sociology associated with Yale. Drawing especially on the late work of Émile Durkheim, this school has argued that American civil society has a unique set of binary codes that interrelate the social structural dimensions of actors, relationships between actors, and institutions. *See* Jeffrey C. Alexander & Philip Smith, *The Discourse of American Civil Society: A New Proposal for Cultural Studies*, 22 THEORY & SOC'Y 151, 161 (1993). A "democratic code" creates a discourse of liberty, specifying the characteristics of "actors, social relationships, and institutions that are appropriate in a democratically functioning society." *Id.* By contrast, a "counter-democratic code" specifies such features in an authoritarian society. *Id.* at 161–62. Thus, the friction between the Democratic and Republican parties in fact affirm the same underlying values that characterize American democracy. *See id.* Certain criminal laws similarly affirm such values, though the application in certain cases may vary.

51. *Cf.* Kleinfeld, *supra* note 9, at 1490–91 (discussing values in the law school classroom and the consequences of damage to its normative order). This Part affirms and builds on Kleinfeld's reconstructivist theory, identifying specific values that constitute the basis of order in American civil society.

Because this was a closed-book final exam, the student's cheating negatively shifted the grading curve down for you and your classmates. No ambiguity exists on this point: the student openly bragged to friends that he "hacked" the final exam computer software, put several questions to ChatGPT, and copy/pasted several long answers into his exam.

What would be the effect if your law school *lacked* any procedures to rectify this situation? Imagine that the law school administration took no action against the student—he was allowed to keep his grade of "A+" and simply continue to proceed with further plagiarism, should he wish, next semester. You and other students negatively impacted by the curve must keep their lower grades. What would be the effect? You and the other students would feel betrayed not only by the cheating student but also by the law school administration. Armed with this information, students might protest because their academic records have been adversely affected. Furthermore, other students may begin to plagiarize, reasoning that such conduct was now *de facto* permitted and to do otherwise would put them at a disadvantage. Trust between students would corrode. Classrooms would soon be unable to function. Faculty would lose credibility.

Why such adverse effects? At its very core, every law school depends on a deep value: academic integrity.[52] Faculty members may not plagiarize their legal scholarship. Students may not plagiarize final exam answers or seminar essays. The *Law Review* must ensure that published articles adhere to rigorous editorial standards. Thus, the law school must prospectively develop procedures to identify when someone has engaged in the very opposite: plagiarism. Every law school has some definition of plagiarism and some procedure to determine whether a student or faculty member has engaged in such misconduct. A poll of any law school would result in virtually 100% of faculty and students affirming that "someone who has taken the exact wording of another and used it as their own, without attribution, has problematically engaged in plagiarism."

Herein lies the counterintuitive point: even seemingly opposing arguments about a particular case of alleged plagiarism still reaffirm this deep value. Imagine a different hypothetical, in which disagreement emerges about whether a 2L student plagiarized a seminar essay. Certain paragraphs in the essay resemble those of a well-known treatise, and

52. While this hypothetical was written before events leading to the removal of Professor Claudine Gay from her post as Harvard University President, her example underscores this point further. Regardless of the merits of her conduct as university president or as a scholar, she—and all professors—are most vulnerable to a critique that they have violated the deepest university value: academic integrity. *See generally* Jennifer Schuessler, Anemona Hartocollis, Michael Levenson & Alan Blinder, *Harvard President Resigns After Mounting Plagiarism Accusations*, N.Y. TIMES (Jan. 2, 2024), https://www.nytimes.com/2024/01/02/us/harvard-claudine-gay-resigns.html [https://perma.cc/PT6L-L9KF].

citations are sparse. Some faculty and students argue that the student is being unfairly targeted: "This student did his best to develop his ideas—I don't see any evidence that he did anything wrong other than not putting in enough footnotes." Others argue that the student plagiarized: "Enough resemblance exists between the paragraph and the treatise—the student's conduct violates the rules."

But critically, both sides are upholding a fundamental binary: academic integrity vs. plagiarism. *Both* the argument "this student engaged in plagiarism, and this is unfair to the other students who worked hard for their original ideas" *and* the argument "this student has not engaged in plagiarism, and is being punished for something that is his own work" draw from the same academic-integrity-related binary: original ideas (good) vs. copying the work of others (bad).[53] It would be completely—even laughably—bizarre for someone to make a differing argument: "Sure, the student plagiarized—what's the problem with that? Who cares if someone wants to copy someone else's work and it negatively affects the curve?" Such a statement would contravene a deep value, the subject of implicit consensus within the law school community. This underlying, values-oriented consensus recasts what might superficially seem like polarized debate in the law school community.

Finally and importantly, some law school community members may call for a less punitive approach. For example, should the student express genuine contrition in a restorative mode for other students, perhaps the student would be able to emerge without any stronger sanctions, such as suspension or expulsion from the school. This conversation is undoubtedly noteworthy and critical for the law school community to undertake. Surely, the student should not be dehumanized or reduced to an object of derision. But revising sanctions for plagiarism is a long-term, prospective and collective act of reimagining. In the case of recent, flagrant plagiarism, the administration must make a timely, affirmative choice about what redress is most appropriate.

B. Values in Contemporary Prosecutions

The above law school analogy illustrates this Part's central argument: codified prohibitions may underscore deep values within a given community. This is a social inevitability: as long as human communities

53. By way of review of the hidden consensus in Part II, some may emphasize a traditional, individualist account about plagiarism as a harmful, immoral act. Others may invoke a critical perspective, perhaps noting how the nature of power and the law school institution may systematically target certain community members over others. As noted above, both articulate a need to redress a wrong within the law school community: either someone who has plagiarized or a system that is unfairly targeting a member of the community.

exist, they will identify wrongs undermining their collective values. Even in moments of disagreement about a particular case, the underlying binary affirms the social meaning within the community—in this case, the American polity. The examples below will underscore this point. As will be seen below, each of the recent prosecutions—January 6th insurrectionists; Congressman Santos and Senator Menendez; and Officer Derek Chauvin—have sparked polarized debate within the United States. But just as law school plagiarism rules affirm the deep value of academic integrity, debates about these cases affirm the deep values of fair elections, public integrity, and law enforcement equity.

1. Fair Elections: January 6th Insurrectionists

On January 6, 2021, President Donald Trump amassed a rally on the National Mall in front of the White House in Washington, D.C. There, he inveighed against the integrity of the 2020 U.S. presidential election, claiming it was fraudulent. Meanwhile, as required under Article II, Section 1 of the U.S. Constitution, members of Congress convened to certify the Electoral College results affirming Joe Biden's victory.[54] Subsequently, a mob of Trump supporters stormed the Capitol, disrupting the certification process by entering the building, breaking into offices, destroying property, and taking items from various Congressional offices. Many protesters evinced violent intentions toward members of Congress, in particular Vice President Mike Pence for not succumbing to Trump's attempts to overturn the election. The coup was not spontaneous; it had been openly discussed for weeks by the protesters, provoked by the insistence of fraud by elected officials like Representative Mo Brooks, Representative Paul Gosar, Senator Josh Hawley, and Senator Ted Cruz, and of course, President Trump. The violence led to multiple injuries and five deaths.[55]

At time of writing, more than 1,069 defendants have been charged with federal crimes in nearly all fifty states and the District of Columbia (including those charged in both District and Superior Court). According to a statement issued by the U.S. Attorney's Office for the District of Columbia, "[a]pproximately 350 defendants have been charged with assaulting, resisting, or impeding officers or employees, including

54. *See* U.S. CONST. art. II, § 1, cl. 3. ("The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.").

55. *The January 6 Attack on the U.S. Capitol*, AM. OVERSIGHT (Sept. 26, 2023), https://www.americanoversight.org/investigation/the-january-6-attack-on-the-u-s-capitol [https://perma.cc/QD7F-MXWU].

approximately 110 individuals who have been charged with using a deadly or dangerous weapon or causing serious bodily injury to an officer."[56] Furthermore, "[a]pproximately 935 defendants have been charged with entering or remaining in a restricted federal building or grounds"[57] and "[a]pproximately 61 defendants have been charged with destruction of government property and approximately 49 defendants have been charged with theft of government property."[58] Over "310 defendants have been charged with corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so."[59] And "[a]pproximately 55 defendants have been charged with *conspiracy*, either: (a) conspiracy to obstruct a congressional proceeding, (b) conspiracy to obstruct law enforcement during a civil disorder, (c) conspiracy to injure an officer, or (d) some combination of the three,"[60] while "[a]pproximately 561 federal defendants have had their cases adjudicated and received sentences for their criminal activity on Jan. 6."[61] Of those, 335 were sentenced to periods of incarceration, and 119 were sentenced to a period of home detention.[62]

Multiple cases have made national headlines. For example, on September 3, 2021, Jacob Chansley—the "Q Anon Shaman" infamous for his face paint and horned, fur helmet at the Capitol—pleaded guilty to one count of obstruction of an official proceeding in the U.S. District Court for the District of Columbia.[63] He had been charged with a six-count indictment that included civil disorder, violent entry and disorderly conduct, as well as a felony count for obstruction of an official proceeding.[64] Chansley was subsequently sentenced to forty-one months in prison, after "acknowledge[ing] using a bullhorn to rile up the mob, offering thanks in a prayer while in the Senate for having the chance to get rid of traitors and

56. *30 Months Since the Jan. 6 Attack on the Capitol*, U.S. ATT'Y'S OFF. D.C. (Oct. 6, 2023) [hereinafter *30 Months Since Jan. 6*], https://www.justice.gov/usao-dc/30-months-jan-6-attack-capitol [https://perma.cc/U4KS-JZA6]; *see also* 18 U.S.C. § 111.

57. *30 Months Since Jan. 6*, *supra* note 56; *see also* 18 U.S.C. § 1752.

58. *30 Months Since Jan. 6*, *supra* note 56; *see also* 18 U.S.C. § 1361.

59. *30 Months Since Jan. 6*, *supra* note 56; *see also* 18 U.S.C. § 1505.

60. *30 Months Since Jan. 6*, *supra* note 56 (emphasis added); *see also* 18 U.S.C. §§ 231, 371–72.

61. *30 Months Since Jan. 6*, *supra* note 56.

62. *Id.*

63. Jacques Billeaud, *Jan. 6 Rioter Known as 'QAnon Shaman' Sentenced to 41 Months*, PBS (Nov. 17, 2021, 1:07 PM), https://www.pbs.org/newshour/nation/jan-6-rioter-known-as-qanon-shaman-sentenced-to-41-months [https://perma.cc/D4E3-U98M]. Chansley has now filed a candidate statement of interest to run as a Libertarian in the 2024 election for Arizona's 8th Congressional District seat. *Former "QAnon Shaman" Apparently Running for Congress*, CBS NEWS (Nov. 13, 2023, 5:50 AM), https://www.cbsnews.com/news/former-qanon-shaman-jacob-chansley-congress-arizona/?intcid=CNI-00-10aaa3a [https://perma.cc/8NRQ-YAA3].

64. Billeaud, *supra* note 63.

scratching out a threatening note to Vice President Mike Pence saying, 'It's Only A Matter of Time. Justice Is Coming!'"[65]

The January 6th prosecutions have engendered bitter polarized critique. Alienation abounds in right-wing communities that identify with the January 6th insurrectionists.[66] But even such supporters generally agree on a deep value: free and fair elections are critical in the American republic.[67] Indeed, democracy critically depends upon voters freely expressing their democratic choices and election officials administering the requisite procedures without interfering with such choices. The integrity of such process is axiomatic in our system of government. A 2022 Pew Research report shows that "97% of voters who back Republican candidates say voting is important; an identical share of Democratic voters say the same."[68] Simply put, both sides agree on the underlying, deep value: voting and election integrity matters.[69] On November 2, 2022, in a speech about standing up for democracy, President Biden stated, "We believe the vote in America is sacred — to be honored, not denied; respected, not dismissed; counted, not ignored."[70] Similarly, Nancy Pelosi tweeted: "Every American who supports our Constitution and believes in fair and free elections should be shoulder to shoulder with us to push back on the Trump Party's systematic assault on our democracy to #RestoreTheVote. The sanctity of our vote is the foundation of our democracy."[71] Meanwhile, Alabama Representative Mo Brooks also took to Twitter to discuss free elections: "A republic is nothing without honest & accurate elections. Heroic patriots fought & died to give America a republic. Media reports Senate ducks election fraud theft . . . because it requires a 'terrible vote'??!! I can only

65. *Id.*

66. *See* Robert Draper, *Far Right Pushes a Through-the-Looking-Glass Narrative on Jan. 6*, N.Y. TIMES (June 23, 2023), https://www.nytimes.com/2023/06/23/us/politics/jan-6-trump.html [https://perma.cc/7VFJ-ACUK].

67. The very name—Stop the Steal—suggests an election stolen, one that was not "free" and did not "belong to the people." Just as it would be unusual for members of a law school community to dismiss as irrelevant someone plagiarizing, it would be puzzling for Americans to dismiss claims of election interference as irrelevant to American democracy. Perhaps for this reason, both American Democrats and Republicans today claim that the other side is materially interfering with elections.

68. *Two Years After Election Turmoil, GOP Voters Remain Skeptical on Elections, Vote Counts*, PEW RSCH. CTR. (Oct. 31, 2022), https://www.pewresearch.org/politics/2022/10/31/two-years-after-election-turmoil-gop-voters-remain-skeptical-on-elections-vote-counts/ [https://perma.cc/WHV8-ZUDW].

69. In this sense, Americans still have a strong notion of the right (to vote) prior to the good (of the particularities of a party winning). *See generally* JOHN RAWLS, A THEORY OF JUSTICE 43 (1971) (discussing the lexical priority of the right prior to the good in the original position).

70. *Remarks by President Biden on Standing Up for Democracy*, WHITE HOUSE (Nov. 3, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/03/remarks-by-president-biden-on-standing-up-for-democracy/ [https://perma.cc/VFJ9-MSDJ].

71. Nancy Pelosi (@TeamPelosi), X (Oct. 21, 2021, 7:00 PM), https://twitter.com/TeamPelosi/status/1451337504666365957 [https://perma.cc/WM9T-YGRJ].

hope that is 'Fake News'."[72] Along the same vein is Former Vice President Mike Pence, quoting, "I am glad to know that states around the country have been strengthening election integrity laws, . . . and I'll continue to do everything I can to strengthen the confidence in the American people and the integrity of our elections."[73]

2. *Public Integrity: Representative George Santos and Senator Robert Menendez*

The Criminal Division of the U.S. Department of Justice investigates and prosecutes public corruption cases nationwide. Its authority stems from various federal laws, including the Hobbs Act, the Foreign Corrupt Practices Act (FCPA), and other statutes.[74] Specifically, the Division's Public Integrity Section (PIN) focuses on corruption by public officials at all levels of government.[75] PIN works autonomously within the DOJ's Main Justice in Washington, D.C.; it also often consults with the U.S. Attorneys' Offices and assists in trainings in foreign countries to help combat public corruption and election crime.[76]

When bringing cases, PIN most often charges public officials with 18 U.S.C. § 201, which prohibits the offer, solicitation, payment, and receipt of bribes and gratuities at the federal and state level. Other similar statutes regarding wire fraud and extortion are also frequently used. Furthermore, PIN also extensively prosecutes offenses involving judicial process, such as obstruction of justice (18 U.S.C. §§ 1503, 1512, 1519); making false statements (18 U.S.C. § 1001); perjury (18 U.S.C. §§ 1621, 1623); and contempt of court (18 U.S.C. § 401). PIN's Election Crimes Branch also manages all criminal conduct relating to electoral processes and campaign financing under the Federal Election Campaign Act of 1971 (FECA).[77]

Two recent public integrity cases—one regarding a Republican and one a Democrat—have garnered national attention. In May 2023,

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72. Chris Cillizza, *Mitch McConnell Has an 'Election Fraud' Problem*, CNN (Dec. 16, 2020, 10:50 PM), https://www.cnn.com/2020/12/16/politics/mitch-mcconnell-donald-trump-election-fraud/index.html [https://perma.cc/GX4U-65L2].

73. Libby Cathey, *Pence Says 'Crackpot Lawyers' Told Trump What He Wanted to Hear*, ABC NEWS (Aug. 2, 2023, 1:42 PM), https://abcnews.go.com/Politics/pence-trump-indictment/story?id=101953368 [https://perma.cc/9YXN-K3ZQ].

74. *See Organization, Mission and Functions Manual: Criminal Division*, U.S. DEP'T OF JUST. (https://www.justice.gov/doj/organization-mission-and-functions-manual-criminal-division [https://perma.cc/34PY-B24G]; *Justice Manual, Title 9: Criminal*, U.S. DEP'T OF JUST. (https://www.justice.gov/jm/jm-9-131000-hobbs-act-18-usc-1951) [https://perma.cc/T998-FV59].

75. *About the Public Integrity Section*, CRIM. DIV., U.S. DEP'T OF JUST. (Aug. 11, 2023), https://www.justice.gov/criminal/criminal-pin/about [https://perma.cc/Y6J8-HD3Y].

76. *Id.*

77. *See Subject Areas*, CRIM. DIV., U.S. DEPT. OF JUST. (Aug. 11, 2023), https://www.justice.gov/criminal/criminal-pin/subject-areas [https://perma.cc/3SZC-MK6S].

Representative George Santos, U.S. Congressman for New York's Third District, was arrested and charged with "seven counts of wire fraud, three counts of money laundering, one count of theft of public funds, and two counts of making materially false statements to the House of Representatives."[78] The charges alleged that Santos embezzled campaign donations, falsely obtained over $24,000 in unemployment benefits during the pandemic while employed, and lied about his financial disclosures to the House.[79] He allegedly took political donations for personal use, including buying designer clothes, paying debts, and transferring money to associates.[80] The FBI, assisted by various investigative agencies, investigated the case, and the prosecution involved PIN and other DOJ divisions.[81] At time of writing, the House of Representatives has removed Santos from office, and his trial date is set for September 2024.[82]

U.S. Senator from New Jersey, Robert Menendez, and his wife, Nadine Menendez, were both charged with one count of conspiracy to commit bribery, one count of conspiracy to commit honest services fraud, and one count of conspiracy to commit extortion.[83] The indictment alleges that Senator Menendez agreed to utilize his official position to benefit the Egyptian government in exchange for hundreds of thousands of dollars in bribes, including cash, gold bars, and a luxury convertible, all of which were found in an FBI search of his home.[84] He allegedly provided sensitive, non-public U.S. government information to Egypt, used his status to pressure other officials, and promised to improperly protect a business monopoly.[85] Menendez and his wife are now facing as much as forty-five years in prison

78. Press Release, U.S. Att'y's Off. E.D.N.Y., Congressman George Santos Charged with Fraud, Money Laundering, Theft of Public Funds, and False Statements (May 10, 2023), https://www.justice.gov/usao-edny/pr/congressman-george-santos-charged-fraud-money-laundering-theft-public-funds-and-false [https://perma.cc/C39Z-BZZM].

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* Michael Gold & Grace Ashford, *George Santos Is Kicked Out of Congress in a Historic Vote*, N.Y. TIMES (Dec. 1, 2023), https://www.nytimes.com/2023/12/01/nyregion/santos-expulsion-vote-congress.html [https://perma.cc/MQ9J-M4WW]; Nicholas Fandos, Grace Ashford & Michael Gold, *What's Next for George Santos? Court Dates and, Maybe, Reality TV.*, N.Y. TIMES (Dec. 3, 2023), https://www.nytimes.com/2023/12/02/nyregion/george-santos-future-prison.html [https://perma.cc/93XB-8G8E].

83. Press Release, U.S. Att'y's Off. S.D.N.Y., U.S. Senator Robert Menendez, His Wife, and Three New Jersey Businessmen Charged with Bribery Offenses (Sept. 22, 2023), https://www.justice.gov/usao-sdny/pr/us-senator-robert-menendez-his-wife-and-three-new-jersey-businessmen-charged-bribery [https://perma.cc/286G-FXC4].

84. *Id.*

85. *Id.*

if convicted.[86] As of January 2024, DOJ has added new charges to the indictment of using political influence to benefit the government of Qatar.[87]

Some on the political left or right have criticized the specifics of both indictments.[88] But Americans agree that their elected officials should refrain from bribery and material misrepresentations about their histories. As of 2023, "eight-in-ten Americans say members of Congress do a bad job of keeping their personal financial interests separate from their work in Congress," and that campaign donors and lobbyists "have too much influence on members of Congress."[89] Representative Robert Garcia, a Democrat from California, spoke out on removing George Santos from office: "If we're going to restore faith in government, we must start with restoring integrity in the U.S. House of Representatives. It is essential for the American people to have Representatives they can trust and who don't build their careers on deceit and falsehoods."[90] On integrity within the Senate, Majority Leader Chuck Schumer stated, "I've said before, the Senate should have certain standards, and if you read the indictment, Senator Menendez has gone way, way below those standards."[91] Fellow Republican and New York Representative Nick LaLota commented on Santos's expulsion: "What he's done is disgraceful, dishonorable and unworthy of the office. I think he should resign."[92] Also on Santos, Ohio Congressman Max Miller tweeted, "I believe voters have the right to hold government officials to the very highest standard of honesty and trustworthiness. The people's representatives must respect the need for

86. *See id.*

87. Tracey Tully, Benjamin Weiser & Nicholas Fandos, *Menendez Faces a New Accusation: Aiding the Qatari Government*, N.Y. TIMES (Jan. 2, 2024), https://www.nytimes.com/2024/01/02/nyregion/robert-menendez-qatar-influence.html [https://perma.cc/BP8M-ULMR].

88. *See, e.g.*, Kevin R. Kosar, *Why Did Anyone Vote Against Expelling George Santos?*, THE HILL (Dec. 5, 2023, 8:30 AM), https://thehill.com/opinion/campaign/4340942-why-did-anyone-vote-against-expelling-george-santos/ [https://perma.cc/7DB4-N4K5]; Aaron Blake, *The GOP's Defenses of Bob Menendez, and What They Ignore*, WASH. POST (Sept. 26, 2023, 5:47 PM), https://www.washingtonpost.com/politics/2023/09/26/gops-defenses-bob-menendez-what-they-ignore/ [https://perma.cc/34PF-LDPY]; Mini Racker, *As Menendez Faces Calls to Resign, Some Notable Democrats Don't Join In*, TIME (Sept. 25, 2023, 3:47 PM), https://time.com/6317285/senator-menendez-new-jersey-resign-cory-booker/ [https://perma.cc/2CRX-FPSV].

89. Andy Cerda & Andrew Daniller, *7 Facts About Americans' Views of Money in Politics*, PEW RSCH. CTR. (Oct. 23, 2023), https://www.pewresearch.org/short-reads/2023/10/23/7-facts-about-americans-views-of-money-in-politics/ [https://perma.cc/39AG-YWTK].

90. Lauren Peller & Sarah Beth Hensley, *Rep. George Santos Ahead of Likely Expulsion Vote: 'I Don't Care'*, ABC NEWS (Nov. 28, 2023, 4:12 PM), https://abcnews.go.com/Politics/house-democrat-files-privileged-resolution-expel-rep-george/story?id=105219091 [https://perma.cc/KXK7-AF6A].

91. CBS N.Y. Team, *Sen. Chuck Schumer Says He's Had "Serious Discussions" with Sen. Bob Menendez About Federal Charges*, CBS NEWS (Oct. 17, 2023, 7:20 PM), https://www.cbsnews.com/newyork/news/chuck-schumer-bob-menendez-charges/ [https://perma.cc/WP8M-MN55].

92. Andrew Solender, *Scoop: More NY House Republicans Call for Santos to Resign*, AXIOS (Jan. 12, 2023), https://www.axios.com/2023/01/11/scoop-third-ny-house-republican-calls-santos-resignation [https://perma.cc/8UT5-GADM].

transparency and candor with Americans."[93] Just as U.S. representative democracy depends on the deep value of election integrity, it also depends on the integrity of elected officials' conduct. Without it, corruption would surely corrode our federal system of governance.

3. *Law Enforcement Equity: From Derek Chauvin to Emmett Till*

The plain language of the Fourth Amendment prohibits unreasonable "seizures."[94] The Supreme Court has interpreted the term capaciously to include everything from shooting to an arrest, "stop and frisk," and physical restraint situations.[95] The Court has defined seizure as the situation wherein, given "all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[96] As is well known, both civil and criminal remedies are available in cases wherein police have violated Constitutional rights, and the Supreme Court has brought all claims of excessive police force under the Fourth Amendment prohibition against unreasonable seizures.

American laws on police use of force fall into three categories.[97] First, individuals sue civilly a state or local government or the federal government in instances where their constitutional rights have been violated.[98] Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes."[99] *Bivens* actions closely parallel § 1983 claims.[100] Second, 18 U.S.C. § 242 criminalizes police willfully subjecting any person to "the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." This statute prohibits "objectively unreasonable"

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93. Max Miller (@RepMaxMiller), X (Jan. 12, 2023, 5:37 PM), https://twitter.com/RepMaxMiller/status/1613681580186259457?s=20 [https://perma.cc/6YJS-5RJV].

94. U.S. CONST. amend. IV.

95. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, *some physical touching of the person of the citizen*, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." (emphasis added)); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1193 (2017) ("[T]he word seizure is applied to a wide range of police interventions, from short conversation to brutal beating to killing."); *see also* Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 525 (2020) (noting that the categories of seizure and use of force are overlapping but distinct categories).

96. *Mendenhall*, 446 U.S. at 554.

97. *See* Steven Arrigg Koh, *Policing & the Problem of Physical Restraint,* 64 B.C. L. REV. 309, 327 n.111 (2023).

98. *See* 42 U.S.C. § 1983; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

99. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

100. *See* MICHAEL AVERY, DAVID RUDOVSKY, KAREN M. BLUM & JENNIFER LAURIN, POLICE MISCONDUCT: LAW & LITIGATION § 5:2 (3d ed. 2023–24).

force as "judged from the perspective of a reasonable officer on the scene," and is the basis for certain DOJ investigations of police misconduct of state and local law enforcement.[101] And third, state statutes may criminalize police misconduct as either general crimes or law-enforcement-specific crimes.[102]

Contemporary discourse rightly centers on questions of positive law and institutional arrangements that prevent the prosecution of excessive police use of force. On some accounts, doctrines like qualified immunity protect police too robustly.[103] On others, prosecutors are hesitant to prosecute the very law enforcement officers on whom they rely in other contexts.[104] But police officers are sometimes prosecuted for using excessive force. Take *State v. Chauvin*, in which the state of Minnesota prosecuted Derek Chauvin, the police officer who killed George Floyd in Minneapolis on May 25, 2020.[105] The trial gripped the nation over several weeks and refracted a tremendous amount of public discourse about the nature of policing, race, and inequities in the criminal justice system. When Chauvin was convicted in April 2021, the majority of Americans supported the verdict, given the horrific video of the killing, which had gone viral on social media.[106]

Polarized critique abounds in this space. Many in America hold divergent opinions about the nature and value of the police. But—regardless of the specifics of the form of law enforcement in America—virtually all agree that consequences must exist for those who use excessive, deadly force. Officer accountability for misconduct has wide public support, with ninety-six percent of Americans in 2020 reporting support for changing management practices so officer abuses are punished.[107] President Joe Biden issued a statement shortly after the death of George Floyd: "We need

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101. Graham v. Connor, 490 U.S. 386, 396 (1989); *see also, e.g.*, U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 10–12 (2015).

102. JENS DAVID OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE 695–96 (2d ed. 2018).

103. *See, e.g.*, Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 318 (2020).

104. U.S. COMM'N ON C.R., REVISITING *WHO IS GUARDING THE GUARDIANS?* 63 (2000), https://www.ojp.gov/pdffiles1/bja/249021.pdf [https://perma.cc/7J63-YZZU] ("Most district or county attorneys rely heavily on the support and cooperation of the police departments in their jurisdictions, and as such, they are reluctant to pursue criminal charges against them.").

105. State v. Chauvin, 989 N.W.2d 1 (Minn. Ct. App. 2023).

106. *See* Tim Arango & Shaila Dewan, *How to Find an Impartial Jury in the Trial over George Floyd's Death*, N.Y. TIMES (Apr. 23, 2021), https://www.nytimes.com/2021/03/07/us/131xperi-floyd-derek-chauvin-jurors.html [https://perma.cc/Z4TR-R85V]; Tom Jones, *The Derek Chauvin Verdict: How Did the Media Do with Coverage?*, POYNTER (Apr. 21, 2021), https://www.poynter.org/newsletters/2021/the-derek-chauvin-verdict-how-did-the-media-do-with-coverage/ [https://perma.cc/X5US-SUPG].

107. Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP (July 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx [https://perma.cc/B888-4WCU]; *see also* Koh, *supra* note 97, at 344.

real police reform to hold cops to a higher standard that so many of them actually meet, that holds bad cops accountable and repairs relationships between law enforcement and the community they're sworn to protect."[108] In calling for the end of qualified immunity, Derrick Johnson, president of the NAACP, quoted, "Police are here to protect, not lynch."[109] While introducing the 2020 Justice in Policing Act, New Jersey Senator Corey Booker stated, "[T]he bill fixes our federal laws so law enforcement officers are held accountable for egregious misconduct and police abuses are better tracked and reported."[110] South Carolina Senator Lindsey Graham took to Twitter: "I oppose civil lawsuits against individual officers. However, holding police departments accountable makes sense and they should face liability for the misconduct of their officers."[111] Any legal system depends on some individuals to enforce the laws—without them, such laws would be "dead letter."

Just as crucially, the value of law enforcement equity includes *underenforcement*. This has been best articulated by Onwuachi-Willig's aforementioned analysis of trauma theory. In her account, criminal prosecution is not always problematic. In fact, it is the opposite: the *failure* to prosecute crimes may also lead to collective trauma when it reaffirms inequities for historically or systematically subordinated groups.[112] This arises when an established history or accumulation of routine harm exists, media attention brings widespread attention to the occurrence of such harm, and public discourse occurs about the routine harm's meaning.[113] For example, the failure to convict in the Emmett Till case constituted one such perpetuation of collective trauma. As is well known, fourteen-year-old Emmett Till was visiting his family in Mississippi in 1955 when a white

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108. Maggie Astor, *What Trump, Biden and Obama Said About the Death of George Floyd*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/05/29/us/politics/george-floyd-trump-biden-obama.html [https://perma.cc/V6Z4-W2DH].

109. Maggie Astor, *Lawmakers and Activists React to the Derek Chauvin Verdict.*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/chauvin-verdict-reaction-obama.html [https://perma.cc/8C8S-ZLML].

110. *Groundbreaking Justice in Policing Act of 2020 Aims to Hold Police Accountable, Increase Transparency, Improve Practices, Training*, BOB CASEY: U.S. SENATOR FOR PA. (June 8, 2020), https://www.casey.senate.gov/news/releases/casey-joins-senators-booker-and-harris-in-introducing-sweeping-police-reform-bill [https://perma.cc/6PRS-S6TD].

111. Lindsey Graham (@LindseyGrahamSC), X (Jan. 29, 2023, 2:17 PM), https://twitter.com/LindseyGrahamSC/status/1619791947907883010?t=WqJfVkumzK7o9tzKumFhvA&s=19 [https://perma.cc/V53G-J5C7].

112. *See* Angela Onwuachi-Willig, *supra* note 8, at 344 ("Cultural trauma occurs when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways."); Jeffrey C. Alexander, *Toward a Theory of Cultural Trauma*, *in* JEFFREY C. ALEXANDER, RON EYERMAN, BERNARD GIESEN, NEIL J. SMELSER & PIOTR SZTOMPKA, CULTURAL TRAUMA AND COLLECTIVE IDENTITY 1 (2004).

113. Angela Onwuachi-Willig, *supra* note 8, at 346.

woman, Carolyn Bryant, accused him of flirting and touching her.[114] Days later, Till was abducted and lynched.[115] An all-white and all-male jury subsequently acquitted J.W. Milam and Roy Bryant, two white men credibly accused of engaging in the killing.[116] In Onwuachi-Willig's account, this constituted a recurring reaffirmation by public or official government entities—as evidenced by the Till family and others in the Black American community there who expected an acquittal.[117] Furthermore, she notes that the same delay in or failure to either indict or convict may also apply to the cases of Trayvon Martin, Eric Garner, Tamir Rice, and many other Black Americans.[118]

Onwuachi-Willig's account adds an essential dimension to the deep value of law enforcement equity. Law enforcement equity is not only undermined by the deadly police officer (e.g., Derek Chauvin); it is also hampered by a racist criminal justice system that systematically leaves unredressed serious wrongs (e.g., Emmett Till).[119] In fact, the Till investigation still resonates to this day: in 2022, members of the Till family discovered an unserved arrest warrant for Carolyn Bryant, the white woman who accused Till of making advances toward her.[120] Till's cousin, Deborah Watts, stated that upon discovering the warrant, she and others cried.[121] In an interview, Watts asserted, "Justice has to be served."[122] She even acknowledged that the Till family considered engaging in a citizen's arrest, asking, "If the authorities aren't going to do this, what can we do?"[123] A member of the Till family calling for justice is not merely a pretext for perpetuation of the carceral system, as the critical school may claim. It is almost certainly a bona fide call to redress a grave, unredressed wrong that the U.S. criminal justice system has *underenforced*, thus undermining the deep value of law enforcement equity.

114. *Id.* at 341.
115. *Id.* at 353.
116. *Id.* at 342.
117. *Id.* at 346.
118. *See id.* at 353.
119. This echoes Trevor Gardner's aforementioned argument that Black American interests in penal administration are stymied by the current bifurcation between the criminal justice reform and abolitions platforms. *See* Gardner, *supra* note 12, at 1702.
120. Sara Sidner, Tina Burnside & Dakin Andone, *Emmett Till's Family Calls for Justice After Finding an Unserved Arrest Warrant in His Case*, CNN (July 1, 2022, 9:00 AM), https://www.cnn.com/2022/06/30/us/emmett-till-warrant-discovered/index.html [https://perma.cc/5CZ2-R5W6].
121. *Id.*
122. *Id.*
123. *Id.*

IV. VALUES WRIT LARGE: THE AMERICAN CIVIL SPHERE

Thus far, we have established that a central idea—redressing wrongs—unifies distinct wings of criminal law discourse. We have also seen that prosecutions may uphold deep values—fair elections, public integrity, and law enforcement equity—even in moments of seemingly polarized debate. As should now be clear, criminal law does not concern itself only with the violent criminal or low-level marijuana possessor. It also contemplates the election insurrectionist, corrupt politician, and deadly police officer—and must contemplate the racist vigilante.

This Part will complete this analysis by tying these values to American law and society writ large. In so doing, this Part introduces a different structural theory centered around the American civil sphere. Often, the assumption in law school classrooms, scholarship, and popular discourse is that a structural account *must* be critical.[124] Students, scholars, and policymakers may benefit from perspectives that transcend this assumption; a wide variety of structural theories fall outside the Marxist critical tradition. Indeed, sociological theory offers three lineages—a critical account flowing from Marx, a solidarity-oriented account rooted in Durkheim, and an institutional-rational account from Weber. All three provide valuable intellectual leverage for structural critique.

Civil sphere theory, which emerges from the Yale school of cultural sociology, recasts democracy in a distinct light.[125] This account challenges the common political philosophical account of democracy and law, which often emphasizes structural considerations such as elections and the articulation of associational, individual rights. By contrast, civil sphere theory emphasizes solidarity within a democratic society. On this account,

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124. As I have noted elsewhere, the critical school is the dominant paradigm in legal discourse today. *See* Koh, *supra* note 13, at 149. When I was a law student in the mid-2000s, law and economics seemed like the intellectually dominant idiom. Students sensed that the best way to "sound smart" in the classroom was to demonstrate knowledge of economic terms such as externalities, distribution, and efficiency. At that time, other normative postures seemed inferior. Today, the dominant idiom is critical. Students invoke not distributional language, but instead terms like power, subordination, and oppression. *Id.*

125. The strong program in cultural sociology emphasizes the powerful role of culture in social life. Jeffrey Alexander & Philip Smith, *The Strong Program in Cultural Sociology*, *in* HANDBOOK OF SOCIOLOGICAL THEORY 135 (Jonathan H. Turner ed., 2001). In this conceptualization, culture is *autonomous*, *"thick description"* may illuminate this sphere of meaning, and such a sphere has a *causal* influence on actors. *Id.* Simply put, this school illuminates Clifford Geertz's insight, referencing Max Weber, that "man is an animal suspended in webs of significance he himself has spun." CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973). This school provides a way forward for thinking about the deeper social meaning of criminal law and punishment. On this account, we focus not simply on instrumental political or administrative notions of rationality but instead on "signifiers of order and disorder, purity and pollution, the sacred and evil." PHILIP SMITH, PUNISHMENT AND CULTURE 13 (2008). In other words, a focus on cultural notions of social meaning are integral to rendering intelligible the nature of criminal laws in a given society.

a democracy must symbolize fellow citizens as ones with whom we feel solidarity—in other words, fostering a sense that all of its citizens are those to whom we have some actual connection. In a healthy civil sphere, individuals will thus feel that other citizens are similar to them. This is a challenging task: it is easier for individuals and groups to focus on family relations, race and class, ethnicity and gender, or other markers of difference.[126] In an unhealthy civil sphere, polity members "other" each other—lacking any perceived sense of similarity or sameness.[127]

This theory helps calibrate criminal law's scope. On one hand, to function as a society, any community must have some collective values through which to operate and render one another intelligible. Law must thus state authoritatively when individuals have breached such values. On the other hand, when criminal law becomes overly and improperly expansive, it undermines such collective values. As seen below, civil sphere theory engages the critical school's valuable structural critiques and grapples with the traditionalists' concern with individual wrongs. It also shows how failing to prosecute serious offenses fosters cultural trauma for particular communities.

Before embarking on this discussion, it is worth noting that the arguments in this Part do not require a deep commitment to civil sphere theory itself—the particularities of the sociological theory are beyond the scope of this Article. The essence of this Part is to affirm that too much—or too little—criminal law undermines social cohesion.

A. The American Civil Sphere: The Law School Analogy Revisited

To grasp the notion of solidarity in the civil sphere, consider by way of analogy the experience of a college senior admitted to several comparably-ranked law schools. She is weighing in which law school to enroll. How might she decide if a law school community is one that the college student would like to join? On a narrow associational account, the student could review the university rules and bylaws governing the individual academic rights students possess, or perhaps review the procedures by which students choose classes. Surely, if a law school *lacked* these fundamental rights and rules—say, rules regarding plagiarism or sexual harassment—this would be a serious concern. But while such regulatory safeguards are *necessary*, they are not *sufficient* to foster a desirable law school environment.

Instead, a prospective student will likely ask simply, "what is it *like* to be a law student there?" This is a meaning-centered question: the prospective student wants to know what it *feels like* to be part of the school.

126. *See* JEFFREY C. ALEXANDER, THE CIVIL SPHERE 29, 37 (2006).
127. *See id.* at 23–29.

How is the community? Are 1L students friendly with one another? Is there a sense of collective "we"? Or are they competitive, just about "me"? And how does the law school foster a sense of connection between students, faculty, and staff? Most 1Ls know no other classmates upon entering. Does the school care about bringing students together into some sense of community? When disagreements inevitably emerge between various community members, how does the administration resolve such disputes in a way that maintains a sense of mutual respect and intellectual integrity? These are experiential questions rooted in solidarity or "a feeling of identity with, or at least empathy for, every other member of one's society."[128] In other words, a law school community with solidarity is one in which students, faculty, and staff feel humanized by one another. A law school experiencing the inverse—alienation—is one in which individuals are isolated, strangers to one another.

Much the same may be said of a national polity. Just as the measure of a law school is not simply its academic rules and regulations, the measure of democracy is not merely the rights guaranteed but instead the horizontal relationships between individuals and communities. One scholar has described this as "a realm of solidarity, identity and cooperation" alongside "power, conflict, alienation and isolation; of stable expectations, systems, custom, trust and confidence" and "unpredictable action, unforeseen change, violence, disruption and discontinuity."[129] This collective experience is so central to our daily lives that it almost eludes description. It is "distinct from . . . the study of politics, law, the economy or other more specific kinds of social action or experience."[130] This fabric thus is "intelligible as a unity."[131]

The United States faces unique challenges in building solidarity. Our American society is unusual by historical standards: we are not bonded by the same language, religion, and customs as our pre-modern ancestor communities. Just a few centuries ago, more of the world was in isolated groups wherein all people shared the same language, customs, and religious beliefs. By contrast, today, we are part of a vast, pluralist society connected only through an imagined, collective sense of solidarity, around collective notions shared socially and enshrined in law. Often, this sense of the civil

128. JEFFREY C. ALEXANDER, THE PERFORMANCE OF POLITICS: OBAMA'S VICTORY AND THE DEMOCRATIC STRUGGLE FOR POWER 10 (2010).

129. ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 15 (2006).

130. *Id.* at 16.

131. *Id.*

sphere is mundane. But in certain moments of rupture, civic rituals are needed to engage in civil repair.[132]

This perspective helps identify what is wrong with America today. Individuals on all sides of the U.S. political spectrum agree that the country is heading in the wrong direction.[133] Both sides of the political spectrum increasingly agree that the opposing political party threatens the country.[134] In 2014, 27% of Democrats reported that they believed that Republicans were a threat to the nation's well-being, while 36% of Republicans said the same thing about Democrats.[135] By most accounts, since that time, such trend lines have only gone in worse directions. In 2024, polarization is a commonplace topic in popular and academic discourse.[136] We have come to the point where we see one another as the enemy. This is not merely a political matter—it is a sociological one, reflecting the nature of social cohesion and collective conceptualization within American society.

B. Law in the American Civil Sphere

What is law's role in the civil sphere? Crucially, the civil sphere relies on legal institutions to concretize collective civil values. This occurs in two steps. First, communicative institutions (media, group associations, public opinion and its polling) engage in robust but ephemeral daily discourse regarding "everything from income disparities, race relations, gender, and generation gaps to sports, food, fashion, film, literature, historiography, and celebrity."[137] In this quotidian discourse, communities gauge what comports with collective life—what is "civil" versus "anti-civil."[138] But second, the "rubber meets the road" when regulative institutions (public office, law, elections, and political parties) concretize the civil and anti-civil views with sanctions and rewards.[139] This may include, for example, 2020 election administration officials, the leaders of today's Democratic and Republican

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132. *See* JEFFREY C. ALEXANDER, THE MEANINGS OF SOCIAL LIFE: A CULTURAL SOCIOLOGY 161 (2003).

133. *See Americans' Dismal Views of the Nation's Politics*, PEW RSCH. CTR. (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/americans-dismal-views-of-the-nations-politics/ [https://perma.cc/7RU9-3WNB].

134. *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/LM5P-8FWH].

135. *Id.*

136. *See generally, e.g.*, EZRA KLEIN, WHY WE'RE POLARIZED (2020); *Prosecution and Polarization*, *supra* note 10.

137. Jeffrey C. Alexander, *Office Obligation as Civil Virtue: The Crisis of American Democracy, November 3, 2020–January 6, 2021, and After*, 60 SOCIETY 651, 652 (2023).

138. *Id.*

139. *Id.*

parties, or legal actors in the state and federal judicial system.[140] The law school analogy here holds: classrooms, extracurricular student groups, and faculty meetings moot various values within the school; such values are most concretely tested and applied by the administration by, say, revising the list of required courses or awarding degrees at graduation.

Civil sphere theory thus emphasizes the role of rules and enforcement around higher values within a given community. In doing so, it complements the traditional and critical accounts. Consider the following table:

TABLE 3: A NEW STRUCTURAL ACCOUNT FOR CRIMINAL LAW

	Archetype	**Wrong for Redress**	**Assumption**
Critical School	Low-level drug offender	The criminal justice system	With less criminal law, human communities will flourish
Traditional School	Violent criminal	Human wrongdoing	Individuals should be punished for wrongdoing
Civil Sphere Theory	*Election insurrectionist, corrupt politician, or violent police officer*	*Undermining social cohesion within a pluralist democracy*	*Human flourishing requires identification of wrongdoing—too much (e.g., mass incarceration) or too little (e.g., failure to prosecute police) is corrosive to the social fabric*

140. *Id.*

	Philosophical Origin	**Limitation**
Critical School	Legal realism and social theory (Holmes, Marx, Foucault, Gramsci)	Fails to account for underenforcement for historically marginalized communities (e.g., collective trauma from failure to convict in the Emmett Till case) and the necessity of criminal law to affirm collective values (e.g., January 6th election interference)
Traditional School	Moral philosophy (Kant, Bentham)	Fails to account for criminal law structurally (e.g., James Comey statement)
Civil Sphere Theory	*Social theory (Durkheim, Alexander)*	*Solidarity may minimize societal conflict/variation and is a malleable principle*

Let us now return to the case examples mentioned in Part III above. From the vantage point of civil sphere theory, all such prosecutions are critically necessary to promote values inherent in the American civil sphere. They ensure that federal elections are certified, politicians are not misrepresenting their records before constituents, and police officers are not using excessive force on the street. Public discourse—interpersonally, on social media, and in print media—all affirm such values. But legal institutions—including legislators, executive officials, and judges—must prosecute these cases to maintain solidarity within a civil sphere. Thus, when DOJ prosecutes Representative Santos or Senator Menendez, it functions as a regulative institution affirming civil sphere ideals.

What are the limitations of civil sphere theory in the criminal law context? While it is too soon to tell, two could likely arise. First, civil sphere theory may minimize notions of societal conflict and variation. In a pluralist democracy, it is unclear what fosters solidarity given the diversity of

populations. But solidarity in fact strengthens the argument for narrowing criminal justice to emphasize commonalities across populations. American pluralism is not only based on difference—it is also based on overlapping consensus around certain rules in which to live. For this reason, the archetype of the election insurrectionist, fraudulent politician, and deadly police officer are fitting. As long as our democracy exists around certain republican ideals, some notion of solidarity must continue to exist around such ideals and consequences must ensue for those who have violated such deep values. But criminal law frays when it begins to alienate certain communities; the further it goes down the road to disproportionate targeting of certain populations, the more it undermines its own goal of redressing wrongs—in fact, it becomes its own wrong.

Second, civil sphere solidarity relies on collective meaning to govern when prosecution is or is not appropriate. It thus may be a more malleable principle than "harm" as a criminal legal principle. But solidarity's vice is also its virtue. Solidarity is a relational description of social life. Thus, on its own, it is transtemporal, transhistorical, and transcultural. It is a phenomenological way of understanding how society functions: instead of rooting notions of prosecutorial priority in some abstract ideal, we may root it in the collective perception of well-being within a given society. As such, solidarity provides some guidance within specific contexts, such as liberal democracies, that have embedded within them other structural societal commitments.[141]

C. Criminal Law and Civil Repair

Civil sphere analysis agrees with the critical school's critique of mass incarceration. Just as a law school community must ensure that its plagiarism procedures are adjudicated as fairly as possible to avoid student mistrust and unrest, legal institutions must also ensure that the interventions within criminal justice only function as is necessary to affirm the relevant values. As noted above, from this vantage point, mass incarceration is itself a deep structural wrong within civil society. Civil sphere theory points to the same pathological system but articulates the pathology from a slightly different angle. The very nature of this system is to be *anti-civil*, diminishing any sense in which Americans belong to one another. On this account, the

141. Finally, all of this continues to take place within a liberal democracy. As Rawls has noted, the right takes lexical priority to the good. *See generally* RAWLS, *supra* note 69, at 43 ("[T]he basic structure of society is to arrange the inequalities of wealth and authority in ways consistent with the equal liberties required by the preceding principle."). In other words, certain rights are safeguarded before broader questions of social welfare. Thus, the need for solidarity will not overwhelm certain fundamental rights bound up in the criminal process. If they are, that provides a foundation for critique of the system itself.

central problem with mass incarceration is that it is socially destructive.[142] It labels vast swaths of the American society as dangerous "others," often as morally deformed.[143] Race and class prejudices exacerbate this dynamic, dividing us into our respective camps instead of promoting a sense of interconnectedness. This thus fosters not a feeling of solidarity but one of alienation, as Bell has described.[144]

From this perspective, a criminal legal system is pathological when *over*-enforced but plays a crucial role in promoting social cohesion when *properly* enforced. Indeed, civil sphere theory helps us to understand the problem of underenforcement in criminal law. Imagine a universe in which Capitol rioters are never prosecuted, George Santos is allowed to continue to serve in Congress with no consequences, or Derek Chauvin is never prosecuted after unlawfully killing George Floyd. The results of such action would be deeply corrosive—indeed, perhaps fatal—to any civil society. The bonds of trust between individuals would be weakened or eviscerated, and in its place, deeper antipathies rooted in blood relations and identities would emerge as the central basis for identification and solidarity.

This refines the critical school's critiques of the criminal justice system. We will continue to debate the nature of law enforcement, criminalization and decriminalization, and the nature of prisons themselves, including the possibility of a radical new system. But individualized wrongs must be redressed, and such redress must be socially meaningful—fostering civil repair around deep values. Without this, social fabric and cohesion decay. Thus, in the long term, criminal law could lose much of the punitiveness we currently associate with the worst aspects of our mass incarceration era—disproportionate effects on communities, inequalities in plea bargaining, overcriminalization, etc. But it will almost certainly never lose its tendency to be among the state's most coercive tools.

Other scholars have recognized aspects of this dynamic.[145] In particular, Ekow Yankah has articulated a republican theory of criminal law, which rests on the notion that human beings are deeply social and political

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142. *See generally* Vincent Chiao, *Excess Incarceration* (unpublished manuscript) (on file with author).

143. *See generally* Kleinfeld, *supra* note 9.

144. *See* Bell, *supra* note 7, at 2054 ("Legal estrangement is a theory of detachment and eventual alienation from the law's enforcers, and it reflects the intuition among many people in poor communities of color that the law operates to exclude them from society.").

145. *See, e.g.*, Vincent Chiao, *What Is the Criminal Law for?*, 35 LAW & PHIL. 137, 138 (2015) (arguing that criminal law is crucial to the functioning of stable institutions because it provides assurance of reciprocity and cooperation of the public with the legal system); Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 989 (1940) (arguing that criminal law is an integral part of the legal system that cannot be separated from other branches); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) ("Punishment for a past offense is justified by the future benefits it provides.").

creatures, and that "criminal law represents a reciprocal duty that flows between a citizen and their civic community."[146] Under this conception, crimes are considered threats to our ability to live together in a community where each individual has equal standing.[147] Yankah's work also emphasizes the violent criminal—he notes that crimes make the communal project of living together difficult, if not impossible, because a community that allows one to be raped, attacked without reprisal, or have one's home entered without permission could not secure conditions necessary for peaceful cohabitating.[148] Furthermore, rule of law scholarship has long emphasized criminal law and its equitable enforcement as necessary for any fair administration of laws. Rule of law requires some enforcement system when certain rules or norms have been violated.[149] Integral to such system is central principles of law, such as that they must be widely promulgated, prospective, and clear.[150]

V. TOWARD CRIMINAL LAW MINIMALISM: A SWORD AND SHIELD

Let us conclude by considering the future of U.S. criminal law reform and the promise of criminal law minimalism.[151] Both the traditional and critical schools today correctly call for some reform of the American criminal justice system on the ground that mass incarceration is

146. Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 463 (2015).

147. *See id.* at 465.

148. *Id.*

149. *Rule of Law*, U.S. AGENCY FOR INT'L DEV., https://www.usaid.gov/democracy/rule-law [https://perma.cc/B8SX-GKPB] ("Without the rule of law, autocracy, corruption, impunity, discrimination, and a host of other societal ills go unchecked and unpunished."); *Rule of Law and Security*, UNITED NATIONS, https://www.un.org/ruleoflaw/thematic-areas/security/ [https://perma.cc/J4GQ-U85G] ("Strong justice and corrections institutions, together with accountable police and law enforcement agencies, which fully respect human rights, are critical . . . . They allow for perpetrators of crimes to be brought to justice, encourage the peaceful resolution of disputes and restore trust and social cohesion based on equal rights.").

150. LON L. FULLER, THE MORALITY OF LAW 39 (2d ed. 1969). In his canonical list of legal principles, Fuller also lists that laws must be general, non-contradictory, do not ask the impossible, constant, and congruent between what written statutes declare and how officials enforce those statutes. *Id.*

151. While the emphasis in this Part is on decriminalization and alternative modes of accountability, the analysis may apply to other parts of the U.S. criminal justice system. Penal administration breaks down into three major categories: policing, prosecution, and prisons. The hidden consensus reaffirms the importance of cutting down on all three to the degree they perpetuate wrong within society. The degree to which policing is overly violent and overly coercive, leading to structural marginalization, is a deep concern. At the prosecution stage, the nature of the adversarial process and the inequalities in plea-bargaining, for example, are problematic. And both the lengthy nature of disproportionate sentences and the quality of prisons themselves may be problematic. In particular, we must not simply define and prosecute conduct in an individualistic manner. We may also analyze criminal justice structurally and consider its collective impact. For example, stop and frisk is widely reported to have alienated large American populations with uncertain results for crime control.

problematic.[152] But the discourse itself is highly fragmented. The traditional school more often calls for paring back criminal law.[153] Meanwhile, the critical school has called for a more systematic commitment to "non-reformist reforms," which aim to undermine the political, economic, and social system in a move toward a fundamentally distinct ideological or material system.[154] Each school often sees the other as engaging in bad faith—either perpetrating the pathologies of a structural system or excusing harmful individual conduct.

How do we build a way forward? This Part will show that we may leverage the hidden consensus described above: *both* the wrong of individual harms *and* the wrong of the criminal justice system must be redressed. Certain conduct—violent criminals, election insurrectionists, corrupt politicians, and violent police—undermines the very values that bind society. Without meaningful redress for such crimes, American solidarity will corrode—just as a law school community will corrode absent meaningful accountability for plagiarism. At the same time, an overreaching criminal justice system prosecutes conduct falling beyond a consensus around deep values and perpetuates a systemic wrong disproportionately borne by certain populations. An eye on both is essential for criminal law minimalism.

Prescriptively, this Part will show that this analysis is both a sword and shield for the existing system—cutting away the corrosive parts of the American criminal justice system but also safeguarding its core ideals. It emphasizes redressing wrongs around deep values, clarifies the need for less criminal law, and opens us to alternative, imaginative modes of redress. But it also guards against dismantling too much too soon, especially around deep values such as election interference, public integrity, and excessive use of police force. This Part is, of course, the beginning of a new theoretical architecture for a new criminal law minimalism. As such, what follows is not a definitive taxonomy of all structural reforms nor a wholesale justification for all criminal legal policy. It does, however, respond to a curious and problematic under-theorization of American criminal law. As I have argued previously, in the absence of such considered reflection,

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152. *See* Akbar, *supra* note 22, at 2519 ("[R]eform as an end goal—reformism—is a project distinct from reform toward revolutionary or transformative ends. If capitalism is the problem, then abolition rather than reform should be the goal. Parallel arguments are made for white supremacy, heteropatriarchy, and the prison-industrial complex.").

153. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008); Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407, 424–25 (2008); *cf.* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 541 (2012).

154. *See* Akbar, *supra* note 22, at 2527. Such reforms "draw[] from and build[] the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions—most clearly, in doctrinaire Marxism, for example, the working class." *Id.*

criminal law proliferates without principle.[155] Indeed, as Professors Dan Richman and Bill Stuntz have persuasively argued, no principled line has animated substantive criminalization; instead, our current political moment is one wherein legislators have publicly positioned themselves to voters as "tough" on crime[156] and wherein judicial articulation of greater criminal procedural protection has triggered an expansive criminal legislative response.[157] They have observed that a rigorous principle for criminalizing conduct would readily guard against overcriminalization because it would "anchor our decisions about when criminal sanctions should be used as a tool of government power at the border between 'mere' regulation and prosecution."[158]

A. Redress, Not Retribution

For starters, the hidden consensus is a sword that emphasizes redress over retribution or the need for *socially meaningful* reform that restores the social fabric of society.

First, the sword commits us to *less* criminal law. If the essence of criminal law is redressing wrongs around deep values, a significant percentage of conduct must be decriminalized. For example, while a society crucially depends on certification of federal elections (without attempts at insurrection), it does not necessarily depend on the criminalization of drug offenses, vagrancy, or traffic violations. To take the former: collective notions of drug possession and use vary widely. Thus, many drug-related prosecutions contain dual harms—they do not affirm any deep consensus, and they undermine the deep value of law enforcement equity, leading to alienation for the individuals and/or communities involved. The same may be said of traffic violations: while every society needs efficient transportation administration, prosecuting every traffic infringement would certainly lead to mass alienation from the state because almost all drivers violate some traffic law daily.[159] Furthermore, as is well known with

155. *See* Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 782 (2021).

156. *See* Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 64, 66–67 (Michael Klarman, David Skeel & Carol Steiker eds., 2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (describing the political economy of overcriminalization); *see also* Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE. L.J. 1381, 1391 (2001) (surveying the political and legislative barriers to criminal justice reform).

157. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) ("As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs.").

158. Richman, *supra* note 156, at 64, 67.

159. *See generally* Devon W. Carbado & Jonathan Feingold, *Rewriting* Whren v. United States, 68 UCLA L. REV. 1678 (2022) (rewriting the opinion to redress racial justice concerns).

pretextual police stops in constitutional criminal procedure, disproportionate enforcement of traffic laws that burden communities of color undermines the deep value of law enforcement equity.[160] Writ large, the same may be said for the general category of misdemeanors, which may be recategorized as nonjailable or fine-only offenses.[161] As Alexandra Natapoff has noted, "the ten million misdemeanor cases annually comprise eighty percent of state criminal dockets."[162]

Second, the sword commits us to alternatives to traditional modes of criminal legal punishment. This emphasizes other, non-punitive policy modalities to redress certain societal ills. An overly expansive criminal justice system plainly fails to do this; the quintuple increase in incarceration in recent decades is deeply destructive to our collective social fabric.[163] This is particularly the case given the disproportionality and inequities of the contemporary system, discussed above, which undermine the deep value of law enforcement integrity.[164]

As such, the sword aligns with many reform proposals emerging from the critical school. Such proposals aim at structural change—moving beyond legalism and pressuring "prevailing legal arrangements and the power relations they overlay."[165] Deep, systematic reimagining of society is invaluable at a time when criminalization and imprisonment are key drivers of American policy. What is most important here is, again, the question of redressing wrongs. Some collective, condemnatory statement about an individual's wrongdoing is necessary to promote the social fabric. That need not require incarceration, but some process of sanction and admission of guilt is necessary for the collective repair.

The sword's dual commitment—to less and alternative modes of criminal law—quickly leads to deeper questions about criminal justice that may confound. At a certain point, theories of criminal law reform become caught in a reasoning that seems both circular and existential. Classically, what differentiates criminal law is its sanction: the deprivation of liberty. But then individuals call for elimination of incarceration—thus opening the question: what is the distinctive function of criminal law itself?

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160. *See id.* at 1699.

161. *See generally* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015) (noting that such recategorization may preserve the punitive features and collateral consequences of the misdemeanor regime).

162. *Id.*

163. *See Mass Incarceration*, ACLU, https://www.aclu.org/issues/smart-justice/mass-incarceration#:~:text=Since%201970%2C%20our%20incarcerated%20population,of%20every%2017%20white%20boys [https://perma.cc/M6PY-4VMQ]; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 21 (2017).

164. *See, e.g.*, BUTLER, *supra* note 1, at 71; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 3–4 (2010); GARLAND, *supra* note 1, at 90.

165. Akbar, *supra* note 22, at 2562.

The hidden consensus reveals that criminal law does not simply punish. It also functions "to construct and, after this construction, to criticize and symbolically expose" wrongs.[166] Some essence of this process must always exist to affirm social cohesion and collective values—particularly for the values that undergird the very structure of our society. Just as a law school must prohibit and seriously redress bona fide plagiarism, a democratic society must prohibit and seriously redress election interference, public integrity, and law enforcement inequity. Without meaningful public accountability for such crimes, American solidarity will corrode—just as a law school community will corrode absent meaningful accountability for plagiarism.

Herein lies the shield: as we cut away the corrosive parts of the American criminal justice system, we must also safeguard the core ideals that underpin it and—for the time being—stay committed to orthodox criminal law when certain deep values are undermined by flagrant wrongs. Consider: how should society address Jeffrey Epstein, Ghislaine Maxwell, Larry Nassar, or Harvey Weinstein's serial sexual assaults? Despite the rich and important national discourse of decriminalization and reform, few would argue that such offenders should somehow be absolved from investigation, prosecution, or sentencing in our contemporary system. Even a criminal justice system shorn of its excesses will and should engage in the strongest form of socially meaningful public redress for such wrongs. This will mean serious consequences for the wrongdoer. And in the 2020s, while alternative forms of punishment continue to be mooted, this will almost certainly mean some sentence to a term of years.

Furthermore, human wrongdoing—however defined—will always exist. Violent criminals, corrupt politicians, or abusive law enforcers will almost always be present in societies. Even if, in some ideal society, such wrongs were to be eliminated, some system of laws would still need to define such wrongs and advance some system of meaningful redress. As Shelby notes:

> The optimistic thought seems to be that if we were to create just societies and a just global order, and to treat (rather than punish) those with mental illnesses, prisons would be obsolete. Yet interpersonal violence was prevalent before the emergence of racism and capitalism, even before Christian and Islamic imperialism, and in a wide variety of societies. Another reason to suspect that there would be serious interpersonal wrongs even under just conditions is the existence of familiar human vices such as the thirst for power, greed, jealousy, lust, and wrath. These character flaws and temptations have

166. ALEXANDER, *supra* note 126, at 171.

> been present in every society of recorded history, not just in capitalist or racist societies.[167]

Without meaningful prosecution, other systems in society will emerge to right such wrongs.[168] When criminal prosecution is absent, human communities do not simply and immediately flourish. Instead, wrongs are perpetrated against such communities, and social mechanisms arise to redress such wrongs. In other words, the impulse to critique legal systems may be warranted, but a wholesale critical account, trending toward abolition, may be dangerous and harmful to the very communities such advocates are calling to protect.

B. A Smaller Core of Criminal Justice

What should criminal law minimalism look like? As I have argued previously, a smaller criminal justice system could draw from Paul Robinson's articulation of criminal law's "core principles," supported empirically as having cross-cultural validity and purchase in criminal legal systems worldwide.[169] The core principles are: (1) wrongdoing deserves punishment; (2) wrongdoing includes physical aggression, assisting another person to commit a crime, and does not include necessity; (3) blameless conduct should be protected from criminal liability; and (4) the extent of liability and punishment should be proportionate to the wrongdoing.[170] This builds upon his earlier theory that criminal law emerges from fundamentally social, evolutionary origins wherein human group cohesion depended on human groups accepting rules that protected group members and, as necessary, meted out punishment for violating such rules.[171] Robinson also rightly notes that this cross-cultural core underscores the availability of restorative justice mechanisms, which emphasize offender-victim mediation.[172] Because "the method of punishment is *not* a core principle," societies and communities may vary in how they administer a justice

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167. SHELBY, *supra* note 35, at 193 (footnote omitted).

168. The phenomenon known as "cancel culture" exemplifies the relationship between criminal law and broader sociocultural contexts. As I have argued previously, cancel culture may redress wrongs that the criminal justice system has not prosecuted through both a referral and shaming function. *See generally* Steven Arrigg Koh, *"Cancel Culture" and Criminal Justice*, 74 HASTINGS L.J. 79 (2022).

169. Koh, *Send a Message*, *supra* note 10, at 409.

170. Paul H. Robinson, *Criminal Law's Core Principles*, 14 WASH. U. JURIS. REV. 153, 164–93 (2021); *cf.* Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251, 261–70 (2020) (identifying a cross-cultural core of criminal procedural rights in domestic, transnational, and international criminal law).

171. *See generally* Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1687 (2007) (concluding that shared institutions of justice are "more likely a specific evolved human mechanism for acquiring these core intuitions").

172. Robinson, *supra* note 170, at 203–05.

system.[173] Thus, variety in sanction—community service, fine, incarceration—is available so long as it accords broadly with community norms.[174] In other words, the core consideration is the degree to which the system is *socially meaningful* in redressing wrongs.

Again, criminal accountability methods may evolve. As Adrian Laani has noted, restorative justice circles offer many benefits: meeting victims' needs, holding offenders accountable, promoting reintegration, and avoiding incarceration.[175] However, she cautions that while restorative justice circles may offer benefits, scaling up the programs in a widespread, institutional manner would undermine its structural goals.[176] To take just one example, professionalization of facilitators would almost certainly risk undermining the goal of local community members presiding over restorative justice mechanisms.[177] The details of such implementation are beyond the scope of this Article. Most crucially, while scholars and policymakers moot deep structural reforms, some minimal core of criminal justice must continue to redress wrongs.[178]

In sum, the hidden consensus affirms that a criminal justice system will continually evolve alongside society. Societal views will shift on issues of violent crime, white collar malfeasance, or drug offenses. What will never change, however, is that all societies *inevitably* share a collective notion of what values they uphold and those they do not. This terrain will be renegotiated over time. And the necessary response will as well. What is important is that society redresses such wrongdoing.

CONCLUSION

Criminal law affirms deep values when it redresses wrongs that undermine the American civil sphere. While prosecutions of Capitol rioters, corrupt politicians, or deadly police officers may trigger immediate critique, they affirm solidarity in our pluralist democracy. Such cases symbolize a sociocultural dimension, distinct from the dichotomous imagery of the

173. *Id.* at 204 (emphasis added).

174. *See id.* at 205. He also notes that international criminal law is not destined to fail due to deep cultural contingency in criminal codes; yet it will have most moral credibility when it aligns itself with the core principles. *Id.* at 211–13.

175. Lanni, *supra* note 25, at 642.

176. *See id.* at 659.

177. *Id.*

178. Relatedly, Jamelia Morgan has grappled with "abolition in the interstices": how to address the concrete questions that advocates must face in the midst of a broader commitment to non-reformist reforms. Jamelia Morgan, *Abolition in the Interstices*, LPE PROJECT (Dec. 14, 2023), https://lpeproject.org/blog/abolition-in-the-interstices/ [https://perma.cc/SJM6-ZZ38]. For example, should abolitionist groups work to have progressive prosecutors elected? *Id.* Such effort could alternatively "legitimize[] the . . . carceral structure," but "sitting on the sidelines can result in significant harm to members of the community, if a more aggressive prosecutor is installed in office." *Id.*

violent criminal and low-level drug offender that the traditional and critical schools both advance. This civil sphere approach acts as both a sword and a shield, guiding us toward a justification for criminal law minimalism.