

THE CONSENSUS MYTH IN CRIMINAL JUSTICE REFORM

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*It has become popular to identify a “consensus” on criminal justice reform, but how deep is that consensus, actually? This Article argues that the purported consensus is much more limited than it initially appears. Despite shared reformist vocabulary, the consensus rests on distinct critiques that identify different flaws and justify distinct policy solutions. The underlying disagreements transcend traditional left/right political divides and speak to deeper disputes about the state and the role of criminal law in society.*

*The Article maps two prevailing, but fundamentally distinct, critiques of criminal law: (1) the quantitative approach (what I call the “over” frame); and (2) the qualitative approach (what I call the “mass” frame). The “over” frame grows from a belief that criminal law has an important and legitimate function, but that the law’s operations have exceeded that function. This critique assumes that there are optimal rates of incarceration and criminalization, but the current criminal system is sub-optimal in that it has criminalized too much and incarcerated too many. In contrast, the “mass” frame focuses on criminal law as a socio-cultural phenomenon. This reformist frame indicates that the issue is not a mere miscalculation; rather, reforms should address how the system marginalizes populations and exacerbates both power imbalances and distributional inequities.*

*To show how these frames differ, this Article applies the “over” and the “mass” critique, in turn, to the maligned phenomena of mass incarceration and overcriminalization. The existing literature on mass incarceration and overcriminalization displays an elision between these two frames. Some scholars and reformers have adopted one frame exclusively, while others use the two interchangeably. No matter how much scholars and critics bemoan the troubles of mass incarceration and overcriminalization, it is hard to believe that they can achieve meaningful reform if they are talking about fundamentally different problems.*

*While many scholars may adopt an “over” frame in an effort to attract a broader range of support or appeal to politicians, “over” policy proposals do not necessarily reach deeper “mass” concerns. Ultimately, then, this Article argues that a pragmatic turn to the “over” frame may have significant costs in legitimating deeper structural flaws and failing to address distributional issues of race, class, and power at the heart of the “mass” critique.*

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## INTRODUCTION

We live in an era of mass incarceration. Since the early 1970s, the criminal justice system has expanded rapidly, disproportionately affecting poor people of color.<sup>1</sup> A growing chorus of criminal law scholars, judges, policy makers, and activists increasingly agree that “too many Americans go to too many prisons for far too long.”<sup>2</sup> We also live in an era of overcriminalization. During this same time period, state and federal criminal codes have expanded rapidly to the point where no one knows how many criminal laws actually are on the books.<sup>3</sup> Most adults have—knowingly or unknowingly—committed a jailable offense.<sup>4</sup>

But what are “mass incarceration” and “overcriminalization”? They undoubtedly are significant concepts in both policy and academic circles, not to mention the popular imagination. Michelle Alexander’s *The New Jim Crow*:

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<sup>1</sup> See generally DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007); Rachel Barkow, *The Criminal Regulatory State*, in THE NEW CRIMINAL JUSTICE THINKING 33 (Sharon Dolovich & Alexandra Natapoff, eds. 2017).

<sup>2</sup> Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013 (quoting then-Attorney General Eric Holder). See generally *United States v. Valdovinos*, 760 F.3d 322 (4th Cir. 2014) (Davis, J., dissenting); *United States v. Young*, 766 F.3d 621 (6th Cir. 2014) (Stranch, J., dissenting); Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE NEW YORK REVIEW OF BOOKS, Nov. 14, 2015; Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014); Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

<sup>3</sup> See, e.g., DOUGLAS N. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008); Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407 (2008).

<sup>4</sup> See generally HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009).

*Mass Incarceration in the Age of Colorblindness*,<sup>5</sup> the critically acclaimed documentary *13<sup>th</sup>*,<sup>6</sup> and a growing body of legal scholarship have popularized “mass incarceration” as a description of the current structure and operation of the criminal system.<sup>7</sup> Similarly, overcriminalization as a concept has gained traction. Congress has convened a task force on overcriminalization,<sup>8</sup> and the Heritage Foundation, the Association of Criminal Defense Attorneys, and other groups have produced extensive reports diagnosing overcriminalization as one of the primary pathologies afflicting the U.S. criminal system.<sup>9</sup> Legal scholars have organized numerous overcriminalization conferences, and the phrase appears in law review articles written by academics of differing political and methodological commitments.<sup>10</sup>

Yet, despite their prevalence in scholarly and policy discussions, these two phenomena are ill-defined. In different debates, they appear to have very different meanings. And, it is not uncommon for a single article to contain a great deal of slippage in its treatment of what constitutes overcriminalization or mass incarceration. While there are a plethora of definitions and approaches, two stand out: (1) a quantitative approach focused on calibration (*i.e.*, there may be an optimal rate of incarceration or criminalization, but the current rate is *too* high); and (2) a more qualitative or sociological approach (*i.e.*,

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<sup>5</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>6</sup> *13<sup>TH</sup>* (Kandoo Films 2016).

<sup>7</sup> See, e.g., Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 549 (2017) (“Today, mass incarceration rolls comfortably off the tongues of people of all ideological stripes.”); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) [*hereinafter*, “*Racial Critiques*”]; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown As A Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011).

<sup>8</sup> See *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. (2013).

<sup>9</sup> Overcriminalization, NAT’L ASSOC. OF CRIMINAL DEFENSE LAWYERS, <http://www.nacdl.org/overcrim/> (last visited Jul. 6, 2017); Overcriminalization, THE HERITAGE FOUNDATION, <http://www.heritage.org/issues/legal/overcriminalization> (last visited Jul. 6, 2017); Overcriminalization, RIGHT ON CRIME, <http://rightoncrime.com/category/priorityissues/overcriminalization/> (last visited Jul. 6, 2017); Overcriminalization, TEXAS PUBLIC POLICY FOUNDATION, <http://old.texaspolicy.com/issues/overcriminalization> (last visited Jul. 6, 2017); Task Force on Overcriminalization, ABA, <http://www.americanbar.org/groups/litigation/initiatives/overcriminalization.html> (last visited Jul. 6, 2017).

<sup>10</sup> See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013).

the phenomena reflect a flawed method of managing populations via criminal law, resulting in significant social costs reflected across axes of class, gender, sexuality, and race). This definitional inconsistency is not simply a matter of theoretical or semantic imprecision. As descriptive terms (*i.e.*, “mass incarceration” and “overcriminalization”) that carry significant normative weight, their definitions matter. Uncertainty as to the nature of the phenomena poses significant real world problems—fixing either of these problems requires an accurate understanding of the problem itself, and definitional differences yield vastly different policy solutions.

This Article seeks to address the inconsistency by mapping the two prevalent critiques or critical tendencies: (1) the quantitative approach (what I will call the “*over*” frame); and (2) the qualitative approach (what I will call the “*mass*” frame). The *over* frame takes many forms but—at its core—is rooted in a belief that the criminal law has an important and legitimate function, but that it has exceeded that function. There is an optimal rate of incarceration and an optimal rate of criminalization, but the current criminal system is sub- (or, perhaps extra-) optimal in that it has criminalized too much and incarcerated too many. The *mass* frame, on the other hand, focuses on the criminal system as a socio-cultural phenomenon.<sup>11</sup> The issue is not a miscalibration;<sup>12</sup> rather, it is that criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities.<sup>13</sup> Every incarcerated person might have been guilty of the charged offense, and the critique would still hold.

The existing literature on mass incarceration and overcriminalization displays a troubling elision between these two frames. Some scholars and reformers have adopted one frame exclusively, while others use the two interchangeably. While it has become popular to identify the current moment as one of “bipartisan consensus” on criminal justice reform,<sup>14</sup> it is important to recognize how tenuous this consensus is and how much it relies upon different

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<sup>11</sup> See Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 1, at 71 (“[S]ocio-legal theories of power, social control, race, and institutional structure better explain the criminal process and predict its outcomes.”).

<sup>12</sup> See generally Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419 (2016).

<sup>13</sup> See Stephanos Bibas, *Improve, Dynamite, or Dissolve the Criminal Regulatory State*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 1, at 61, 64–65 (describing this view).

<sup>14</sup> See, e.g., Alex Altman, *Criminal Justice Reform is Becoming Washington’s Bipartisan Cause*, TIME (Feb. 19, 2015), <http://time.com/3714876/criminal-justice-reform-is-becoming-washingtons-bipartisan-cause/>; Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 640 n. 298 (2016); Eric Holder, *Remarks at the National Press Club*, 27 FED. SENT. R. 297, 299 (2015) (“[I]n the preliminary data we’ve seen—and the growing, bipartisan consensus surrounding the work that’s underway—they prove unequivocally that criminal justice reform is an idea whose time has finally come.”); Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to A For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 126–27 (2017).

frames and different goals.<sup>15</sup> No matter how much scholars bemoan the troubles of mass incarceration and overcriminalization, it is hard to believe that meaningful reform can occur if they are talking about fundamentally different problems.

To be clear, my claim is not that these two frames or approaches are wholly distinct or incompatible. Indeed, the *over* approach might (and does) add specificity and substance to the *mass* approach—data puts meat on the bones of what might otherwise be a gestural skeleton.<sup>16</sup> Likewise, the *mass* approach might add theoretical backing to the *over* approach, helping to illustrate the effects of an error in calculation.<sup>17</sup> And, many scholars, articles, and books may reflect sympathy or affinity for different tendencies when faced with different issues or different audiences.

But just because the two approaches might be complementary does not mean that they are consistent or congruent. Thinking in *over* terms means constructing policy solutions designed to reach optimal rates. In turn, reaching optimal rates requires a consensus on what an optimal rate is. Thinking in *mass* terms, on the other hand, invites a more radical or totalizing critique of the current system and its institutions. If criminal law inherently functions to marginalize or subjugate poor people of color, it is not clear that imprisoning fewer black men or increasing enforcement in affluent white neighborhoods—for example—would remedy deeper structural inequalities in society. Instead, the *mass* frame invites a deeper reckoning with questions of political economy to address the levers of power and the distribution of resources in society. *Over* solutions might help *mass* problems, but they need not.<sup>18</sup> And, importantly, the two critiques operate on different planes and invite solutions of vastly different magnitudes.

In setting up the typology, this Article proceeds in four Parts. First, Part I introduces the *mass* and *over* frames, situating them (and the typology itself) within the growing critical literature on the criminal system. Next, Part II describes scholarly critiques of the criminal system rooted in the language of mass incarceration. This Part presents a brief genealogy of the phrase “mass

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<sup>15</sup> See generally MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2014) (critiquing the consensus narrative and offering a skeptical treatment of conservative reform movements).

<sup>16</sup> See, e.g., Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379, 387 (2016); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000).

<sup>17</sup> Cf. Deborah Jones Merritt, Correspondence, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1287 (1999) (“[E]mpirical knowledge is most useful in unmasking the theoretical assumptions that undergird constitutional law. . . .”). Further *mass* critiques still rest on an empirical claim about the size and scope of the problem. See note 75, *infra*.

<sup>18</sup> But, as this Article discusses, *over* solutions are not always responsive to *mass* concerns, and may even exacerbate *mass* problems. See generally Part IV A., *infra*.

incarceration” before teasing out the critiques that fall into the *mass* and *over* frames. Part III employs a similar approach to overcriminalization. This Part addresses economistic language and approach, while also noting the ways in which moral philosophers and some theories-of-punishment scholars have adopted a similar discourse on optimal rates of punishment. The literature on overcriminalization (unsurprisingly) generally adopts the *over* frame, but I argue that some of the overcriminalization literature can (or should) be read as focusing not on *over*criminalization, but on *mass*criminalization. In Part IV, I argue that the *over* frame has gained ground, particularly in discussions of mass incarceration. This Part examines the ways in which this mis-framing has led to a flawed “standard story”<sup>19</sup> of what is wrong with the criminal system. Further, this Part contends that the *over* frame conceals hard and deeply politicized questions about the role of the state and the proper function of criminal law. The *over* frame intuitively may have a pragmatic appeal, but ultimately, I argue that the turn to an *over* frame is not costless—it legitimates deep structural flaws in the criminal system and misses the opportunity to consider larger reform projects.<sup>20</sup>

## I. MAPPING CRIMINAL JUSTICE CRITIQUES

The conventional account of criminal law scholarship is that it operates as a sort of echo chamber: there is a consensus that the criminal system is (with a few notable exceptions)<sup>21</sup> too harsh and should be reformed.<sup>22</sup>

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<sup>19</sup> See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

<sup>20</sup> On the concept of “legitimation” in criminal law, see generally Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *HARV. L. REV.* 355, 429–32 (1995).

<sup>21</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 507 (2001) (noting the “important exception of sexual assault”). Notably, these exceptions tend to be areas in which progressive or left-leaning scholars favor criminalization that they frame as exceptional—notably, sexual assault, domestic violence, hate crimes, and environmental and financial crimes. See, e.g., Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986); Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority*, 93 *MARQ. L. REV.* 971 (2010) (criticizing “[i]nadequate law enforcement against corporate criminals”); Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 *HASTINGS L.J.* 411 (2012); Deborah Tuerkheimer, *Underenforcement As Unequal Protection*, 57 *B.C. L. REV.* 1287, 1289 (2016). In the context of each of these crimes, support tends to rest on arguments that the victims are particularly powerless or marginalized by the legal system and/or that criminal law is necessary to help advance desirable social ends. See, e.g., RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 19 (1997); Aya Gruber, *The Feminist War on Crime*, 92 *IOWA L. REV.* 741, 825 (2007); Tania Tetlow, *Discriminatory Acquittal*, 18 *WM. & MARY BILL RTS. J.* 75, 78 (2009).

<sup>22</sup> Throughout the Article I refer to the structures of criminal law’s enforcement and administration as a “system.” I do so mindful of the compelling critiques of systems theory in

Scholars focused on larger institutional questions tend to decry the current regime as ineffective, racially disparate, and “broken.”<sup>23</sup> This Article challenges that conventional account. Many scholars undoubtedly begin from this critical posture,<sup>24</sup> but that baseline agreement belies deeper disagreements with real consequences for criminal justice reform.<sup>25</sup> Further, to the extent that other scholars and commentators have questioned the “bipartisan consensus,” they have done so along predictable left/right grounds.<sup>26</sup> That is, this skeptical literature tends to conclude that mapping disagreement boils down to differences between political left and right.<sup>27</sup> But that account is not quite right. The *mass* and *over* critiques that this Article describes do not accord neatly with U.S. political parties or conventional packages of views.<sup>28</sup> Instead, they reflect deeper beliefs about the role of the state and the proper function

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this context. See, e.g., Bernard E. Harcourt, *The Influence of Systems Analysis on Criminal Law and Procedure: A Critique of a Style of Judicial Decision-Making* (Columbia Public Law Research Paper No. 14-562, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3062900](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062900) (tracing the use of “criminal justice system” as a concept in legal and social thought); Benjamin Levin, Review, *Rethinking the Boundaries of “Criminal Justice,”* \_\_ OHIO ST. J. CRIM. L. \_\_ (forthcoming 2018); Sara Mayeux, *The Idea of the “Criminal Justice System,”* \_\_ AM. J. CRIM. L. \_\_ (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050263) (same). However, given that most of the literature and activism that I analyze adopts that formulation and offers a “systemic” critique, I continue to use the terms “criminal system” or “criminal justice system.”

<sup>23</sup> See generally STUNTZ, *supra* note 1.

<sup>24</sup> There certainly are scholars and commentators active in criminal justice debates who do not share these baseline critiques, or who do only very narrowly. See, e.g., William Otis, *Sentencing Reform: Let’s Keep What We Know Works and Avoid What We Know Fails*, 28 FED. SENT. R. 219 (2016); William G. Otis, *The Case Against the Smarter Sentencing Act*, 26 FED. SENT. R. 302 (2014); Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099 (2014).

<sup>25</sup> See Nicola Lacey, Review, *Humanizing The Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 HARV. L. REV. 1299 (2013) (“[T]he system is in urgent need of reform marks the limit of scholarly consensus. As soon as one moves to specifics—to analysis of the particular ways in which the system is defective or problematic; to interpretation of why these defects or problems have arisen; and perhaps above all, to elaboration of possible solutions and institutional reforms—one encounters not only the sort of variety that is to be expected in any vibrant field of scholarship, but also fundamental differences of diagnosis and prescription.”).

<sup>26</sup> But see Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1551 (2016) (arguing that differences among utilitarians, retributivists, and others complicate the consensus).

<sup>27</sup> See, e.g., GOTTSCHALK *supra* note 15, at xv.

<sup>28</sup> That said, as I discuss later, the *mass* frame tends to reflect some sort of left critique of social and economic inequality (broadly conceived). See notes 57–58. It is conceivable to me that there could be some right-leaning version of the *mass* critique (*i.e.*, identifying a different set of deep structural issues in U.S. political economy and criminal justice policy), but I have been unable to identify such a critique in the literature. As discussed later, the *over* critique transcends traditional political distinction and is as much the province of the rights-focused libertarian and the technocratic, progressive consequentialist.

of the criminal system that reject easy political categorization.

To tease out these points of disagreement, this Article examines two phenomena that have received widespread scholarly and political criticism: mass incarceration and overcriminalization. Both “mass incarceration” and “overcriminalization” have become common buzzwords in criminal law scholarship and in criminal justice policy circles,<sup>29</sup> but neither phrase appears to have a fixed meaning.<sup>30</sup> Instead, each phrase has a fluid definition, reflecting different critiques, concerns, and normative commitments in different contexts. This Part introduces what I take to be the two dominant approaches to these pathologies of the criminal system: *over* and *mass*. These approaches, frames, or tendencies reflect two different ways of conceptualizing what is wrong with the criminal system and how to address reform projects. To be clear, there are many ways to criticize the system, and the two frames I introduce here are not exhaustive and do not capture every critique. Further, scholars and commentators who generally apply one frame may sometimes apply another frame or may use different approaches for different audiences or different desired results.<sup>31</sup>

Nevertheless, the typology offered here maps the two major ideological frames through which scholars discuss the criminal justice system. The typology is an attempt to understand an otherwise fluid literature and to fix the commitments and approaches that currently dominate the field. To the extent that “criminal justice reform” has become a catchall category for a range of critiques, proposals, scholarship, and activism,<sup>32</sup> it is critical that we understand what exactly needs to be reformed and to what end.<sup>33</sup>

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<sup>29</sup> See, e.g., MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010); López, *supra* note 7, at 1028 n. 21; Taslitz, *supra* note 7, at 133 (“That the last several decades have seen an explosion of Americans’ reliance on imprisonment as a penal sanction is unquestioned. So vast has this expansion been that the term ‘mass incarceration’ has entered scholarly vocabulary as a way of describing this phenomenon.”);

<sup>30</sup> See, e.g., PFAFF, *supra* note 19, at 8 (“Although widely used, [mass incarceration] has no precise definition . . . .”); Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1197 (2015) (“For a phenomenon that has received so much sustained attention by legal scholars, identifying an accepted definition of overcriminalization is surprisingly difficult.”); Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 CRIMINOLOGY & PUBLIC POLICY 673, 673 n. 2 (2011) (“The concept of ‘mass incarceration,’ or ‘mass imprisonment,’ is not fully defined in the literature. . . .”); Kimberly Thomas, *Interpersonal Power in the Criminal System*, 50 AM. CRIM. L. REV. 247, 276 n. 120 (2013); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 427 (2013) (tracking scholarly debate regarding the meaning and use of “mass incarceration”).

<sup>31</sup> See generally Part IV, *infra*. And, as noted above, every criminal law scholar is not necessarily critical of the system. See note 24, *supra*.

<sup>32</sup> See generally Katherine Beckett *et al.*, *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238 (2016).

<sup>33</sup> Cf. Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice*



Movements to alter sentencing policy, to address police violence, and to re-write substantive criminal codes find support in declarations about scholarly and bipartisan consensus.<sup>34</sup> But how broad and real is that consensus?<sup>35</sup> Viewed from thirty thousand feet, one critique of criminal justice policy looks very similar to the next. And, overstating nuance and difference might have an effect of stymieing change or discouraging cooperation among reformers and scholars with varying politics, methods, and commitments. But glossing over real differences and ignoring nuance ultimately undercuts cooperation and effective reform as well.<sup>36</sup> Without a clear diagnosis of the

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*Thinking*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 1, at 1 (making a similar argument regarding the definition of the criminal system's scope); Harcourt, *supra* note 22, at 5–7 (same); Mayeux, *supra* note 22, at 5–7 (same).

<sup>34</sup> See, e.g., Rachel Bade, *Criminal Justice Reform Gains Bipartisan Momentum*, POLITICO (July 15, 2015), <http://www.politico.com/story/2015/07/criminal-justice-reform-gains-bipartisan-momentum-120125>; Radley Balko, *Here's What Presidential Candidates' Websites Say About Criminal Justice Reform*, WASH. POST (Aug. 6, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/08/06/heres-what-presidential-candidates-websites-say-about-criminal-justice-reform/> (“Criminal justice reform is the one issue that just about everyone seems to agree on right now.”); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1497–98 (2008); I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 590 (2016); Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1516 (2017); Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1997 (2016); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 648 (2012); Kleinfeld, *supra* note 26, at 1550–51; Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 991 (2017) (describing “a broad-based consensus that criminal justice reform is needed”); Obama, *supra* note 2, at 822; Michelle S. Phelps, *Possibilities and Contestation in Twenty-First-Century Us Criminal Justice Downsizing*, 12 ANN. REV. L. & SOC. SCI. 153, 154 (2016); Norman L. Reimer, *Will A Summer of Unease Halt the Momentum for Criminal Justice Reform?*, CHAMPION 9, 10 (September/October 2016); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 228 (2013); Stuntz, *supra* note 21, at 507; Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1099–1100 (2014).

<sup>35</sup> See, e.g., GOTTSCHALK, *supra* note 15; David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1507 (2014); Scott-Hayward, *supra* note 34, at 228; Douglas A. Berman, *Is It Really True that “Conservatives and Liberals Are Increasingly United” on Criminal Justice Reform?*, SENTENCING LAW AND POLICY (Aug. 17, 2012, 10:07 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2012/08/is-it-really-true-that-conservatives-and-liberals-are-increasingly-united-on-criminal-justice-reform.html](http://sentencing.typepad.com/sentencing_law_and_policy/2012/08/is-it-really-true-that-conservatives-and-liberals-are-increasingly-united-on-criminal-justice-reform.html).

<sup>36</sup> See, e.g., Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 664 (2017); Takei, *supra* note 14, at 127 (“The left and the right, however, each come to this alliance with distinct and, ultimately, incompatible interests. Recently, the progressive advocacy community has begun to seriously grapple with the limits of the left-right alliance. This includes differences over whether and how to address policing practices and racial disparities in prosecutions, suspicions that conservatives are using decarceration as a Trojan Horse to protect white-collar criminals, and disagreement about whether decarceration should be accompanied by increased societal investment in housing, employment opportunities, health care, and other social services.”).

disease, how can anyone propose a cure? And, without appreciating differences in normative commitments and goals, how can we tell if a proposed reform is making the problem worse or moving the system in the right direction?

In response to these questions, this Article maps the critical literature on the criminal system in terms of *over* and *mass*.<sup>37</sup> The following chart provides a rough description of the key properties that I associate with each frame:

<b>Over</b>	<b>Mass</b>
Concerned about the culpability of the defendant ( <i>i.e.</i> , that individuals who are not morally blameworthy or who do not pose a direct threat to public safety are being punished).	Concerned about the culpability of the state ( <i>i.e.</i> , that individuals are suffering because of the mode of punishment and policing and the effects of state violence).
Accepts policing, prosecution, and punishment as parts of society, but argues that the rates are sub-optimal and/or the various actors' incentives require re-calibration.	Fundamentally questions policing, prosecution, and punishment, and asks whether re-calibration is possible or whether the system is inextricably tied to flawed incentives and troubling outcomes.

To put a finer point on it and to understand how the frames play out, the following chart provides a rough overview of this typology as it applies to several salient issues in criminal justice scholarship and criminal law reform:

	<b>Over</b>	<b>Mass</b>
<b>Criminalization</b>	The state has criminalized too much conduct, leading to a situation in which there are too many substantive criminal laws on the books.	The state has used the criminal system selectively to address social problems, leading to a situation in which certain individuals and communities are (or perceive that they are) criminalized.
<b>Incarceration</b>	The state incarcerates people for longer than they need to be incarcerated and locks up people who pose little danger to the public.	The state uses jails and prisons to manage populations, effectively increasing marginalization across lines of gender, race, and class.
<b>Collateral Consequences</b>	The state imposes too many formal collateral consequences that fail to	By imposing formal collateral consequences, the state treats individuals as though they are

<sup>37</sup> To be clear, for some readers, *over* and *mass* as terms may carry the baggage of their association with other literatures. Nevertheless, in the analysis that follows, I use both terms advisedly to describe broader trends in or approaches to criminal justice critique.

	distinguish between truly dangerous individuals with criminal records and individuals who are no longer a public safety threat.	branded and cannot change; and collateral consequences extend the effects of punishment.
<b>Policing</b>	The state “over polices” a neighborhood or community when police aggressively stop individuals who have not committed crimes or where police activity reflects prejudice or assumptions, rather than the crime rate.	The state “over polices” a neighborhood or community when aggressive or intrusive police tactics systematically inconvenience or marginalize certain members of the community.

I will return to this chart later when I examine the potential policy proposals that respond to each frame. And I will address questions of incarceration and criminalization at much greater length and in much greater detail in Parts II and III. But, for the time being, the chart is meant to illustrate that these frames may identify closely related problems but identify the core evil or the desired intervention in very different terms.

The *over* frame treats criminal justice problems as a matter of degree that can be remedied by re-calibrating the way that the system sorts among defendants, categorizes conduct, and punishes wrong-doing.<sup>38</sup> The core problem to be addressed is one of scope. This line of critique emphasizes scope over structure. Former Attorney General Eric Holder’s claim that “too many Americans go to too many prisons for far too long”<sup>39</sup> provides perhaps the most pithy encapsulation of the critique.<sup>40</sup> Similarly the mantra of conservative criminal justice reform activists—that the state should be “right on crime”, not “tough on crime”—speaks to a preference for “right sizing” the criminal system.<sup>41</sup> The state has criminalized more conduct than traditional

<sup>38</sup> See Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 539 (2012) (describing and critiquing this “quantitative” view of overcriminalization);

<sup>39</sup> Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013 (quoting then-Attorney General Eric Holder); see also Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 702 (2017) (describing “Congress’s penchant for passing too many criminal laws carrying sentences that are too long”).

<sup>40</sup> See also Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 125 (2008) (“The problem of mass incarceration is entirely produced by the simple mathematics of two pressure points – how many people enter prison and how long they stay there.”).

<sup>41</sup> See, e.g., McLeod, *supra* note 36, at 668; Vikrant P. Reddy & Marc A. Levin, *Right on Crime: A Return to First Principles for American Conservatives*, 18 TEX. REV. L. & POL. 231 (2014); Ellen S. Podgor, *Introduction Overcriminalization: New Approaches to A Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 534 (2012); Statement of Principles, Right on Crime (last visited July 5, 2017), <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/>.

justifications for punishment warrant, so the problem might be remedied by criminalizing less conduct.<sup>42</sup> An ideal legislature would adopt the proper theory of punishment and abolish all criminal statutes that do not serve that theory or justification. For example, if society were to adopt the harm principle, then the legislature would be correct to criminalize conduct that caused harm, regardless of the harm to the defendant caused by punishment.<sup>43</sup> Similarly, the state incarcerates for too long because the desired benefits of incarceration could be obtained more quickly or without such an extreme degree of punishment.<sup>44</sup> Therefore, the state should re-calibrate punishment to achieve the desired effect while reducing inefficient or unjustified incarceration.<sup>45</sup>

Perhaps the easiest way to appreciate and understand the *over* frame is to consider its poster child: the “non-violent”<sup>46</sup> drug offender.<sup>47</sup> Viewed

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<sup>42</sup> See, e.g., HUSAK, *supra* note 3, at 3–4; Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 745 (2014); Luna, *supra* note 10, at 712–713.

<sup>43</sup> Cf. Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity As A Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 294–95 (2013) (advocating for decriminalization of “victimless” crimes). As Bernard Harcourt has shown, however, applying such a principle is easier said than done. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 194 (1999); see also Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in the judgment); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1969 (2004).

<sup>44</sup> See, e.g., Frank O. Bowman, III, *Beyond Band-AIDS: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 164 (2005); Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 378 (2013) (“This mass incarceration is overincarceration. . . . [A] criminal justice system based on mass incarceration, in which we lock up more and more people, and particularly more people of color, with no crime reduction impact, and at a tremendous financial cost to our federal and state budgets, accomplishes none of those goals.”); Chad Flanders, *Can Retributivism Be Progressive?: A Reply to Professor Gray and Jonathan Huber*, 70 MD. L. REV. 166, 170 (2010); Timothy W. Floyd, *Steven’s Choice*, 10 OHIO ST. J. CRIM. L. 203, 203 (2012) (“Although prisons are a necessary evil, we imprison far too many people in our society, and for far too long.”); Jennifer Seltzer Stitt, *Worth Fighting For: Keeping the Promise of Sentencing Reform*, 23 FED. SENT. REP. 126, 128 (2010).

<sup>45</sup> See Clear, *supra* note 40, at 125–26 (“If the problem of mass incarceration is the large number of people who go into prison and how long they stay there, then the solution is for fewer to go in and for shorter stays. In other words, the solution is not programmatic. . . .”).

<sup>46</sup> While such a discussion falls largely outside the scope of this Article, the distinction between violent and nonviolent crimes (and defendants) remains far from certain. See generally Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 621 (2011). Therefore, even though categorizing a certain crime as “violent” and attaching severe punishment and collateral consequences may have some intuitive appeal, it is not clear that courts and legislators have been successful in drawing these lines. See generally *id.*; Benjamin Levin, *It’s Time To Rethink “Violent” Crime: How Mislabeling Misconduct Contributes To Our Bloated Criminal Justice System*, SALON, June 19, 2016, [http://www.salon.com/2016/06/19/its\\_time\\_to\\_rethink\\_violent\\_crime\\_how\\_mislabeling\\_misconduct\\_contributes\\_to\\_our\\_bloated\\_criminal\\_justice\\_system/](http://www.salon.com/2016/06/19/its_time_to_rethink_violent_crime_how_mislabeling_misconduct_contributes_to_our_bloated_criminal_justice_system/). Indeed, the Supreme Court

through this frame, the individual serving an extended prison sentence for a drug offense represents the apotheosis of the criminal system's ills. She is being punished for conduct that is not necessarily morally blameworthy and does not necessarily have a victim (*contra* "violent" crime).<sup>48</sup> Her conduct has been overcriminalized (because it could be regulated effectively non-criminally) and she has been overincarcerated (because she does not deserve the punishment).<sup>49</sup>

The *mass* frame, on the other hand, is less concerned with the culpability of the individual defendant.<sup>50</sup> Instead, this frame is rooted in an inherent skepticism about the operation and goals of the criminal system as embedded in a larger model of governance.<sup>51</sup> Where the *over* frame emphasizes scope, the *mass* frame prioritizes structure. The *mass* critique asks why criminal law has replaced other regulatory models and what the consequences of criminal regulation are (*e.g.*, arrest, conviction, and collateral consequences of both).<sup>52</sup> In this respect, *mass* accounts are largely phenomenological. This line of critique focuses on the ways in which the criminal system marginalizes both individual defendants, but also communities that bear the brunt of criminalization.<sup>53</sup> The *mass* frame would also lead to a critique of the

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continues to grapple with what constitutes a "crime of violence" for purpose of "career offender" statutes. *See, e.g.*, Beckles v. United States, 137 S. Ct. 886 (2017); Welch v. United States, 136 S. Ct. 1257 (2016); Johnson v. United States, 135 S. Ct. 2551 (2015).

<sup>47</sup> *See* GOTTSCHALK, *supra* note 15, at 165–69 (criticizing reformers' focus on those who have committed "nonviolent, nonserious, nonsex crimes"); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 221–22 (2017) [*hereinafter* "LOCKING UP OUR OWN"] (critiquing the "non-violent only" approach to criminal justice reform).

<sup>48</sup> *See, e.g.*, Buchhandler-Raphael, *supra* note 43, at 294–95; Floyd, *supra* note 44, at 203; Stuart P. Green, *Vice Crimes and Preventive Justice*, 9 CRIM. L. & PHIL. 561, 562 (2015); Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 35 (1995).

<sup>49</sup> *See* Stuart P. Green, *Why It's A Crime to Tear the Tag Off A Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1536 (1997).

<sup>50</sup> *See, e.g.*, David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 2 (David Garland ed., 2001); Traum, *supra* note 30, at 427.

<sup>51</sup> *See, e.g.*, ALEXANDER, *supra* note 5, at 8 ("I came to see that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow."); Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 237 (2009) ("Mass incarceration is a symptom of grave structural problems in the United States. . . . The reliance on incarceration for social control is . . . due to . . . larger socio-economic issues and structural racism that have marginalized a large percentage of the U.S. population.").

<sup>52</sup> *See, e.g.*, Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 716 (2009); Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809 (2015).

<sup>53</sup> *See, e.g.*, Jonathan Simon, *Wechsler's Century and Ours: Reforming Criminal Law in A Time of Shifting Rationalities of Government*, 7 BUFF. CRIM. L. REV. 247, 265 (2003) ("Mass imprisonment

nonviolent drug offender’s treatment, but it would not rest on the offender’s lack of culpability.<sup>54</sup> Indeed, this frame also can encompass (or invite) critiques of criminalizing violent conduct.<sup>55</sup> That is, this critical tendency transcends a focus on “nonviolent” offenders or “nonserious” offenses. Generally, this frame stresses the ways in which the criminal system contributes to and is a part of greater structural inequalities in society.<sup>56</sup> In this respect, the *mass* frame is less a critique of the criminal system as such than it is a critique of legal, social, economic, and racial injustice that uses the criminal system as an example or a point of entry.<sup>57</sup>

Ultimately, then, the *mass* frame is more (or at least more explicitly) an ideological critique. In contrast, the *over* frame is more ideologically indeterminate—the fiscal conservative, the libertarian, and the liberal/progressive egalitarian all might adopt it. The project of recalibrating or “right sizing” might (and does) bring together groups whose normative commitments and vision of the optimal rate of criminalization or incarceration varies. In contrast, the *mass* frame—at least in its strong form—is rooted in a particular (left) ideological critique of neoliberalism, capitalism, and structures of governance. Of course, there are different flavors of “left”, and *mass* critiques and critics have different political valences and endorse different policy solutions. Some critics adopting a *mass* frame might embrace what Allegra McLeod describes as a “prison abolitionist ethic,”<sup>58</sup> while others might

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abandons the individual as a target of penal power in favor of dangerous classes. The careful calibration of the social interest in sanctioning certain behaviors is replaced by a zero tolerance model in which those designated as dangerous are subjected to long-term containment on the model of waste management. Imprisonment remains a plausible if unpredictable strategy to deal with serious crime, but mass imprisonment promotes something different, the indiscriminate use of imprisonment as a response to even modest levels of criminality when they are associated with feared or despised groups.”)

<sup>54</sup> See, e.g., FORMAN, LOCKING UP OUR OWN, *supra* note 47, at 221–22.

<sup>55</sup> See, e.g., FORMAN, LOCKING UP OUR OWN, *supra* note 47, at 221–22; Ristroph, *supra* note 46, at 621 (“The criminal law is a necessary feature of any society of vulnerable embodied persons. We must punish violence. Or so it seems, until we discover that we are not always sure what counts as violence, and the criminal law doesn’t always punish what seems to be violence, and in fact, the greatest source of violence might be the criminal law itself.”).

<sup>56</sup> See ALEXANDER, *supra* note 5, at 185 (describing mass incarceration as a “set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position”); López, *supra* note 7, at 1028.

<sup>57</sup> See, e.g., Emily Hughes, *Investigating Gideon’s Legacy in the U.S. Courts of Appeals*, 122 YALE L.J. 2376, 2386 (2013) (conceptualizing “mass incarceration as a social justice or civil rights issue and not simply a criminal justice issue”).

<sup>58</sup> Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015); see also Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 NYU L. REV. (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3061917](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3061917); Dorothy E. Roberts, *Democratizing Criminal Law As an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017) (“My criminal law scholarship has not claimed that criminalizing pregnant black women, loitering laws, order-maintenance policing, mass incarceration, capital punishment,

hold less radical views and be more open to prisons, police, and prosecutors who served different socio-political ends or who were directly responsible to marginalized communities. Regardless, these critiques seem to retain a certain affinity (broadly defined) and a certain commitment to critique or a more radical reimagining of the state and the criminal system.<sup>59</sup>

This Part has offered only a rough sketch of two complicated, nuanced visions of the criminal system's flaws. In doing this, I am not suggesting that either frame is monolithic. At times, in this Part and in this Article, the strong form of either frame may appear unfamiliar or extreme, but—to be clear—I am not suggesting that each author or article cited would endorse that strong form. Nor am I suggesting that a given author or article adopts only one approach. Instead, my hope is to use this strong form of the typology to map the prevailing critiques of the criminal system and to emphasize the ways in which very different legal, political, and institutional reforms might flow from different frames. In the next two Parts, I explain the two frames using as examples the lively scholarly debates about mass incarceration and overcriminalization.

## II. INCARCERATION

While the first law journal article to use the term “mass incarceration” appeared in 1938,<sup>60</sup> the use of the phrase to denote a distinct phenomenon did not gain significant traction for over half a century. In the intervening decades, the phrase appeared occasionally in passing, mostly in reference to the imprisonment of Japanese Americans during World War II.<sup>61</sup> Notably,

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and police terror enforce a democratic system in a discriminatory manner. Rather, I have argued that these institutions enforce an undemocratic racial caste system originating in slavery. Making criminal law democratic, then, requires something far \*1605 more radical than reducing bias or increasing inclusion in this antidemocratic system. Democratizing criminal law requires dismantling its anti-democratic aspects altogether and reconstituting the criminal justice system without them. I therefore have joined calls for an abolitionist approach.”)

<sup>59</sup> Because of its phenomenological orientation, the *mass* frame encompasses not only normative critiques of prison and the carceral state, but also descriptive and theoretical work in a range of disciplines from history to political science and criminology. *See generally* Levin, *Rethinking the Boundaries of “Criminal Justice,”* *supra* note 22 (describing the shifting and overlapping terms of interdisciplinary “criminal justice” scholarship).

<sup>60</sup> *See* Joseph Ullman, *A National Program to Develop Probation and Parole*, 29 JOUR. OF CRIM. LAW AND CRIMINOLOGY 517, 524–25 (1938) (“[I]f a prison term is imposed the young criminal goes to a reformatory or a prison in which the mass incarceration of hundreds or even thousands of inmates makes almost impossible any effective work of rehabilitation.”).

<sup>61</sup> *See, e.g.,* Roger Daniels, *American Historians and East Asian Immigrants*, 43 PACIFIC HISTORICAL REV. 449, 465 (1974); Walter F. Murphy, *Civil Liberties and the Japanese American Cases: A Study in the Uses of Stare Decisis*, 11 WESTERN POLITICAL QUARTERLY 3, 6, 12 (1958); Philip Tajitsu Nash, *And Justice for All: An Oral History of the Japanese American Detention Camps by John Tateishi*, 94 YALE L. J. 743, 744, 753 (1985); William L. Richter, “The Revolver Rules the Day!”: Colonel DeWitt C. Brown and the Freedmen’s Bureau in Paris, Texas, 1867-1868, 93

“mass incarceration” in these articles appears to reflect the state’s focus on using incarceration to target a discrete racial or ethnic group.<sup>62</sup> The phrase/concept crops up—with a similar connotation—in the early 1980s.<sup>63</sup> But its use appears to take off in the 1990s,<sup>64</sup> led by the work of David Garland.<sup>65</sup>

Twenty years, later, “mass incarceration” has become a commonplace phrase (or concept)<sup>66</sup> used by academics,<sup>67</sup> judges,<sup>68</sup> and politicians alike.<sup>69</sup> The

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SOUTHWESTERN HISTORICAL QUARTERLY 303 (1990).

<sup>62</sup> See, e.g., Roger Daniels, *The Japanese American Cases, 1942-2004: A Social History*, 68 LAW AND CONTEMP. PROBS. 159, 163–64 (2005); Nash, *supra* note 61, at 753

<sup>63</sup> See, e.g., Francis Cullen & John Wozniak, *Fighting the Appeal of Repression*, 18 CRIME & SOCIAL JUSTICE 23, 23 (1982) (“It is not too much to assert that Americans have long felt comfortable with the notion that the best solution to the crime problem is to put criminals in jail. While our role in founding the modern penitentiary is often overstated, it is nevertheless true that we were the first people to embrace the practice of mass incarceration and to proselytize others to the merits of this crime control strategy.”); Richard Rubenstein, *Moral Outrage as False Consciousness*, 9 THEORY & SOCIETY 745, 746 (1980) (arguing that “institutions of mass incarceration and enslavement” helped define twentieth century politics); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUMBIA L. REV. 1 (1984) (“[M]ass asylum claims have encouraged the INS to adopt an explicit policy of mass incarceration of undocumented aliens . . .”).

<sup>64</sup> See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1998); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 813 (1998); Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism the Constitution and Criminal Procedure*, 107 Yale L.J. 2281, 2323 (1998).

<sup>65</sup> See David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. JOUR. OF CRIMINOLOGY 445, 461 (1996) (““In a society which manifests deep social and racial divisions, which experiences high crime rates and levels of insecurity, where welfare solutions have been politically discredited, and in which a developing commercial sector encourages and facilitates the expansion of imprisonment—in other words in societies such as the USA or the UK—a punitive political and legal culture soon gives rise to mass incarceration, with all of its social and financial consequences.”).

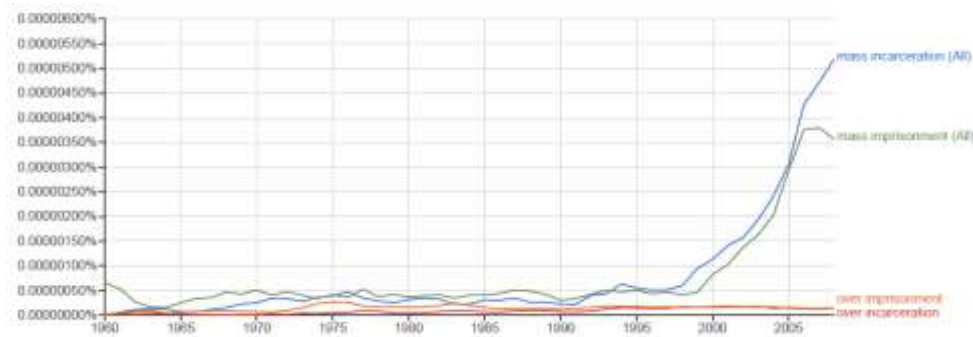
<sup>66</sup> As this Part – and this Article, generally – suggests, it is not clear that the phrase always has a clear theoretical content. Or, to the extent that it does, it is not clear that “mass incarceration” is a single concept or phenomenon, rather than a catchall for a range of critiques or pathologies.

<sup>67</sup> See, e.g., Vincent Chiao, *Mass Incarceration and the Theory of Punishment*, CRIM. L. & PHIL. 4–5 (2015); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165 (2010); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011); Mona Lynch, *Mass Incarceration, Legal Change, and Locale*, 10 CRIMINOLOGY & PUBLIC POLICY 637 (2011); Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921 (2014); Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503 (2014).

<sup>68</sup> See, e.g., *United States v. Anglin*, 846 F.3d 954, 967 (7th Cir. 2017) (“Citing Professor Alexander’s seminal work on mass incarceration, the judge assured Anglin that he ‘does not approach sentencing blindly or without due regard for the consequences of substantial



following chart constructed from Google Ngram data reflects the spike in use of “mass incarceration” and “mass imprisonment” during the 1990s and 2000s.<sup>70</sup>



Of course, this chart hardly paints a complete picture.<sup>71</sup> The data only runs through 2008, so it fails to capture the Obama years and the spike in criminal justice reform literature following the release of *The New Jim Crow*.<sup>72</sup> And, critically, it includes books, rather than law review articles. But it does help illustrate just how important the “mass incarceration” critique is. But what is that critique?<sup>73</sup> This Part argues that there is both an *over* and a *mass* iteration

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incarceration, particularly in a case like this with a young man age 25.”); *United States v. Black*, 750 F.3d 1053, 1057 (9th Cir. 2014) (Reinhardt, J., dissenting) (“In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth, it is especially curious that the government feels compelled to invent fake crimes and imprison people for long periods of time. . . .”); *United States v. Valdovinos*, 760 F.3d 322, 339 (4th Cir. 2014) (Davis, J., dissenting); *United States v. Young*, 960 F. Supp. 2d 881, 903 (N.D. Iowa 2013 (describing “the nation’s mass incarceration problem”)); *United States v. Bannister*, 786 F. Supp. 2d 617, 649–51 (E.D.N.Y. 2011); *United States v. Haynes*, 557 F. Supp. 2d 200, 202–203 (D.Mass. 2008).

<sup>69</sup> See, e.g., Conyers, *supra* note 44; Juleyka Latingua-Williams, *Cory Booker Takes Justice Reform Personally*, THE ATLANTIC, May 22, 2016, <https://www.theatlantic.com/politics/archive/2016/05/what-cory-booker-criminal-reform/483794/>; Obama, *supra* note 2; Press Release, Leahy: Congress Must Address The Nation’s Exploding Prison Population This Year, Jul. 22, 2015, <https://www.leahy.senate.gov/press/leahy-congress-must-address-the-nations-exploding-prison-population-this-year>.

<sup>70</sup> Data available at: <http://bit.ly/2t2qSXJ>.

<sup>71</sup> While the Google Ngram viewer remains a helpful way of tracking usage across time, its limitations are well-documented. See, e.g., Eitan Adam Pechenick, *et al.*, *Characterizing the Google Books Corpus: Strong Limits to Inferences of Socio-Cultural and Linguistic Evolution* 10 PLOS ONE 10 (2015); Sarah Zhang, *The Pitfalls of Using Google Ngram to Study Language*, WIRED, Oct. 12, 2015, <https://www.wired.com/2015/10/pitfalls-of-studying-language-with-google-ngram/>.

<sup>72</sup> A Westlaw search indicates that *The New Jim Crow* has been cited by 904 law review articles since its publication. (Search conducted on April 4, 2018 using search term: “The New Jim Crow: Mass Incarceration in the Age of Colorblindness”).

<sup>73</sup> Cf. Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203,

of the mass incarceration critique, and that these two critiques have very different focal points, suggesting very different possible solutions.

#### A. Mass Incarceration

As noted above, the early uses of the phrase to characterize Japanese incarceration appear to reflect a *mass* frame—the focus is the social function or imprisonment, more so than the sheer number of Japanese Americans who suffered. But Garland—in what might be the clearest and most cited definition of the phenomenon<sup>74</sup>—offers a precise statement of the *mass* frame:

What are the defining features of mass imprisonment? There are, I think, two that are essential. One is sheer numbers. Mass imprisonment implies a rate of imprisonment and a size of prison population that is markedly above the historical and comparative norm for societies of this type. The US prison system clearly meets these criteria. The other feature is the social concentration of imprisonment's effects. Imprisonment becomes mass imprisonment when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population. In the case of the USA, the group concerned is, of course, young black males in large urban centres. For these sections of the population, imprisonment has become normalized. It has come to be a regular, predictable part of experience, rather than a rare and infrequent event.<sup>75</sup>

This two-part definition first provides a quantitative statement that—taken alone—might serve as the basis for the *over* frame. But, critically, Garland pairs that concern (*i.e.*, too many people in prison) with a deeper critique of incarceration's social function.

From a *mass* perspective, perhaps the most important word in Garland's definition is "systemic." That is, the critique is not about one-off interactions between individuals and the legal system; rather, the phenomenon is a phenomenon because of the structural or systemic dimensions.<sup>76</sup> The

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1203–04 (2012) ("Over the past decade, the humanities and social sciences have yielded substantial literature examining the rise of mass incarceration from various perspectives, ranging from econometric analyses of contributory factors to cultural critiques of American exceptionalism in penal policy.").

<sup>74</sup> See Forman, *Racial Critiques*, *supra* note 7, at n. 6. ("David Garland is credited with coining 'mass imprisonment.'").

<sup>75</sup> Garland, *supra* note 50, at 5–6. While Garland uses the phrase "mass imprisonment," "[t]he terms 'mass incarceration' and 'mass imprisonment' are used synonymously in the criminal justice literature." Forman, *Racial Critiques*, *supra* note 7, at n. 6.

<sup>76</sup> See also Simon, *supra* note 53, at 256. *But see* United States v. Tarango, No. CR 07-2443, 2015 WL 10401775, at \*22 (D.N.M. Oct. 29, 2015) ("While many criticize the federal courts

quantitative critique or element is a means of understanding the larger structural point—that the criminal system is a form of social control that creates and exacerbates societal inequalities. It is this element of Garland’s definition that helps explain the *mass* definition and how it differs from a purely quantitative account of mass incarceration.

Critiques applying a *mass* frame (and even those critical and agnostic about it) tend to characterize mass incarceration much like Garland does.<sup>77</sup> Such critiques have stressed that punishment and marginalization operate collectively, rather than simply on an individual basis.<sup>78</sup> Jonathan Simon has described mass incarceration as a set of structures that imposes “systemic inhumanity and racialized violence.”<sup>79</sup> Similarly, in *The New Jim Crow*, Michelle Alexander argues that mass incarceration has operated as a “stunningly comprehensive and well-disguised system of racialized social control.”<sup>80</sup>

Much as Garland’s definition is essential to understanding the *mass* critique, so too is *The New Jim Crow* (and the critical response to it). *The New Jim Crow* delivers a searing critique of the criminal system as a model of marginalizing and subjugating people of color, particularly black men.<sup>81</sup> And the book helped herald a growing public awareness of the criminal system’s flaws.<sup>82</sup> As James Forman, Jr. puts it, Alexander’s book “played a crucial role

for ‘mass incarceration,’ surely this phrase is a hyperbole, or at least a poor shorthand for the problem being addressed; there is no ‘mass incarceration’—each defendant was separately convicted and sentenced, one at a time.”)

<sup>77</sup> See Nicole P. Dyszlewski, *et al.*, *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U. L. REV. 471, 476–77 (2016) (“Among mass incarceration scholars, David Garland is the father of mass incarceration.”).

<sup>78</sup> See, e.g., Traum, *supra* note 30, at 427 (identifying mass incarceration as “a group and systemic problem, not merely an individual problem”); Bruce Western & Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, 647 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 166, 168 (2013) (“incarceration must be so extensive and concentrated that it imprisons not just the individual but the group”).

<sup>79</sup> Jonathan Simon, *Amnesty Now! Ending Prison Overcrowding Through A Categorical Use of the Pardon Power*, 70 U. MIAMI L. REV. 444, 475 (2016); see also Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to Brown v. Plata*, 48 HARV. C.R.-C.L. L. REV. 217, 220 (2013).

<sup>80</sup> ALEXANDER, *supra* note 5, at 8; see also Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1446 (2012) (“[T]he current crisis that we call mass incarceration or punishment comprises multiple intersections – not just of identity and power but of systemic dynamics that themselves do the work of subordination.”).

<sup>81</sup> See generally ALEXANDER, *supra* note 5.

<sup>82</sup> See, e.g., GOTTSCHALK, *supra* note 15, at 3 (“[T]he contributions of Alexander’s *The New Jim Crow* cannot be underestimated. No other book has been so vital in making the problem of the carceral state starkly visible to the wider public and in rallying members of disadvantaged communities and other groups to take on the project of dismantling it.”); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L. J. 1531, 1534–37 (2016) (describing the book as “a modern classic” and observing that “*The New Jim Crow* makes a notable contribution to public discourse, shedding light on

in providing advocates with a framework for understanding, and a rhetoric for criticizing, the War on Drugs. Published in 2010, the book quickly became required reading for anyone concerned about mass incarceration.”<sup>83</sup> Forman recounts how the D.C. City Council’s 2014 decision to decriminalize marijuana possession rested—at least in part—on the resonance of the book: “various witnesses [at hearings] cit[ed] *The New Jim Crow* and one city council member explain[ed] that the book had ‘compelled me to be heavily engaged in the conversation.’”<sup>84</sup>

In this respect, *The New Jim Crow* operates as one of the most recognizable critiques of mass incarceration. But that doesn’t mean that its approach or arguments have been embraced by other academic critics of mass incarceration. Scholars have leveled a number of criticisms at *The New Jim Crow*:<sup>85</sup> the book overstates the role of the War on Drugs and understates the role of violent crime;<sup>86</sup> the book overemphasizes the federal system when, in fact, states incarcerate vastly more individuals than the federal government;<sup>87</sup> the book paints race in the United States as black and white, understating the criminal system’s impact on Latinos and other racial and ethnic groups;<sup>88</sup> the book focuses on the role of white conservatives and understates the role of liberals and black lawyers, lawmakers, and activists in constructing the apparatus of mass incarceration;<sup>89</sup> and, the book stretches the historical analogy to Jim Crow.<sup>90</sup> These critiques certainly have some merit and add important and much-needed nuance to the discussion of the criminal system’s flaws. But some of the critiques of *The New Jim Crow* appear to be rooted less in any problem with Alexander’s arguments than in a difference of frame or perhaps even a fundamental disagreement as to what mass incarceration is.

Granted, some scholars’ criticisms operate as internal critiques—*mass*

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how society became trapped in the current web of overzealous punishment and then pointing the way out.”).

<sup>83</sup> FORMAN, LOCKING UP OUR OWN, *supra* note 47, at 220.

<sup>84</sup> *Id.*

<sup>85</sup> This list is not meant to be exhaustive. *Cf. generally* Jonathan Wood, Note, *The Old Boss the Same As the New Boss?: Critiques and Plaudits of Michelle Alexander’s New Jim Crow Metaphor*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSP. 175 (2015) (collecting critiques).

<sup>86</sup> *See, e.g.*, PFAFF, *supra* note 19, at 5–6, 21; GOTTSCHALK, *supra* note 15, at 138; Forman, *Racial Critiques*, *supra* note 7, at 23; Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2194 (2016); Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 846 (2014).

<sup>87</sup> *See generally* PFAFF, *supra* note 19; *see also* German Lopez, *Why You Can’t Blame Mass Incarceration on The War on Drugs*, VOX, May 30, 2017, <https://www.vox.com/policy-and-politics/2017/5/30/15591700/mass-incarceration-john-pfaff-locked-in>.

<sup>88</sup> *See, e.g.*, Forman, *Racial Critiques*, *supra* note 7, at 60.

<sup>89</sup> *See, e.g.*, FORMAN, LOCKING UP OUR OWN, *supra* note 47; MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014); Forman, *Racial Critiques*, *supra* note 7, at 23;

<sup>90</sup> *See, e.g.*, Forman, *Racial Critiques*, *supra* note 7, at 23; Walker, *supra* note 86, at 848–55.

concerns that Alexander might have overstated, understated, or missed. But from an *over* perspective, the critique is essentially empirical; for example, the laws that Alexander blames (primarily drug crimes) actually account for a comparatively small portion of all prosecutions, arrests, and convictions.<sup>91</sup> Instead, jails and prisons are filled disproportionately with people who have committed violent crimes.<sup>92</sup>

This critique serves as the backbone for John Pfaff's well-received book *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.<sup>93</sup> To Pfaff, *The New Jim Crow* has helped popularize a flawed "standard story" of mass incarceration.<sup>94</sup> The standard story is misleading, according to Pfaff, as it presents the War on Drugs as the true enemy and convinces reformers and scholars that re-thinking drug prohibition would reverse or end mass incarceration.<sup>95</sup>

This critique of the drug-centric narrative is right as far as it goes. To the extent that *The New Jim Crow's* contribution is the argument that drug arrests and prosecutions directly caused the spike in U.S. prison populations, then Pfaff (and others) are spot on and have done an important service by offering such a corrective.<sup>96</sup> Reading *The New Jim Crow* through an *over* frame renders some of its core claims contestable at best and dramatically reduces its effect. But, despite its importance, Pfaff's critique assumes only one mode of critique—an *over* mode. *Mass* critiques of the book identify other issues, but recognize that Alexander's critique is about more than arrest numbers; it also operates as a *mass* account of the criminal system.<sup>97</sup>

In other words, we might read the book as more of a sociological or cultural claim—the War on Drugs (as a component of the broader War on Crime) served to marginalize generations of people of color, particularly young black men. This marginalization occurs via formal legal structures—collateral consequences in the labor market, in housing, and in voting rights<sup>98</sup>—and also via social and legal estrangement.<sup>99</sup> So, the impact of the War on Drugs transcends any data that we could track using the Bureau of Justice Statistics. In so far as the criminal system serves a function of social control, of public

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<sup>91</sup> See, e.g., PFAFF, *supra* note 19, at 5–6, 21.

<sup>92</sup> See *id.*

<sup>93</sup> See generally PFAFF, *supra* note 19, at 21–51.

<sup>94</sup> See *id.* at 5.

<sup>95</sup> See generally *id.* at 21–51.

<sup>96</sup> I will return to Pfaff's account (and definition) of mass incarceration in Part I.B., *infra*.

<sup>97</sup> In a sense, *The New Jim Crow* demonstrates how *mass* and *over* approaches can coexist in the same work. The book rests on both an empirical claim and a cultural claim.

<sup>98</sup> See ALEXANDER, *supra* note 5, at 143, 158, 187, 193. Cf. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 28–41 (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 6 (2007) (describing the process of social exclusion).

<sup>99</sup> Cf. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054, 2083 (2017) (describing the social construction of "legal estrangement").

education, and of constructing social meaning,<sup>100</sup> the War on Drugs and aggressive policing of poor people of color sends a critical message—a message of second-class citizenship and othering.<sup>101</sup> Borrowing Garland’s formulation, “[P]enal exclusion has been layered on top of economic and racial exclusion,” . . . ensuring that social divisions are deepened . . . and that a criminalized underclass is brought into existence and systematically perpetuated.”<sup>102</sup>

Viewed through the *mass* frame, then, mass incarceration comprises a system of making and enforcing criminal law, as much as much as it consists of individual case outcomes or numbers of people incarcerated.<sup>103</sup> Paul Butler describes “[m]ass incarceration’s process of control” as “the social and legal apparatus by which poor people [and black people] become losers in criminal justice.”<sup>104</sup> Butler identifies “five steps” that make up the process of exclusion:

- (1) The spaces that poor people, especially poor African Americans, live in receive more law enforcement in the form of police stops and arrests.
- (2) The criminal law deliberately ignores the social conditions that breed some forms of law-breaking. Deprivations associated with poverty are usually not “defenses” to criminal liability, although they may be factors considered in sentencing.
- (3) African Americans, who are disproportionately poor, are the target of explicit and implicit bias by key actors in the criminal justice system, including police, prosecutors, and

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<sup>100</sup> See, e.g., ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (W.D. Halls trans., 2014) (1893); MICHEL FOUCAULT, *DISCIPLINE & PUNISH* 138 (Alan Sheridan trans., 2d ed. 1995); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509, 554 n. 90 (2014). Cf. RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 59 (1981) (“To say that the members of the society take a basic social institution to be ‘legitimate’ is to say that they take it to ‘follow’ from a system of norms they all accept[.] . . . a set of general beliefs (normative beliefs and other kinds of beliefs) which are organized into a world-picture which they assume all members of the society hold. So a social institution is considered legitimate if it can be shown to stand in the right relation to the basic world-picture of the group.”); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 347 (1998) (“[T]he legal system creates as well as reflects consensus (this is true both of legislation and of adjudication). Its institutional mechanism ‘legitimizes,’ in the sense of exercising normative force on the citizenry.”)

<sup>101</sup> See Bell, *supra* note 99, at 2083.

<sup>102</sup> Garland, *supra* note 50, at 2; see also Jonathan Simon & Richard Sparks, *Punishment and Society: The Emergence of an Academic Field*, in *THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY* 11 (Jonathan Simon & Richard Sparks, eds. 2013).

<sup>103</sup> See generally DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* 11 (2011).

<sup>104</sup> Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2183 (2013).

judges.

(4) Once any person is arrested, she becomes part of a crime control system of criminal justice, in which guilt is presumed. Prosecutors, using the legal apparatus of expansive criminal liability, recidivist statutes, and mandatory minimums, coerce guilty pleas by threatening defendants with vastly disproportionate punishment if they go to trial.

(5) Repeat the cycle. A criminal caste is created. Two-thirds of freed prisoners are rearrested, and half return to prison, within three years of their release.<sup>105</sup>

Butler's account does not foreground guilt or innocence. Rather, his description is a structural critique of how institutions operate to strip power and agency from the already-marginalized. The system fails not because it mistakes the innocent for the guilty, but because it creates a "criminal caste."<sup>106</sup>

As Butler's critique illustrates, the *mass* frame suggests that mass incarceration is not just about incarceration as such. Instead, it is a critique of a mode or method of doing criminal law—of lawmaking, of enforcement, and of regulating court-involved individuals. *Mass* incarceration encompasses modes of policing, interactions between civilians and criminal justice officials, and a host of causes, effects, and features of the carceral state. For example, Jack Chin has argued that the term "mass incarceration" "obscures the reality" of the criminal system.<sup>107</sup> According to Chin, "mass conviction" would make a more appropriate label—it is not incarceration that does much of the harm to court-involved individuals; instead, conviction (even if unaccompanied by incarceration) triggers a vast web of collateral consequences and a social status akin to "civil death."<sup>108</sup> Indeed, mass conviction still would be under-inclusive or would fail to capture the breadth of the criminal system. Arrest or simply contact with police officers can be enough to catapult an individual into the Kafkaesque realm of collateral consequence, fines, and fees.<sup>109</sup> That realm, that web of laws, of social structures, and of formal and informal

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<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1804 (2012).

<sup>108</sup> *See id.*; see also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 693 (2014) ("The era of mass incarceration might more accurately be called the era of mass conviction and correctional supervision, as parole and probation populations have grown at an even faster rate than the incarcerated population.").

<sup>109</sup> *See, e.g.*, Delgado & Stefancic, *supra* note 82, at 1537; Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 314 (2016); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk As A Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2431 (2017); Jain, *supra* note 52; Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 258 (2015); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1079 (2015) [*hereinafter* "Misdemeanor Decriminalization"].

consequences comprises the target of critique.<sup>110</sup>

Taking the broadest or strongest form of the critique, then, leads us to a deeper critique of the state and broader structures of governance.<sup>111</sup> Marie Gottschalk describes the U.S. structures of governmentality as “the carceral state.”<sup>112</sup> Likewise, Bernard Harcourt describes the post-1970 approach to criminal justice policy as “neoliberal penalty”—the state has adopted a “de-regulatory” or free market approach to the economy, but has grown significantly as an institution of punishment.<sup>113</sup> In this vein, a range of *mass* critiques emphasize the ways in which a deterioration of the New Deal or Great Society welfare state has led to a new vision of governance in which the government replaces provision of benefits with provision of punishment and where the model of addressing poverty and social problems is via the criminal system.<sup>114</sup> Sharon Dolovich and Alexandra Natapoff argue that “[e]ven as our

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<sup>110</sup> See, e.g., Tamar R. Birkhead & Katie Rose Guest Pryal, *Introduction*, 93 N.C. L. REV. 1211, 1221 (2015) (“Whether it is solitary confinement, the prosecution of minors for prostitution, racial profiling, criminalizing the mentally ill, or sexually abusing children in custody, the common denominator is that these practices are all by-products of the systemic problems that continue to plague our criminal justice system.”); Dorothy E. Roberts, *Privatization and Punishment in the New Age of Reprogenetics*, 54 EMORY L. J. 1343, 1350–51 (2005) (“Mounting social science studies on the community-level impact of mass incarceration reveal that prison has become a systemic aspect of community members’ family affairs, economic prospects, political engagement, social norms, and childhood expectations for the future.”).

<sup>111</sup> See Akbar, *supra* note 58, at 20 (describing radical interventions as “expand[ing] the frame beyond police violence and even criminal justice institutions to the interlocking set of current and historical systems that propel and draw from anti-Black racism”).

<sup>112</sup> See generally Gottschalk, *supra* note 15; Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006) (“Three features distinguish the U.S. carceral state: the sheer size of its prison and jail population; its reliance on harsh, degrading sanctions; and the persistence and centrality of the death penalty.”). Cf. Michael Meranze, *Pathology of the Carceral State*, L.A. REVIEW OF BOOKS, Feb. 4, 2015, <https://lareviewofbooks.org/article/pathology-carceral-state/> (tying Gottschalk’s characterization and critique of the carceral state to Michel Foucault’s conception of the “carceral archipelago”).

<sup>113</sup> See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 40–44 (2011) (“Neoliberal penalty facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics. By creating and reinforcing this categorical division between a space of free self-regulation and an arena where coercion is necessary, appropriate, and effective, neoliberal penalty has fertilized the growth of the penal domain.”); Bernard E. Harcourt, *On the American Paradox of Laissez-Faire and Mass Incarceration*, 125 HARV. L. REV. F. 54 (2012); see also Aziza Ahmed, *Adjudicating Risk: AIDS, Crime, and Culpability*, 2016 WIS. L. REV. 627, 630 (2016); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1581 (2014); Frank Pasquale, *Grand Bargains for Big Data: The Emerging Law of Health Information*, 72 MD. L. REV. 682, 765 (2013) (“As Bernard Harcourt and Loïc Wacquant have shown, neoliberal penalty has been a hallmark of U.S. politics since the 1970s”).

<sup>114</sup> See, e.g., NICOLA LACEY, *THE PRISONERS’ DILEMMA* 170–73 (2008); LOIČ



welfare institutions route the disadvantaged into the criminal system, the criminal process itself functions as a powerful engine of social inequality.”<sup>115</sup> Likewise, Aya Gruber contends that “[t]he tough-on-crime philosophy that overtook America was not a singular phenomenon, divorced from a larger political and economic program, but a distinct part of a neoliberal paradigm of rampant individualism, minimization of government services, and unconstrained capitalism.”<sup>116</sup> That is, *mass* incarceration reflects a political system in which the state is “governing through crime.”<sup>117</sup>

### B. *Over Incarceration*

The *over* frame shares many similar concerns with the *mass* frame and relies on much of the same data, but the underlying definition of the phenomenon differs, and the breadth of the critique is significantly narrower. In the introduction to *Locked In*, Pfaff observes the challenge in defining mass incarceration.<sup>118</sup> Pfaff cites to Garland’s definition in an endnote, observing that “the second part [of the definition] might do some real work.”<sup>119</sup> Nevertheless, Pfaff concludes that “[t]he criticisms over ‘mass incarceration’ essentially boil down to claims that we have too many people in prison . . . and that we should reduce that number. . . .”<sup>120</sup> Race is a part of Pfaff’s critique (and his reading of others’ critiques), but generally not in the totalizing, caste

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WACQUANT, PUNISHING THE POOR 1–3 (2009); Angelina Snodgrass Godoy, *Converging on the Poles: Contemporary Punishment and Democracy in Hemispheric Perspective*, 30 LAW & SOC. INQUIRY 515, 517 (2005); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 85–86 (2007); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 171 (2014); Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 331 (2015); Gustafson, *supra* note 52, at 646 n. 12 (“A number of sociologists use the term criminalization of poverty to describe an element of neoliberalism that involves the mass incarceration of poor people of color.”); McLeod, *supra* note 36, at 667; Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 438 (2009).

<sup>115</sup> Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 1, at 1, 14.

<sup>116</sup> Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618–19 (2009) (footnotes omitted).

<sup>117</sup> See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 17 (2007) (“When we govern through crime, we make crime and the forms of knowledge historically associated with it—criminal law, popular crime narrative, and criminology—available outside their limited original subject domains as powerful tools with which to interpret and frame all forms of social action as a problem for governance.”).

<sup>118</sup> See PFAFF, *supra* note 19, at 8.

<sup>119</sup> *Id.* at 241 n. 13. Pfaff continues that “the first part [*i.e.*, the quantitative portion of the definition] provides little guidance about when ‘high’ becomes ‘mass.’” *Id.*

<sup>120</sup> *Id.* at 8.

sense that the *mass* frame indicates.<sup>121</sup> Instead, viewed through an *over* lens, the issue is whether *too many* people of color are incarcerated, as compared to either an optimal rate or the rate at which white people are incarcerated.<sup>122</sup>

Pfaff's book serves as an instructive point of entry into the *over* frame for mass incarceration both: (1) because it provides a compelling version of the account; and (2) it expresses skepticism about the *over* incarceration frame and suggested policy solutions.<sup>123</sup> To the first point, Pfaff's account of mass incarceration, its causes, and its cures rests almost exclusively on quantitative analysis. Trained as an economist (as well as a lawyer), Pfaff provides a data-driven story of growing prison populations that rejects the primacy of the War on Drugs, emphasizes the role of prosecutors, and stresses the importance of states and localities, rather than the federal government.<sup>124</sup> In this respect, *Locked In* operates as a direct response to *The New Jim Crow*—using the *over* frame, Pfaff sets out to debunk empirical errors and overstatements that he views as undermining the “standard story” of mass incarceration.<sup>125</sup>

While different scholars articulate the *over* critique differently, as a way of understanding mass incarceration, it rests on a concern about *too much*.<sup>126</sup> Taken in its extreme form, we can imagine mass incarceration represented by an equation:<sup>127</sup>

$$\text{High Rate of Incarceration} + 1 = \text{Mass Incarceration}$$

Or:

$$\text{High Prison Population} + 1 = \text{Mass Incarceration}$$

The assumption is that there is an optimal (or acceptable) rate of punishment, and at some point, society crosses a line, and we get mass incarceration. Through this frame, “[t]he problem of mass incarceration is entirely produced by the simple mathematics of two pressure points—how many people enter

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<sup>121</sup> *But see id.* at 49 (“It is also essential to address the structural barriers that limit access to the primary job market in the first place—to focus on making sure people have first chances before trying to help them get second ones. Yet this is not something that the criminal justice system is equipped to do, which points to very real limits on what reforms that focus on the criminal justice system by itself can accomplish.” (footnotes omitted)).

<sup>122</sup> *See id.* at 44–49.

<sup>123</sup> Pfaff has articulated similar critiques and arguments elsewhere. *See, e.g.*, John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951 (2016); *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008); *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567, 1568 (2015); *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173 (2015); *Waylaid by A Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087 (2013).

<sup>124</sup> *See generally* PFAFF, *supra* note 19.

<sup>125</sup> *See id.*

<sup>126</sup> *See, e.g.*, HUSAK, *supra* note 3, at 4 (identifying the criminal system's flaws as boiling down to “too many crimes” and “too much punishment”); Conyers, *supra* note 44, at 378 (“This mass incarceration is overincarceration.”).

<sup>127</sup> *Cf.* PFAFF, *supra* note 19, at 241 n. 13 (expressing frustration about the lack of clarity as to when “high” incarceration becomes “mass” incarceration).

prison and how long they stay there.”<sup>128</sup> And, by that logic, “[i]f the problem of mass incarceration is the large number of people who go into prison and how long they stay there, then the solution is for fewer to go in and for shorter stays.”<sup>129</sup>

*Mass* critiques also may rely on prison, arrest, and conviction data (reflecting Garland’s first element).<sup>130</sup> But those accounts remain focused on the social control element—the numbers are an illustration of just how extreme the marginalization is.<sup>131</sup> *Over* critiques, on the other hand, tend to focus on the data not only as evidence of the problem, but as the problem itself.<sup>132</sup>

While Pfaff largely adopts the *over* frame, he also articulates compellingly one of the key challenges with such an approach: the lack of a shared understanding of the optimal or acceptable rate of punishment.<sup>133</sup>

“Part of the problem,” he explains,

is that no one has provided a metric for determining how many people in prison is “too many” (except perhaps prison abolitionists, for whom it is any number much greater than zero). Should we rely on some sort of strict cost-benefit analysis – and if so, what sorts of costs and benefits should we include? Does harm to the inmate count, for example, or harm to the inmate’s family? And are there other moral values, such as retributivism or mercy, that argue for more or fewer people in prison, independent of any effect on crime or safety or budgets?<sup>134</sup>

For a model that at first appears to offer greater clarity than the *mass* frame,<sup>135</sup> this question of optimal rates, metrics, and theories of punishment quickly complicates matters.

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<sup>128</sup> Clear, *supra* note 40, at 125; *see also* John J. Donohue, III, *Economic Models of Crime and Punishment*, 74 SOC. RES. 379, 384 (2007) (identifying mass incarceration as operating through “more frequent and longer impositions of terms of imprisonment as well as through the war on drugs”).

<sup>129</sup> Clear, *supra* note 40, at 125–26.

<sup>130</sup> *See* Garland, *supra* note 50, at 5–6; *see also* Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, in Garland, *supra* note 50, at 35–50; Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934-2001*, 40 J. LEGAL STUD. 39, 62 (2011); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274 (2004) (“The first feature of mass incarceration is simply the sheer numbers of African Americans behind bars.”).

<sup>131</sup> *See generally* Beckett & Western, *supra* note 130.

<sup>132</sup> *See, e.g.*, Clear, *supra* note 40, at 125–26; PFAFF, *supra* note 19, at 8.

<sup>133</sup> *See* PFAFF, *supra* note 19, at 8.

<sup>134</sup> *Id.*

<sup>135</sup> *Cf.* Western & Muller, *supra* note 78, at 168 (describing the second part of Garland’s two-part definition as “more elliptical” than the first part).

Indeed, surveying *over* critiques of mass incarceration reveals a range of metrics, cost-benefit analyses, and theories of punishment driving the designation of “mass.” Some scholars and critics do not necessarily identify their metric or their theory of socially acceptable incarceration—the current amount is too much, and it is greater than the amount earlier in U.S. history, but there is no articulated standard for what the rates *should be*.<sup>136</sup> On the other hand, some scholars frame mass incarceration as a failure or problem because it flies in the face of some other value. For a range of critics, the problem is one based on cost and efficiency: the state should be punishing, but the current system costs too much, given the limited returns in terms of increasing public safety.<sup>137</sup> This critique has been a staple of the advocacy from conservative and libertarian criminal justice reformers.<sup>138</sup> But an efficiency-maximizing approach also has gained ground with judges, scholars, activists, and politicians with other political commitments.<sup>139</sup>

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<sup>136</sup> See, e.g., Rachel Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 UNIV. OF CHI. L. REV. 1 (2015); Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2328 (2013); Michael M. O’Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. U. L. REV. 709, 709 (2013); Alexander Shalom, *Bail Reform As A Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 923 (2014); Taslitz, *supra* note 7, at 133.

<sup>137</sup> See e.g., Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 551 (2015); Marc Levin, Testimony for House Judiciary Committee Overcriminalization Task Force (2014), available at <http://rightoncrime.com/2014/05/marc-levin-testimony-at-house-judiciary-committee-overcriminalization-task-force/>; Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013) (“Driven by a number of factors, not the least of which is the enormous human and financial cost of mass incarceration, policy makers are now shrinking prison and jail populations and pursuing cheaper non-brick-and-mortar social control options.” (footnotes omitted)); Suzanne Valdez, *A Policy Paper on What Can Be Done About Low-Level, Non-Violent Female Drug Offenders in Kansas*, 25 KAN. J.L. & PUB. POL’Y 131, 133 (2015).

<sup>138</sup> See, e.g., Newt Gingrich & Pat Nolan, Op-Ed., *Prison Reform: A Smart Way for States To Save Money and Lives*, WASH. POST, Jan. 7, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>; Reddy & Levin, *supra* note 41; Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 449 (2017).

<sup>139</sup> See, e.g., *United States v. Leitch*, No. 11-CR-00039 JG, 2013 WL 753445, at \*12 (E.D.N.Y. Feb. 28, 2013); *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at \*10 (E.D.N.Y. Jan. 28, 2013) (“[M]ass incarceration comes at great cost; prison is expensive. The annual cost of housing a prisoner is \$21,006 for a minimum-security facility; \$25,378 for a low-security facility; \$26,247 for a medium-security facility; and \$33,930 for a high-security facility. The President’s Fiscal Year 2013 budget request for BOP is over \$6.9 billion dollars, an increase of \$278 million or 4.2% from the Fiscal Year 2012 budget. The BOP budget request accounts for about 25% of DOJ’s overall budget request. We will spend almost exactly as much on federal prisons alone as we do on the entire federal judiciary.” (footnotes omitted)); Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349 (2014); Barkow, *supra* note 1, at 45; Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV.

Aside from pure economic efficiency, a range of scholars and commentators embrace an *over* critique relying on a preferred theory of punishment. If punishment should be designed for optimal deterrence, the critique goes, the current rate of punishment is excessive.<sup>140</sup> The deterrence could be achieved by incarcerating fewer individuals for less time.<sup>141</sup> From a retributive standpoint, the critique sounds in the language of moral desert: an individual who commits a crime deserves to be punished, but the current degree of punishment is too great and is not morally required.<sup>142</sup> Incapacitacionist critics focused on public safety note that the current system does a bad job sorting out the truly dangerous defendant from the one who might pose less of a social threat.<sup>143</sup> As a result (similarly to the efficiency critique), the state is incarcerating people who do not (or cease to) pose a danger to society.<sup>144</sup> Finally, some *over* accounts take up the expressive or democratic-legitimacy-based concern about “rule of law” and respect for institutions: how can the criminal system embody community norms and serve a public educational function when so many people are incarcerated and when the public perceives the system as unjust or punishment as excessive?<sup>145</sup> While

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189, 212 (2013) (“Bipartisan calls for reform in particular emphasize evidence that rehabilitation is cheaper than incarceration.”); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 634 (2012); Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 316 (2012).

<sup>140</sup> See, e.g., Mirko Bagaric *et. al.*, *Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 HOFSTRA L. REV. 785, 789 (2017)

<sup>141</sup> See Robert Weisberg, *Empirical Criminal Law Scholarship and the Shift to Institutions*, 65 STAN. L. REV. 1371, 1378 (2013).

<sup>142</sup> See, e.g., Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 190 (2016); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1036 (2016); Mark Osler & Judge Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 157 (2014) (“[T]here are too many people, especially people of color, in too many prisons, serving sentences that are far too long, and that this mass incarceration serves no legitimate penal or law enforcement rationale.”).

<sup>143</sup> See, e.g., Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 3 (2017); Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705, 729 (2016).

<sup>144</sup> See *United States v. Moore*, 851 F.3d 666, 676 (7th Cir. 2017) (Posner, J., dissenting) (“Many violent offenders, moreover, age out of crime, often as early as their mid- to late-twenties—by the time a person in his 30s has generated a long criminal history suggesting that he poses a continuing risk, he is likely to have started ‘aging out’ of crime, violent behavior in particular. . . . A long prison sentence also undermines someone’s ability to find the stabilizing influence of a job or a spouse, thus increasing the long-run risk that he will reoffend.” (quoting Pfaff)).

<sup>145</sup> See, e.g., *United States v. Spears*, 469 F.3d 1166, 1190 (8th Cir. 2006) (Bye, J., dissenting), *cert. granted, judgment vacated*, 552 U.S. 1090 (2008), and *opinion vacated in part, reinstated*

these critiques might not speak in utilitarian or consequentialist terms (*e.g.*, “optimal punishment”), they present an account based on a belief that justifiable punishment has overflowed its banks.

Of course, these critiques vary dramatically. And, just because a scholar articulates a preferred theory of punishment or metric does not mean that Pfaff’s observation lacks merit—how do we know when punishment is too expensive or what punishment matches the exact degree of a defendant’s culpability?<sup>146</sup> Nevertheless, these *over* accounts retain a baseline assumption that some degree of punishment is necessary, and the core functions and structures of the criminal system are legitimate, but that the current regime misses the mark in advancing legitimate ends. That is, despite their normative differences, each of these accounts focuses on the first prong of Garland’s definition.

But, what about the second element of Garland’s definition? Is it fair to say that *over* critiques focus exclusively on element one? I think not.<sup>147</sup> Although race plays a different role in these critiques than the *mass* accounts, racial disparities remain a major focus of many *over* critiques.<sup>148</sup> Indeed, race receives significant attention in many *over* critiques and is often used as a way to frame what makes over punishment so objectionable.<sup>149</sup> Yet, unlike *mass* critiques, *over* characterizations do not purport to reimagine racial hierarchies in society or to provide a broader account of the relationship among race, law, and, power. Rather, the *over* critique of mass incarceration’s racial dimensions focuses on a narrower form (or forms) of inequality: per capita arrest and conviction rates; sentence duration; prosecutorial charging decisions; etc. That is, the *over* critique targets specific instances of racial inequality reflected in the

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*in part on reb’g*, 533 F.3d 715 (8th Cir. 2008) (“Perceived improper racial disparity fosters disrespect for the law and lack of confidence in the criminal justice system. . . .”); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 321 (2017); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 680–84 (1998).

<sup>146</sup> See PFAFF, *supra* note 19, at 8. Indeed, Pfaff’s trenchant critiques of (the empirical aspects of) the “Standard Story” rest on places where critics’ metrics are not clear or appear to clash with their critiques or proposed police solutions. For example, Pfaff (like a number of critics who generally adopt a *mass* frame), emphasizes the failure to address violent crime. Many accounts of mass incarceration focus only on “non-violent” crime, despite the majority of people incarcerated are serving time for “violent” offenses. That is, confronting the question of violent crime requires a reckoning with who should be incarcerated and for how long. I take the central thrust of Pfaff’s argument to be that if critics claim that they are focused on numbers exclusively (*i.e.*, the movement to cut the prison population in half), then the stories that they are telling of prisons full of non-violent, non-repeat, non-serious offenders are misleading.

<sup>147</sup> Certainly, some *over* accounts may pay little attention to race or may mention race only in passing.

<sup>148</sup> See, *e.g.*, Spears, 469 F.3d at 1190 (Bye, J., dissenting); STUNTZ, *supra* note 1; Osler & Bennett, *supra* note 142, at 157.

<sup>149</sup> See, *e.g.*, Barkow & Osler, *supra* note 136; Conyers, *supra* note 44, at 378

available data on the criminal system as specific instances in need of a fix.<sup>150</sup>

For example, take critiques of drug possession enforcement. The *over* frame focuses on whether black defendants who used illegal drugs were as likely to be arrested and serve time as white defendants engaged in the same conduct.<sup>151</sup> Certainly, the *mass* critic might share these concerns; but the *over* critics' concerns would (at least ostensibly) be addressed if these rates were equalized, even if that meant leveling up punishment, such that more white defendants were arrested and charged. As a practical matter, it might well be that critics adopting an *over* critique of racialized drug enforcement would balk if the state actually began enforcing drug laws universally in an effort to equalize disparities. Nevertheless, the critiques themselves sound as though such a policy would be responsive.

In short, comparing the *mass* critique to the *over* critique reveals some shared set of basic concerns. But the scope and nature of the critiques appear to be quite different. The next Part takes the literature on overcriminalization as a space that reveals a similar divide.

### III. CRIMINALIZATION

By all accounts, “overcriminalization” entered the scholarly lexicon in the 1960s through the work of Sanford Kadish.<sup>152</sup> Writing in 1967, Kadish lamented that “American criminal law . . . has extended the criminal sanction well beyond . . . fundamental offenses to include very different kinds of behavior, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all.”<sup>153</sup> Kadish defines the phenomenon as a pressing one in the criminal justice system generally, but concludes that it is cause for particular concern in “situations in which the criminal law is used: (1) to declare or enforce public standards of private morality, (2) as a means of providing social services in default of other public agencies, and (3) as a disingenuous means of permitting police to do indirectly what the law forbids them to do directly.”<sup>154</sup>

While its definition changed (and the number of crimes on the books

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<sup>150</sup> See, e.g., Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 30 (2013);

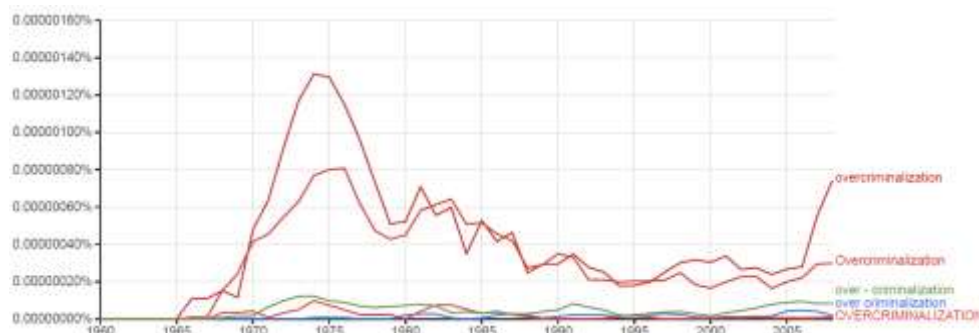
<sup>151</sup> See, e.g., *People v. Price*, No. 121557, 2017 WL 598695 (Ill. Jan. 25, 2017) (“Much has been written recently about whether the mass incarceration of black men for minor drug offenses through lengthy sentences is an abuse of the justice system’s discretion. I believe that it is.” (citation omitted)); *Kane v. Winn*, 319 F. Supp. 2d 162, 179 n.27 (D. Mass. 2004).

<sup>152</sup> See Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012) (citing Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962)) (“As far as I can tell, Sanford Kadish coined the term “overcriminalization” in a 1962 article in the *Harvard Law Review*. . .”).

<sup>153</sup> Kadish, *supra* note 42, at 17.

<sup>154</sup> *Id.* at 19.

increased),<sup>155</sup> overcriminalization has remained a staple of criminal law literature in the ensuing decades.<sup>156</sup> Like “mass incarceration,” “overcriminalization” has seen varied usage over time.<sup>157</sup>



And, as recurring law review articles illustrate, it remains a topic of continuing interest to legal academics.<sup>158</sup> “Those most closely studying the phenomenon regard it as a vexing problem of the criminal justice system; some say it is the most pressing problem in criminal law today.”<sup>159</sup> At the same time, the

<sup>155</sup> See, e.g., Am. Bar Ass’n, *The Federalization of Criminal Law* 7 (1998); Smith, *supra* note 38, at 538 (“Federal criminal law has been growing at a breakneck pace for generations. According to a 1998 American Bar Association report, an incredible 40% of the thousands of federal criminal laws passed since the Civil War were enacted after 1970. . . . On average, Congress created fifty-seven new crimes every year between 2000 and 2007, roughly the same rate of criminalization from the two prior decades, resulting today in some 4,500 federal laws that carry criminal penalties.” (footnotes omitted)).

<sup>156</sup> See, e.g., HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249-364 (1968); DAVID A. J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* (1982); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 224 (2007); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 197 (1991); John C. Coffee, Jr., *Husb!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 159 (1994); Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 31 (1995)

<sup>157</sup> Data available at: <http://bit.ly/2vb2Sht>. Of course, the same caveats regarding the limitations of Ngram apply here as they did in the context of mass incarceration. It is worth noting that, much as the mass incarceration data misses post-*New Jim Crow* usage, so too does the overcriminalization data precede the publication of Douglas Husak’s widely cited *Overcriminalization: The Limits of Criminal Law*. See HUSAK, *supra* note 3.

<sup>158</sup> See, e.g., Ellen S. Podgor, *Foreward*, 7 J.L. ECON. & POL’Y 565 (2011) (describing the “Overcriminalization 2.0” symposium); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541, 541 (2005) [hereinafter “*The Politics of Crime*”]; Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Zach Dillonns, *Symposium on Overcriminalization Foreword*, 102 J. CRIM. L. & CRIMINOLOGY 525 (2012).

<sup>159</sup> Haugh, *supra* note 30, at 1194.



phenomenon also has captured the imagination of judges, politicians, advocates, and policy organizations.<sup>160</sup> In 2013, the House Judiciary Committee unanimously created a taskforce on overcriminalization that met ten times over the following year.<sup>161</sup>

Also, much like mass incarceration, overcriminalization is a phenomenon that has been criticized roundly from a range of political and ideological perspectives. Notably, for example, the Heritage Foundation and the National Association of Criminal Defense Lawyers have frequently joined forces to advocate for solutions to the problem of overcriminalization and encourage further scholarship on the topic.<sup>162</sup> However, as with mass incarceration, this ostensible consensus belies deeper disagreements rooted in different conceptions of the phenomenon and the criminal system, itself. Therefore, as in Part II, this Part teases out those differences by addressing the phenomenon through both an *over* and a *mass* frame.

#### A. Overcriminalization

Like “mass incarceration”, “overcriminalization” lacks a universally accepted definition.<sup>163</sup> But, unlike the literature on mass incarceration, the

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<sup>160</sup> See, e.g., *United States v. Young*, 766 F.3d 621, 634 (6th Cir. 2014) (“Congress is well aware of the problem of over-criminalization . . . .”); BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010).

<sup>161</sup> See Congressional Task Force on Overcriminalization, National Association of Criminal Defense Attorneys, <https://www.nacdl.org/overcrimtaskforce/>. The problem of overcriminalization had been a topic of interest to the Committee prior to the Task Force’s inception. See *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions*: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law*: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. (2009); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 721 (2013).

<sup>162</sup> See, e.g., Dillons, *supra* note 158, at 525 (“Overcriminalization is one of those rare topics where both the political right and political left come together. The Heritage Foundation and the American Civil Liberties Union joined forces to cosponsor our live Symposium and send the unified message that whether you are liberal, moderate, or conservative, overcriminalization is an issue that can no longer be ignored. Yet, despite this bipartisan support, the tendency to overcriminalize continues to grow stronger.”); Podgor, *The Politics of Crime*, *supra* note 158, at 541 (“The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL), two groups with very distinct missions, joined together with the *American University Law Review* to examine the topic of overcriminalization. Despite standing at different points on the philosophical spectrum, the two groups recognized the grave implications of a criminal justice system that fails to consider increased federalization, the diminished recognition of a *mens rea* element in criminal statutes, and a growing prosecution of conduct that could be addressed via civil sanctions.”).

<sup>163</sup> See Hopwood, *supra* note 39, at 703.

literature on overcriminalization is chock full of attempts to define the phenomenon.<sup>164</sup> And, also unlike the mass incarceration literature, most of the overcriminalization literature adopts a decidedly *over* frame. Put simply, “‘overcriminalization’ posits that there are too many criminal laws on the books today,”<sup>165</sup> and “‘overcriminalization is a problem because ‘we have . . . too many crimes in the United States.’”<sup>166</sup>

In this respect, overcriminalization invites (or is embedded in) an *over* frame for the criminal system—criminal law and punishment have their place, but the current system of criminalization has run amok. In defining the phenomenon, most scholars adopt a critique along the lines of Kadish’s, but they tend to provide a set of descriptive elements or features, rather than a formal definition. For example, Sara Sun Beale contends that overcriminalization is characterized by “(1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs).”<sup>167</sup> In explaining how overcriminalization works in practice, Beale emphasizes two particular classes of crimes that exhibit the properties: (1) crimes that regulate morals; and (2) federal crimes that stretch the boundaries of federalism.<sup>168</sup> Likewise, Erik Luna asserts that “[T]he overcriminalization phenomenon consists of: (1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.”<sup>169</sup> That is, the *over* frame indicates that overcriminalization is as much a phenomenon (*i.e.*, the passage of too many criminal statutes) as a means of classifying certain laws (*i.e.*, criminal statutes that are objectionable, unnecessarily, or illegitimate).

Just as the *over* critique of mass incarceration begged the question of baselines or metrics,<sup>170</sup> so too does this way of thinking about

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<sup>164</sup> See, e.g., Chacón, *supra* note 10, at 648 n. 182; Haugh, *supra* note 30, at 1194; Dmitriy Kamensky, *American Peanuts v. Ukrainian Cigarettes: Dangers of White-Collar Overcriminalization and Undercriminalization*, 35 MISS. C. L. REV. 148, 151 (2016); Larkin, *supra* note 42, at 745; Smith, *supra* note 38, at 539; Luna, *supra* note 10, at 713–17; Stephen F. Smith, Yates v. United States: *A Case Study in Overcriminalization*, 163 U. PA. L. REV. ONLINE 147 (2014) (defining overcriminalization as “the existence of multitudinous, often overlapping criminal laws that are so poorly defined that they sweep within their ambit conduct far afield from their intended target”); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 806 (2005).

<sup>165</sup> Smith, *supra* note 38, at 538.

<sup>166</sup> HUSAK, *supra* note 3, at 3–4.

<sup>167</sup> Beale, *supra* note 10, at 749.

<sup>168</sup> See generally *id.*

<sup>169</sup> Luna, *supra* note 10, at 717.

<sup>170</sup> See notes 133–136, *supra*, and accompanying text.

overcriminalization.<sup>171</sup> As Stephen Smith observes,

It is, of course, difficult to make such claims without a normative baseline—an idea of what constitutes the “right” number of criminal laws—and such a baseline is elusive at best. Still, history and crime rates provide relevant benchmarks, and they suggest that the criminal sanction is being seriously overused, particularly at the federal level, where overcriminalization has resulted in nothing less than the federalization of crime.<sup>172</sup>

Much like Pfaff’s *over* critiques of mass incarceration, Smith’s account rightly notes the problem of metrics, but then assumes that the problem is, in some sense, obvious: just as there are too many people in prison, there are too many crimes on the books.<sup>173</sup>

As with the mass incarceration literature, however, a survey of the overcriminalization literature indicates that while many commentators agree that there is a problem, identifying just what constitutes overcriminalization can be a trickier proposition because the metrics applied vary. Indeed, the wide political spectrum of voices opposing overcriminalization makes the question of baselines and normative commitments even more difficult to answer.

To the civil libertarian critic, overcriminalization represents a triumph of the authoritarian state and a violation of individual rights.<sup>174</sup> Whether it is using criminal law to impose a certain vision of morality, or whether it is empowering police and prosecutors unduly, overcriminalization poses a danger to individual rights or liberties.<sup>175</sup> Through this lens, those rights and liberties might be endangered by any criminal laws or law enforcement, but the

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<sup>171</sup> See Smith, *supra* note 38, at 538.

<sup>172</sup> *Id.*

<sup>173</sup> While I share Pfaff’s belief that there are too many people in prison and Smith’s belief that there are too many criminal laws on the books, I do not think either conclusion is obvious without *some* normative baseline, metric, or set of commitments. In this case, the appeal to history does not strike me as terribly convincing. Society and the legal system have changed dramatically over time. That the criminal code does not resemble criminal codes from the Early Republic need not be a problem. (Unless, of course, one’s normative commitment was that any departure from eighteenth century social, legal, and political orderings would be objectionable.) Indeed, a central purpose of this Article is to highlight how nonobvious these critiques of the criminal system are. Even if it were obvious (regardless of one’s normative commitments) that the state criminalizes and incarcerates too much, that would tell us that there is a serious problem with the criminal system. But it would tell us very little about how to solve that problem because we still would lack a baseline against which to compare results, making it difficult to judge success and failure or to determine what solutions were desirable and which might be off the table.

<sup>174</sup> See, e.g., SILVERGLATE, *supra* note 4; Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 34 (1997); Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 736 (2015).

<sup>175</sup> See generally SILVERGLATE, *supra* note 4; Kadish, *supra* note 42.

presence of constitutional protections and a belief that some conduct might (or should) be criminalized keeps this from becoming an anarchic or abolitionist critique.<sup>176</sup> Instead, this critique focuses on a range of criminal laws that often run counter to left political interests (*e.g.*, criminalization of abortion) or those that appear to go too far in empowering law enforcement.<sup>177</sup>

A range of conservative and right libertarian critics shares some common ground with the left civil libertarian (*e.g.*, fear of an oppressive state; concern about arbitrary enforcement; underlying faith or belief in constitutional constraints and a non-authoritarian criminal justice system).<sup>178</sup> But, unlike the civil libertarian critic, the libertarian critic views overcriminalization alongside the administrative state and aspects of the welfare state as a marker of unacceptable “big government.”<sup>179</sup> The libertarian critique, then, often takes on a fundamentally deregulatory tone—there is too much criminal regulation, but there is also too much civil regulation.<sup>180</sup> As a result, the libertarian critique tends to emphasize regulatory crimes, particularly financial and environmental crimes that may harm industry.<sup>181</sup>

Some critiques from left and right (and center) prioritize concerns for “rule of law” and legitimacy.<sup>182</sup> Part of this critique rests on concerns of selective enforcement and prosecutorial discretion—as William Stuntz and others have stressed, too many criminal statutes and/or criminal statutes that are too broad grant too much discretion to prosecutors.<sup>183</sup> If people commit

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<sup>176</sup> Were the critique so totalizing, it would cease to be an *over* critique as there would be no baseline or optimal/acceptable rate of criminalization.

<sup>177</sup> See, *e.g.*, Kadish, *supra* note 42, at 23–24; Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at “Substantive Due Process,”* 44 S. CAL. L. REV. 490, 490,493 (1971).

<sup>178</sup> See generally GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004).

<sup>179</sup> See Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 919 (2013) (“An important strand of contemporary conservative thought indeed sees the modern criminal justice system as big government with its usual defects.”).

<sup>180</sup> See Grover Norquist, Opinion, *Conservatives Must Police Bottom Line on Criminal Justice*, ORANGE COUNTY REG. (Feb. 18, 2011), <http://www.ocregister.com/articles/prison-288870-government-criminal.html> (“Today’s criminal justice system is big government on steroids, and the responsibility for taming its excesses falls to those committed to smaller government: conservatives.”).

<sup>181</sup> See, *e.g.*, Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 CRIM. JUST. 4, 5 (2013) (“Excessive criminalization not only leads to injustice and unfairness, it also deters and even reduces productive activity. The Sarbanes-Oxley legislation and the labyrinth of rules it has spawned impose criminal penalties for accounting errors, and has saddled US businesses with an estimated \$100 million in compliance and opportunity costs.”); George F. Will, *Eric Garner, Criminalized to Death*, WASH. POST, Dec. 10, 2014.

<sup>182</sup> See, *e.g.*, C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L. J. 1279, 1281 (2014)

<sup>183</sup> See, *e.g.*, Josh Bowers, Legal Guilt, *Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1665 (2010) (“[S]ubstantive overcriminalization increases

crimes all the time (knowingly or unknowingly), then people are constantly at the mercy of prosecutors, allowing for pretextual and political prosecutions.<sup>184</sup> Under this view, that discretion renders criminal law un-lawlike or, at least, highly contingent. As Stuntz claims, “[c]riminal law is . . . not law at all, but a veil that hides a system that allocates criminal punishment discretionarily.”<sup>185</sup> More broadly, this critique feeds into a belief that overcriminalization undermines the importance and legitimacy of the criminal system. As Judge Gerard Lynch argues, “[b]oth in justice to those so labeled [as criminals], and to preserve the always-threatened moral capital of the criminal law from dilution, conviction of crime must ordinarily be reserved for those who violate deeply held and broadly agreed social norms.”<sup>186</sup> Indeed, this claim is part of what makes these *over* critiques emblematic of an *over* frame—they depend on strong claims about the existence of a baseline that makes the criminal justice system inherently legitimate.<sup>187</sup>

Returning to the lists of elements that Beale and Luna provide, it is worth noting that most of these *over* critiques focus on examples of overcriminalization, rather than generally discussing that baseline. That in and of itself is not remarkable—certainly, a commentator identifying a phenomenon should be able to provide specific, concrete examples. But it is fascinating how much of the scholarship and policy work on overcriminalization relies on individual statutes or individual prosecutions. Unquestionably, the stories of individuals ensnared in the criminal system are a critical component of public fascination with crime policy and are a significant driver of the criminal justice reform movement.<sup>188</sup> Whether it is the

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not only the need for equitable discretion, but also the risk of its misuse or abuse.”); J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 477–78 (2012); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through A Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1354 (2008); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Law*, 107 YALE L. J. 1, 4 (1997)

<sup>184</sup> See generally Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

<sup>185</sup> Stuntz, *supra* note 21, at 599.

<sup>186</sup> Lynch, *supra* note 174, at 47.

<sup>187</sup> See John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249, 281 (2016) (“There are, of course, certain kinds of crimes such as murder, rape, arson, robbery, and fraud . . . that are clearly morally opprobrious. It is completely appropriate and necessary in such cases to bring the moral force of the government in the form of a criminal prosecution in order to maintain order and respect for the rule of law.”).

<sup>188</sup> See Mission Statement, The Marshall Project, <https://www.themarshallproject.org/about#.vdaFEZxjl> (last visited Jul. 25, 2017) (“The Marshall Project is a nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the U.S. criminal justice system. . . . In all of our work we strive to educate and enlarge the audience of people who care about the state of criminal justice.”).

proliferation of statutes named after crime victims,<sup>189</sup> the rise of the Black Lives Matter movement,<sup>190</sup> or the success of the Innocence Project,<sup>191</sup> personal stories and publicized cases shape public perception and help define the politics of crime. Or, as Rachel Barkow puts it, “in criminal law, stories, not data, drive the policy analysis.”<sup>192</sup> Yet, the overcriminalization literature’s foregrounding of anecdotes presents a fascinating tension: on the one hand, most commentators suggest that overcriminalization is a sweeping phenomenon; on the other hand, they identify one-off cases that do not necessarily appear to be representative.

A laundry list of cases and statutes recur in overcriminalization literature as illustrations of criminal law’s absurd breadth. For example, a number of commentators cite to *U.S. v. McNab*,<sup>193</sup> occasionally referred to simply as “the Honduran lobster case.”<sup>194</sup> In *McNab*, the defendant was convicted under the Lacey Act<sup>195</sup> and sentenced to eight years in prison for importing spiny rock lobsters in violation of a Honduran regulation (which the government of Honduras subsequently disavowed).<sup>196</sup> A pair of recent Supreme Court cases also have drawn significant attention as illustrations of overcriminalization: in *Yates v. United States*,<sup>197</sup> a fisherman was charged with three felonies— “destroying property to prevent a federal seizure in violation of 18 U.S.C. § 2232(a); destroying the undersized fish—an alleged ‘tangible object’ under Sarbanes-Oxley—to impede an investigation in violation of 18 U.S.C. § 1519; and making a false statement to a federal officer in violation of 18 U.S.C. § 1001(a)(2).”<sup>198</sup> And, in *Bond v. United States*,<sup>199</sup> a woman was

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<sup>189</sup> See Rachel E. Barkow, *Criminal Law As Regulation*, 8 NYU J.L. & LIBERTY 316, 322 (2014).

<sup>190</sup> See generally Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015).

<sup>191</sup> See Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1551 (2008).

<sup>192</sup> Barkow, *supra* note 189, at 322.

<sup>193</sup> 331 F.3d 1228, 1232 (11th Cir. 2003), *as amended* (May 29, 2003).

<sup>194</sup> See Panelists: Hon. Mary Beth Buchanan, John G. Malcolm, Hon. George J. & Terwilliger III, Adam Liptak, *Panel: Criminal Law at the Federal Level*, 18 TEX. REV. L. & POL. 97, 108 (2013).

<sup>195</sup> 16 U.S.C. §§ 1701, 3371–3372 (2006).

<sup>196</sup> See Buchanan, *et al.*, *supra* note 194, at 108; Larkin, *supra* note 161, at 744 n. 125. For additional discussion of the case in the context of overcriminalization, see, e.g., Paul J. Larkin Jr., *A Mistake of Law Defense As A Remedy for Overcriminalization*, 28 CRIM. JUST. 10, 12 (2013); Luna, *supra* note 10, at 711; Edwin Meese III & Paul J. Larkin Jr., *Reconsidering the Mistake of Law Defense*, 102 J. OF CRIM. L. & CRIMINOLOGY 725, 777–82 (2012); Matthew S. White, Note, *Overcriminalization Based on Foreign Law: How the Lacey Act Incorporates Foreign Law to Overcriminalize Importers and Users of Timber Products*, 12 WASH. U. GLOBAL STUD. L. REV. 381, 388 (2013).

<sup>197</sup> 135 S. Ct. 1074 (2015).

<sup>198</sup> Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1236 (2017) see also Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 237–39 (2017); Stephen F. Smith, *Yates v. United States: A Case Study in*

charged under a chemical weapons treaty for attempting to poison a romantic rival.<sup>200</sup> While neither of these cases explicitly addresses the overcriminalization phenomenon, both include critiques of prosecutorial discretion and the over breadth and overly broad application of criminal statutes.<sup>201</sup>

The focus on statutes' absurd application or on criminal prohibitions that do not pass the "laugh test" similarly are a staple in the *over* literature.<sup>202</sup> One scholar suggests that "[T]he most 'famously innocuous federal crimes' are the 'Woodsy Owl' statute, which prohibits the unauthorized use of the character 'Woodsy Owl,' the name 'Woodsy Owl,' and the associated slogan, 'Give a Hoot, Don't Pollute,' and the federal prohibition against tearing the tag off a mattress. . . ."<sup>203</sup> Another commentator provides a list of statutes that criminalize conduct including: "transport[ing] water hyacinths, alligator grass, or water chestnut plants [,] . . . writ[ing] a check for an amount less than \$1 [, and] . . . install[ing] a toilet that uses too much water per flush."<sup>204</sup> And, a Twitter feed with over fifty thousand followers, "A Crime A Day," posts a new federal criminal law each day, highlighting esoteric laws or applications.<sup>205</sup>

To be clear, none of these accounts suggests that prisons are full of people who have violated the "Woodsy Owl" statute, transported garden plants improperly, or installed high-flow toilets. Put differently, the *over* critique of overcriminalization generally does not foreground systemic punishment or enforcement.<sup>206</sup> That is, the *potential* enforcement of statutes is a problem, as are some specific examples of particularly egregious enforcement, but the claim generally is distinct from claims regarding over punishment or over enforcement.<sup>207</sup> Instead, the focus appears to be on

*Overcriminalization*, 163 U. PA. L. REV. ONLINE 147 (2014).

<sup>199</sup> 134 S. Ct. 2077 (2014).

<sup>200</sup> See generally *id.*

<sup>201</sup> See Michael Pierce, *The Court and Overcriminalization*, 68 STAN. L. REV. ONLINE 50, 50–51 (2015).

<sup>202</sup> Luna, *supra* note 10, at 716.

<sup>203</sup> Mila Sohoni, *The Idea of "Too Much Law"*, 80 FORDHAM L. REV. 1585, 1632 n. 118 (2012).

<sup>204</sup> Malcolm, *supra* note 187.

<sup>205</sup> See A Crime A Day (@CrimeADay), <https://twitter.com/CrimeADay>.

<sup>206</sup> *But see* Broughton, *supra* note 183, at 167 ("Still others fear the problem of punishment severity and mass incarceration, which are incident to the growth of federal criminal law and the resulting increase in prosecutions, convictions (and therefore more prisoners), and strained budgets and resources at a time of outrageous deficits and slow economic growth.").

<sup>207</sup> Husak's work is an outlier in this respect, as it explicitly argues that it is over punishment and massive prison populations that drive his critique and make overcriminalization a moral and political crisis. See HUSAK, *supra* note 3, at 3 ("I argue that overcriminalization is objectionable mainly because it produces too much punishment."). In this respect, Husak's *over* account of overcriminalization is inextricably tied to his *over* critique of mass incarceration. While both critiques adopt an *over* frame (*i.e.*, predicated on a retributivist's views about deserved punishment and respect for rule of law), Husak's move to

preserving rule of law values (*i.e.*, if we all break the criminal law, how can we respect it), reducing prosecutorial power, and perhaps preventing any chilling effects.

Many of these *over* critiques are designed to highlight the absurdity or outrageousness of the criminal code's breadth. Critically, though, there is an implicit assumption in many of these critiques about what should and should not be criminalized and who should and should not be subject to criminal penalties. For example, maybe Woodsy Owl is an easy case, but what about hunting on certain public lands or failure to comply with food safety laws? It is fair to argue that criminal law is not the best way to address the concerns that those statutes advance. (And, a critic adopting a *mass* frame might well agree.) But that does not mean that they are easy cases. Indeed, one of the challenges for the overcriminalization literature and the bipartisan *over* critique in this area is the question of civil versus criminal regulation. If a libertarian critic believed that it were wrong or absurd for the state to regulate civilly how a slaughterhouse employee processed meat, then the critic necessarily would believe that criminal regulations were even worse. That is, regulation is the evil to be stopped. Overcriminalization is but a particularly pernicious form of that evil. But what about a critic (left or otherwise) who believes that the state can and should regulate meat processing civilly or administratively?<sup>208</sup> Such a critic would need to have a theory of criminalization, or at least a way of understanding the world in which she could tease out the different strands of regulation and make sense of what punishments (civil or criminal) matched a given misdeed.<sup>209</sup> The specter of state violence might be more immediate and ominous in the criminal regulatory context, but that doesn't mean state violence (or threat thereof) is somehow lacking in the civil regulatory context.

Proposed solutions reflecting an *over* critique tend to center de-regulatory concerns, rather than a focus on prison populations or widespread

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tie the two critiques makes his account more closely aligned with what I describe as *mass* critiques of overcriminalization (*i.e.*, accounts fundamentally concerned with enforcement). *See generally* Part III.B. Donald Dripps similarly argues that too much punishment is a part of the overcriminalization phenomenon, but articulates his critique even more explicitly in *over* terms by emphasizing that "all agree" incarceration is appropriate in some cases. *See* Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9, 12 (2003) ("Not only are many harmless or trivially harmful acts made crimes, but harmful wrongdoing that all agree should be criminal is made punishable by draconian prison terms." (footnotes omitted)).

<sup>208</sup> *Cf.* Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL. 437, 445 n. 28 (2004) (noting that libertarians "have the virtue of consistency" on some questions of criminalization).

<sup>209</sup> *See generally* Douglas Husak, *Reservations About Overcriminalization*, 14 NEW CRIM. L. REV. 97 (2011). Of course, despite her ostensibly more consistent approach, the libertarian critic would need to do a similar sort of justifying in order to explain why it is wrong for the state to regulate in many or most cases, but why the state still can use violence against some people who commit certain crimes.



enforcement. For example, former Attorney General Edwin Meese has proposed four fixes that Congress can employ to address overcriminalization: (1) consolidating most federal crimes into Title 18 of the U.S. Code; (2) repealing or consolidating “redundant, superfluous, and unnecessary” criminal statutes; (3) preventing administrative agencies from defining criminal offenses; and (4) imposing heightened *mens rea* requirements to limit or eliminate strict liability crimes.<sup>210</sup> Certainly, Meese comes from a staunchly conservative viewpoint and might disagree with a range of other *over* critics, but some of his proposals have found significant backing and reflect some version of the *over* critique. Therefore, it is worth considering the practical consequences of the proposals.

First and foremost, the emphasis here (and throughout the overcriminalization literature) is on the federal system.<sup>211</sup> As others have noted,<sup>212</sup> the focus on the federal is misplaced, given that states do most of the policing, prosecuting, and imprisoning.<sup>213</sup> Certainly scholars particularly concerned about federalism might want to address the problem of “over federalization,”<sup>214</sup> but it is not clear that a state’s decision to pass many of the objectionable statutes would be less troubling than the federal government’s.<sup>215</sup> Even aside from that concern, though, there is real reason to be skeptical about the practical impact of Meese’s proposals.

Three of the four (excluding the agency one) speak to concerns about notice. Notice may be a critically important component of constitutional law and due process values,<sup>216</sup> but it is not clear who actually would benefit from the calls to consolidate. That is, most people probably don’t own a bound copy of Title 18 and probably are not knowledgeable about the law (whether civil or criminal). Indeed, that observation drives much of the criticism of

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<sup>210</sup> *Principles for Revising the Criminal Code, Hearing Before the Subcommittee On Crime, Terrorism & Homeland Security of the House Commission on the Judiciary, 112th Cong. 3* (2011) (statement of Hon. Edwin Meese III, Chairman, Center for Legal & Judicial Studies, Heritage Foundation).

<sup>211</sup> See, e.g., Brown, *supra* note 156, at 231; Julie R. O’Sullivan, *The Federal Criminal “Code” Is A Disgrace: Obstruction Statutes As Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 654 (2006); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 908 (2005); Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1937 (2014) (“Virtually all the discussion of overcriminalization has focused on the federal government.”).

<sup>212</sup> See PFAFF, *supra* note 19, at 13.

<sup>213</sup> See, e.g., PFAFF, *supra* note 19, at 13–14; Welty, *supra* note 211, at 1937 n. 7.

<sup>214</sup> See, e.g., Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); William H. Pryor Jr., *Commentary, Federalism and Sentencing Reform in the Post-Blakely/Booker Era*, 8 OHIO ST. J. CRIM. L. 515, 517 (2011).

<sup>215</sup> That is, unless the critique is rooted distinctly in the Commerce Clause, it is not clear why concerns associated with overcriminalization would or should be lessened if state legislatures, rather than the federal one were passing the laws. The same concerns about the moral justifications and the economic costs would persist in either case.

<sup>216</sup> See, e.g., Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1139–40 (2016); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 364 (2005).

overcriminalization and that has led to greater calls for an expanded “mistake of law” defense.<sup>217</sup> To the extent that a cleaner federal code might make it easier to be on notice, I think it is fair to wonder about the distributive effects of that notice. That is, it may be that the better educated will be more likely to stay apprised of what the criminal code has to say. Perhaps more pointedly, notice probably would be more meaningful to a business, corporation, or wealthy individual who retained a lawyer or had a team dedicated to compliance. My claim is not that the wealthy should be unable to comply with the law, or even that I would not support Meese’s proposal, but rather that the proposal appears to speak only to a narrow segment of the population—a segment of the population that looks very different from the millions of Americans caught up in the criminal system.<sup>218</sup>

The recommendation regarding agency authority has a similar flavor and appears to jibe with conservative and libertarian deregulatory takes on overcriminalization.<sup>219</sup> How many defendants or prosecutions would be affected remains an empirical question, but, based on available Bureau of Justice Statistics data, it seems unlikely that regulatory offenses (*i.e.*, crimes defined by agency, rather than legislature) account for a large percentage of prison admissions.<sup>220</sup>

Finally, *mens rea* reform has been both one of the most popular reform proposals and also one of the most contentious.<sup>221</sup> It has been supported by both conservative activists and criminal defense attorneys but opposed by politicians and commentators on the left who believe that it would operate as a shield against prosecutions for financial and environmental crime.<sup>222</sup> It is possible that *mens rea* reform might cut more broadly than other proposals and

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<sup>217</sup> See Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 *BYU J. PUB. L.* 71, 115 (2013). *Cf.* ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013) (examining the concept of political ignorance and voters’ lack of understanding of the political system).

<sup>218</sup> By way of comparison, consider Alexandra Natapoff’s description of the “penal pyramid”. See generally Natapoff, *supra* note 11. According to Natapoff, the role of formal legal rules in the criminal system reflects a stratified society: at the top of the pyramid, the wealthy tend to live in a world that can be described by legal rules and some concept of “rule of law”. See *id.* at 73. As we move down the pyramid, legal doctrine becomes increasingly less useful as a means of predicting outcomes or explaining individuals’ interactions with the criminal system. See *id.*

<sup>219</sup> See notes 178–181, *supra*.

<sup>220</sup> See E. Ann Carson, *Prisoners in 2013*, Bureau of Justice Statistics, Sept. 30, 2014, p.17, available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

<sup>221</sup> See, e.g., Peter J. Henning, *Making Sure “The Buck Stops Here”*: Barring Executives for Corporate Violations, 2012 *U. CHI. LEGAL F.* 91, 109 (2012); Harvey Silverglate, *Remarks on Restoring the Mens Rea Requirement*, 7 *J.L. ECON. & POL’Y* 711 (2011); Sarah N. Welling, *Reviving the Federal Crime of Gratuities*, 55 *ARIZ. L. REV.* 417, 446 (2013).

<sup>222</sup> See Alex Sarch, *How to Solve the Biggest Issue Holding Up Criminal Justice Reform*, POLITICO, May, 16, 2016, <http://www.politico.com/agenda/story/2016/05/criminal-justice-reform-mens-rea-middle-ground-000120>.

implicate a range of crimes and help a range of less privileged defendants. And, even if it primarily benefited people charged with corporate crime, it might have a broader impact on the way in which criminal statutes were drafted, or perhaps even the general approach to criminal punishment that has embraced strict liability.

Once again, that these proposals might benefit business or more affluent people does not mean that they are not worthy changes. But the proposals help illuminate the scope of the *over* critiques and their distance from the *mass* critiques. Indeed, each of these proposals, like the critiques from which they flow, depends on the belief that criminalization has run amok, but that the state does need tools to prosecute and incarcerate some class of individuals—individuals who do not need to be shielded from overcriminalization’s reach. And, as I will discuss in Part IV, opposition to *mens rea* reform from the left indicates how tenuous and contingent the *over* critique may be: even among criminal justice reform proponents and critics of criminal law’s reach, the political drive to use criminal law to address social problems (*e.g.*, economic inequality or environmental degradation) remains high.

### B. Mass Criminalization

While the majority of the literature on overcriminalization employs the *over* frame, a certain strand (or strands) of critical writing appears to address questions of overcriminalization through a *mass* frame. To be clear (and unlike in the context of mass incarceration), much of the literature discussed in this Section is not explicitly framed in terms of overcriminalization as such. That is, the literature addresses problems and pathologies that I think it is fair to classify as “overcriminalization,” but the authors do not necessarily invoke seminal overcriminalization literature or frame their critiques in similar terms. Nevertheless, scholars, activists, and commentators have adopted a set of critiques that sound in concerns about overcriminalization, but through a very different lens—a *mass* lens, prioritizing a concern for social control, the role of the state, and criminal law’s function as a tool of social marginalization.

As a preliminary matter, it is worth noting that a limited amount of criminal law scholarship actually does use the phrase “mass criminalization.”<sup>223</sup> A certain amount of this literature appears to use “mass criminalization” interchangeably with a traditional, *over* characterization of overcriminalization, often citing to *over* accounts or definitions.<sup>224</sup> Other authors appear to use

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<sup>223</sup> A Westlaw search of all law reviews and journals conducted on July 26, 2017 yielded sixty-six articles that used the phrase.

<sup>224</sup> See, *e.g.*, Andrea L. Dennis, *Criminal Law As Family Law*, 33 GA. ST. U. L. REV. 285, 308 (2017); Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL’Y REV. 361, 383 (2016) (“Mass criminalization

“mass criminalization” as interchangeable with “mass incarceration.”<sup>225</sup>

Using a more explicitly *mass* frame, though, other scholars use “mass criminalization” to refer to overcriminalization as a means of social control. For example, Jenny Roberts critiques overcriminalization through the frame of criminal records and collateral consequences for previously incarcerated individuals.<sup>226</sup> Roberts’s claim is not that the wrong people have criminal records or that the system is failing to sort among people who are morally culpable and those who are not. Instead, her claim is that the effects of a criminal conviction have rendered a growing population of adults incapable of participating in society.<sup>227</sup>

Although mass incarceration is perhaps the most serious and pressing problem with the criminal justice system in the United States, most criminal cases are misdemeanors and often do not result in jail or prison time. The problem is thus better characterized as one of mass criminalization. Mass criminalization over the past 40 years means that about one in three people in the United States has some type of criminal record. Law enforcement agencies have made more than a quarter of a billion arrests, and the FBI adds between 10,000 and 12,000 new names to its database each day. The result is that “the FBI currently has 77.7 million individuals on file in its master criminal database.”<sup>228</sup>

In this respect, Roberts’s characterization of “mass criminalization” sounds a great deal like Jack Chin’s characterization of mass conviction.<sup>229</sup> The criminal system’s impact on communities and individuals transcends incarceration and implicates a range of stages in the process—from the earliest court

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refers to the incredible expansion and enforcement of the criminal code at the state and federal level. For a detailed analysis supplemented with real world anecdotes, see generally HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011)); Jonathan Oberman & Kendea Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York’s Poor Communities of Color?*, 37 *CARDOZO L. REV.* 931, 947 (2016) (citing to Luna for the claim that “we live in an era of mass criminalization”)

<sup>225</sup> See, e.g., Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 *SEATTLE U. L. REV.* 1123, 1136 (2016); Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 *B.C.J.L. & SOC. JUST.* 233, 236 (2014); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 *PENN ST. L. REV.* 349, 352–53 (2012)

<sup>226</sup> See Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 *WIS. L. REV.* 321, 340 (2015).

<sup>227</sup> See generally *id.*; see also Benjamin Levin, *Criminal Employment Law*, 39 *CARDOZO LAW REVIEW* \_\_ (2018) (forthcoming) (examining the exclusion of people with criminal records from formal labor markets).

<sup>228</sup> *Id.* at 325–26.

<sup>229</sup> See notes 107–109, *supra*, and accompanying text.

involvement through collateral consequences.<sup>230</sup>

Another strand of *mass*-inflected scholarship uses “mass criminalization” to describe *over*-style incarceration, but with a distinct focus on race, gender, immigration status, and sometimes sexuality.<sup>231</sup> This approach is embodied perhaps most clearly in the work of critical race theorist Devon Carbado. Carbado cites to Sara Sun Beale’s work in describing mass criminalization,<sup>232</sup> but the definition he offers goes beyond the traditional *over* approach. He argues that mass criminalization is not only “the criminalization of relatively nonserious behavior or activities,” but also “the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies.”<sup>233</sup> In this respect, he claims that mass criminalization empowers police to confront black civilians “through the diffusion of criminal justice officials, norms, and strategies into the structure and organization of the welfare state.”<sup>234</sup>

Carbado’s account, coupled with Roberts’s, fits alongside the *mass* accounts of mass incarceration that described a sprawling web of criminal regulation and situated it alongside (or as a part of) a mode of governance that marginalizes and controls populations. This vision of “mass criminalization” is a totalizing form of control that “incorporates punitive responses to poverty, employment rights, and even young children’s behavior.”<sup>235</sup>

Like the *over* critiques, the *mass* critiques address the growing universe

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<sup>230</sup> See also Joel Rogers, *Foreword: Federalism Bound*, 10 HARV. L. & POL’Y REV. 281, 294 (2016) (“‘[M]ass criminalization’ is different, and affects even more people, than the more familiar phenomenon of ‘mass incarceration’ . . .”).

<sup>231</sup> See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487 (2016) [hereinafter “*Blue-on-Black Violence*”]; Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 549 (2017); Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 610 (2016); Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 37–38 (2017); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 311 (2016); Justin Hansford, *The First Amendment Freedom of Assembly As A Racial Project*, 127 YALE L.J. FORUM 685, 700 (2018); K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color*, 34 N.Y.U. REV. L. & SOC. CHANGE 439 (2010) (“The mass criminalization of people resulting from Zero Tolerance Policing and ‘quality of life’ initiatives adopted in the mid-1990s has made it nearly impossible for a young man of color in our city to avoid arrest or harassment. . . .”); George Lipsitz, *In an Avalanche Every Snowflake Pleads Not Guilty: The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1770 (2012); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1317–18 (2012); Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability*, 33 YALE J. ON REG. 165, 203–04 (2016) (describing “the masscriminalization of young minority men through aggressive minor-offense enforcement”).

<sup>232</sup> See Carbado, *Blue-on-Black Violence*, *supra* note 231, at 1487.

<sup>233</sup> *Id.* at 1489.

<sup>234</sup> *Id.* at 1490.

<sup>235</sup> Heather Schoenfeld, *A Research Agenda on Reform: Penal Policy and Politics Across the States*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 155, 157–58 (2016).

of substantive criminal law, but they do so with an eye to enforcement and punishment, rather than with a focus on the laws themselves. That is, where the *over* critiques were often conjectural or rooted in a concern about the theoretical or legitimacy-based costs of overcriminalization,<sup>236</sup> the *mass* critics focus on enforcement and application.<sup>237</sup> For Carbado and others focused on racial marginalization, the expansion of the criminal code matters because of the ways in which urban policing enforces those statutes against people of color.<sup>238</sup> For Roberts and others focused on collateral consequences and widespread social marginalization, overcriminalization matters because it expands the criminal system's reach and exposes more people to the marginalization and social stigma that accompanies court involvement.<sup>239</sup>

Taking either approach, one way of understanding the *mass* critique of overcriminalization is through Jonathan Simon's concept of "governing through crime."<sup>240</sup> In Simon's account, starting in the latter half of the twentieth century and in the years following the attacks of September 11, 2001, the model of government regulation became to focus on problems in terms of threats to security and use the criminal law to address them.<sup>241</sup> This mode of governance through criminalization takes many forms.<sup>242</sup> For example, Simon and others have addressed the ways in which schools (or their students) have been criminalized.<sup>243</sup> Problems with academic achievement, concerns about discipline, and worry about gangs or drugs received significant attention, but only through a system that empowers law enforcement—placing police in schools, ramping up "zero tolerance" policies, and shifting the space of the school from a place of academic discipline to a place of pure discipline based on the exercise of state violence.<sup>244</sup> Via the so-called "school to prison

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<sup>236</sup> See generally notes 206-208, *supra*, and accompanying text.

<sup>237</sup> See, e.g., Ann Cammett, *Reflections on the Challenge of Inez Moore: Family Integrity in the Wake of Mass Incarceration*, 85 *FORDHAM L. REV.* 2579, 2580-81 (2017); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 *HARV. C.R.-C.L. L. REV.* 159, 163 (2016).

<sup>238</sup> See, e.g., Carbado, *supra* note 237, at 163; Cházaro, *supra* note 231, at 610.

<sup>239</sup> See, e.g., Roberts, *supra* note 226, at 325-26; Rogers, *supra* note 230, at 294.

<sup>240</sup> See generally SIMON, *supra* note 117.

<sup>241</sup> See generally *id.* In this respect, Simon's account draws from Foucault's focus on the inherent links between governance and "security" as a means of the state asserting and consolidating its power. See generally MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977-78* (Graham Burchell trans., 2007). Cf. Levin, *supra* note 100, at 554 (arguing that this conception of the state or "governmentality" helps explain the political economy of modern carceral policy).

<sup>242</sup> See generally SIMON, *supra* note 117.

<sup>243</sup> See, e.g., SIMON, *supra* note 117, at 207-232; Tamar R. Birckhead, *Toward A Theory of Procedural Justice for Juveniles*, 57 *BUFF. L. REV.* 1447, 1496 (2009); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 *CORNELL L. REV.* 383, 386 (2013).

<sup>244</sup> See, e.g., Henning, *supra* note 243, at 386; Catherine Y. Kim, *Policing School Discipline*, 77 *BROOK. L. REV.* 861, 862 (2012).

pipeline,” poor children of color are effectively criminalized—shuttled from underachieving and underfunded schools to carceral or detention facilities.<sup>245</sup> To put a finer point on it, this critique differs from the *over* critique in that it is not concerned with whether a given law is *justified* or whether students have done bad things; rather, this account is focused on how the criminal system effectively replaces (or at least coexists with) the educational system as a way of managing poor children.

This style of *mass* critique recurs elsewhere,<sup>246</sup> but as a final example, consider the highly fraught realms of intimate partner violence and sexual assault. These are not areas of criminal law that appear in the *over* overcriminalization literature. To the extent that the *malum in se/malum prohibitum* distinction is meaningful,<sup>247</sup> both clearly are *malum in se* crimes (*i.e.*, the conduct is inherently culpable). In other words, we’re a long way from Woodsy Owl. But a number of *mass* critiques have focused on these crimes as areas in which some form of overcriminalization is at work.

The critiques take two forms. First, some critics argue that the criminal system fails to protect women of color, queer people, and other socially marginalized victims, and—in its attempts to protect them—further marginalizes and victimizes them.<sup>248</sup> That is, the criminal system focuses on punishment, rather than prioritizing the needs and wants of the victim.<sup>249</sup> This critique often sounds in the same language as the racialized “mass criminalization” critiques.<sup>250</sup> The concern is not one of innocence (*i.e.*, the

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<sup>245</sup> See, e.g., MARTHA MINOW, IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 28 (2010); Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 347 (2011); Janet E. Mosher, *Lessons in Access to Justice: Racialized Youths and Ontario’s Safe Schools*, 46 OSOODE HALL L.J. 807, 827 (2008).

<sup>246</sup> See, e.g., JOEY L. MOGUL, ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System an Essay*, 48 S.C. L. REV. 577, 584 (1997); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J. L. & GENDER 113, 132 (2011); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 UC IRVINE L. REV. 297 (2013); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1020–27 (2001).

<sup>247</sup> See Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law As Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 154–57 (2013) (critiquing the distinction).

<sup>248</sup> See, e.g., Crenshaw, *supra* note 80; Kimberé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Jesse Krohn & Jamie Gullen, *Mothers in the Margins: Addressing the Consequences of Criminal Records for Young Mothers of Color*, 46 U. BAL. L. REV. 237, 241 (2017).

<sup>249</sup> See, e.g., JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009); Crenshaw, *supra* note 80; Francine T. Sherman & Annie Balck, *Gender Injustice: System-Level Juvenile Justice Reform for Girls*, The National Crittenton Foundation and the National Women’s Law Center (2015), [http://nationalcrittenton.org/wp-content/uploads/2015/09/Gender\\_Injustice\\_Report.pdf](http://nationalcrittenton.org/wp-content/uploads/2015/09/Gender_Injustice_Report.pdf).

<sup>250</sup> See generally Crenshaw, *supra* note 80.

defendant did not commit the crime), ignorance (*i.e.*, the defendant did not know it was a crime), or culpability (*i.e.*, the defendant committed the crime, but is not morally culpable). Instead, the concern is that marginalized communities being criminalized—whether victims or alleged abusers—are being subjected to intrusive policing and state intrusion.<sup>251</sup>

A related strand of criticism focuses on “governance feminism” or “carceral feminism.”<sup>252</sup> Janet Halley describes “governance feminism,” as a mode of governance in which feminists have assumed the reins of power (or at least access the halls of power) and have used this power to pursue feminist ends.<sup>253</sup> According to Halley and her co-authors, governance feminist law reform projects often invoke state violence via the criminal law and

sound like fairly simple social-control projects. Method: define a wrong happening to women; then either criminalize it with the goal of eliminating it, or decriminalize women's participation in the underlying exchange with the goal of liberating them in it. The highly contingent and complex relationship between law in the books and law in action—and the multitudinous ways in which the legal system can be designed to shape but cannot control this relationship—seem to fall outside the scope of feminist concern.<sup>254</sup>

Through this critical lens, criminalization projects—even if well intentioned—cannot escape the flawed politics and structures of the state and the criminal system. Goals of equality or redistribution are easily “subsum[ed]. . . into the state’s goal of managing undesirables.”<sup>255</sup>

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<sup>251</sup> The case of Bresha Meadows has attracted significant criticism from activists focused on domestic violence who are skeptical or critical of criminal system as the ideal mechanism for addressing these problems. *See generally* #FreeBresha, <https://freebresha.wordpress.com/> (last visited Jul. 27, 2017). Meadows, a fourteen-year-old black girl who allegedly sustained significant, ongoing abuse from her father, ultimately killed him. *See id.* Activists rallied around her and pointed to her case as one that demonstrated the criminal system’s failures and failures to serve the interests of black girls and women. *See generally id.*

<sup>252</sup> *See, e.g.*, JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 20–22 (2006); Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1, 5 (2012) (describing carceral feminism as “a move towards market-based (neoliberal) and punitive rather than redistributive solutions to contemporary social problems”); Gruber, *supra* note 116, at 604; Janet Halley, *et al.*, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 340 (2006); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 70 (2006).

<sup>253</sup> *See* Halley, *et al.*, *supra* note 252, at 340–41.

<sup>254</sup> *Id.* at 420. *But cf.* Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1 (2013) (complicating the history of criminal law responses to domestic violence).

<sup>255</sup> Gruber, *supra* note 21, at 825. I have used the sexual violence examples as a case study, but this same line of critique could apply to other instances in which progressive causes ultimately join hands with (or are subsumed by) conservative or tough-on-crime politics.



All of these critiques reflect the *mass* frame's general preoccupation with criminal law as a mode of governance. Because "criminal law historically enforced and entrenched racial, gender, and socio-economic hierarchies,"<sup>256</sup> the turn to criminal law as a regulatory regime or as a means of solving social problems carries with it those hierarchies and forms of structural oppression. And, the critiques of gender-based and sexualized violence demonstrate that—unlike the *over* critique—*mass* concerns apply even when the social problems or the criminalized conduct are themselves violent or oppressive. Whether the operative description is "governing through crime", "neoliberal penalty", "carceral feminism", or "mass criminalization", the core concerns relate to deep-seated structural and political flaws that have allowed for punitive responses to crowd out redistributive ones.

In his *over* account of overcriminalization, Douglas Husak asserts that "a comprehensive theory of criminalization requires nothing less than a theory of the state."<sup>257</sup> While the *mass* critiques do not necessarily offer a positive theory of the state, their descriptive project appears to center more on a critique or critical account of the state than simply on the profusion of objectionable criminal laws.

#### IV. THE STAKES OF THE DISTINCTION

The previous Parts have shown the ways in which the two different modes of critique play out and how they shed different light on generally accepted criminal justice system flaws. But why does the distinction matter? The frames are not simply different languages for describing the same problem. They are different ways of understanding what is wrong that identify flaws of different magnitudes and at different levels in the legal and political system. Therefore, adopting one frame, accepting a critique through one frame, or using one frame to reach policy solutions might mean alternate outcomes and approaches.

As a result, understanding the ways that the two critiques differ is—in and of itself—important to understanding the literature and policy debates swirling in the contemporary moment of criminal justice reform. Appreciating the limits or tenuous nature of the critical consensus should be a key component of conversations about how to fix the "broken" system. But this Part aims to go a step further by identifying the ways in which the two critiques might interact and the potential costs of a turn to the *over* critique to address *mass* concerns or serve *mass* ends.

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<sup>256</sup> Gruber, *supra* note 252, at 605.

<sup>257</sup> HUSAK, *supra* note 3, at 120. Husak notes that such a theory is lacking in most accounts and, for pragmatic reasons, focuses his work on the theory of criminalization, rather than delving into the broader theory of the state. *See id.*

*A. Over Limitations*

This Article proceeds from the premise that a significant amount of criminal law scholarship and reform work adopts the *over* frame.<sup>258</sup> For scholars seeking to communicate with policy makers, prosecutors, and judges, the *over* frame probably has significant appeal. By framing the criminal system's problems explicitly in terms of an optimal and a sub-optimal, this approach tees up policy solutions more easily. That is, even if many scholars adopting this frame do not articulate clearly just what the optimal rate of criminalization or incarceration is,<sup>259</sup> their critiques make it easier for policymakers, judges, and prosecutors to identify or remedy problems: the 100:1 crack/powder sentencing disparity is too great and needs to be reduced;<sup>260</sup> the criminalization of marijuana possession is indefensible and should be abolished;<sup>261</sup> the resources used to prosecute and incarcerate "non-violent offenders" are better spent on other prosecutions or other corners of the criminal system.<sup>262</sup>

In that respect, the *over* frame avoids the pragmatic concerns that the *mass* frame might introduce. The optimal and sub-optimal (even if framed in more philosophical terms by retributivists, expressivists, or incapacitacionists) sound in the canon of policy arguments.<sup>263</sup> They help make the *over* frame—whatever its operative normative motivation—the recognizable province of or discourse for the liberal reformist project.<sup>264</sup> Even when leveling stinging

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<sup>258</sup> Cf. I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 591 (2016) ("Certainly, much of this conversation is attributable to the numbers. We live in a country that, between 1970 and 2005, increased its prison population by 628%, where one in every one hundred persons is behind bars, and where our prisons and jails now hold about 2.2 million individuals.")

<sup>259</sup> See generally *supra* notes 133–136, 170–173, and accompanying text.

<sup>260</sup> See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1254–56 (1996).

<sup>261</sup> See, e.g., DOUGLAS N. HUSAK, LEGALIZE THIS!: THE CASE FOR DECRIMINALIZING DRUGS (2002); Buchhandler-Raphael, *supra* note 43, at 336 (collecting sources).

<sup>262</sup> See, e.g., Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293, 351 (2009); William W. Berry III, *Eighth Amendment Presumptions A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 96 (2015).

<sup>263</sup> See generally Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1075 (2004).

<sup>264</sup> I use "liberal" here in the sense of "liberal legalism", rather than in the sense of "liberal Democrat." See generally Karl Klare, *Law-Making as Praxis*, 40 TELOS 123, 132 n.28 (1979) ("I mean by 'liberal legalism' the particular historical incarnation of legalism . . . which characteristically serves as the institutional and philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general 'democratically' promulgated rules, the equal treatment of all citizens before the law, and the

critiques at the criminal system, the *over* critic need not reject the system as a whole: by decrying a “broken” system, the *over* approach still retains a “good government” valence.<sup>265</sup> If only we could tweak the rules and the actors’ incentive, the *over* critique tells us, we could start to right the ship. There may be many major problems to address, and there may be a long way to go in order to fix them, but the fundamental project of the U.S. criminal system and its core tools (prisons, state violence, etc.) are not up for debate.<sup>266</sup> We can tackle fundamental criminal justice policies without addressing underlying structures of power (*e.g.*, voting rights, economic inequality, or the long hangover of segregation in jobs, housing, and schools).

Agree or disagree, that line of critique and that approach sound like the ways a scholar might speak convincingly to a legislator considering a piece of criminal justice reform legislation.<sup>267</sup> Even if the ask is a big one (*e.g.*, reduce sentences dramatically for a broad range of defendants; decriminalize previously criminal conduct), it is framed in manageable or recognizable terms.

The *mass* frame, on the other hand, sounds in a very different discourse. Foregrounding questions of political economy, race, class, and power, the *mass* frame (at least potentially) raises questions about all aspects of the criminal system and the political economy in which it is embedded. It sounds not in the language of small-bore solutions or narrow, pragmatic fixes, but in terms of sweeping systemic critique. Rather than telling a judge that she should re-think some sentencing determinations or telling a legislator that she should resist the impulse to draft another criminal statute, the *mass* scholar speaks a radical language of deep social ills and social injury. As discussed above and in the next Section, this not to say that the *mass* frame does not provide or invite policy solutions—it certainly does. It is to say that the critique itself sounds in an academic or ideological discourse that is at best skeptical about capitalism and the fundamental structures of the criminal system. In that respect, it is no surprise that the *mass* frame originated (and appears to retain significant purchase) in sociological and criminological literatures where first principles questions of political economy and distributive

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radical separation of morals, politics and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate on its underlying jurisprudence. With respect to its modern Anglo-American form these include adherence to precedent, separation of the legislative (prospective) and judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ration decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis (‘legal reasoning’). . . .’); see also Ahmed A. White, *Victims’ Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L. J. 357, 358 (1999).

<sup>265</sup> Cf. generally Klare, *supra* note 264 (explaining this mode of rationale legal reasoning).

<sup>266</sup> Cf. Kennedy, *supra* note 263 (“In policy argument, a major question is whether the rule proposed will be adequately calculable. . . .”)

<sup>267</sup> For a critical take on this approach, see generally Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 179 (1990).

consequences are more prevalent.<sup>268</sup> Where the law review article as a general matter includes a final policy proposal,<sup>269</sup> articles in these and other allied fields in the humanities and social sciences need not contain such an explicit endorsement, making this mode of critique more easily recognizable and acceptable. Similarly, the law's, legal academics', and legal scholarship's relationship to judges, practitioners, and policymakers complicates a turn to such a critical frame—if the lawyer-scholar's comparative advantage comes from her grounding in the practical aspects of the law and legal practice,<sup>270</sup> then does she give ground by adopting a less quantifiable or more heavily theoretical frame?<sup>271</sup>

All of this is to say that the *over* turn that much contemporary legal scholarship and commentary reflects is neither surprising nor illogical. Indeed, it makes a lot of sense, and it is an invaluable part of both the criminal justice reform literature and movement. But I think that this turn is not costless. That is, the pragmatism it reflects masks pragmatic concerns about its adoption. Or, put simply, different characterizations of a problem invite different solutions. Framing *mass* problems as *over* problems means advocating for or endorsing *over* solutions, not *mass* solutions.

By way of example, consider marijuana legalization (or, at least, decriminalization). As described above, the criminalization of marijuana possession is a frequent target of the *over*criminalization literature.<sup>272</sup> Similarly, *over* critiques of mass incarceration frequently focus on marijuana possession (and other “nonviolent” drug crimes) as indicative of unduly harsh sentencing policy and the existence of a prison population that does not necessarily deserve to be incarcerated. Put simply, then, legalizing marijuana would be a big win and a big step forward in addressing *over* critiques.

But what about *mass* critiques? Presumably, many scholars and

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<sup>268</sup> See generally Part II A, *supra*.

<sup>269</sup> Cf. Stuntz, *supra* note 21, at 507 (“Consider two defining features of criminal law’s large literature. First, it is relentlessly normative. Almost all writing about American criminal law argues that some set of criminal liability rules is morally wrong or socially destructive, and that a different (usually narrower) set of rules would be better.”).

<sup>270</sup> See *id.* Cf. Klare, *supra* note 264, at 132 n.28 (“The rise and elaboration of the ideology, practices and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts trained in manipulating ‘legal reasoning’ and the legal process.”).

<sup>271</sup> See, e.g., Harry T. Edwards, *Another Look at Professor Rodell’s Goodbye to Law Reviews*, 100 VA. L. REV. 1483, 1484 (2014); *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). But see Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419, 422 (1992) (“[T]he academic practice of writing for judges increasingly appears as a degraded art-form used to communicate with personas who are not listening in order to achieve nothing very much whatsoever.”).

<sup>272</sup> See, e.g., Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 981–82 (2010); Buchhandler-Raphael, *supra* note 43, at 336; Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1 (2011).

advocates who embrace *mass* critiques would support marijuana legalization<sup>273</sup>—it would be a small step towards getting the state out of the business of regulating criminally; it would eliminate a class of crimes that lead to many police stops and that are disproportionately enforced against poor people of color; and it would reduce, in small part, the number of people exposed to the criminal system and subjected to the universe of formal and informal collateral consequences of conviction and arrest. Yet, the *mass* critique speaks to deeper flaws than a single statute (or set of statutes) might address.<sup>274</sup> If the concern is with the state governing through crime, then why should we think that police and prosecutors wouldn't use other criminal provisions to adopt a similar approach to regulating the underclass(es)?<sup>275</sup> If the concern is with how prisons and police function, then it is not clear that removing one crime—even an indefensible crime—from the books would get at the real problem. Decriminalizing marijuana would be a victory in battle, not a seminal win to end the war.

Or, think back to the case of the “non-violent” offender.<sup>276</sup> At this point, it should go without saying that most of the literature on the criminal system would support a gentler approach to such a defendant. But, from a *mass* perspective, a reform agenda that emphasizes the non-violent offender has a couple of serious problems.

First, this approach would have little to say about the majority of people currently serving time.<sup>277</sup> Therefore, a reform movement, ethos, or package of proposals based on saving the “non-violent” individuals has serious limitations.<sup>278</sup> Not only would it have a low ceiling in terms of its potential for reducing prison populations, but it would also risk significant backlash. For example, consider President Obama's clemency grants for “non-violent drug offenders.”<sup>279</sup> In commuting a number of sentences, the Obama administration stressed that the recipients of executive mercy were deserving in part because they had not committed “violent” crimes and, therefore, were

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<sup>273</sup> See, e.g., Michelle Alexander, *In Legalizing Marijuana, End the Racial Bias*, N.Y. TIMES, May 22, 2013, <https://www.nytimes.com/roomfordebate/2013/05/22/how-can-marijuana-be-sold-safely/in-legalizing-marijuana-end-the-racial-bias>.

<sup>274</sup> See FORMAN, LOCKING UP OUR OWN, *supra* note 47, at, 220.

<sup>275</sup> Cf. Natapoff, *Misdemeanor Decriminalization*, *supra* note 109 (examining the hidden costs of decriminalization).

<sup>276</sup> See *supra* notes 47–50, and accompanying text.

<sup>277</sup> See PFAFF, *supra* note 19, at 31; FORMAN, LOCKING UP OUR OWN, *supra* note 47, at, 220.

<sup>278</sup> See GOTTSCHALK, *supra* note 15, at 116.

<sup>279</sup> See Department of Justice, Commutations Granted by President Barack Obama, <https://www.justice.gov/pardon/obama-commutations>; Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES, Dec. 19, 2013, <http://www.nytimes.com/2013/12/20/us/obama-commuting-sentences-in-crack-cocaine-cases.html>.

not dangerous.<sup>280</sup> When news circulated that some of the individuals to be released had been convicted of possessory gun charges, some conservative politicians and commentators grew outraged.<sup>281</sup> Focusing on the “non-violent offenders” might have seemed like the least risky move politically,<sup>282</sup> but the line between violent and non-violent is fuzzy,<sup>283</sup> and predicating reform on only the “most deserving” has serious drawbacks because of the difficulty of finding anyone (incarcerated or otherwise) who can stand up to heavy scrutiny and be found blameless.

Second, this approach serves to legitimate the system and its treatment of “violent” offenders. As Pfaff explains, “the rhetoric and tactics used to push through reforms for lower-level offenses often explicitly involve imposing even harsher punishments on those convicted of violent crimes.”<sup>284</sup> For example, even in criticizing the criminal system and announcing plans to

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<sup>280</sup> The Administration sought clemency petitions and explained that they would prioritize petitions that met the following criteria:

- (1) the inmate is currently serving a federal sentence in prison and has served at least 10 years of her/his sentence;
- (2) the inmate likely would have received a substantially lower sentence if convicted of the same offense(s) under the guidelines in effect today;
- (3) the inmate is a non-violent, low-level offender without significant ties to large scale criminal organizations, gangs or cartels and without a significant criminal history;
- and (4) the inmate has demonstrated good conduct in prison and has no history of violence prior to or during the current term of imprisonment.

Sanjay K. Chhablani, *Legitimate Justice: Using Clemency to Address Mass Incarceration*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 48, 51 (2016).

<sup>281</sup> See, e.g., Heather Mac Donald, *Obama Continues His Crusade against a Criminal-Justice System He Derides as Racist*, NATIONAL REVIEW, Aug. 4, 2016, <http://www.nationalreview.com/article/438698/obama-releases-prisoners-guilty-gun-crimes> (“That so many of recipients of Obama’s clemency were armed and dangerous shows how distorted the dominant narrative about “mass incarceration” is.”); Bill Otis, *When the Mask Drops*, CRIME AND CONSEQUENCES (Dec. 26, 2016, 9:14 PM), <http://www.crimeandconsequences.com/crimblog/2016/12/when-the-mask-drops.html> (“When pro-criminal groups thought (or fooled themselves into thinking) that they had a chance for federal sentencing ‘reform,’ what they said they envisioned was sentencing reduction for ‘low level, non-violent’ offenders. If you’ve read that phrase once, you’ve read it a million times. Now that these groups understand they have no chance at such ‘reform’ for the foreseeable future, they let us in on what the plan actually was. The stuff about ‘low level, non-violent’ offenders was a head fake.”); David Sherfinski & Stephen Dinan, *Obama’s Forgiveness of Gun Crimes Amid Push for Controls ‘Incredible Hypocrisy’*, WASHINGTON TIMES, Aug. 9, 2016, <http://www.washingtontimes.com/news/2016/aug/9/obamas-forgiveness-of-gun-crimes-amid-push-for-con/>.

<sup>282</sup> See FORMAN, LOCKING UP OUR OWN, *supra* note 47, at, 229 (“Defenders of the nonviolent-offenders-only approach suggest it is just a start. Reform must begin with the nonviolent offenders, they say, but others might benefit later.”). Cf. PFAFF, *supra* note 19, at 31 (describing drug sentences as “low-hanging fruit” in the quest to reform the criminal system).

<sup>283</sup> See *supra* note 46.

<sup>284</sup> PFAFF, *supra* note 19, at 31.

assist “nonviolent offenders,” President Obama explicitly stated that “violent criminals . . . need to be in jail” and that he “tend[ed] not to have a lot of sympathy for violent criminals.”<sup>285</sup> One way of making “nonviolent offenders” appear more sympathetic is to provide them with a foil—those “violent” criminals who are not in need of mercy, compassion, or at least greater thought and consideration. This approach “effectively mark[s] this larger group of violent offenders as permanently out-of-bounds.”<sup>286</sup>

That is, by adopting an *over* frame to target the most glaring problems, *mass* critics risk playing into a dynamic by which “criminal justice reform’s first step—relief for nonviolent drug offenders—could easily become its last.”<sup>287</sup> *Over* grants politicians political cover, but that cover comes with risks.<sup>288</sup>

By way of analogy, Carol and Jordan Steiker—staunch opponents of capital punishment—have argued that anti-death penalty advocacy strategies that focused on *methods* of execution, rather than execution itself, may have had an unintended legitimating effect. While the advocacy strategy made sense in light of Supreme Court politics and precedent, it also effectively conceded the death penalty’s legitimacy—the arguments advanced indicated that the death penalty itself was not unconstitutional; rather, using a given drug or execution method made the death penalty unconstitutional.<sup>289</sup> Importantly, their claim is not that advocates should not have made these arguments or used the line of legal argument available to them. Instead, they worry about the unintended consequences of such a move.<sup>290</sup>

Ultimately, part of what makes Pfaff’s critique of the “standard story” so important is the way in which it shows the limitations of the *over* frame. That is, while Pfaff himself adopts an *over* frame (defining mass incarceration in *over* terms and thinking largely quantitatively about the problem),<sup>291</sup> his

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<sup>285</sup> FORMAN, LOCKING UP OUR OWN, *supra* note 47, at 221 (quoting Obama).

<sup>286</sup> *Id.* at 230. *Cf.* Levin, *supra* note 247, at 151–64 (examining the role of criminal law in drawing lines between excusable and inexcusable wrongdoing).

<sup>287</sup> FORMAN, LOCKING UP OUR OWN, *supra* note 47, at 230.

<sup>288</sup> *See generally* Steiker & Steiker, *supra* note 20; *cf.* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 775 (1990) (making a similar claim with regard to anti-discrimination law). *See generally id.*

<sup>289</sup> *See generally* Steiker & Steiker, *supra* note 20.

<sup>290</sup> *Cf.* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010) (examining the unintended consequences of feminist advocates’ use of trauma discourse); Jennifer S. Hendricks, *Converging Trajectories: Interest Convergence, Justice Kennedy, and Jeannie Suk’s “The Trajectory of Trauma”*, 110 COLUM. L. REV. SIDEBAR 63 (2010) (arguing that consideration of unintended consequences should not disregard the sorts of constraints that shape advocates’ strategies and decision making). It is worth noting that many of the critiques that this Article describes come from academics, not just advocates. Without veering into deeper questions of advocacy strategies (whether before courts, legislators, or others), then, we should recognize that academics may be, and often are, not similarly situated to movement lawyers in terms of their constraints, audiences, etc.

<sup>291</sup> *See supra* notes 118–127, and accompanying text.

account highlights how the *over* frame often has gotten it wrong. By looking at problems in *over* terms—particularly by overstating the role of nonviolent crime and the federal system—critics have arrived at critiques that invite ill-fitting solutions. It may be that decriminalizing marijuana, ending prosecutions of a range of low-level “nonviolent” conduct, etc., would have significant positive results in society. But, if the claim is that such moves will cut the prison population in half, then Pfaff shows that such approaches are off base. Much like Meese’s proposals to fix overcriminalization,<sup>292</sup> these solutions are solutions to one problem; it just is not clear whether it is the same problem that the critics claim to be addressing.

### B. Mass Pragmatism

To be clear, though, this Article is meant neither to be a call for ideological purity nor a critique of incrementalism. To that end, the *over/mass* distinction is not intended to be a stand-in (or disguise) for the incremental/radical distinction.<sup>293</sup> Indeed, while the *mass* critique is fundamentally radical and sweeping, that does not mean that the critique is incompatible with pragmatism or incremental reforms.<sup>294</sup> Existing *mass* critiques—both inside and outside of the academy—often *do* include concrete steps or policy solutions designed to redistribute political, social, and economic power.<sup>295</sup>

Putting aside, for a moment, a range of *over*-style policy solutions that would address *mass* concerns (*e.g.*, drug decriminalization; ending mandatory minimum sentencing), it is important to recognize that many of the most vital criminal justice reform efforts on the ground reflect a *mass* approach.<sup>296</sup> For example, consider the movements to end cash bail and the push to reduce fines and fees in the criminal system.

In recent years, scholars and activists have focused on the problem of

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<sup>292</sup> See *supra* notes 210–222, and accompanying text.

<sup>293</sup> *But cf.* Bibas, *supra* note 13, at 61 (describing the difference between a “radical” and a “meliorist” approach to criminal justice reform and describing the “radical” approach as “condemn[ing] lesser reforms as papering over injustice”).

<sup>294</sup> *Cf.* Susan R. Klein & Jordan M. Steiker, *Foreword*, 84 TEX. L. REV. 1687, 1688 (2006) (“Marie Gottschalk’s article takes aim at the present carceral state and analyzes the political prospects for major reform. Gottschalk is not interested in tinkering with the machinery of the carceral state, but seeks a wholesale dismantling with the goal of reducing state and federal imprisonment rates by more than 75%. Her article offers a pragmatic assessment of the plausible sources of such ambitious reform, including fiscal conservatives, civil rights groups, international advocates, professional organizations (*e.g.* the ABA), and the judiciary.”). *But see id.* (“That radical approach is impractical.”).

<sup>295</sup> See Akbar, *supra* note 58, at 20; see also Movement for Black Lives, Platform, A VISION FOR BLACK LIVES, <https://policy.m4bl.org/platform/>.

<sup>296</sup> See Akbar, *supra* note 58, at 7–8 (arguing for a more serious scholarly and legal engagement with radical activism by heavily policed and incarcerated communities).



cash bail: people who cannot afford bail must languish in jail as they await trial or resolution of their case.<sup>297</sup> The movement to address cash bail gained steam following the suicide of Kalief Browder, a young man who spent three years incarcerated at Riker’s Island awaiting trial for allegedly stealing a backpack.<sup>298</sup> The *over* response to the problem focuses on whether the right people are being detained—*i.e.*, courts should use algorithms to determine if a given defendant poses a societal danger; if so, she should remain in custody pretrial.<sup>299</sup> That response addresses *over* concerns—*i.e.*, more people are being detained than necessary. That said, *mass* responses reflecting different concerns and priorities have attracted significant attention and backing. Perhaps most notable has been the rise of the community bail fund—a fund established by community members to pay bail for people awaiting trial.<sup>300</sup> The idea being that the court is detaining defendants in the name of the community, but the community does not believe that the court represents its voice(s).<sup>301</sup> This *mass* approach to the problem does not focus on optimizing detention; rather, its goal is to resituate power and voice in the criminal system.<sup>302</sup> By providing bail money to defendants, community members are able to override official decisions that might have disparate impacts or that might not accurately reflect popular will.<sup>303</sup> As a part of a broader political project of community empowerment and a less punitive criminal system, the bail fund represents an incremental solution.

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<sup>297</sup> See, e.g., Thomas B. Harvey, *Jailing the Poor*, 42 HUM. RTS. 16 (2017); Paul Heaton, *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 777 (2017); Margaret Talbot, *The Case Against Cash Bail*, NEW YORKER, Aug. 25, 2015, <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail>; Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135, 141 (2007); Oberman & Johnson, *supra* note 224, at 933 n. 8 (collecting sources); Liana M. Goff, Note, *Pricing Justice the Wasteful Enterprise of America’s Bail System*, 82 BROOK. L. REV. 881, 883 (2017).

<sup>298</sup> See generally Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014, <http://www.newyorker.com/magazine/2014/10/06/before-the-law>; *Kalief Browder, 1993–2015*, NEW YORKER, June 7, 2015, <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

<sup>299</sup> See generally Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 556 (2012) (collecting sources).

<sup>300</sup> See generally Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

<sup>301</sup> See *id.* at 633. Cf. Jenny Carroll, *The Jury As Democracy*, 66 ALA. L. REV. 825, 870 (2015) (arguing that “jury composition should be reimagined as a forum to embrace the citizen’s fluid identity and to promote diverse perspectives within democracy”).

<sup>302</sup> See Simonson, *supra* note 300.

<sup>303</sup> Cf. Akbar, *supra* note 58; Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 545 (2015) (discussing the role of community participation in overriding police policy); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 392 (2016) (arguing that filming police empowers otherwise marginalized communities in the criminal system); Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 HARV. L. REV. 2173, 2174 (2014) (making a similar claim in the context of court observation).

Relatedly, media coverage has helped shed light on the problem of fines and fees in the criminal system, and a range of scholars and activists have taken up the cause.<sup>304</sup> Like the cash bail issue, this is a problem deeply rooted in issues of economic and racial justice.<sup>305</sup> Poor arrestees and defendants often wind up deep in debt, re-arrested, or incarcerated because they are unable to pay fines or fees that courts and police departments impose.<sup>306</sup> The critique of this practice is fundamentally a *mass* one, rather than an *over* one: the issue is not that the fines should be lower, that the wrong class of defendants is being fined, or even that the fines or fees are sometimes levied against people who have not been convicted. Rather, the concern is that the criminal system is driving people further into poverty and helping to drive a cycle in which people remain court-involved after their case is resolved. In some cases, the state and law enforcement entities are enriching themselves on the backs of poor and marginalized defendants. This line of criticism and law reform, then, explicitly confronts the place of the criminal system as a driver of inequality and as inextricably linked to distributive justice. A growing body of scholarship addresses these issues, and advocates are working to end these practices via impact litigation and legislative activism.<sup>307</sup>

While these are only two examples, they both demonstrate the capacity of *mass* critiques to translate into on-the-ground legal and policy solutions. That is, while the critique itself maybe sweeping and may be less appealing as a

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<sup>304</sup> See generally ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016); Laura I Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016); Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 844 (2017); Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016).

<sup>305</sup> See, e.g., Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1659 (2015); Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235 (2017); Larry Sshwartzol, *The Role of Courts in Eliminating the Racial Impact of Criminal Justice Debt*, National Center for State Courts, Trends in State Courts: Fines, Fees, and Bail Practices: Challenges and Opportunities (2017), available at <http://www.ncsc.org/~media/Microsites/Files/Trends%202017/Eliminating-Racial-Impact-Trends-2017.ashx>; Note, *Chapter One Policing and Profit*, 128 HARV. L. REV. 1723, 1724 (2015).

<sup>306</sup> See generally Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189 (2016)

<sup>307</sup> See, e.g., *O'Donnell v. Harris Cty., Texas*, No. CV H-16-1414, 2017 WL 1735456, at \*68 (S.D. Tex. Apr. 28, 2017); *Cain v. City of New Orleans*, 184 F. Supp. 3d 349, 350 (E.D. La. 2016) (Fourteenth Amendment claim based on method of collecting fines and fees from defendants); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014); Sarah Geraghty, *How the Criminalization of Poverty Has Become Normalized in American Culture and Why You Should Care*, 21 MICH. J. RACE & L. 195 (2016); Criminal Justice Policy Program, "Confronting Criminal Justice Debt: A Guide for Policy Reform", Report, Harvard Law School, September 6, 2016, available at <http://cjpp.law.harvard.edu/publications/confrontingcjdebt>.

way to frame legal or policy arguments, it is important to recognize that the *mass* critique can yield *mass* reform movements and interventions that are pragmatic and incremental in scope.<sup>308</sup> It might be that these movements find support among some critics adopting an *over* frame, just as it may well be that *mass* critiques support *over*-inflected solutions. But recognizing the different motivations, priorities, frames, and goals should be an important component of our understanding of the criminal justice reform movement as a collection of—at times complementary, and at times contradictory—movements.

## V. CONCLUSION

In his powerful account of race and criminal justice in Washington, DC, Forman argues that mass incarceration is the product of “a series of small decisions, made over time, by a disparate group of actors.”<sup>309</sup> Therefore, “mass incarceration will have to be undone the same way.”<sup>310</sup> I agree with Forman that fixing the criminal system will require many different decisions, interventions, and solutions. Indeed, as in many contexts, the perfect may be the enemy of the good, and recognizing the promises of a range of criminal justice reforms and reformers is and will be critical to the movement’s success. But, in order to reform a system, we need to know what is wrong with it, and what “reform” means. Ultimately, this Article argues that the literature on criminal justice reform reflects two distinct ways of understanding the system and its flaws. While cooperation and compromise will be essential to addressing the broken and unjust system, glossing over disagreement and nuance risks losing the power of the critiques that got us to this moment of possibility in the first place.

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<sup>308</sup> Cf. Akbar, *supra* note 58, at 22-30 (describing the policy “demands” adopted by the Movement for Black Lives).

<sup>309</sup> FORMAN, LOCKING UP OUR OWN, *supra* note 47, at, 229.

<sup>310</sup> *Id.*