Introduction

Mapping the New Criminal Justice Thinking

Sharon Dolovich and Alexandra Natapoff

This is a pivotal moment for the American criminal system. Police violence is squarely on the public agenda. Mass incarceration, until recently viewed with indifference if it was noticed at all, is now broadly recognized as a national crisis and an expensive mistake. The system’s racial skew is openly acknowledged at the highest levels of government. States are experimenting with decarceration, decriminalization, and alternative forms of punishment. Liberals and conservatives alike condemn the enormous economic costs and questionable public safety benefits of the current system. After 30-plus years of our “war on crime”—with its exponential growth in arrests and convictions, increasingly harsh sentences, unprecedented prison building, and profligate use of probation and other noncarceral penalties—there is an emerging willingness on all sides to question, challenge, and rethink our existing approach to preventing and punishing crime.

Such change requires new ways of thinking. If we are to fix the current criminal system—a vast enterprise affecting millions of lives and costing billions of dollars—we need a complete and nuanced understanding of what exactly this system is: What social and political institutions, what laws and policies, does it encompass? How do the stories we tell ourselves about the criminal system diverge from the way it actually operates? What does the system really do every day in the name of criminal justice, and how does it do it?

There are high moral stakes in getting the answers right. The criminal system is integral to our democracy, performing vital social functions while inflicting considerable pain and suffering on the individuals it targets. Its operations and failures impact not only its direct subjects
but also their families and communities. And its harmful effects are lasting and corrosive, promoting and exacerbating conditions of socio-economic and political marginalization. Any adequate account must therefore attend honestly to these effects and to the mechanisms by which they are achieved and justified, as well as to the daily realities of those people most burdened by the state’s exercise of its penal power.

To do so, we must recognize law’s profoundly situated nature. Law does not function in the abstract. It is always implemented within institutional contexts inseparable from their own social, political, and economic realities. The law of policing, for example, cannot be understood apart from how, and against whom, American police officers enforce their power. In the same way, the law regulating punishment can be fully appreciated only by surveying how, as a practical matter, the state’s agents mark, burden, and exclude those it labels as criminal. To understand the law governing the criminal context, we need to understand the rich and conflicted relationship between law’s implementation (the law in action) and the terms set down by various legal sources (the law on the books).

This collection reveals the American criminal system in all its multilayered complexity; at every moment, there are numerous actors, institutions, and dynamics operating on multiple fronts. A system this complicated requires a roadmap and techniques for navigating its typography, and the essays in this volume provide these tools—legal and institutional as well as sociological and moral. In essence, they reflect new, richer ways of thinking about criminal justice. Challenging the standard view, with its formalistic and linear vision of individual wrongdoers breaking legal rules, the authors in this collection offer a variety of thick and nuanced models for making sense of the legal processes, social institutions, and political dynamics that together shape the reality on the ground. If these essays share a common insight, it is the inescapable need for contextualization. As they show by example, it is only through a richly textured, empirically situated analysis that the daily truths of the American criminal system can be fully understood.

The American Socio-Criminal System in Four Dimensions

The American criminal system is not only complex. It is also massive. At the moment, there are over 2.2 million people behind bars in the United
States and approximately 4.5 million more under some form of community supervision. In 2013, there were 11.3 million arrests, and at least 10 million minor criminal cases were processed through local criminal courts. Fully one third of the adult population has a criminal record of some kind.\textsuperscript{1}

Above and beyond this sheer scale, the criminal system can be highly intrusive, and even, for some individuals, omnipresent. The policing of some citizens and communities often commences well before any crime has occurred. For people with criminal convictions, the burdens of punishment continue to be felt long after any formal sanction has been lifted. The system is also a colonizer, relentlessly expanding its reach and blurring familiar boundary lines. If, as a formal matter, there remains a distinction between criminal and civil law, between law enforcement and social work, between penal policy and social regulation, in each case it can be difficult in practice to say where one ends and the other begins.\textsuperscript{2} A full understanding of American criminal justice must therefore account for the enormous scope and expansiveness of a system that has grown to define and constitute a wide swath of American social and political life.

In what follows, we sketch what we regard as the four essential dimensions of the American criminal system—four integral but often unacknowledged aspects that must be appreciated as we struggle to comprehend and morally evaluate the system itself. Collectively, these dimensions provide a roadmap that is not only analytically thorough, but also captures the interrelated and profoundly social dimensions of criminal justice that make it such a powerful, and powerfully oppressive, governance mechanism.

First and foremost, space must be made for the entire, protracted, and frequently recursive criminal process as it is experienced by those caught up in it. This first dimension centrally concerns the \textit{actual human experience} of the millions of people who are selected, labeled, managed, and punished as “criminals.”

Second is the \textit{full range of relevant law}, defined not only by the standard rules of criminal procedure and formal definitions of crimes and criminal sentences, but also by the laws establishing the terms of the criminal penalties as actually served, along with the civil remedies, collateral consequences and disabilities, and all the laws of all the
institutions—civil as well as criminal—that make up the socio-criminal complex.

The third necessary dimension encompasses the public policies that generate the crime/poverty nexus, including the institutions, from public schools to private workplaces, responsible for the ongoing collective processes of resource redistribution, social engineering, and power allocation. These civic institutions, long abutting the criminal system, have been enlisted in promoting the mass criminalization of America’s most disadvantaged citizens. As a result, public institutions like schools, hospitals, and welfare offices now help to determine not only an individual’s economic and social well-being, but also his or her relationship to the penal system.

Fourth and finally, our criminal system is a profoundly American way of managing social status and power, acting as both a source and a reflection of historical stratifications and governing cultural norms. As recent events in Ferguson and Baltimore remind us, this final dimension highlights the role that the criminal system has long played in the collective generation and perpetuation of national legacies of racism, sexism, classism, and other forms of systemic discrimination.

Conceptualizing the criminal system in this multifaceted way is a deliberately expansive move. It is an argument that, in order to understand, judge, and ultimately refashion our system of criminal justice, we need to acknowledge multiple dimensions: the system’s impact on fellow human beings, its legal rules, its cross-institutional workings, and its caste-perpetuating effects. Omit one of these elements, and you will have missed a vital piece of the puzzle. Our vision is also deliberately unconventional. It locates the criminal process at the center of a far broader set of institutions, procedures, and laws than is typically associated with the state’s response to crime. It does so in order to capture the dynamic, interrelated quality of criminal justice on the ground, and to reveal the extent to which much civil law, and many of our basic social institutions, are implicated in the management of the criminal system well beyond what is conventionally thought of as “criminal law.” Ultimately, it insists on understanding criminal justice broadly, as a socio-political system that lies at the heart of modern American society and constitutes a full-fledged governance system in its own right.

Each of the essays in this collection contributes in its own unique way to this broader vision of criminal justice. Below, we briefly survey the
contours of this expansive understanding, and then describe how each essay pushes us to think in new ways about criminal justice.

The Making and Treatment of Individual Criminals

First and foremost, the criminal system transforms people into “offenders” so as to punish and control them. Part of this terrain is familiar from what might be called the “standard model,” which construes the criminal system narrowly as the process that identifies individual wrongdoers, proves their guilt, and then (and only then) imposes penalties. But to fully understand how we decide who will be designated as “criminal” and what actually happens to them as a result, it is not enough to look to formal rules and processes. We must also attend to the reality on the ground—what actually happens every day—as certain classes of criminal suspects are targeted by the police while others are ignored; as some are charged by prosecutors while others are let go; as some defendants deploy significant resources to contest their guilt before judges and juries while others succumb to the pressures to plead guilty; and as convicted offenders are sentenced to and experience wildly disparate punishments.

The official implementation of the criminal law is morally fraught, informed at any given moment by a range of social, political, economic, cultural, institutional, and psychological factors (see Lynch, Kohler-Hausmann). There are many players here—legislators, public defenders, law enforcement officials, judges, correctional officers, parole officers, and so on—and each actor is subject to their own experiences, influences, pressures, and interests, and empowered to make discretionary decisions critical to the ultimate outcomes. To fully and accurately comprehend this central component of the American criminal system—what it actually does to the people it targets, from the moment of police contact through the entire administration of punishment—we must develop a rich account that recognizes and grapples with the experiences and influence of all the parties involved.

The question of who is seen and treated as “criminal” turns heavily on selection by law enforcement (see Barkow). Most Americans violate the law in some way at some time, and law enforcement resources are limited. As a result, the targeted population necessarily reflects a
wide variety of selective public policies, resource constraints, and biases (see Richman, Chesney-Lind). Not even all murders are created equal: in some impoverished communities, unsolved homicides languish for years, while in other more privileged venues, resources are lavished on similar cases. And such disparities are not unique to homicides. Assaults against women, for example, are increasingly vigorously prosecuted when labeled “domestic violence,” but underenforced when they occur against sex workers. And it is only in recent history that Wall Street’s market manipulations have become treated as potential crimes and not just clever money-making schemes.

The power of law enforcement selection is particularly strong in low-level cases (see Natapoff). As New York City’s stop-and-frisk debacle demonstrates, police targeting decisions importantly shape the legal significance of crimes. In New York, until the practice was challenged by public outrage and court order, police stopped over half a million people a year, disproportionately young men of color. In some poor Black neighborhoods, every young male resident could expect to be stopped at least once a year. These “order-maintenance” and “zero tolerance” policies amounted to an official decision to treat young men of color in certain neighborhoods as presumptive criminals (see Fagan). And this decision was a self-fulfilling prophecy: racially inflected policing ensured that these men were marked and brought into the system, giving them arrest and conviction records that putatively justified the initial decision to treat them—and the demographic group to which they belonged—as criminals, even in the absence of evidence to this effect.

Similarly, as is by now familiar, the war on drugs has been waged with methods that select and define “criminal” in racialized ways (see Océn). Although African Americans and whites use drugs—including marijuana—at approximately the same rate, we criminalize those groups at vastly different levels. The national arrest rate for marijuana possession for African Americans is four times that of whites. In some jurisdictions, it has been 10, 20, even 30 times higher.

These policies and practices are fully a part of the criminal law we actually have. Only by evaluating how and why we select our criminals on the front end—and who escapes selection—can we properly understand the scope and significance of the criminalization process.
Yet front-end selection is only part of the challenge. In addition, we need to fully acknowledge all that happens afterward to those labeled as criminals. For those convicted of more serious crimes, the punishment will include incarceration, whether for months, years, or decades. In many states, the death penalty remains an option, and across the country, the imposition of sentences of life without the possibility of parole (LWOP), whether formal or virtual, has reached unprecedented levels. As a consequence, the number of people doing LWOP in one form or another far outstrips the number of people on the nation’s death rows. Even people convicted of non-homicide crimes can find themselves serving decades or even life sentences. And although sentence length is a crucial determinant of the weight of the penalty, the degree of harm incarceration represents for prisoners themselves turns as much upon the conditions of confinement as on the length of stay—and perhaps even more so (see Dolovich, Kerr). This is especially true for long-term prisoners, who often endure extreme hardship, the combined effect of many compromising factors, including overcrowding, understaffing, minimal programming, gang control, threats of predation from staff and other prisoners, the proliferating use of solitary confinement, grossly inadequate medical and mental health care, and the radical indifference of society at large to the suffering of those who live under such conditions.  

For those millions of Americans convicted of minor crimes, punishment may also involve a custodial term, along with months or years under some form of burdensome and intrusive “community supervision.” Low-level offenders are often saddled with fines and fees they cannot pay, a punishment that can lead to long-term debt, deeper impoverishment, family displacement, and even additional incarceration. And for everyone with a criminal conviction, whether incarcerated or not, the system imposes an endless gauntlet of exclusions, restrictions, obstacles, and prohibitions to be navigated and endured for years, if not forever. These so-called “collateral” consequences include formal restrictions on such crucial matters as housing, employment, access to student loans, voting, jury service, and government contracts. They also include the substantial informal economic costs, psychological burdens, and social stigma that go with being labeled a criminal. 

This account intentionally expands the class of conditions and burdens that count as punishment. The Supreme Court has been parsimo-
nious in this regard, but from the perspective of the actual individuals on the receiving end, the punishment inflicted is more than just a fine, probation, or a custodial term. It also includes such practical burdens and personal indignities as denial of the right to vote or serve on a jury, the unwillingness of private individuals to rent them an apartment, and the often insurmountable difficulty in getting a job. These experiences are not “collateral” to punishment. For those subjected to them, they are punishment (see Simon).

This expansive understanding has special implications for those who are convicted of minor crimes, an experience that can mark and burden a person for a lifetime in ways that far exceed their culpability. Even brief periods of probation can trap a minor offender in an extended and punitive dance with the state. For the poor, the underemployed, and those with substance abuse or mental health problems, a minor conviction can further derail their lives, undermining the stability of their families and communities and spreading the burden of heavy penalty even to the next generations.  

It is crucial here to recognize the cyclical nature of the penal experience. What might be thought of as the “back end” of the system—all the punishments and burdens that follow conviction—is also in important ways a direct conduit back to the beginning of the criminal process. Hardships imposed on people convicted of crimes can steer them back into the criminal system. Prison conditions are famously criminogenic, compromising rather than enhancing the development of pro-social tendencies and skills. And even once people have served their time, the countless formal and informal collateral consequences can make daily life a constant struggle, further marginalizing those subject to them, both socially and economically. This marginalization increases the likelihood of recidivism and helps keep people visible to law enforcement, thus facilitating their readmission into the system.

At the same time, the composition and complexion of the population of convicted offenders shapes front-end enforcement policies. Police point to offense rates to justify stop-and-frisk practices, even though offense rates are a direct function of those very enforcement choices. American culture has long associated criminality with blackness and continues to do so, even though the racial makeup of the criminalized population is itself a result of law enforcement selection and prosecution
policies. Focusing on what happens at the back end thus helps explain the many ways the system operates to ensure a steady supply of certain kinds of people coming in through the front.

Even more troubling from a rule-of-law perspective, the question of individual guilt turns out to be only a part—and sometimes a negligible part—of how we decide whom to treat like criminals. Most young men stopped-and-frisked in New York were released without arrest or charge, indicating that the police themselves realized they had gotten the guilt question wrong. Many people who find themselves in jail plead guilty, not because they actually committed the crime, but because they cannot afford bail and do not want to risk the loss of job or home that often attends even short-term incarceration. Or they may plead guilty because the risk of a long sentence after trial is not worth taking when weighed against the certainty of a short plea-bargained sentence. We know that innocent people are marked and punished in these ways, and yet we permit the process to persist. These are hallmarks of a system that is at best careless about guilt.

Our body politic is currently grappling with perhaps the most disturbing and tragic manifestation of this carelessness: the threat it poses to the lives of young Black men. Ferguson was once just the name of a St. Louis suburb, as Selma was once just an Alabama city with a bridge. Today, “Ferguson” represents not only the death of Michael Brown, an 18-year-old unarmed African American killed by a local police officer, but numerous other cases, recent and not so recent, of unjustified police violence against unarmed Black men, among them Eric Garner, Tamir Rice, Freddie Gray, Amadou Diallo, and Abner Louima. Now a cultural symbol of political protest, “Ferguson” stands for a growing anger and frustration over the routine way the criminal system overstates the threat posed by Black men and undervalues their safety and lives.

In sum, any adequate conception of American criminal justice needs to push the boundaries of the standard view, to expose and encompass more of what actually happens on both the front and back ends. This reality is lived by flesh-and-blood human beings, a fact that the standard focus on formal rules and processes tends to ignore, but which must be front and center in any morally adequate understanding of the criminal system (see Bibas, Simon).
All the (Criminal) Law

As the foregoing indicates, the criminal system often operates in ways that contravene the basic values of a constitutional democracy: fairness, equality, impartiality, political accountability. Because existing rules are so often insufficient, ignored, or twisted in practice, it is tempting to shed one’s faith in the centrality of rules and the value of changing them. We believe this would be a mistake, both philosophically and pragmatically. In a society that aspires to the rule of law, legal rules form a vital infrastructure for state action and the conduit for legislative and judicial directives to other legal actors (see Dolovich). In the criminal context, rules define crimes; fix penalties; empower and constrain police, prosecutors, and judges; and undergird the effective operation of the adversarial process. In a foundational sense, we rely on the rule of law and the concept of legality to ensure the legitimacy of the state’s exercise of its penal power. As the late William Stuntz put it, “this central commitment of American government” requires that “when the state deprives one of its citizens of life, liberty or property, the deprivation is primarily the consequence of a legal rule, not a discretionary choice.”

Justice Scalia once referred to the principle of *nulla poena sine lege* (no punishment without law) as “one of the most widely held value judgments in the history of human thought,” and later in this volume, Jonathan Simon refers to the legality principle as “the central premise of modernity in criminal law.”

To understand the criminal system is thus always in some deep sense to understand its laws. But exactly what law is relevant? American law schools generally operate on a narrow working definition of “criminal law,” as that collection of statutes defining which behaviors count as crimes and the legal rules for determining what factual showing is required for conviction. This so-called substantive law is accompanied by the study of the myriad procedural rules, both statutory and constitutional, that govern investigations, trials, and due process more generally, a body of law collectively referred to as “criminal procedure.”

Yet once we view the criminal system expansively, the legal distinction between “civil” and “criminal” loses much of its force (see Barkow). The diverse body of law that shapes both the mechanisms by which people are marked for entry into the system as criminals and the full reality of what happens to them once they are so marked is far broader than
what law students know as criminal law and criminal procedure. Indeed, many legal regimes more commonly labeled as civil are as fully a part of the criminal system as the basic principles of mens rea.

The front end of the system, where people are labeled as criminal, is driven by many seemingly civil phenomena: the administrative principles that shape prosecutorial and public defender offices, the aggregate settlement dynamics that generate guilty pleas, the contractual market for bail bonds. On the back end, the criminal system includes not only the laws governing sentencing, but also the bureaucratic mechanisms for imposing and administering the various criminal penalties, including prison regulations, the rules governing probation and parole, and the broad discretion accorded probation, correctional, and parole officers. It includes the vast set of legal rules that define and constrain the civic functioning and economic options of the 65 million Americans living with criminal convictions, as well as the rules that enable informal collateral consequences such as the commercial collection of personal data. It even includes regimes explicitly styled as civil, including civil contempt for failing to pay criminal fines and fees, the rules governing (civil) immigration detention, the regime of habeas corpus through which defendants challenge the constitutionality of their convictions and sentences, and the doctrinal standards and framework for challenging prison conditions and other issues relating to the administration of punishment.

The socio-criminal legal regime also indirectly relies on the rules of many civil institutions (see Valverde). Immigration is perhaps the most obvious example, but the criminal law should also be understood to include social regulations like the school disciplinary rules that drive the school-to-prison pipeline, and zoning restrictions that “banish” offenders from public parks and other public arenas and expose repeat violators to jail time. And it increasingly encompasses welfare policies that restrict the civil rights of welfare recipients and refer those recipients to prosecutors when the terms of that (civil) contract are broken.

An expansive view of criminal law also requires that we rethink the constitutional scope of this area, not least because, in our constitutional democracy, the Bill of Rights is an important way that we legitimize the harms imposed in the name of criminal justice. The police procedural and courtroom dramas of television and film have made generations of Americans experts on various constitutional protections, from
Miranda warnings to the right to a jury trial and the right to counsel. And to be sure, at the front end of the criminal process, even before the determination of guilt, these and other protections deriving from the Fourth, Fifth, and Sixth Amendments are of central relevance. But for those individuals subjected to criminal punishment—who, once misdemeanors are factored in, number in the millions annually—the list of relevant constitutional provisions and principles gets longer. The Eighth Amendment prohibition on cruel and unusual punishment is vital for anyone facing criminal punishment in any form. The Eighth Amendment Excessive Fines Clause looks to increase in importance along with the growing public awareness of the myriad fees imposed by the criminal process. And for the incarcerated, several other constitutional protections also become directly relevant, including First Amendment freedom of speech and association and the free exercise of religion, and the Fourteenth Amendment Equal Protection Clause.

Finally, it bears remembering that criminal procedure and civil rights are flip sides of the same constitutional coin. Although law schools typically distinguish between criminal law and procedure on the one hand, and constitutional law and civil rights on the other, this is a misleading distinction. The urgent civil rights issues embodied in the slogan “Black Lives Matter” are centrally about criminal procedure. Conversely, the criminal system is heavily shaped by habeas corpus, prison litigation, the rules governing constitutional challenges arising from the administration of punishment, and a wide range of civil rights laws and procedures that permit institutional enforcement of conventional criminal rules. All of this law is criminal law, and must be understood as such if one is to fully comprehend the legal foundations of the criminal system.

The Criminalization of Poverty: An Institutional View

In the United States, the criminal process by which we decide who is to be labeled a criminal and what happens to them as a consequence is inextricably entwined with the institutions of welfare provision and the experience of poverty more generally. This is a two-way street: poor people tend to get routed into the criminal process, and brushes with the criminal system tend to make or keep people poor. Understanding the American criminal system thus requires looking specifically at how the
criminal process works as an official socio-economic regulator in close cooperation with other features of the welfare state.

Poor people are routed into the criminal system in a number of ways. One way is by formally criminalizing things that poor people do. When we make it a crime to sleep or urinate in public, we turn the homeless into criminals. When we make it a crime to provide unlicensed child care, we criminalize poor parents and their neighbors. As Kaaryn Gustafson has described, when welfare case workers are directed to refer their clients to prosecutors for violation of welfare rules, we criminalize welfare recipients. When we incarcerate people for failure to pay traffic fines or for driving on a suspended license they cannot afford to fix, we criminalize the working poor.

Poor people are also routed into the criminal system geographically, based on where they live. Urban African American neighborhoods are overpoliced, especially for drug offenses. Public housing estates are likewise heavily policed, creating a direct pathway between residency and entrance into the criminal system. Some cities have “million-dollar blocks”: concentrated areas in poor urban communities where the incarceration rate “is so dense that states are spending in excess of a million dollars a year to incarcerate the residents of single city blocks.”

The welfare institutions that serve children have also become engines of criminalization. In some public schools, internal disciplinary mechanisms have been seeded with law enforcement officers. Children who might otherwise receive detention or a trip to the principal’s office find themselves arrested, brought before a judge, and incarcerated for conduct that in another school would be written off as normal behavior for school-aged children. This “school-to-prison pipeline” disproportionately affects children of color: 70% of arrested students are African American or Latino, and minority boys and girls alike are more likely to be arrested, referred to law enforcement, suspended, or expelled than their white counterparts for comparable behavior. In a particularly tragic doubling down, children of incarcerated parents often end up in foster care, where they “are significantly more likely to be abused and neglected . . . than their peers in the general population.” Such children are less likely to complete their education and more likely to end up on the streets. The experience of being in foster care “is [thus] one of the best predictors there is that a child will wind up behind bars.”
Even as our welfare institutions route the disadvantaged into the criminal system, the criminal process itself functions as a powerful engine of social inequality, crisply labeled by Loïc Wacquant as “a self-perpetuating cycle of social and legal marginality with devastating personal consequences.”\textsuperscript{26} The mechanisms by which the criminal system contributes to this feedback loop are well understood. People who lack well-resourced lawyers are more likely to be treated unfairly. As many as 80% of those held on bail cannot afford to pay it, and are thus exposed to the financial and personal costs of incarceration: losing their jobs, cars, apartments, or even custody of their children. Increasing attention is being paid to the resurgence of “debtor’s prison,” as low-income and middle-class people struggle to pay off the numerous fines and fees levied against even minor criminal conduct—including conduct that has been officially decriminalized. Indeed, misdemeanor fines strongly exacerbate the class bias of the criminal system: offenders with financial resources can pay their fines and walk away, while the indigent and underresourced remain at risk of probation, incarceration, and further punishment.\textsuperscript{27}

Finally, there are the myriad ways that a criminal conviction may directly impoverish its bearer. A conviction severely undermines a person’s ability to obtain employment, African American men being especially disadvantaged in this regard.\textsuperscript{28} The collateral consequences of a conviction can include the loss of public housing, student loans, and licenses. Fines and fees can destroy a person’s credit, while convictions and failure-to-pay warrants can prevent people from connecting with important support institutions such as banks, police, and hospitals.\textsuperscript{29}

These examples are just the tip of the iceberg: a vast literature chronicles the many intersections between criminalization and poverty. The point here is to note the mutually reinforcing relationship between the criminal system and the public institutions tasked with supporting the socially disadvantaged. Any complete understanding of the criminal system must make space for this dynamic relationship.

Perpetuating Social Caste

The criminal process does more than simply manage crime and mete out punishment. It is also a central mechanism by which society marks
and controls the socially vulnerable and politically disadvantaged. As the foregoing discussion indicates, it is impossible to describe the reality of the criminal system without including the corrupting effects of racism, class bias, and other mechanisms for institutionalizing disadvantage and conferring privilege. This phenomenon is not an independent dimension of the criminal system; it is woven deep into its every aspect. But it is precisely the constitutive effect of social caste on the criminal system (and vice versa) that makes it necessary to give separate notice to this interaction and the recursiveness it produces. From racially driven police selection decisions to longer prison sentences, from the school-to-prison pipeline to the lasting social burdens and exclusions imposed on offenders, the criminal apparatus imposes and preserves social and economic inequalities—in ways frequently untethered from individual blameworthy conduct.

Race is the most obvious and peculiarly American fault line that we manage and reproduce through the criminal process. As Priscilla Ocen observes in this volume, it is impossible to comprehend the system without reference to the African American experience. But race is not the only basis on which the criminal system marks, controls, excludes, or dehumanizes its subjects. Poverty, drug addiction, mental illness, even residence in public housing or being on welfare: all serve as markers of social disadvantage at once heavily shaped by the criminal system and contributing to its immense scope. If we ever manage to transform our practices so that members of these disadvantaged groups were not disproportionally policed, criminalized, and penalized, we would radically alter the landscape of socio-economic and racial inequality in the United States.

To be sure, this insight is hardly new. As Mariana Valverde writes in her chapter, the criminal system has long been understood as a mechanism for controlling and managing “misère.” But as many of the authors in this volume explain, the precise rules and techniques by which it currently does so vary widely. As Issa Kohler-Hausmann describes, those rules and techniques change over time and in different contexts. Sometimes rules work to reduce caste and inequality; sometimes they obscure and preserve it. Dan Richman argues that local conditions and politics make an enormous difference, and Mona Lynch similarly emphasizes the impact of individual actors and the cultures of the institutions in
which they work. In many ways, this collection reflects a persistent desire to understand not merely how the criminal system operates, but also how it contributes to the most inequitable aspects of our culture and society, and ultimately how it might be otherwise.

This Collection

The authors in this book have collectively spent over a century dissecting the criminal process, asking what this process does and how it does it. We invited each of them to think expansively and critically about crucial aspects of the process, and each author has sliced the conceptual question in his or her own way. The resulting essays bring a wide range of perspectives to the enterprise, including administrative law, constitutional law, social psychology, moral philosophy, political theory, criminology, and critical race theory.

In 2013, we organized a conference co-sponsored by UCLA School of Law, Loyola Law School, Los Angeles, and NYU School of Law, at which this interdisciplinary conversation began. Some of the essays in this collection were initially written for that conference; these are accompanied here by shorter essays written in response by one or more conference participants. We subsequently invited additional authors to contribute to the collection; those essays do not have responses.

Each essay and response is a product of years of unique experience and scholarly perspective. They have their own special flavors and reflect a wide range of worldviews. Rather than trying to reduce them to neat categories, we offer the following roadmap to help the reader navigate this collection.

The first set of essays offer Systemic Perspectives—conceptual frameworks that we might use to understand the criminal system as a whole. The second set explores Legal Doctrine in Principle and Practice, the promises and limitations of legal rules and constitutional principles. The third set is about Getting Situated, shining a light on the situational and contextual nature of legal practices and outcomes, and the Actors, Institutions, and Ideology that inform their particular shape. The fourth section, Humanizing the Question, focuses on the dignitary and democratic values that the criminal system should manifest in practice. And finally, in The New (Old) Criminal Justice Thinking, we are reminded...
that all these questions have been around for a long time in various forms.

As will be apparent even from the brief summaries below, many essays overlap and pick up themes in other sections, which means this collection could have been organized in numerous ways. For example, there is no single section on race because most of the authors engage race and social disadvantage in ways that are integral to their analyses. Similarly, we do not segregate chapters based on the common “substantive” versus “procedural” divide because each essay grapples with the intimate relationship between process and outcomes in its own distinctive manner. Most of the chapters are interdisciplinary in various ways. We think this thematic messiness is appropriate: it reflects the rich, interrelated nature of the criminal justice system on multiple dimensions, and is itself a necessary component of the new criminal justice thinking.

Systemic Perspectives

The first set of essays offers different ways of conceptualizing the criminal system other than the traditional story about legal rules and guilty individuals. Each of these essays and responses is particularly attuned to the institutional realities of the criminal process: who makes the decisions, in what institutional context, and how those variations affect the normative trajectory of the system as a whole.

Rachel Barkow takes aim at the criminal-civil divide by reconceptualizing the criminal process as an administrative bureaucracy. She points out that prosecutors’ offices make decisions in ways that are better explained by bureaucratic pressures and institutional history than by crime rates or individualized concerns about culpability or proportionality. Of particular importance is her argument that the explosion of the penal state and our current policies of mass incarceration can be explained at least in part by common principles of bureaucratic expansion and institutional self-interest, which in turn help us understand why the penal system grew so radically even as crime rates fell. As she puts it, in response to “the violence and unrest of the 1960s and 1970s . . . [t]he government created agencies and actors who have a vested stake in resisting any efforts to contract the system and who seek to maintain the rules that make those bureaucracies run most efficiently. The criminal
regulatory state is thus a critical and necessary link to understanding mass incarceration in America.”

In response, Dan Richman takes Barkow’s challenge a step further. He agrees that the penal state can be explained in part by administrative principles, but argues that local variations in law enforcement resources and normative community commitments are powerful drivers that help account for the wide divergences in actual practice. “Why are some counties quicker to fill up prison beds than others? What trade-offs are being made between social welfare expenditures and policing expenditures, between policing expenditures and prosecution decisions? And why?” By reminding us of “the messy decentralized politics that are a hallmark of American criminal justice,” Richman links Barkow’s administrative model to the variegated realities of criminal practice on the ground.

Also in response, Stephanos Bibas reminds us that the criminal law is supposed to be normatively distinctive. He zeroes in on Barkow’s primary conceptual move, in which the penal apparatus loses its special status as an adjudicator of moral culpability and becomes just another agency like the Department of Health and Human Services. While acknowledging that the modern penal state has in practice lost much of its moral compass and connection to public values, Bibas argues that we should fight rather than embrace this trend, and attempt instead to “return [the system] to its roots as a popular morality play.” Bibas argues that we once had—and could have again—a more morally grounded, communitarian, and transparent model of criminal justice in which convictions are more tightly linked to individual culpability and community values. Or as he puts it, “What we need more of is not expertise or revolution, but transparent, accountable democracy rooted in the community’s moral consensus.”

This trio of essays invites a significant departure from the traditional criminal justice model. The conventional story is that legislatures pass statutes defining culpable criminal activity and the executive investigates and enforces those rules against offenders, who are punished only upon a finding or concession of guilt. The legitimacy of the process and ultimate punishment depends on the idea that this sequence defines culpable conduct in advance in a democratically legitimate way, and then accurately identifies people who have engaged in it. This scaffolding un-
derlies most criminal legal theory as well as the standard commitment to due process. Barkow, Richman, and Bibas turn this familiar picture on its head. Their approach suggests that the administrative bureaucracy of criminal justice has itself become the source of penal legitimacy and power, and that it—and not our definitions of guilt or the personal culpability of criminals—best explains the outcomes that the system produces. While Barkow and Richman more or less accept this intellectual turn and Bibas resists it, they all agree that the modern criminal process has lost much of its special connection to the individual culpability of the offender.

Far from uniform, the criminal process works in different ways for different people and for different crimes. Sometimes formal rules clearly determine processes and outcomes, while sometimes social factors seem more salient. Alexandra Natapoff conceptualizes these systemic variations through the model of the “pyramid.” The top represents serious felonies, the federal system, wealthy defendants, and the rest of the relatively small class of cases in which rule of law works more or less the way it is supposed to. Defendants who want to contest their guilt can have a trial, counsel have resources, and courts are receptive to arguments based on evidence and law. By contrast, as we move down the pyramid, cases get pettier, defendants get poorer, and counsel gets more burdened. By the time we reach the bottom—the realm of petty offenses and assembly-line courts—race, class, police arrest policies, and prosecutorial plea-bargaining habits best explain what the criminal system does and how it does it. Natapoff traces this dynamic to concrete doctrinal and policy choices. As she writes, “the pyramid . . . illustrates a profound feature of the penal system: sometimes criminal convictions can fairly be justified as a product of law and evidence, while sometimes they are better understood as a product of institutional practices and inequalitarian social relations.”

In response, Meda Chesney-Lind notes that the pyramid model resonates with longstanding concerns in criminology, particularly the attempt to measure the effects of race, class, and gender. She offers concrete examples of the pyramid’s operation from her own work, which showed that “bias against females was more pronounced at the [Honolulu] district court level (where minor offenses were prosecuted) than at circuit court levels”; in cases involving low-level offenses, women
were actually more likely to be jailed than men. Similarly, she notes that “typically many more girls than boys enter the juvenile justice system” for status offenses like running away from home, “because parents are concerned about their daughters’ and not their sons’ behavior outside the home.” Chesney-Lind ends with a challenge to criminology to “increas[e] efforts to describe and document the actual functioning of the criminal system, particularly the system that most U.S. citizens actually experience.” In particular, she argues that “the field’s traditional bias toward quantitative methods (and large national samples) must be augmented by richer, more detailed descriptions of key parts of the system that most people experience.”

In these ways, the pyramid is a heuristic that helps organize a broad range of scholarship as well as widely held intuitions about the criminal process. It mediates the tension between the influence of social variables like race, class, and gender— weaker at the top, nearly dispositive at the bottom—while still acknowledging the vital role of rules. It also upends the usual conceptual hierarchy in which serious cases are treated as paradigmatic, while misdemeanors are dismissed as minor deviations from the due process ideal. Most Americans are criminalized through the misdemeanor process, which means that in reality the sloppy secretive bottom of the pyramid overwhelms the rule-bound transparent top, offering a new way of thinking about the system as a whole.

Legal Doctrine in Principle and Practice

The second set of essays takes aim at the relationship between principle, doctrine, and practice. The criminal system holds a distinctive place in our constitutional democracy, wielding awesome powers over life and liberty. Even as we rely on legal and especially constitutional doctrines to make sense of and legitimate those powers, chasms remain between what the law purports to justify and the everyday reality on the ground. These essays help us understand how that divergence comes about, and what we might do to better realign the way the system actually functions with the values it is supposed to embody.

Sharon Dolovich examines a pervasive contradiction that haunts key doctrines of constitutional criminal law. Throughout this area, the Supreme Court has affirmed basic constitutional principles—such as the
right to counsel or the right against cruel and unusual punishment—that courts are to enforce against the state for the protection of individual penal subjects. Yet in practice, the governing doctrinal standards encourage judges in individual cases to affirm the constitutionality of state action seemingly regardless of the facts. As a result, at the precise moment of judicial review, when our constitutional scheme promises penal subjects direct critical scrutiny of their treatment by the state, the system instead delivers almost automatic and uncritical validation of whatever state action produced the challenged conviction, sentence, or punishment. Dolovich shows how this effect is achieved doctrinally, through the Court’s repeated deployment of what she calls the three “canons of evasion,” and she further identifies troubling questions raised by pervasive use of these canons for the legitimacy of the state’s penal power. As she asks, “If the courts are not disciplining the criminal system—a site that presents strong temptations for state officials to cut constitutional corners—who is? And if the answer is no one, what does this mean for the degree to which citizens should regard the outputs of the criminal system as consistent with [our] core constitutional commitments?”

In response, Hadar Aviram considers three intellectual frameworks through which we might understand Dolovich’s doctrinal insights. She argues that the classic “legal model,” which views constitutional interpretation as a vehicle for furthering core legal values, naively assumes the neutrality of legal institutions. Conversely, the “socio-empirical approach,” which treats courts as just one of many socio-political institutions that legitimate and reinforce existing structures of power and inequality, fails to grapple adequately with the nature of law and legal discourse. Aviram concludes that Niklas Luhmann’s systems theory offers the most satisfying way to make sense of both the constitution’s functions and its limitations. This approach helps us to see law’s character as a closed system of communication. Although it is open to evidence from other systems and seemingly able to assimilate that evidence, law is structurally incapable of getting beyond the limitations of its own reductive legal/illegal dichotomy. For this reason, judicial review is ultimately an ineffective vehicle for resolving the complex challenges that typically give rise to constitutional claims. Systems theory, concludes Aviram, “offers us a modicum of modesty when expecting great things from the courts. If what we need are better defense attorneys, juries, and
correctional officers, hanging our hopes on the flawed instrument of constitutional communication will prove hollow indeed.”

Lisa Kerr provides a case study of the dynamic Dolovich identifies, focusing on U.S. courts’ failure to extend maternal rights into the prison context. Highlighting the interest incarcerated mothers have in retaining custody of their newborn infants, Kerr illustrates how courts, although acknowledging that prisoners retain constitutional rights, drain the content of those rights in response to the most minimal justifications advanced by prisons and state officials. One particularly severe implicit consequence of state punishment thus becomes the permanent breaking apart of families. As Kerr shows, Canadian courts have largely adopted the same deferential approach to prison officials as have American courts, including—at least historically—with respect to claims brought by new mothers to remain with their children. But according to Kerr, one recent Canadian case—*Inglis v. British Columbia*—sharply diverged from this tradition. Not only did the judge in *Inglis* rule on the side of the prisoners, but her reasoning departed significantly, even radically, from what one typically sees in judicial rulings on prisoners’ constitutional claims, even while resting on wholly recognizable and noncontroversial legal principles. As Kerr writes, “the *Inglis* court pushes for benefits to outweigh costs and demands sensible connections between the long-range goals of the system and its present-day actual operation.” Moreover, “[r]ather than treating the prison as an exceptional space, where the difficulties of managing problematic residents can justify any managerial approach, the court constructs penal facilities as ordinary state institutions responsible to the full spectrum of public law commitments and values.” In this way, *Inglis* offers a new model for judicial review of prisoners’ constitutional claims—new criminal justice thinking for courts—on which “the fundamental rights of prisoners can be . . . bounded by higher law,” rather than “the contingent product of local policy trends.”

*Getting Situated: Actors, Institutions, and Ideology*

One of the most fertile aspects of this collection is the robust conversation it introduces between sociology, criminology, and legal theory. Many of the essays draw on multiple fields, but the three pieces in this
section take the interdisciplinary challenge head on. They reveal how sophisticated insights from sociology, social psychology, institutional theory, and critical race theory can deeply enrich our understanding—both theoretical and applied—of how the criminal system actually functions.

Mona Lynch offers what she calls a “social psychology of criminal procedure.” The term challenges us to understand local criminal justice processes and their outputs in a multivariate way: by considering individual “situated” actors, their institutional contexts, and the ways that rules engage, constrain, and are interpreted by both individuals and institutions. Drawing from sociology, social psychology, and structural legal analysis, Lynch proposes a dynamic model for understanding “local criminal justice systems (and the criminal justice actors and workgroups that people them) [as] hubs that translate and put into motion formal legal change to produce punishment outcomes.” By way of example, she dissects a case study on racially disproportionate felony charging practices in Cleveland, Ohio, from the late 1980s until 2009. Lynch argues that in order to fully understand how the criminal process operates, we would need to unpack the specific individual, organizational, and cultural dynamics that produced those felony convictions: “How did the drug paraphernalia felony arrest policy get conceived of, enacted, and routinized . . . ? Why did prosecutors . . . take action to ratify those arrests as felony charges? Why was the practice so resistant to change even after its racially disparate impacts were made clear to system actors?” Such thick descriptions are critical as we rethink the system’s institutional commitment to mass incarceration. “[A] full understanding of criminal justice practices,” Lynch concludes, “requires fleshing out those fundamental human processes as they are shaped by the specific conditions that comprise the constituent organizations as complex social spaces.”

Priscilla Ocen responds by applying Lynch’s model to recent events in Ferguson, Missouri, and to the problem of discretionary racism more generally. She asks how a social psychology of criminal procedure might help us understand the situated and influential role of race for all the actors that make up the criminal justice drama, including not only police and prosecutors, but also local residents. Ocen argues that the “situated actor” model should take a page from critical race theory (CRT) and in-
clude the historical and “macro-institutional dynamics” of race, because “individuals and institutions [in the criminal system] operate in particular political and historical contexts that are deeply racialized.” Specifically, Ocen reminds us that “many of the institutions that comprise the criminal justice system have historically been deployed to contain the ‘threat’ presented by non-whites, the poor, and other marginalized groups.” This history still inflects the many assumptions, inferences and decisions that go into police and prosecutorial decision-making. Ocen also points out that the subjects of the criminal system are themselves situated actors, whose interpretations and operationalization of criminal rules and norms should also be accounted for in empirically rich ways. Ultimately, Ocen argues that Lynch’s model and CRT would each gain much from thoughtful engagement with the insights of the other. As she puts it, “Lynch’s model can provide an empirical basis for theoretical claims advanced by CRT . . . [including the] claim that race and racism are foundational aspects of the modern criminal justice system. On the other hand, . . . Lynch’s model can incorporate some of the normative and methodological insights of CRT. Specifically, . . . the model can engage CRT’s normative claim that race and law are mutually constitutive; that law constructs and reinforces racial inequality.”

Like Lynch, Issa Kohler-Hausmann calls for a thicker understanding of the criminal system. She cautions us against the framework of surprise, in which we waste precious time dissecting the “surprising” fact that “law in action” diverges from “law on the books.” Instead, she reminds us that law is a situated phenomenon, one that can never be fully explained or encompassed by its rules. Rather, “[t]he actors populating living criminal justice systems are working with (or under) all types of legal rules—those detailing proscribed behavior and authorized sanctions, those conferring powers and capacities, those defining roles and statuses, and many others difficult to categorize.” To understand what law does, “we want to ask what exactly the frontline legal actors are doing with legal rules and how they interpolate them into an ongoing course of meaningful (although not necessarily beneficial) social action.” Kohler-Hausmann then brings this question to two exemplary contexts discussed in the first section: the determinate sentencing/mandatory minimum regime (Barkow), and the lack of attention to individual guilt in low-level misdemeanor courts (Natapoff). In each example, she shows how practices diverge from legal
mandates in significant and revealing ways that can be fully grasped only by examining the actual operations, histories, and outcomes of the process. Kohler-Hausmann concludes that “we must understand the particular commitments, constraints, and conceptualizations of current legal actors working with the rules we hope to change if we wish to change the outcomes produced by those rules.”

**Humanizing the Question**

As Stephanos Bibas reminds us in the first section, the criminal system has moral, not just instrumental aspirations. Here, Jonathan Simon argues that whatever our moral commitments have been in the past, going forward, the modern criminal system should adopt the value of dignity as its governing ideal. Simon argues that the legality principle—once a primary engine for strengthening the criminal system’s democratic legitimacy—has exhausted its sociological and jurisprudential power. Surveying 150 years of criminal legal commitments, Simon shows how the legality principle rose to prominence as a vehicle for reform and accountability, and then fell under pressure from mass incarceration and institutional racism. He concludes that, “with the proliferation of harsh criminal laws, even the demand for formal legality has become a weapon of the strong to streamline conviction and harden punishment.” Accordingly, we need to supplement the legality principle with a dignity principle, “an increasingly prominent value in legal systems internationally since the middle of the 20th century.” Simon traces the quiet development of various forms of dignity in Supreme Court jurisprudence, from police procedure to prison conditions, determinate sentencing, and mental health. He ends with a call to action: “the great banner reading ‘nulla poena sine lege’ must now be, not lowered, but joined by another banner of ‘no crime and no punishment without respect for human dignity.’”

In response, Jeff Fagan takes Simon’s project a step further by exploring the emotional dimensions of individual interactions with state actors. It is a step fueled by Fagan’s own work in procedural justice in which he, along with Tom Tyler and others, examines the procedural legitimacy of legal institutions and how certain forms of official treatment are more or less likely to incline citizens to respect the state’s author-
ity. In this essay, Fagan considers the dignitary implications of official maltreatment, focusing in particular on the dignity-injuring potential of unjustified, racially motivated, or otherwise abusive police stops. Such interactions not only personally humiliate, but they also deny the targeted individuals “basic and essential recognition” as social and political equals, instilling instead “a profound sense of loss.” In line with Simon's vision, Fagan calls for a jurisprudence that “recognizes the emotional highway between dignity and legitimacy.” This approach would “internalize[] the central role of dignity and respect to regulate the relations between citizens and criminal legal actors,” and condemn the “everyday indignities” inflicted even by officers whose conduct is “perfectly compliant with constitutional requirements.”

The New (Old) Criminal Justice Thinking

Mariana Valverde wraps up the collection with a historical overview of the discourses that got us here in the first place. She explains that modern criminology has its roots in a long tradition of what she calls “miserology,” the study of that “hybrid of moral degradation, physical ill health, spatial marginality, and collective despair . . . found among the new urban proletariat.” It is an illustrious history, spanning Engels’s focus on the “nameless misery” of British factory workers, great 19th-century novelists like Charles Dickens and Victor Hugo, Christian anti-poverty activism, modern welfare dependency discourse, and even The Wire. But criminology, like much of criminal theory, has lost touch with those deeply situated inquiries. Valverde points to the mid-20th century as a moment of schism between the professional study of crime and crime rates—what we now call criminology—and the study of housing, alcoholism, public health, mental health, and other poverty-related phenomena. But the early miserologists were engaged in a project that looks cutting-edge today; among other things, they recognized the role of criminogenic social conditions, understood crime as just one facet of a larger social reform project, and developed ideas about “spatialization.” Valverde concludes that “further research in the intellectual history of criminology may well restore the social reformers, philanthropists, socialists, journalists, and assorted organic intellectuals of the 1830s and 1840s to their proper place as the pioneers of criminology.”
We thought Valverde’s essay—particularly her interest in de-centering crime—was an apt conclusion to a collection that in many ways seeks to do just that. Each author, in his or her own fashion, invites us to transcend the narrow framework of “crime” and “criminal” and to think in an institutionally, socially, and empirically situated way about what the criminal system does, how it does it, and to whom. Indeed, Valverde made us wonder whether Black Lives Matter might not itself be a new and timely iteration of “miserology,” a call to recognize the pain and lived experiences of those most burdened by the criminal system. In many ways, this demand for a more just and equitable criminal process captures something profound about the current historical moment, in which the criminal system of the 21st-century United States has become a primary battleground for civil rights and social justice. The essays in this collection not only make sense of this terrain, but the conceptual tools they offer will, we believe, help point the way toward meaningful change.

NOTES
5 Am. Civil Liberties Union, The War on Marijuana in Black and White 40 (June 2013).
6 See Sharon Dolovich, Two Models of the Prison: Accidental Humanity and Hyper-masculinity in the LA County Jail, 102 J. Crim. L. & Criminology 965, 992–


9 See Wayne Logan, Informal Collateral Consequences, 88 Wash. L. Rev. 1103 (2013); see also National Inventory of the Collateral Consequences of Conviction at www.abacollateralconsequences.org (national database documenting over 38,000 formal collateral consequences).


11 See Dolovich, Incarceration American-Style, supra note 6.

12 See Bruce Western & Becky Pettit, Incarceration & Social Inequality, Daedalus (Summer 2010) 8 (explaining that prisoners have collectively become “a group of social outcasts,” whose “[s]ocial and economic disadvantage, crystallizing in penal confinement, is sustained over the life course”).


14 E.g., ACLU, War on Marijuana in Black and White, supra note 5.


17 See, e.g., Lisa Kerr, this volume (describing how imprisoned mothers lose custody of their newborn infants at the discretion of prison officials).


25 Id. at 147.