ELIMINATING CRIMINAL LAW

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INTRODUCTION

The United States Code creates over 3,000 federal crimes.[1] States and localities maintain countless statutes and ordinances that empower police to make arrests, prosecutors to bring charges, and courts to impose punishments. Nearly two million people in the U.S. are imprisoned and nearly four million people are on parole or probation.[2] The U.S. prison population increased from 93 people in prison per 100,000 in 1972 to a high of about 536 per 100,000 in 2008,[3] and people of color are numerically overrepresented behind bars.[4]

There's a cross-ideological consensus that the U.S. "criminal justice system"—if it can be called that[5]—faces a legitimacy "crisis."[6] The causes and precise nature of this crisis are disputed.[7] But it's common ground that

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1. The Department of Justice in 1982 "produced only an educated estimate" of "about 3,000 criminal offenses." Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920; s*ee also* Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170, 176 (2011) (cautioning that "[n]o one has been able to come up with a reliable count of the number of federal crimes that are on the books"); Gamble v. United States, 587 U.S. 678, 759 n.98 (2019) (Gorsuch, J., dissenting) ("There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes.").

2. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html.

3. *See, e.g.*, JOHN P. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN ERA OF COLORBLINDNESS (2011); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); PETER ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD (2016).

4. *See* Leah Wang et al., *Beyond the Count: A Deep Dive Into State Prison Populations*, PRISON POL'Y INITIATIVE (Apr. 2022), https://www.prisonpolicy.org/reports/beyondthecount.html.

5. *See* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 902 (2023) (explaining that critics of the phrase "criminal justice system" claim that it is "a failure as a descriptive matter" and engaging as well "the larger normative question of whether the system (which is not a single system) is even supposed to do justice, or whether its true purpose is something else.").

6. *See, e.g.*, Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1951 (2019) (describing and critiquing "crisis" rhetoric) [hereinafter Ristroph, *Intellectual History*]; Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1367 (2016) ("It is widely recognized that the American criminal system is in a state of crisis . . . ."); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1446 (2015) (contending that "the crisis in criminal justice stems more from legal police conduct than illegal police misconduct.").

7. Ristroph, *supra* note 6.

criminal law is part of the problem. There's too much criminal law;[8] criminal law isn't what it used to be;[9] criminal law isn't performing its proper functions, or at a minimum could perform its functions more effectively.[10] Leading criminal-law scholars contend that we need a theory of the nature and limits of criminal law to address "overcriminalization."[11]

I contend that we should not use the concept of criminal law to think or talk about U.S. criminal systems at all.[12] Eliminating criminal law will enable us to better understand how the U.S. creates crimes and criminals; describe U.S. criminal systems to laypeople; and evaluate those criminal systems. It will also create more space to question whether any criminal systems can be justified.

Discussions of "criminal law" often occlude the reality that no single set of rules governs what in the United States is labeled a crime and who is considered a criminal. Criminal-law exceptionalism[13]—a group of oft-advanced claims about what makes criminal law different from other kinds of law—fails as description. Nor is *the* criminal law—the definitive article connoting a unified and coherent structure[14]—an ideal for which we can strive while minding the gap between is and ought. "It" is a confusing tangle of is and ought, real and ideal. In this uncertain state, *the* criminal law continues to organize American textbooks and curricula; engender optimism about U.S. criminal-justice reform; and marginalize calls for systemic transformation.

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8. *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008); Ellen S. Podgor, *Symposium, Foreword, Overcriminalization 2.0: Developing Consensus Solutions*, 7 J.L. ECON. & POL'Y 565, 565 (2011); Symposium, *Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525 (2012).

9. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012).

10. *See, e.g.*, Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2015); Sandra G. Mayson, *The Concept of Criminal Law*, 129 HARV. L. REV. 1485 (2015).

11. *See, e.g.*, R.A. DUFF, THE REALM OF CRIMINAL LAW 1-2 (2018); HUSAK, *supra* note 8; Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2004).

12. For reasons that will soon become clear, I believe that "justice" and even "legal" concede too much. I'm sensitive to concerns about "system" talk. *See* Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421-22 (2018); Sara Mayeux, *The Idea of "The Criminal Justice System"*, 45 AM. J. CRIM. L. 55, 65 (2018). But I ultimately opt for the term because the creation of crimes and criminals does take place through organized methods and frameworks. The plural indicates their diversity.

13. *See* Ristroph, *supra* note 6, at 1953 (coining the phrase); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381 (2022).

14. *See* Alice Ristroph, *The Definitive Article*, 68 U. TORONTO L.J. 140 (2018). Because it is possible to reject this structure without rejecting the concept of criminal law and because Ristroph does precisely that, I will use and emphasize the definitive article when referring to the structure.

A growing body of skeptical literature questions criminal-law exceptionalism and critiques the influence of *the* criminal law. One response—pioneered by Alice Ristroph—is to drop the definitive article and check our jurisprudential assumptions.[15] Not "the criminal law," but "criminal laws," or "the law of crimes,"[16] understood in accordance with a positivist theory of law which (1) treats crimes and criminals as having been created rather than discovered by the state and (2) doesn't convey unity or coherence. Another response is to analyze criminal law as a species of a broader genus of governance.[17] We could treat criminal law as a species of *criminalisation*[18]—a mode of governance which consists in various enactments, institutions, processes, and practices through which crimes and criminals are created, investigated, prosecuted, and punished.

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15. *See id*.; Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563 (2018) [hereinafter Ristroph, *Farewell to the Felonry*]; Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305 (2018); Alice Ristroph, *Criminal Law as Public Ordering*, 70 U. TORONTO L.J. 64 (2020) [hereinafter Ristroph, *Public Ordering*]; Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020) [hereinafter Ristroph, *Carceral Curriculum*]; Alice Ristroph, *Criminal Theory and Critical Theory: Husak in the Age of Abolition*, 41 L. & PHIL. 243 (2022).

16. *See* Ristroph, *supra* note 14, at 141.

17. *See, e.g.*, VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE (2018); Vincent Chiao, *What is the Criminal Law for?*, 35 L. & PHIL. 137 (2016); Malcolm Thorburn, *Criminal Law as Public Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R. A. Duff & Stuart P. Green eds., 2011).

18. U.S. readers are likely to find this spelling unusual. Criminalisation is a theoretical development that began outside of the United States and the spelling choice is intended to alert readers both to the fact of these origins and the importance of reckoning with the literature. *See, e.g.*, Nicola Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 MOD. L. REV. 936 (2009); NICOLA LACEY, REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW (2009); David Brown, *Criminalisation and Normative Theory*, 25 CURRENT ISSUES CRIM. JUST. 605 (2013); Luke J. McNamara, *Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform*, *in* CRIMINALISATION AND CRIMINAL RESPONSIBILITY IN AUSTRALIA 33-51 (2015) (Thomas Crofts & Arlie Loughnan, eds., 2015); Luke McNamara et al., *Theorizing Criminalisation: The Value of a Modalities Approach*, 7 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY 91(2018).

I press beyond these skeptical critiques by drawing upon a growing *eliminativist* literature in jurisprudence.[19] This literature questions the need for (and likelihood of) settling debates about the nature of law. I argue for eliminating criminal law from our conceptual inventory, on the ground that it is not only unnecessary but potentially harmful. The concept of criminalisation enables us to more accurately describe existing criminal systems. Deliberation concerning how those systems ought to operate, and even whether they ought to exist at all, is the stuff of political theory. Whether one conceptualizes the latter work as "normative criminalisation" or something else is less important than that it is not conceptualized as criminal law.

Part I describes *the* criminal law in modern Anglo-American criminal law scholarship.[20] It focuses on claims that *the* criminal law is exceptional, contending that criminal-law exceptionalism misdescribes criminal systems and confers unwarranted legitimacy upon them. Part II details how *the* criminal law emerged as an uncertain mixture of descriptive and normative claims and is taken seriously as description today. It engages and critiques Ristroph's call to eliminate *the* criminal law and to conceptualize criminal laws along positivist lines.

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19. *See e.g.*, Lewis A. Kornhauser, *Doing Without the Concept of Law* (N.Y.U. Sch. L. Pub. L. Rsch. Paper, Paper No. 15-33, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2640605; Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2016); Hillary Nye, *The One-System View and* Dworkin's *Anti-Archimedean Eliminativism*, 40 L. & PHIL. 247 (2021) [hereinafter Nye, *The One-System View*]; Hillary Nye, *Does Law 'Exist'? Eliminativism in Legal Philosophy*, 15 WASH. U. JURIS. REV. 29 (2022) [hereinafter Nye, *Does Law Exist?*]. For a critical summary of this literature, see Michael S. Green, *The New Eliminativism*, JOTWELL (Jan. 18, 2016), https://juris.jotwell.com/the-new-eliminativism; *see also* Dan Priel, *Law as a Social Construction and Conceptual Legal Theory*, 38 L. & PHIL. 267, 286 (2019) (denying that "what is law?" can be a "conceptual, morally-neutral inquiry" and contending that "answers to it will depend on arguments from political theory as well as on facts"); Alice Ristroph, *Is Law?*, 25 CONST. COMMENT. 431, 451 (2008) (questioning whether there exists in the U.S. a "common rule of recognition toward which judges and other officials take an internal points of view"); Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as a Super-Legislature*, 66 HASTINGS L.J. 1601 (2014) (denything that there is such a rule).

20. I acknowledge that "Anglo-American" is an imprecise term. *See* Markus D. Dubber & Lindsay Farmer, *Introduction: Regarding Criminal Law Historically*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 6 (2007) ("Though a convenient shorthand, this term may be taken to suggest an identity between the laws of England and the United States on the basis of their common law roots and a certain affinity between the concepts of criminal liability. However, the precise nature of this affinity is rarely subject to analysis, and subsequent divergences in the uses of criminal law as a tool of certain governmental practices are ignored."). All of the descriptive claims that I make in this Article apply only to U.S. criminal systems. This limitation of scope should not be construed as implying anything other than my lack of knowledge of other systems and the history and present state of academic and political discourse around them.

Part III introduces eliminativism, explaining its motivations and sketching an initial case for an eliminativist approach to criminal systems. Parts IV and V advance affirmative arguments for eliminating criminal law and viewing criminal systems through the lens of criminalisation. Part VI clarifies the limits of these arguments. Part VII concludes.

I. WHAT IS *THE* CRIMINAL LAW?

The criminal law is a two-part structure. The first, "general" part is concerned with principles that govern the definition, prosecution, and punishment of all criminal offenses; the "special" part focuses on the content of particular offenses.[21] In popularizing this structure, British criminal-law scholar Glanville Williams[22] borrowed from continental legal systems which—as John Gardner observes—often "carry [the two-part structure] on the face of their criminal codes."[23] But the structure was intended and received as a normative framework for reform, not as a description of a particular jurisdiction's laws. Thus, Gardner explains that the "unruly special part" was, for Williams, to be "subject[ed] to the disciplined governance of a more expansive, more exacting, and indeed more general part."[24]

The criminal law is also different from other law — "exceptional" is the preferred adjective. Criminal-law exceptionalism is best regarded as a cluster of conventional claims rather than parts of a widely shared theory. I'll borrow a tripartite categorization scheme encompassing *burdens*, *subject-matter*, and *operational* exceptionalism from Alice Ristroph.[25] I'll then add two more exceptionalisms: *historical* exceptionalism and *functional* exceptionalism.

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21. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 30-35 (1993); HUSAK, *supra* note 8, at 63-65.

22. *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (1953).

23. John Gardner, *On the General Part of Criminal Law*, *in* PHILOSOPHY AND THE CRIMINAL LAW 205 (R.A. Duff ed., 1998).

24. *Id.* at 206.

25. *See* Ristroph, *supra* note 6, at 1952-53. Ristroph distinguishes "historical exceptionalism" on the ground that it doesn't pick out something distinctive about what *the* criminal law is. *Id.* As she acknowledges, however, historical exceptionalism is invoked to support arguments that *the* criminal law has descriptive value as well as to support normative arguments for reform that are predicated upon that descriptive value. *See id.* at 1953 ("Alongside the descriptive claim is usually a normative assessment that things have changed for the worse, and very much so . . . . America went from a just and functional system of criminal law into an unjust and dysfunctional one."). Thus, I include it here.

Burdens exceptionalism is the least controversial. It is generally acknowledged that *the* criminal law tends to be exceptionally burdensome.[26] True, civil custody rules can separate a person from their family, unpaid civil fines can result in detention, and an adverse tort judgment may result in financial ruin. But *the* criminal law inflicts pains and imposes penalties that greatly differ in degree (if not in kind) from anything else that the state does to people. Imprisonment, death, and "collateral consequences"[27] that exclude people convicted of crimes from the franchise, the jury, and licensed professions "express[] …. . . the community's hatred, fear, or contempt *for the convict*"[28] in distinctive ways. Under the U.S. Constitution, reasonable suspicion of criminal activity authorizes state actors to forcibly search and seize;[29] probable cause empowers state actors to arrest and jail, even for a crime that isn't punishable by imprisonment.[30]

By the lights of any political theory which demands that state power be justified *to* individuals, such fearsome exercises of power *over* individuals present a legitimacy problem.[31] The other exceptionalisms can be seen as a response to this legitimacy problem. *Yes, criminal sanctions are exceptionally burdensome, but they are (or ought to be) addressed to exceptional subject matter and their operation is (or ought to be) exceptionally constrained by legal principles that ensure that they are imposed only when necessary.*

It is hard to distinguish between the descriptive and normative components of criminal-law exceptionalisms. Subject-matter exceptionalism includes descriptive claims that the conduct targeted by *the* criminal law is exceptionally harmful and normative claims that the law

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26. *See id.* (describing this as a "standard point of departure"); Levin, *supra* note 13, at 1392 ("Criminal law scholars frequently rely on burdens exceptionalism in defining criminal law and distinguishing it from other sanctions or regulatory regimes….[B]urdens exceptionalism stands as a common feature of judicial treatments of the criminal system.").

27. *See generally* ALEXANDER, *supra* note 3; DEVAH PAGER: MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007).

28. Henry M. Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 405 (1958); *see also* Joel Feinberg, *The Expression Function of Punishment*, 49 THE MONIST 397, 402 (1965) (arguing that although Hart stressed the moment of sentencing, "in many cases . . . the unpleasant treatment itself expresses the condemnation").

29. *See* Terry v. Ohio, 392 U.S. 1 (1968).

30. *See* Atwater v. Lago Vista, 532 U.S. 318 (2001).

31. *See, e.g.*, Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. L. REV. 307, 312 n.11 (2004); Markus D. Dubber, *Legitimating Penal Law*, 28 CARDOZO L. REV. 2597 (2007). Although this legitimation problem is frequently described as a "liberal" one, there seems no compelling reason to cabin its scope in this way unless one is seeking to identify the ideological context in which it originally emerged. A commitment to liberalism isn't a precondition for political-moral concern about the creation and punishment of crime. For a classic Marxist critique of the legitimacy of punishment under capitalism, see Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973).

ought to target exceptional harms.[32] One example is Herbert Wechsler's 1952 claim that criminal law "is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions."[33] Wechsler didn't say that *all* criminal laws address the "deepest injuries." But he surely meant that *some* address those injuries; he made plain that criminal law's normative "importance to society" was a function of this subject-matter focus.

Operational exceptionalism is similarly a descriptive-normative tangle. Its proponents hold that *the* criminal law's content, enforcement, and adjudication is limited in ways that other law is not.[34] Principles of legality that fall within the general part—e.g., no punishment absent violation of existing law, innocent until proven guilty, fair notice—ensure that its exceptional burdens are addressed only to exceptional subject matter, through means that are exceptionally protective of the individual. No one seriously maintains that criminal systems are always so limited in practice. But these limits are still framed as important components of *existing* criminal law that can serve as the basis for internal critiques of criminal systems that fail to conform to them.[35]

Newer to the scene is a fourth exceptionalism that distinguishes *the* criminal law past from present. What Ristroph calls "historical exceptionalism" encompasses claims that *the* criminal law is facing a crisis *today* because of semi-recent developments.[36] For example, William Stuntz's *The Collapse of Criminal Justice* traces the eponymous collapse to the mid-20th century.[37] He contends that "[f]or much of American history—. . . outside the South—criminal justice institutions punished sparingly, mostly avoided the worst forms of discrimination, controlled crime effectively, and, for the most part, treated those whom the system targets fairly."[38] The collapse was precipitated by the rise of plea bargaining and the expansion of substantive criminal law.[39] Stuntz attributes these developments to backlash against Supreme Court decisions constraining the

32. Ristroph, *supra* note 6, at 1983.
33. *See* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L REV. 1097, 1098 (1952).
34. Ristroph, *supra* note 6, at 1954.
35. *See, e.g.*, HUSAK, *supra* note 8, at 65 (averring that "positive law itself involves a commitment to two constraints on the scope of the criminal law . . . the *nontrivial harm or evil* constraint and the *wrongfulness* constraint" and using these principles to critique overcriminalization).
36. Ristroph, *supra* note 6, at 1953.
37. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).
38. *Id.* at 2.
39. *See id.* at 235-63.

police and strengthening trial rights.[40] And his prescriptions are framed as a return to historical criminal-law norms whereby "residents of poor city neighborhoods"[41] had more democratic control over police and prosecutors and "[p]roof of criminal intent meant proof of moral fault, not just the intent to carry out one's physical actions."[42]

Fifth and finally, we have what can be called *functional* exceptionalism. These are claims that *the* criminal law is uniquely capable of performing a normatively desirable political function. Thus, homicide, rape, and robbery might be crimes not just because they are harmful but also (as Anthony Duff has argued) because they require collective condemnation in the public's name—and *only* criminal sanctions can thus condemn.[43] Those who advance functional-exceptionalist claims acknowledge that criminal sanctions are often imposed on conduct that doesn't implicate the function they identify. But they don't view this is-ought gap as a refutation; they call for reform.[44]

Apart from burdens exceptionalism, all of these exceptionalisms reinforce the legitimacy of existing criminal systems. As descriptions of those systems, exceptionalisms suggest that exceptional burdens are imposed on exceptionally harmful conduct; perform exceptionally valuable functions; and operate in ways that are appropriately tailored to that conduct and those functions. As prescriptions for reforming criminal systems, exceptionalisms imply that exceptional burdens *can in fact* be appropriately tailored to exceptional harms and perform exceptionally valuable functions.

These legitimating effects make it especially important to question whether actual criminal systems have ever looked like *the* criminal law. We can describe entities without affirming their existence. Thus, we can describe Sherlock Holmes as a bachelor without affirming that he was ever a living, breathing, consulting detective. But this isn't how proponents of criminal-law exceptionalism tend to speak. When Sanford Kadish, Stephen Schulhofer, and Rachel Barkow affirm that the principle *nulla poena sine lege*—no punishment without law—is "[o]ne of the most ancient and widely

40. *See id.* at 216-44.

41. *See id.* at 7. Stuntz calls for the restoration of "local democracy" via a number of mechanisms, including "community policing" whereby "urban police meet with, consult with, and listen to residents of high-crime city neighborhoods," *id.* at 288, and neighborhood-based jury selection, *id.* at 305.

42. *See id.* at 140. Stuntz proposes that courts "reestablish the older concept of *mens rea*: requiring that, save when legislators expressly impose strict liability, proof of a 'guilty mind' or 'criminal intent' … is present in every case." *Id.* at 303.

43. *See* DUFF, *supra* note 11; R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007); R.A. Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217 (2014).

44. *See* R.A. Duff, *A Criminal Law We Can Call Our Own?*, 111 NW. U. L. REV. 1491 (2016); Mayson, *supra* note 10.

repeated doctrines of the criminal law," they're treating *the* criminal law as a political-institutional reality in the U.S., not a fiction.[45]

It is worth dissolving the connection between *the* criminal law's status as law and criminal-law exceptionalism to see why they *needn't* be tightly linked. All we need is a dose of positivism. On H.L.A. Hart's dominant account of positivism, law consists in a combination of social-institutional and psychological phenomena—primary rules governing conduct, secondary rules governing legal change, adjudication, and recognition, and convergence around a perceived obligation to follow the rules.[46] Those phenomena would have to be present in a given jurisdiction for a criminal label to be applied *lawfully*. But standing alone, they wouldn't make criminal law exceptional. A statute that makes it a misdemeanor for a front-seat passenger to fail to wear a seatbelt certainly isn't focused on exceptional harms. If it satisfies the jurisdiction's secondary rules, however, it is *a* criminal law by positivist lights.[47]

The criminal law did *not*, however, develop along Hartian positivist lines. Those who played a leading role in that development claimed that the identification of particular offenses as crimes and the labelling of particular people as criminals to some extent is, and to some extent ought to be, part of a distinctive legal system. Such claims remain influential today.

II. *IS* THE CRIMINAL LAW?[48]

The unsavory origins of a concept, institution, value, or insight ought not be considered conclusive against its truth or merits.[49] But neither should origins be dismissed as irrelevant, particularly when they seem to explain

45. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 160 (10th ed. 2017).

46. *See* H.L.A. HART, THE CONCEPT OF LAW 82-88, 155 (Joseph Raz, Leslie Green & Penelope A. Bulloch eds., 2012). For a summary of Hart's theory, see Brian Leiter, *Back to Hart*, 2021 ANNALS FAC. L. BELGRADE INT'L ED. 749 (2021).

47. *See* Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 152 (2020) (arguing that "[s]uch offenses expand the power of the state to criminalize large numbers of people for common, rarely culpable, often harmless conduct, and they confer vast discretion on police to aim that carceral power in racially disproportionate ways."). On the outsized and underappreciated role that misdemeanors play in U.S. criminal systems, *see generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2023).

48. *See* Alice Ristroph, *Is Law?*, 25 CONST. COMMENT. 431 (2008).

49. On the "genetic fallacy," *see* Amia Srinivasan, *The Archimedean Urge*, 29 PHIL. PERSPS. 325 (2015); Margaret A. Crouch, *A Limited Defense of the Genetic Fallac*y, 24 METAPHILOSOPHY 227 (1998). For example, the truth of German physicist Werner von Heisenberg's pathbreaking insights into quantum mechanics doesn't depend upon whether Heisenberg acquitted himself ethically under the Nazi regime. *See generally* DAVID C. CASSIDY, THE LIFE AND CERTAINTY OF QUANTUM MECHANICS (1993).

the concept's use over time.[50] This appears to be the case with *the* criminal law.

Lindsay Farmer traces *the* criminal law to William Blackstone, whose *Commentaries on the Laws of England*[51] made a "clear break from older conceptions of the law of crimes."[52] In place of a panoply of different courts handling different offenses pursuant to different procedures, Blackstone offered a "concise account of the law as a body of rules unified by a common aim and conceptual structure."[53] What unified *the* criminal law was the concept of the public wrong.[54] The public-wrong theory held that crimes were not merely violations of the law of nature but threats to the state, which derived its legitimacy from protecting people against violations of the law of nature.[55]

Blackstone may have believed that his public-wrong theory described the real world. We have reason to doubt, however, that Blackstone happened upon this theory *because* of its descriptive power. Drawing upon Mary Douglas's work on institutions and what sorts of beliefs about them are important to their establishment and persistence,[56] Farmer points out that the appearance of contingency undermines, and the appearance of necessity strengthens.[57] Framing the criminal law as a guarantor of the law of nature justified the state's monopolization of it *and* Blackstone's project of organization.[58]

Now, Blackstone *didn't* deny the label of law to criminal statutes that failed to fit his public-wrong theory. The "multitude of sanguinary laws" that Parliament enacted in the late-nineteenth century were unjust because disproportionately severe, but they were still *laws.*[59] Still, that didn't prevent his *Commentaries* from encouraging a conception of *the* criminal law that was sensitive to the substance of what was labeled a crime. For example, Blackstone's distinction between crimes punishable in a state of nature (*mala in se*) and punishable only because of legislative enactment (*malum*

50. For defenses of the normative relevance of genealogy, see for example Brian Leiter, *Morality in the Pejorative Sense: On the Logic of Nietzsche's Critique of Morality*, 2 BRIT. J. FOR HIST. PHIL. 113 (1995), Christoph Schuringa, *Nietzsche's Genealogical Histories and His Project of Revaluation*, 31 HIST. PHIL. Q. 249 (2014), and COLIN KOOPMAN, GENEALOGY AS CRITIQUE: FOUCAULT AND THE PROBLEMS OF MODERNITY (2013).

51. *See generally* BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1st ed. 1765-69).

52. LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER 66 (2016).

53. *Id.*

54. *Id.* at 66-71.

55. *Id.* at 73.

56. *See generally* MARY DOUGLAS, HOW INSTITUTIONS THINK (1986).

57. *See* FARMER, *supra* note 52, at 142.

58. *See id.* at 54-55.

59. BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 16 (1st ed. 1765-69).

prohibitum) was later received as a distinction between core and marginal crimes.[60]

Whatever the descriptive merits of Blackstone's project, U.S. criminal systems could never be accurately described as "a body of rules unified by a common aim and conceptual structure." Markus Dubber has documented the U.S. embrace of the "police power"—a comprehensive, hierarchical, and discretionary mode of governance acknowledged by Blackstone and "defined by its very undefinability."[61] This mode of governance included the power to define and punish crimes, not in the service of a distinctive criminal function but as a means to the end of all policing—that is, "safeguard[ing]and maximiz[ing] the public welfare."[62] The police power is in pronounced tension with the post-Enlightenment insistence that "punishment [w]as an instance of state power that was in particularly dire need of legitimation."[63] But Dubber finds that this tension was never confronted in earnest, with the result that U.S. criminal systems have been predominantly policing systems—"discretionary, undefinable, and ultimately alegitimate."[64]

Even if one rejects these genealogies or considers them irrelevant, a unified, structured entity termed *the* criminal law remains a fixture in American pedagogy despite a tenuous connection to reality. Consider that Jerome Michael and Herbert Wechsler in their influential 1940 casebook devoted hundreds of pages to homicide.[65] Why?

Certainly not because homicide was a representative offense in respect to its incidence or coverage in criminal codes. Ristroph writes that for decades leading up to the publication of the casebook, criminal sanctions had in the U.S. been expanding into new areas, including "crimes against government; regulation of business; banking and finance; food, drug, and liquor regulation; and automobile regulation."[66] And Anders Walker describes how the authors were "convinced that the so-called 'Langdellian method' had contributed to the Supreme Court's destruction of early New

60. *See* FARMER, *supra* note 52, at 109-10.

61. Markus D. Dubber, *Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, *supra* note 17, at 95. *See generally* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE ORIGINS OF AMERICAN GOVERNMENT (2005); THE DUAL PENAL STATE: THE CRISIS OF CRIMINAL LAW IN COMPARATIVE-HISTORICAL PERSPECTIVE (2018).

62. Dubber, *supra* note 61, at 94-95.

63. *Id.* at 94.

64. *Id.* at 105.

65. *See* JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940). Ristroph, *Carceral Curriculum*, *supra* note 15, at 1644-45, 1645 n.65.

66. Ristroph, *Carceral Curriculum*, *supra* note 15, at 1668 n.172.

Deal programs by fostering a view of the law as a 'closed-system.'"[67] The solution, in the authors' words: "[A] method which emphasizes general normative ideas rather than specific legal rules."[68] Those normative ideas were rationalist and utilitarian, anticipating the Model Penal Code that Wechsler played a principal role in drafting.[69]

All well and good, one might think, so long as the normative premises are clearly stated; a useful descriptive map is provided; and readers are given space to challenge the premises on the basis of the map. But that's not what happened. Ristroph highlights the entire absence of race from the Michael-Wechsler casebook. This absence is especially notable because the authors discuss the crime of vagrancy, which has historically been used as a means of racialized social control.[70] More generally, *substantive* criminal law specifying the content of offenses—the special part—was presented as color-blind and enforcement was pushed outside the frame, thus obviating the need to engage with racialized policing and prosecution and the challenges that they might present to the authors' normative project.[71]

Subject-matter and operational exceptionalism transcend era and ideology. Thus, the fourth edition of Cynthia Lee and Angela Harris's *Criminal Law: Cases and Materials*, published in 2019, begins with nearly 150 pages detailing "Basic Principles of the Criminal Law" and "Constitutional Limitations on the Power to Punish."[72] These are followed by just over 100 pages on act and mental-state requirements that (the reader gathers) structure and constrain all crime and punishment.[73] When one reaches substantive offenses, the first two are "Criminal Homicide" and "Sexual Offenses" which together span roughly 250 pages.[74] The remaining category of substantive offenses, "Theft Offenses," covers less than 50.[75] Tellingly, the book is advertised as "provid[ing] the reader with both critical

67. *See* Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 219 (2009). On Langdell's case-centered method, see Catherine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 585 (2010) (explaining that "Langdell was emphatic in describing his work as legal science[]" and maintained that "our approach to law should be both rigorous and systematic.").

68. MICHAEL & WECHSLER, *supra* note 65, at 3.

69. *See* Walker, *supra* note 67, at 237.

70. Ristroph, *Carceral Curriculum*, *supra* note 15, at 1646 n.170. *See generally* RISA GOLUBOFF, VAGRANT NATION (2016); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2007); THEODORE BRATNER WILSON, THE BLACK CODES OF THE SOUTH (1966).

71. Ristroph, *Carceral Curriculum*, *supra* note 15, at 1651.

72. *See* CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 1-147 (4th ed. 2019).

73. *Id.* at 147-253.

74. *Id.* at 319-573.

75. *Id.* at 573-603.

race and critical feminist theory perspectives on criminal law *while following a traditional format*."[76] Even as it occasionally questions *the* criminal law, the casebook's structure reproduces it.[77]

In scholarship, too, *the* criminal law can be difficult to pin down as either real, ideal, or something in between. Consider this striking passage from Douglas Husak's provocative "Is the Criminal Law Important?"

> I am frequently asked how the law will respond to a person who uses or sells small quantities of drugs, especially marijuana. How will the criminal law deal with this individual? This question is simple and straightforward. Approximately 15 million Americans use illicit drugs on a regular basis, and undergraduates are at or near the age of peak consumption. I am sure that virtually all of my students are acquainted with someone who smokes marijuana. Many of these users occasionally sell drugs. Despite the prevalence of these behaviors and the frequency with which I am asked about them, I am forced to admit that I cannot answer this question with any confidence. My knowledge of the criminal law—and even my specialty in drug policy—gives me little guidance about the probable fate of the person in question.
>
> Should I be embarrassed about this? I think so.[78]

Husak frames "the criminal law" as something that *ought* to provide an answer about someone's fate in the present-day United States. Husak urges that "there is good reason to have a criminal law that is important" and to "reform the criminal law to restore the rule of law."[79] This ideal, important criminal law would ensure that "the factors that govern whether or not persons will be punished are … affected by the content of the statutes."[80] Law professors have a responsibility to make the law that they teach and write about important by "defending and applying a theory of

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76 *See Criminal Law, Cases and Materials*, WEST ACAD., https://faculty.westacademic.com/Book/Detail?id=147853#description.

77. For instance, the authors include an excerpt from Robert Blecker's 1980 book *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified* which raises doubts about whether prison adheres to any leading moral justification for punishment. *See* LEE & HARRIS, *supra* note 72, at 20-31. I don't mean to be too hard on this casebook—I teach it, in part because of the tension between the structure and the critique.

78. Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 263 (2003).

79. *Id.* at 270. Note that "restoration" implies not only the possibility of reform but that "the rule of law" was in fact once a thing. This is an example of historical exceptionalism, unsupported by any specific historical evidence.

80. *Id.* at 262.

criminalization," and they should be somewhat embarrassed for not doing enough.[81]

But Husak doesn't consider it inherently embarrassing that law professors are teaching and writing about something that doesn't exist. If existing U.S. criminal systems can't provide a simple answer to the question "how the law will respond to a person who uses or sells small quantities of drugs," ought it not be embarrassing that American professors are teaching and writing about nonexistent criminal law that *would* provide an answer? Shouldn't they be teaching and writing about reality? Certainly, Husak is aware of that reality:

> What does happen to persons who smoke or sell marijuana? Although the answer varies radically from one time and place to another, I will hazard a few generalizations. In the first place, the majority of users and sellers manage to avoid detection. But the police do not always confront even those offenders they happen to notice. For five years, I lived in a neighborhood where persons (literally) sold drugs on my sidewalk and driveway. Police frequently observed them, but seemed more interested in ensuring that they did not move to more upscale locations than that they were arrested and prosecuted. Occasional confrontations took place, but arrests were fairly unusual. Police would hassle these offenders, confiscate their drugs, and frighten them away. When no arrests were made, one can only guess what happened to the contraband that was seized. Typically, the same sellers would reappear at a later time. I assume the demeanor of the seller was the most important factor in explaining why some confrontations led to arrests and others did not, but it is hard to be sure. Although I raised these issues with the police in my neighborhood, I was not surprised that they were unhelpful in clarifying their policy.[82]

Husak doesn't provide a simple answer to the question of "how the law *will* respond." Instead, he explains why a simple answer is impossible. He describes how criminal statutes differ across jurisdictions and are enforced by police who behave differently in different places and interact differently with different people. They do so pursuant to (differing) informal norms. One might actually be unable to figure out whether *any* policy guides their behavior. Accordingly, a responsible lawyer or criminal law professor would say exactly what Husak said. They might add more, depending upon

81. *Id.* at 270.
82. *Id.* at 264.

who asked for advice. Advising young Black men, Paul Butler cautions them to be courteous and deferential to the police, lest they be perceived as challenging police dominance; to not ask bystanders to record a police stop; to not admit to police any offense other than a traffic violation; to not run from police unless there is a custom in one's neighborhood whereby police do not chase people who run; and to never tell police "[y]ou can't do this," adding "under the law of the streets, yes, they can."[83]

It shouldn't be embarrassing to be unable to answer an unanswerable question. Husak is right, however, in regarding as embarrassing the failure to do one's part to make important questions answerable. And it *ought* to be embarrassing to teach and write as if unanswerable questions are in fact answerable and thereby reproduce systems that have generated a legitimacy crisis. One runs the latter risk by teaching and writing about *the* criminal law in the United States.

We cannot run a controlled experiment to test the hypothesis that teaching and writing about *the* criminal law has obscured understanding and impeded reform (to say nothing of reconsideration) of U.S. criminal systems. What we can do is ask whether we *need* to teach and write about *the* criminal law in order to describe or prescribe. If we don't, even a low risk of embarrassment would not be worth taking.

Put another way, we might apply to *the* criminal law a variant of the parsimonious principle articulated by William of Ockham.[84] "Ockham's Razor" is typically associated with the proposition that simpler explanations are to be preferred over complex explanations. But there are many razors, and the original one cut more precisely.[85] It was an ontological tool, wielded to eliminate entities that need not be posited *as existing* in order to understand the world.[86]

Do we need to posit the existence of *the* criminal law—the bipartite, exceptional structure that law professors teach and write about—in order to understand and reform U.S. criminal systems? Husak's embarrassment suggests that we don't. Indeed, it suggests that *the* criminal law may hinder understanding and reform.

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83. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 206 (2017).

84. *See* Paul Vincent Spade, *William of Ockham*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/ockham/. For another Ockhamite intervention in the criminal space, see Bernard E. Harcourt, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 45 (2011) (describing "free markets," "excessive regulation," "natural order," and other concepts as "universals" and "challeng[ing] the very existence of those universal categories in order to discover … how the designations work" and "what they hide"). Ockham's critique of universals didn't require his razor, however, so the inspiration I take is somewhat differet. *See* Spade.

85. *See* ELLIOTT SOBER, OCKHAM'S RAZORS: A USER'S MANUAL (2015).

86. *Id.* at 6-7.

For Ristroph, the next step is to drop the definitive article.[87] It is an unnecessary and troublesome distraction, not because definitive articles always connote unified, coherent, structures—certainly "the mess" does not—but because of the particular history of *this* definitive article and the connotations that "*the* criminal law" carries. If we follow her lead, how do we conceptualize the existing mess—and what do we call it?

Ristroph emphasizes that she is "a skeptic about the very existence—to say nothing of the legitimacy—of a unified and therefore destructible institution called 'the' criminal law" but "not a skeptic about the existence of criminal *laws*."[88] More than that, she is not a skeptic of the value of the concept of law. Far from it—she insists that we ought to center the nature of law in any talk about crime or criminals. In short, criminal laws stand in need of jurisprudence—in particular, of positivism.

Drawing upon Farmer, Ristroph finds sufficient variation in the definition of crimes throughout Anglo-American history to preclude the possibility that U.S. crimes—even supposedly "core" ones like murder, rape, and robbery—pick out natural, pre-political wrongs.[89] Her own research shows that criminal-labels like "felony" are "contingent and constructed" and that their "contingency is obscured by the rhetoric of naturalism and by connotations of intrinsic wrongfulness."[90] The obscurity doesn't just impede understanding—it harms people. It does so by making it possible to "multiply the constraints imposed on a convicted person" and promotes "severity and racial disparity in the U.S. penal system" because it is people of color who are disproportionately policed, prosecuted, and punished.[91]

Ultimately, then, Ristroph's critique of *the* criminal law is grounded in the concept's confusing blend of descriptive and normative claims; its failure to accurately describe; and its capacity to legitimize U.S. criminal

87. *See* Ristroph, *supra* note 14.

88. *See* Alice Ristroph, *Criminal Theory and Critical Theory: Husak in the Age of Abolition*, 41 L. & PHIL. 263, 279 (2022) (emphasis added).

89. *See* Ristroph, *Definitive Article*, *supra* note 14, at 153.

90. *See* Ristroph, *Farewell to the Felonry*, *supra* note 15, at 567.

91. *Id.* at 566. As Ristroph acknowledges, the term "naturalism" may mean any of several quite different things, even within the same field of inquiry. *See* Ristroph, *Definitive Article*, *supra* note 14, at 150. Indeed, at least two of the concepts to which it refers are not only consistent with Ristroph's account of criminal law—they lend support to it. See Brian Leiter & Matthew X. Etchemendy, *Naturalism in Legal Philosophy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2021) (describing methodological naturalism—which rejects "philosophical inquiry that proceeds entirely *a priori* and without the benefit of empirical evidence"—and substantive naturalism—which holds that "there exist only *natural* things, things of the kind natural science describes."). Leiter defends positivism as consistent with both forms of naturalism in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007).

systems through misdescription. But she contends that it is "useful to try to identify aspects of criminal law that span place and time, for that will help us assess whether present conditions are normal, and what we could reasonably hope to change," and offers the following descriptive propositions:

> Criminal law is human law.
>
> Criminal law empowers state officials to use a particular enforcement mechanism: a criminal sanction. Criminal sanctions involve a state-imposed inequality: They alter the convicted person's formal status within the political community.
>
> Although the criminal sanction is an important distinguishing characteristic, criminal law cannot be reduced to punishment.
>
> Criminal law has no fixed substance; criminal sanctions can be (and are) used in nearly every area in which law regulates at all.
>
> Nor does criminal law have a fixed purpose. No single statement of purpose captures all or most of the circumstances in which states do in fact choose to use criminal sanctions.[92]

Even as positivisms go, this is a substantively thin conception. Unlike Scott Shapiro, Ristroph does not require that criminal law constitute a plan to accomplish a normative end.[93] There is not a gesture in the direction of what Hart called "the minimum content of Natural Law," consisting of "rules of conduct" that "constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control."[94]

Ristroph is adamant that what we call criminal law isn't of mere theoretical interest. The notions that "criminal law policies … coincide with, or enforce, a natural order" and that "criminality is something other than legislative or judicial – or executive – choice" are pernicious.[95] They ought to be dispelled. Her austere positivism is a means to that end.

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92. Ristroph, *Carceral Curriculum*, *supra* note 15, at 1695.
93. *See generally* SCOTT J. SHAPIRO, LEGALITY (2011).
94. HART, *supra* note 46, at 193.
95. Ristroph, *supra* note 14, at 145, 149.

I think Ristroph is right about the baneful influence of *the* criminal law in the U.S., and I can do no better than to refer you to her arguments.[96] But her centering of jurisprudential questions and the way in which she answers them have their own risks. The entrenched associations between criminal law and pre-political, "natural" wrongs that she decries will hinder any effort to conceive of criminal law in positivist terms. Those associations have survived centuries of profound transformations in the functions of criminal systems; the content of offenses; and the mechanisms through which crimes and criminals are created. We'll see that there are compelling reasons to doubt that centering the nature of law will result in a victory for positivism—or that such a victory would be an unmixed blessing.

We should therefore ask if there is a way to avoid two risks — one of legitimation through disaggregating criminality *from* law; the other, of legitimation through aggregating criminality *with* law—without hindering our ability to describe or prescribe. One of the most striking recent interventions in jurisprudence suggests that we can. The next Part summarizes and discusses arguments for *eliminativism*——the view that we can and should do without the concept of law—and sketches an initial case for the plausibility of eliminating criminal law.

III. WHY (CRIM)ELIMINATIVISM?

The first self-conscious defense of eliminativism was formulated by Lewis Kornhauser in a still-unpublished manuscript.[97] Eliminativism has since been theoretically developed by Hillary Nye[98] and contested by a number of critics, including Liam Murphy, Michael Green, Mitchell Berman, and Felipe Jiménez.[99] Scott Hershovitz, Mark Greenberg, and Ronald Dworkin have all been identified as eliminativists.[100] Characteristic of all forms of eliminativism is a denial of the need to posit a distinctive

96. For a different view, see ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF CRIMINAL PUNISHMENT 51 (2014) (contending that it is positivism that has abated the rise of the carceral state as a consequence of "[t]he integrity of the system as created becom[ing] the assumed standard for proceeding" and claiming that positivism "lacks the temperament to discover a catastrophe on its own doorstep.").

97. *See* Kornhauser, *supra* note 19, at *26-29.

98. Nye, *The One-System View*, *supra* note 19; Nye, *Does Law 'Exist'?*, *supra* note 19.

99. *See* LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW (2014); Green, *supra* note 19; Mitchell Berman, *Of Law and Other Artificial Normative Systems*, *in* DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 137, 153 (David Plunkett, Scott Shapiro & Kevin Toh eds., 2019); Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMANS. 59 (2022).

100. Hershovitz, *supra* note 19; RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 400-17 (2011); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1289 (2011).

domain of legal normativity. Stronger forms of eliminativism hold that even talking about what *the* law requires in a particular setting is objectionable.[101]

One motivation for eliminativism is ontological. Perhaps "the law" is like "unicorn"—it refers to something that does not really exist. Kornhauser argues in this vein, claiming that "[t]he separation of governance tasks and the complex institutional relations make it unlikely that we can usefully distill a single norm from the web of decisions that individual public officials make."[102] He offers the following example:

> [C]onsider the set of public officials who are implicated in the implementation of the criminal law: the police, the prosecutor, and the judge (and arguably the warden of the relevant prison). All three of these institutions "apply the law"; but each responds to the criminal code differently. The policeman on the street has vast discretion in implementing the legal materials. He can choose to arrest an individual for a criminal violation even if he knows that he has insufficient proof to convict the individual. Conversely, he can choose not to arrest an individual against whom he believes he has sufficient evidence to convict.[103]

As Kornhauser sees it, no concept of law will help us predict the officer's decision or determine whether it is justified. The decision "will depend on myriad situational and institutional factors" rather than "some freestanding, well-defined legal norm."[104] Nor will it help the officer—or the prosecutor, who "need not determine what 'the law requires'" but "what the court will do."[105] The criminal code structures the decision, to be sure. But so does "the environment in which these decisions are taken and in which the decisions will have effect."[106] There's no need to single out particular considerations as "legal," much less to identify *the* law. Understood as "a single norm," *the* law simply doesn't exist.

Of course, Kornhauser might be wrong. It is not clear that someone who is arrested, prosecuted, convicted, and punished under the regime Kornhauser describes hasn't been treated consistently with positive law. From a nonpositivist standpoint, the regime may be legally defective if it fails to provide adequate notice or confers too much discretion on officials.

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101. *See* Kornhauser, *supra* note 19, at *4.
102. *Id.* at *17.
103. *Id.*
104. *Id.* at *18.
105. *Id.*
106. *Id.* at *17.

However, the fact that it exists does not prove the nonpositivist wrong about the nature of law. Perhaps we just have a lot of defective criminal law.

But eliminativists don't need to deny that law exists or that it has a particular nature. They might argue instead that there is no prospect of reaching an agreement about what law's nature is and no need to do so. Hillary Nye canvasses longstanding, pervasive jurisprudential disagreement between positivists and nonpositivists and contends that the disagreement is too fundamental to be resolved.[107] She recognizes that longstanding disagreements in other fields of inquiry either have or could be resolved because the disputants share certain basic premises.[108] Thus, proponents and opponents of various string theories of quantum gravity agree about the importance of developing experiments to test the theories' predictions about the physical world, even though we presently lack the technological capacity to do so with sufficient precision to falsify them.[109] By contrast, there's no such common empirical ground concerning the nature of law. Accordingly, Nye argues that there's no *conceivable* empirical test, the results of which could lead nonpositivists or positivists to change their views about the ultimate source of their disagreement—the relationship between law and morality.[110]

To illustrate the impasse, Nye imagines a judge who understands themselves to be *following* law when applying doctrines that refer to moral principles—say, in determining whether a contract is unconscionable.[111] On Joseph Raz's exclusive-positivist conception of law, the judge is wrong.[112] Morality can't serve as a criterion of legal validity, and questions that turn on moral or evaluative considerations can't be answered without *making* law.[113] But a nonpositivist—indeed, even an inclusive positivist who admits

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107. *See* Nye, *Does Law Exist?*, *supra* note 19, at 39-52.

108. *See id.* at 45-46.

109. Like that of Nye, my knowledge of string theory is quite limited—in my case, derived from a few physics books intended for lay audiences, a skim of what the latter describe as important papers (the parts with words, not the parts with numbers), and a steady diet of podcasts consumed at 1.5x speed. Fortunately, if anything about the nature of law turns upon string theory, the consensus among experts appears to be that we won't know for some time. *See generally* BRIAN R. GREENE THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY (2000); SEAN CARROLL, SOMETHING DEEPLY HIDDEN: QUANTUM WORLDS AND THE EMERGENCE OF SPACETIME (2020). The basic problem is that string theory is a "they," not an "it," and that we lack the computational capacity to test them in a way that would distinguish between them. CARROLL at 274-75. One of its pioneers acknowledges "only modest hope that [string] theory will confront data in my lifetime." Brian S. Greene, *Why String Theory Still Offers Hope We Can Unify Physics*, *in* THE BEST WRITING ON MATHEMATICS 139 (2017).

110. Nye, *Does Law Exist?*, *supra* note 19, at 40.

111. *Id.*

112. Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 310 (1985).

113. *Id.*

that morality can be part of the law—might dispute this, agreeing with the judge's self-conception.[114]

This hypothetical data could be cited by nonpositivists and inclusive positivists as evidence for their thesis. But it could be dismissed by exclusive positivists as evidence only of official confusion. If the judge instead conceives of themself as a lawmaker, the nonpositivist can categorize the data as an instance of official confusion and the exclusive positivist could point to it as an example in favor.[115]. Fortunately, Nye argues that the essentially contested nature of the concept of law doesn't matter.[116] Any claim that positivists or nonpositivists want to make about what *law* is or *ought* to be, can be made without presupposing the truth of a particular concept of law.

Will this work for criminal law? Consider another one of Husak's examples of embarrassing questions—and his answer:

> Exactly how fast is a driver permitted to travel on given highways? Posted limits offer little guidance. Someone who receives a citation for driving slightly above the posted limit is best advised to pay the fine. And even if he is driving below the limit, he may be cited if weather conditions are deemed to be sufficiently hazardous. In other words, the fate of the driver is almost entirely in the discretion of the police. It is hard to understand why this state of affairs has not given rise to howls of protest from those theorists who take the rule of law seriously. It would not be difficult to alter legal conventions so that posted limits meant what they say. Only the minor penalties that are imposed lead commentators to neglect this area of the law. And neglect it we do. I do not recall that this flagrant disregard of the rule of law was ever mentioned throughout my career as a student or teacher of criminal law.[117]

Husak doesn't make any claims about the nature of law. He identifies a particular, relatively formal state prohibition (posted speed limits) and informal state practices (citations in hazardous weather conditions even where the posted limits are followed). He criticizes the gap between formal prohibition and informal practice as inconsistent with "the rule of law,"

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114. Nye, *Does Law Exist?*, *supra* note 19, at 40.

115. The inclusive positivist could treat it as neutral. Perhaps morality can be part of the law but just isn't part of *this* law.

116. *See* Nye, *Does Law Exist?*, *supra* note 19, at 71 ("The judge's view is backed by the state's power, regardless of whether the positivist is correct that the judge really made new law. This power that judges wield is important to recognize under either description.").

117. Husak, *supra* note 78, at 267. This part of the article is entitled "The Irrelevance of Statutes."

which requires the posted limits to "mean[] what they say." In short, he describes what positivists would say that the law is and critiques the status quo on the basis of deficiencies that a nonpositivist might say present legality concerns. And he does so without taking jurisprudential sides *or* compromising on either descriptive or normative fronts.

But isn't *something* lost? People may want to know what *the law* is. They may want to know about *criminal law* in particular, because of the severity of its penalties, its expression of moral norms to which they believe they ought to conform independently of the law, or both. They may think criminal law is exceptionally important, even if they don't hold any particular views about the nature of law. Is eliminativism committed to telling them that they are wrong or confused?

To the contrary, it may be legal philosophers who are making things confusing. Nye points out that the question "What is the law?" is ambiguous. It invites a further one: "What do they want to know?"[118] When the "bad man" of Oliver Wendell Holmes, Jr.'s *The Path of the Law* asks what the law is, he "wish[es] to avoid an encounter with the public force."[119] Even more specifically, he wants a prediction about "what the *courts* will do in fact."[120] Hart's "puzzled" public official, by contrast, considers themselves obligated to follow the law simply because it is the law.[121] Particularly if they are a judge, telling them that the law is what courts will do in fact seems unhelpful—they *are* the courts! Or perhaps the questioner holds a moralized conception of criminal law that resembles Anthony Duff's or Michael Moore's,[122] or agrees with Mark Greenberg that *all* law, properly understood, consists in the collective impact of all legal institutions on their moral obligations.[123] Ultimately, these are different questioners that require different answers.

Eliminativism can meet these questioners wherever they happen to be. The "bad man" can be told about not only statutes but precedents and enforcement practices. At the same time, the "puzzled" official can be informed only about statutes and precedents. The "questioner" who is concerned about moral impact can be given a run-down of statutes, precedents, enforcement practices, and any other things that are morally salient to them.

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118. Nye, *Does Law Exist?*, *supra* note 19, at 56.
119. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).
120. *Id.* at 461 (emphasis added).
121. HART, *supra* note 46, at 40.
122. *See* MOORE, *supra* note 21.
123. *See* Greenberg, *supra* note 100.

Nor has eliminativism any difficulty with the reality that people care about whether an instrument, institution, or norm is law. Liam Murphy offers the example of a statute that criminalizes same-sex sodomy but is never enforced.[124] He correctly observes that this statute would contribute to the marginalization of gay people simply by being on the books, and he challenges the eliminativist to explain this effect.[125] But this challenge is easily met. Nothing about the effect turns on any particular theory of law being true.

Suppose that those who perceive the statute to be law are wrong because nonpositivism is true and statutes that single out groups for marginalization for no compelling reason do not satisfy moral criteria of legal validity. Now, suppose that positivism is true, and the statute conforms to the jurisdiction's rule of recognition. The statute has whatever stigmatizing effect it has for whatever reasons it has that effect, regardless of whether it is *truly* law. It might be that the stigmatizing effect arises from the perception that statutory enactments are law and that that perception reflects a widely held positivist conception of law. An eliminativist can recognize this, however, without taking a position on whether that conception is accurate.

Finally, eliminativism doesn't obstruct reform. Anything that positivists or nonpositivsts want to say about why existing posited law does not satisfy some evaluative criteria—including criteria that are associated with legality, like Lon Fuller's—can still be said.[126] Even Kornhauser's strong eliminativism can comfortably coexist with a conception of law as an achievement of governance.[127] Law-as-achievement does not aspire to describe or prescribe norms that merit the label of "the law" or institutional arrangements without which there cannot be law. Rather, it calls for the identification of a value or set of values that are deemed to constitute legality and the determination of whether and to what extent a governance system realizes legality.[128]

Kornhauser only sketches the boundaries of legality, saying that legality must be the output of a governance system and turn on more than textual expression.[129] One could easily plug in Fuller's legality criteria or Raz's

124. MURPHY, *supra* note 99, at 90.

125. *Id.* at 90-91.

126. *See* LON FULLER, THE MORALITY OF LAW 38-39 (1964). Fuller's eight criteria are generality, publicity, nonretroactivity, clarity, noncontradiction, observability, constancy over time, and congruence between announced and administered rules.

127. *See* Lewis A. Kornhauser, *Law as an Achievement of Governance*, 47 J. LEGAL. PHIL. 1 (2022).

128. *Id.* at 11.

129. *Id.*

rule-of-law criteria.[130] A criminal system could be praised for achieving legality to the extent that it meets the criteria and could be criticized for its failure to do so—all without settling the nature-of-law question.

We could also consider the distinctive purposes of criminal law to be constitutive of the value of *criminal legality*. Thus, Duff's claim that criminal law has the distinctive purpose of "provid[ing] for those who commit public wrongs to be called to public account for what they have done" becomes a call for criminal systems to achieve the value of holding perpetrators of public wrongs to account.[131] Michael Moore's account of criminal law as a realization of principles of retributive justice can be reframed as an account of the properties of just criminal systems.[132] A pluralist approach, like that which Marc DeGirolami attributes to James Fitzjames Stephen, can also be cast in an achievement mold.[133] If "a welter of multivalent and clashing values rightly informs our punishment practices," we can evaluate practices in light of how they reflect those values.[134] As long as criminal systems achieve the value of criminal legality, they can be praised; when they do not do so, they can be critiqued. Thus do Husak and Paul Gowder[135] criticize U.S. criminal systems for their failure to meet rule-of-law criteria without staking out strong jurisprudential positions.

Just because it's plausible doesn't mean it's persuasive. Ristroph claims that *dis*aggregating law from crimes and criminality risks misdescription and legitimation because it encourages people to view crime/criminality as natural rather than socially constructed. The next Parts contend that *aggregating* law and crimes/criminality poses risks of misdescription and legitimation that eliminativism can mitigate.

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130. Invoked by Husak. *See* Husak, *supra* note 78, at 264 n.11 (citing JOSEPH RAZ, THE AUTHORITY OF LAW 218 (1979)).

131. R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, *supra* note 17, at 131. So, too, Ekow Yankah's account of criminal law as "secur[ing] the conditions in which we can all live together as civic equals." *See* Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 471 (2015).

132. *See generally* MOORE, *supra* note 21.

133. *See* Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699 (2011). I say "attributes" not to express skepticism but to acknowledge my unfamiliarity with the nuances of Stephen's thought; *see also* Mitchell N. Berman, *The Justification of Punishment*, *in* THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW 2 (2011) (claiming that there is an emerging "consensus regarding the pluralistic justifiability of punishment.").

134. DeGirolami, *supra* note 133, at 748.

135. *See* Paul Gowder, *Is Criminal Law Unlawful?*, 2023 MICH. STATE L. REV. 61 (2023).

IV. A DESCRIPTIVE CASE FOR (CRIM)ELIMINATIVISM

I've noted that even critics of criminal-law exceptionalism don't generally dispute the existence of burdens exceptionalism. To say that the criminal label *is* exceptionally burdensome requires a descriptive theory of what makes something a crime and a person a criminal. Fortunately, we don't have to start from scratch. The field of criminalisation has emerged in response to criminal law's characteristic prioritization of general principles and case law.

David Brown traces criminalisation to a "contextual" tradition within Australian criminal law that has since the 1980s "questioned the notion of criminal law, its institutions, processes and practices, as constituting a unity possessing an essence or manifesting 'a single social function.'"[136] Tellingly, the leading contextualist New South Wales teaching text was entitled *Criminal Laws*, plural.[137] In preparation for the 1984 publication of the first edition, participants in the criminalisation project articulated a number of "organising principles," among which were skepticism that "'criminal law' is a discrete and unified area of law" and that "there are general principles which run the breadth of the criminal law and logically (or at least consistently) determine the structure of its rules."[138] As a descriptive endeavor, criminalisation is inclusive, encompassing legislation, judicial decisions, treaties, policing, prosecution, sentencing, parole, probation, and other materials, institutions, and practices through which crimes and criminals are created, investigated, adjudicated, and punished.[139]

In identifying criminalisation, theorists who deploy the concept don't rely solely on formal labels. They explore the effects of enactments, procedures, and enforcement patterns as well. Luke McNamara, Julia Quilter, Russell Hogg, Heather Douglas, Arlie Loughnan, and David Brown defend a "modalities" approach to criminalisation that "includes not only the creation and enforcement of offences (and defenses) and the setting and imposition of penalties, but also statutes that underpin the operation of allied

136. David Brown, *Criminalisation and Normative Theory*, 25 CURRENT ISSUES CRIM. JUST. 605, 607 (2018).

137. The most recent edition is DAVID BROWN ET AL., CRIMINAL LAWS (5th ed. 2011). This history is summarized at 1-40.

138. Brown, *supra* note 137, at 605-06.

139. *See* Nicola Lacey & Lucia Zedner, *Criminalization: Historical, Legal, and Criminological Perspectives*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 58-64 (Alison Liebling, Lesley McAra & Shadd Maruna eds., 2017); NICOLA LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS 15 (2016).

criminal procedures and the deployment of police powers *which can also have coercive and punitive effects."*[140] In this respect they follow Nicola Lacey, who describes criminalisation as "a useful umbrella concept, embracing all the various creative, interpretive and executive processes which produce *the practice and effects* of a criminal justice system."[141] A methodological prescription follows from this focus on effects. Case studies of criminalisation encompass "doctrinal structure, scope and logic;…scope and pattern of…enforcement; and…legislative, social and political genealogy."[142]

Criminalisation theorists analyze crimes as human creations rather than as features of some pre-political moral landscape. Criminalisation's content is determined through what Lacey describes as "a set of interlocking practices in which the moments of 'defining' and 'responding to' crime can rarely be completely distinguished and in which legal and social (extra-legal) constructions of crime constantly interact."[143] Lest it be thought that criminalisation is all territory and no map, theorists have drawn careful distinctions between different sub-modalities of criminalisation. Proponents of the modalities approach identify nine sub-modalities of criminalisation expansion and six sub-modalities of criminalisation contraction.[144] Lacey distinguishes between the "formal" establishment of crimes "on the books" and the "substantive" patterns of enforcement and the allocation of punishment to criminals.[145] She also differentiates criminalisation-as-process—"everything from legislation and judicial interpretation to prosecution and crime, recording and reporting decisions by officials and, indeed, by lay people", from criminalisation-as-outcome— "not only the conviction rates which most vividly exemplify the impact of substantive criminalisation but also the full range of broader social, cultural, economic, emotional and political effects of those processes."[146]

Lacey's formal-substantive distinction might seem at first to distinguish formal law from informal not-law and thus presuppose a kind of positivism. Not so. Duff, for instance, uses the frame of criminalisation despite holding that criminal law is essentially concerned with the condemnation of pre-

140. McNamara et al., *supra* note 18, at 93 (emphasis added).

141. Lacey, *supra* note 18, at 942 (emphasis added).

142. Nicola Lacey, *The Rule of Law and the Political Economy of Criminalisation: An Agenda for Research*, 15 PUNISHMENT & SOC'Y 349, 359 (2013).

143. Nicola Lacey, *Legal and Social Constructions of Crime*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 139, at 197.

144. McNamara et al., *supra* note 18, at 95-96.

145. LACEY, *supra* note 18, at 17-18.

146. Nicola Lacey, *Theorising Criminalisation Through the Modalities Approach: A Critical Appreciation*, 7 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY 122, 123 (2018).

justicial moral wrongs.[147] A combination of formal and substantive criminalisation in a given jurisdiction might not constitute criminal law by *any* jurisprudential lights. Thinking in terms of criminalisation thus enables us to bypass the nonpositivist-positivist debate *without* effectively resolving it in one side's favor.

Husak's speed-limit discussion illustrates the descriptive value of seeking to determine what has been criminalised rather than looking for law. That predicting the on-the-ground impact of clear posited rules is so practically complex suggests that trying to identify what *the* law is may sometimes obscure more than it illuminates, even if we're all positivists. To answer a question about how fast one is permitted to drive by reciting posited speed limits would mislead a questioner who is seeking to avoid a traffic stop.

And that's when statutory language yields determinate answers to legal questions (again, assuming positivism).[148] But statutory crimes often contain broad, underdeterminate language.[149] For instance, the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act prohibits the investment of money obtained through a "pattern" of criminal activity in an "enterprise," as well as acquiring an interest or conducting an "enterprise" through such a criminal "pattern."[150] These terms don't have common-law analogues,[151] and Congress's definition of "enterprise" is capacious, including "any union or group of individuals associated in fact although not a legal entity."[152] Through such broad language, Congress delegated the power to determine RICO's legal effect to federal police, prosecutors, and judges.[153]

The legislative delegation of criminalisation may be implicit, as with RICO; it may also be explicit, as when statutes create agencies that are empowered to issue implementing regulations. Brenner Fissell offers the example of the New York City Subway's Rules of Conduct, which are issued by the New York City Transit Authority ("NYTA").[154] The NYTA

147. *See* DUFF, *supra* note 11.

148. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (stating that a legal question has a single determinate answer "if and only if the set of results that can be squared with the legal materials contains one and only one result.").

149. *See id.* (stating that a question is underdeterminate "if and only if the set of results . . . that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.").

150. 18 U.S.C. § 1962(a).

151. Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 997-98 (2019).

152. RICO is by no means unusual in this respect. *See generally id.*

153. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts I and II, RICO: The Crime of Being a Criminal Parts III and IV*, 87 COLUM. L. REV. 920 (1987).

154. Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855 (2019).

was created by the state legislature, which delegated to it the power "[t]o make, amend and repeal rules governing the conduct and safety of the public as it may deem necessary, convenient or desirable for the use and operation of the transit facilities under its jurisdiction."[155] Violators can be incarcerated for up to ten days.[156] Administrative crimes aren't unusual; they're "pervasive in American law" and have been upheld against nondelegation challenges to their constitutionality for more than a century.[157]

Legislative delegation of criminalisation doesn't necessarily create notice problems. Few people read statutes or regulations, and textually unspecified doctrinal developments can work to the advantage of defendants.[158] Judges can define mental-state requirements to require proof of knowledge of illegality; they can read ambiguous statutes narrowly.[159] In practice, however, such judicial limitations of criminalisation are exceptional. Under pressure from prosecutors and in deference to the norm of legislative supremacy, judges *create* crimes and criminals.[160] Few legal nostrums are more often repeated by than that there are no common-law crimes.[161] But one would be extremely ill-advised to rely upon the text of any number of U.S. statutes to determine what conduct is likely to be treated as a crime or which person a criminal.

Now, positivism does have the theoretical resources to account for unwritten law.[162] On Hart's account, the implementation of a written law with "open-textured"[163] terms is *not* at the point of the law's enactment a matter of *existing* positive law but can *become so*. The question whether a "No Vehicles In the Park" ordinance applies to people on bicycles first falls within the (bounded) discretion of officials.[164] Judges who resolve that question in a particular case act as legislators of new rules, which become

155. *Id.* at 856-57.

156. *Id.* at 857.

157. *Id.*

158. The classic account is Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV 625 (1983).

159. *Id.* at 658-65.

160. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 557-79 (2001).

161. *See* Hessick, *supra* note 151, at 971-74.

162. For illuminating discussions, see for example Neil Duxbury, *Custom as Law in English Law*, 76 CAMBRIDGE L.J. 337 (2017) and Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

163. For an illuminating discussion of what Hart meant by this phrase, see Brian B. Bix, *H.L.A. Hart and the "Open Texture" of Language*, 10 L. & PHIL. 51 (1991). Bix reads Hart, not as "prov[ing] from the nature of language that judges must have discretion" but instead "g[iving] reasons why legal texts should be interpreted in a way that leaves judges discretion in applying the law." *Id.* at 66. On this reading, even language that might be clear if used in the context of an ordinary conversation can be open-textured if it appears in a statute.

164. *See* HART, *supra* note 46, at 121-26.

part of positive law through written opinions that carry precedential weight via the (positive) law of *stare decisis*.[165] The textually unspecified doctrines that are used to implement many criminal statutes are still law.

What of implementation by police, prosecutors, and agencies? Should *their* exercises of discretion be considered acts of lawmaking, resulting in new positive law? Does it matter if they exercise that discretion through written policies? Ristroph criticizes the omission from criminal law theory of "the law of criminal enforcement—the procedural steps that take an offender from crime to punishment" and stresses that "to conceive criminal law as the definition and formal punishment of specific crimes is to ignore vast swaths of 'the law in action.'"[166] On her positivist account, "police and prosecutorial discretion are just part of the law."[167]

Still, the breadth of this discretion means that what one must do to "avoid contact with the public force" will be different for different people *within the same jurisdiction*. It may be consistent with positivism for everyone to be subject to the same (positive) statutory law that reposes the same discretion in the same set of police, prosecutors, and agencies who then make (positive) non-statutory law by exercising that discretion. But if a questioner is focused on what *they specifically* must do to avoid the state, it might be more responsive to their question to talk of different laws for different people. That is because two different people might have to conduct themselves differently under the same statutes to avoid the same public force.

Of course, no one has gathered sufficient data to justify any claim about what people in the U.S. or elsewhere ordinarily want to know when they ask what the law is or even what they mean by "law." Further, a finding that most people conceive of law along positivist lines would hardly persuade a nonpositivist who denies that the nature of law is fixed by what most people think it is. Nor do I expect that the converse finding would persuade Ristroph to abandon her campaign. For Ristroph isn't a Hartian; she is a Hobbesian, preoccupied with the moral legitimacy of criminal law because of the inherent tension between the justifying function of the state and the use of violence *by* the state.

Thomas Hobbes has been identified as a progenitor of positivism because he conceived of law as the command of an earthly sovereign to one

165. *Id.* at 124.
166. Ristroph, *Public Ordering*, *supra* note 15, at 82 n.81.
167. Ristroph, s*upra* note 14, at 162.

obliged to obey.[168] But Ristroph contends that Hobbes was advancing normative political-theoretical arguments, not attempting to describe legal practice.[169] Hobbes considered that "political and thus legal obligation [w]as circumscribed by a right of self-preservation" that served as the justifying purpose of the state to secure.[170] A person consented to be bound by sovereign command in order to escape the fearful and threatening state of nature, in which "every man is enemy to every man," and "the life of man [is] solitary, poor, nasty, brutish, and short."[171] Accordingly, a sovereign might have the power to force compliance with a command that threatened a person's life or limbs, but this would not make it into a moral or legal obligation for that person. More strikingly still, a person whom the law convicted of violating a command that, on balance, secures the life and limb of the populace would not be obliged to submit to life-and-limb-threatening punishment.[172]

Ristroph believes that Hobbes was right about (at least) three important things that ground her positivism. First, the propriety of bringing normative political theory to bear on jurisprudential questions.[173] Hobbes's concept of law would not be defective just because it did not capture how most people or most officials thought about law. Indeed, Ristroph doubts that it is even possible for "those who theorize law" to engage in "pure description," given that they "are also always members of organized political entities and participants in the social practices that constitute law."[174] Second, Hobbes was right in recognizing the legitimacy problem that state violence presents

168. *See* THOMAS HOBBES, LEVIATHAN 183 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("Law in general is not counsel but command; nor a command of any man to any man, but only of him, whose command is addressed to one formerly obliged to obey him."). For Hobbes the proto-positivist, see for example Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, *in* THE PATH OF THE LAW AND ITS INFLUENCE 158, 175 (Steven J. Burton ed., 2000) and M.M. Goldsmith, *Hobbes on Law*, *in* THE CAMBRIDGE COMPANION TO HOBBES 274 (Tom Sorrell ed., 1996), *reprinted in* HOBBES ON LAW 3, 4 (Claire Finkelstein ed., 2005). A revisionist view challenges this characterization. *See* DAVID DYZENHAUS, THE LONG ARC OF LEGALITY HOBBES, KELSEN, HART (2022); Claire Finkelstein, *Hobbes and the Internal Point of View*, 75 FORDHAM L. REV. 1211 (2006); Mark C. Murphy, *Was Hobbes a Legal Positivist?,* 105 ETHICS 846 (1995).

169. Alice Ristroph, *Sovereignty and Subversion,* 101 VA. L. REV. 1029, 1045 (2015) ("[F]or Hobbes a natural right of self-preservation sets boundaries to political obligation, and thus limits what can count as civil law.").

170. *Id.* at 1037.

171. *See id.* at 1031; HOBBES, *supra* note 168, at 89.

172. *See* Ristroph, *supra* note 169, at 1041; HOBBES, *supra* note 168, at 98 ("For though a man may Covenant thus, *Unless I do so, or so, kill me*; he cannot Covenant thus, *Unless I do so, or so, I will not resist you, when you come to kill me*."); THOMAS HOBBES, DE CIVE: OR THE CITIZEN 40 (Sterling P. Lamprecht ed., 1949) (1651) ("It is one thing, if I promise thus: if I do it not at the day appointed, kill me. Another thing, if thus: if I do it not, though you should offer to kill me, I will not resist.").

173. *See* Ristroph, *supra* note 169, at 1034 n.20 ("There is reason to doubt the severability of legal theory from political theory….").

174. *Id.*

on any political theory which demands that state power be justified to individuals.[175] Ristroph admires Hobbes's unwillingness to sugarcoat state violence and his refusal to compromise his political theory to legitimize the state.[176] Third and finally—and I concede that this requires more speculation—Ristroph believes that Hobbes was correct to regard it as *better* to think of criminal law as human law, whatever any particular humans might think about its nature.[177] I suspect that she considers it especially important to think of criminal law as human law because its burdens are exceptionally severe and thus *should* weigh most heavily on state legitimacy.

If Ristroph's positivism *is not* exclusively descriptive, it is important that it not be understood that way. And the influence of nonpositivism on conceptions of criminal law would present a risk of misdescription-through-association regardless. Even if it would be better to view criminal law Ristroph's way, her jurisprudential project rests on the premise that contrary views are commonly held and institutionally entrenched. We can't assume that focusing on the nature of law will increase the sway of positivism. If past debates in general jurisprudence are prologue, the nature of criminal law seems unlikely to be resolved at all, much less resolved in favor of positivism.

But what if people are more likely to accept a positivist conception of criminal law than to stop thinking and talking about criminal law altogether? However desirable eliminativism might be in theory, in practice, criminal *laws*—if not *the* criminal law—might always be with us. If so, and if nonpositivism is particularly harmful because of its misdescription and legitimation, we ought to push toward positivism.

These are big "ifs." People might think and talk about criminal law without being committed to any deep jurisprudential premises. We've seen that a person who asks whether marijuana possession is *against the law* in a particular jurisdiction is asking an ambiguous question. They might only want to know whether there is a statute forbidding marijuana possession. Or they may want to know the likelihood that the statute will be enforced against them. Or they may want to know how whatever criminalisation

175. *Id.* at 1053.

176. *See id.* ("Hobbes was honest, and Hobbes would not cheat … [he] simply admitted that law is a pretty good system as long as individuals consent and comply, and when they do not, the ensuing and often necessary punishment is a regrettable re-emergence of the rule of might.").

177. *See* Alice Ristroph, *Criminal Law for Humans*, *in* HOBBES AND THE LAW 107, 116 (David Dyzenhaus & Thomas Poole eds., 2012) (praising Hobbes for providing an account of criminal law "that keeps firmly in view the shared humanity of criminals, victims and enforcers" and an account of punishment as "imperfectly legitimate" that is "much more conducive to penal minimalism than theories that justify punishment.").

exists contributes to their moral obligations. They may have views about the nature of law or criminal law; they may not, and we shouldn't assume that they do.

This is true of officials as well as laypeople, including officials for whom positions about the nature of law might seem most necessary: Judges. Felipe Jiménez observes that "it is not necessary for judges to have a philosophical theory about the content and the grounds of law in order to fulfil their role as adjudicators."[178] Rather, judges need only a theory of what materials to use to decide cases. They might make a prior identification of what materials are *legal* and constitute *what the law is*; they might not, on the ground that any such *legal* materials underdetermine what they ought to do.[179]

Legislators and executive-branch officials, too, must have decision protocols of some kind, and existing statutes, judicial precedents, regulations, and the like must be part of those protocols. But again, categorizing some of these materials as law and determining *what the law is* based on them isn't necessary. An agency official who implements a decision protocol that tells them to follow clear legislative enactments may be doing so under the belief that clear legislative enactments are Hartian

178. Felipe Jiménez, *A Formalist Theory of Contract Law Adjudication*, 2020 UTAH L. REV. 1121, 1132 (2020).

179. *Id.*

positive law. Or they may do so on the ground that following such enactments promotes democratic accountability. We don't really know.[180]

Perhaps some U.S. officials do have at least *implicit* theories of law. A police officer might consider herself to have an obligation to follow *the law* but be uncertain whether *the law* permits her to make a "pretextual" traffic stop in the hopes of finding evidence of drug possession. She might find pretextual stops morally unobjectionable and think that they are a valuable means of preventing drug crime. The Supreme Court has held that as long as there is probable cause to make a stop, her motivations are irrelevant to Fourth Amendment analysis.[181] Yet a municipal ordinance may forbid pretextual stops. Suppose that in this municipality, there is such an ordinance. Given her internal point of view, it might be better to invoke a particular conception of legality if we are to persuade her at all.

Still, we shouldn't assume that such views are common. Despite Hart's stated aspiration to present "descriptive sociology," *The Concept of Law* is remarkably abstract.[182] Hart's concept of law was structured around what he took to be "widespread common knowledge of the salient features of a modern municipal legal system" shared by "any educated man."[183] But he didn't conduct or rely upon any field work that identified which features

180. Which isn't say that we can't find out. A growing field of experimental jurisprudence ("XJur") explores ordinary people's conceptions about the nature of law and the meaning of legal concepts. *See, e.g.*, Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735 (2022) (summarizing the literature); Julia Kobick & Joshua Knobe, *Interpreting Intent: How Research on Folk Judgments of Intentionality Can Inform Statutory Analysis*, 75 BROOK. L. REV. 409, 410 (2009) (examining experimental research about "the patterns in people's ordinary judgments about whether specific acts were performed intentionally or unintentionally"); Julia Kobick, Note, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 517 (2010) (arguing that "courts [should] pay more attention to human intuitions of intentionality," including those influenced by "societal consensus about the moral badness of the consequences of an action"); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019) (arguing that ordinary people's conceptions should inform statutory interpretation of terms like "causation"); Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232 (2020) (applying ordinary people's conceptions of "consent" to understand why fraudulently procured consent to sex is not legally considered rape); Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165, 165 (2021) (arguing that empirical evidence about "the way people ordinarily think about causation and morality" should be used to interpret the concept of proximate cause). For specific inquiries into lay conceptions of the nature of law, see Ivar R. Hannikainen, Brian Flanagan & Karolina Prochownik, *The Natural Law Thesis Under Empirical Scrutiny*, *in* EXPERIMENTS IN MORAL AND POLITICAL PHILOSOPHY (Hugo Viciana, Antonio Gaitán & Fernando Aguiar eds., 2023); Raff Donelson & Ivar R. Hannikainen, *Fuller and the Folk: The Inner Morality of Law Revisited*, *in* 3 OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 6, 7 (Tania Lombrozo, Joshua Knobe & Shaun Nichols eds., 2020). For criticism of XJur, see Felipe Jiménez, *Some Doubts About Folk Jurisprudence: The Case of Proximate Cause*, 2021 U. CHI. L. REV. ONLINE 1 (2021).

181. Whren v. United States, 517 U.S. 806 (1996).

182. HART, *supra* note 46, at vi. *See* Kornhauser, *supra* note 127, at 16-17; Michael Plaxton, *The Challenge of the Bad Man*, 58 MCGILL L.J. 451 (2012).

183. HART, *supra* note 46, at 240.

were salient. Nor did he adduce evidence that most "modern municipal legal system[s]" have primary and secondary rules and officials who consider themselves obligated to follow them. In particular, Hart didn't show that there are many "puzzled" people who follow the law just because it is the law.[184]

If we want to describe the world in ways that are helpful to people trying to navigate criminal systems, we need a conceptual scheme that enables us to see those systems as they are. We also need to avoid imposing contested conceptions of law upon people and thereby answering descriptive questions never asked. Pairing criminalisation with eliminativism about criminal law enables us to do both.

V. A NORMATIVE CASE FOR (CRIM)ELIMINATIVISM

Eliminativism originated as a critique of talk and thought about the nature of *all* law. When eliminativists have addressed particular areas of law, they have mostly done so in response to critics who have questioned whether eliminativism can "deal" with those areas. Eliminativists have generally responded to such criticisms, not by admitting the possibility that eliminativism is not appropriate for certain areas but by contending that eliminativism can answer their critics' concerns.

But eliminativism is insufficiently developed to deny the label to theories of special jurisprudence. If eliminativism is a response to the separation of governance tasks within all societies that reach a certain level of complexity, then perhaps we ought to eliminate *all* law. If, however, eliminativism is a response to an impasse within general jurisprudence, there's reason to question its application to special jurisprudence. Perhaps in particular contexts there is less institutional complexity or less theoretical disagreement about legality.

I've elsewhere argued for the elimination of the concept of law from constitutional theory.[185] The argument is specifically directed at *normative* constitutional theory, and it rests on two premises. First, any theory about what constitutional decisionmakers ought to do needs to be morally justified.[186] Second, legality by itself cannot provide such a justification.[187] Those premises may be false, or the argument may fail for other reasons. But even if it succeeds, we ought not eliminate nature-of-law talk from

184. *See* Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 608-09 (2010) (reviewing SCOTT J. SHAPIRO, LEGALITY (2011)).

185. Evan D. Bernick, *Eliminating Constitutional Law*, 67 S.D. L. REV. 1 (2022).

186. *Id.* at 12.

187. *Id.* at 27.

constitutional theory, much less law in general. If positivism cannot morally justify constitutional decisionmakers in adopting a particular constitutional theory, it might still describe what we call *constitutional law*.

So, too, with regard to my call to eliminate criminal law. It is specific to criminal law and specific to the United States because the concept of *the* criminal law has a specific history in the context of U.S. criminal systems. I agree with Ristroph that criminalisation *everywhere* presents a specific set of normative problems, even though I am not a Hobbesian[188] and so do not perceive those problems in the same way as she does. I depart from Ristroph because of my pessimism about positivism's utility as a means of understanding and evaluating U.S. criminal systems. Much of this pessimism stems from the prevalent nonpositivism she has documented in Anglo-American criminal theory and pedagogy. Some of it stems from the social fact that positivism's dominant, Hartian form has shortcomings from the standpoint of Ristroph's and my normative concerns. A win for positivism isn't necessarily a win for Hobbesian political theory.

Hart is generally regarded as having conclusively refuted John Austin's "command" theory of law, according to which law consists in orders backed by sanctions.[189] Hart's preferred illustrations of command theory's descriptive limitations were civil laws that empower people to engage in particular activities rather than prohibiting them from doing so.[190] For example, if a promise made to me is not under seal and I have given no consideration for it, the result may not be an enforceable contract.[191] This may disappoint my expectations, and perhaps nullity is a *kind* of sanction for not doing things the state's way. Still, as Roscoe Pound observed (anticipating Hart) it seems rather different than "mak[ing] [me] a

188. I'm a Spinozist, which for present purposes means that I think more positively of democracy and the highest human goods that are attainable through politics than did Hobbes. For an accessible discussion of the differences between Hobbes and Benedict de Spinoza's views of democracy and the power of the state to contribute to human flourishing see JONATHAN ISRAEL, SPINOZA, LIFE AND LEGACY 720-48 (2023). For a deep dive, see generally SANDRA LEONIE FIELD, POTENTIA: HOBBES AND SPINOZA ON POWER AND POPULAR POLITICS (2020). But I acknowledge a robust secondary literature—to which Ristroph has contributed—describing a Hobbes who is more democratic and egalitarian than has long been thought, and I certainly can't prove my case here. *See, e.g.*, Ristroph, *supra* note 169; Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009); Ristroph, *Criminal Law for Humans*, *supra* note 177; JAMES R. MARTEL, SUBVERTING THE LEVIATHAN: READING THOMAS HOBBES AS A RADICAL DEMOCRACY (2007); RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016).

189. *See* HART, *supra* note 46, at 33-40; Frederick Schauer, *Was Austin Right After All: On the Role of Sanctions in a Theory of Law*, 23 RATIO JURIS 1, 1 (2010) ("Hart is widely understood in modern jurisprudential debate to have knocked Austin out of the ring."). Austin articulated his theory in LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (1st ed. 1861) and THE PROVINCE OF JURISPRUDENCE DETERMINED (1st ed. 1832).

190. *See* HART, *supra* note 46, at 33-35.

191. *Id.* at 35.

wrongdoer comparable to a felon."[192] Pound's objection to Austin's model was precisely that it conceived of all law "in terms of the criminal law."[193]

But even if *all* law cannot be *reduced* to a command-sanction structure, *much* law is coercive.[194] Early positivists focused attention on forms of public ordering that most strongly implicate the state's legitimacy. By contrast, modern positivism's decoupling of coercion from law invites us to focus our attention elsewhere—something that we can't afford to do in thinking about criminal systems.

The reality that the creation of crimes and criminals entails coercion suggests a further problem with conceptualizing criminal systems along positivist lines. Early positivists like Austin and Jeremy Bentham made no secret of their reformist ambitions or their belief that it would be better in a consequentialist sense to treat law and morality as distinctive domains of normativity. Modern positivists typically eschew such consequentialist arguments. But as Ristroph, Liam Murphy, and Dan Priel have observed, it's hard to read the Hart-Fuller debates without receiving the powerful impression that Hart believed that the world would be a better place if everyone saw law as he saw it.[195] I've elsewhere noted thickly normative elements in avowedly positivist arguments for particular approaches to constitutional interpretation.[196] The conflation of positive *is* and normative *ought* is particularly problematic in the context of criminal systems, owing to their particular legitimacy challenges. It is especially important that *these* positive laws—if laws they be—*not* be given an unearned legitimacy boost.

Precisely because it doesn't give criminal systems a legitimacy boost, criminalisation theory can create space for wholesale normative reevaluation of criminal systems. *The* criminal law's uncertain relationship with existing criminal systems encourages immanent critiques that draw upon internal-to-the-system principles. As valuable as such critiques have been, eliminating *the* criminal law may encourage thinking beyond the system and promote engagement between immanent and external critics. From the standpoint of normative criminalisation theory, these critiques

192. Roscoe Pound, *Book Review*, 23 TEX. L. REV. 411, 417 (1945) (reviewing JEREMY BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED (Charles W. Everett ed., 1945)). I was alerted to this critique by FREDERICK SCHAUER, THE FORCE OF LAW 23-26 (2015) (discussing Pound's argument in the context of a larger rehabilitation of Austin).

193. Pound, *supra* note 191, at 417.

194. SCHAUER, *supra* note 191, at 23; *see also* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1985) (averring that "[l]egal interpretation takes place in a field of pain and death" and relying upon examples from criminal law).

195. *See* Ristroph, *supra* note 6, at 1050. Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088 (2008); Danny Priel, *Evaluating Descriptive Jurisprudence*, 52 AM. J. JURIS. 139 (2007).

196. *See* Bernick, *supra* note 185.

would stand on equal footing—the latter could not be dismissed as "not criminal law."[197]

This isn't an idle hypothetical where discourse and politics around U.S. criminal systems are concerned. In critiquing arguments for the abolition of criminal systems,[198] reformist[199] scholars have touted the necessity and value of *criminal law*. "Criminal law," Christopher Slobogin contends, is "inevitable," because "[i]nterpersonal harms are inevitable."[200] "*The* criminal law," writes Husak, performs "*ten* important functions … that at best would be jeopardized and at worst would be sacrificed altogether if the criminal justice system were radically transformed."[201] Rachel Barkow finds it "hard to imagine a political context where most voters take seriously

197. It will also open up space for neo-Marxist and Foucauldian accounts of the political-economic conditions in which criminalisation takes specific forms. Aya Gruber observes that these are among "the most compelling critiques of the U.S. criminal system." Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3216 (2014). *See, e.g.*, JACKIE WANG, CARCERAL CAPITALISM (2018); HARCOURT, *supra* note 84; LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2009).

198. *See, e.g.*, JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION (2023); RUTH WILSON GILMORE, ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION (2022); MARIAME KABA & ANDREA J. RICHIE, NO MORE POLICE: A CASE FOR ABOLITION (2022); DOROTHY E. ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES--AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION (2021). DERECKA PURNELL, BECOMING ABOLITIONISTS (2021); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2021); ALEX S. VITALE, THE END OF POLICING (2017); THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022); Note, *Pessimistic Police Abolition*, 136 HARV. L. REV. 1156 (2023); Thomas Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022); Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605 (2021); Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123 (2019); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2018); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2018); Peter N. Salib, *Why Prison? An Economic Critique*, 22 BERKELEY J. CRIM. L. 111 (2017); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2016); Butler, *supra* note 6; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

199. For valuable discussions of the differences between "reform as an end goal—reformism" and "reform toward revolutionary or transformative ends" in the context of criminal systems, [signal] Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2527-34, 2537-42 (2022); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 852 (2019).

200. Christopher Slobogin, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 536 (2024).

201. Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 34 (2020) (emphasis added).

an approach [to criminal justice] that does not provide a satisfying answer, at least in theory, to all potential harms."[202] These critics of what Husak terms "criminal law skepticism" stress that the status quo is not merely less than ideal; it needs major reform.[203] But it is difficult to fairly debate the scope and scale of the necessary changes when *criminal law* sets the terms.

Thus, Máximo Langer, Husak, and Slobogin have endorsed "criminal law minimalism."[204] Langer describes criminal-law minimalism as "a theory under which there is still a penal system that has armed public law enforcement, punishment, and, for the time being, imprisonment as tools to deal with social harm" but "uses these tools fairly and only when no other tool could advance the goal of preventing or reducing harm."[205] Examples of socially harmful conduct that Langer says ought be criminalized are "homicides, rape and other sexual assaults, domestic violence, aggravated assaults, home invasions, certain robberies, and arson."[206] In contrast, Langer endorses a laundry list of abolitionist demands for decriminalisation, including "the decriminalization or legalization of drug use; the decriminalization of sex work; the decriminalization of undocumented immigration" and he similarly opposes "the expansion of criminal law through the creation of new crimes … [and] the widespread use of stops and frisks to manage communities of color and low-income communities."[207] Criminal-law minimalism looks quite a lot like the realization of subject-matter, functional, and operational exceptionalisms.

Husak, Langer, and Slobogin acknowledge that U.S. criminal systems are far from minimal. Criminal-law minimalism is an unknown ideal in the

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202. Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 295 (2023).

203. Indeed, Barkow's pragmatic case against abolitionism is expressly grounded in durable public ignorance of how criminal systems actually work. *See id.* ("While abolitionism may not be 'a politics mediated by emotional responses,' the fact is that American politics is dictated by emotion because that is what drives voters. Politicians and voters do not rationally weigh the costs and benefits of each approach to determine which model, on net, will ultimately lead to the least amount of harm. People do a terrible job thinking in broad general terms and have a variety of cognitive biases that lead them to focus on precisely those individual cases that have driven our policies for decades."). In fairness, Barkow has dedicated much of her career to dispelling that ignorance, most recently in PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

204. *See* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020); Slobogin, *supra* note 199; HUSAK, *supra* note 8. Husak credits Andrew Ashworth with coining the phrase. *See* HUSAK, *supra* note 8 at 60; ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 33 (4th ed. 2003) (referring to a "minimalist approach" to criminal law in the context of a discussion of complicity).

205. Langer, *supra* note 204, at 57.

206. *Id.* at 58.

207. *Id.* at 56.

United States.[208] And yet, each author presents the abolitionist ideal of public safety *without* criminalisation as unrealistic precisely because it has never been realized. Thus, Langer writes that "it is hard to imagine, at least for the time being, how one could deal with [seriously harmful conduct] … without criminal law, armed public law enforcement, and involuntary confinement as one of the possible responses."[209] To which an abolitionist might reply that it is also difficult to imagine criminal systems that target only seriously harmful conduct and unleash violence only as a last resort. Framing these debates in terms of the legitimacy of the not-quite-real, not-quite-ideal *criminal law* gives reformists an unearned advantage.

If that's right, shouldn't reformists regard the elimination of criminal law with the same skepticism with which they regard abolition? No, because criminal law threatens reformist interests as well. A system that is generally seen as directed *now* primarily against seriously harmful conduct and tightly constrained *now* by principles of legality might not be seen as requiring reform, much less revolution. Accordingly, those who are certain that the status quo either is or can be made reasonably just face political marginalization if criminal law persists.

Meanwhile, criminal-law minimalists can advance their normative arguments within the frame of criminalisation. So, too, can others who have articulated theories about what criminal law ought to look like. Thus, Paul Robinson and Lindsay Holcomb have drawn upon empirical studies exploring the public's willingness to comply with criminal systems to advance a consequentialist argument that those systems ought to track the

208. *See* AYN RAND, CAPITALISM: THE UNKNOWN IDEAL (1966) (defending a political system of "laissez-faire capitalism" that has concededly never existed); *see also* HARCOURT, *supra* note 84 (detailing how conceptions of "natural order" and "economic efficiency" have been used to justify criminalisation of attempts to "bypass" the market).

209. Langer, *supra* note 204, at 60.

public's justice judgments.[210] They maintain that failure to track public beliefs about what people deserve—to satisfy the demands of "empirical desert"—undermines a system's reputation, which in turn undermines compliance with criminalisation.[211]

To be sure, the translation from criminal law to criminalistion discourse will not always be unproblematic. I used Duff's adoption of the frame of criminalisation as an illustration of criminalisation's jurisprudential neutrality as a descriptive concept. In developing a normative theory of what ought to be criminalised, Duff draws upon a conception of criminal law that effectively tethers him to the status quo: "[W]hat I take to be central aspects of 'our' Anglo-American systems of criminal law."[212] Perhaps our best normative theory of criminalisation fits particular aspects of existing systems; but it might not, and we ought not assume it will do so. In criticizing Duff, Lacey observes that if "the object of the exercise is to produce a theory with robust normative credentials, then the theory cannot, by definition, 'answer to' every feature of the practice: some parts of the institutional practice must be jettisoned as unwise, unjustifiable, or

210. *See* Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277 (2021); *see also* Paul H. Robinson, *Criminal Law's Core Principles*, 14 WASH. U. JURIS. REV. 153, 158 (2021) (adducing evidence that "there are indeed universal principles of criminal liability and punishment that ordinary people share and, further, for good utilitarian and retributivist reasons, ought not be violated and, as a practical matter, cannot be altered"). For similarly structured arguments that are grounded in empirical claims about widely shared moral intuitions, *see also* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998); John Mikhail, *Law, Science, and Morality: A Review of Richard Posner's 'The Problematics of Moral and Legal Theory'*, 54 STAN. L. REV. 1057, 1106-07 (2002); John Mikhail, *Is the Prohibition of Homicide Universal? Evidence from Comparative Criminal Law*, 75 BROOK. L. REV. 497 (2009). For skepticism of the normative significance of some of this literature that focuses on the high level of abstraction at which the relevant norms are documented, *see* Mark Kelman, *Moral Realism and the Heuristics Debate*, 5 J. LEGAL ANALYSIS 339 (2013). For criticism of related "procedural justice" literature that documents and seeks close to close legitimacy gaps between police and communities, *see* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2149 (2016) (contending that rather than "assessing whether a particular institution (here, the police) has legitimacy or not" policymakers ought engage in a "more relational examination of institutions" that "focuses on the symbolic and structural marginalization of African Americans and the poor from society."). Most closely associated with the germinal empirical work of Tom Tyler and Tracey Meares, procedural-justice literature includes, e.g. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990), Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513 (2003); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 270-71 (2008); Tracey L. Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 653 (2009); Tracey Meares, *Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement or Why I Fell in and out of Love with Zimbardo*, 52 J. RES. CRIME & DELINQ. 609, 611 (2015); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY (2016).

211. *See* Robinson & Holcomb, *supra* note 210, at 288-94.

212. DUFF, *supra* note 11, at 5.

incoherent."[213] Among my hopes in eliminating criminal law is to challenge the assumption that normative theory about criminal systems must answer to institutional practice in this way.

You may still wonder where I'm going with this—or at least why I *wouldn't* go elsewhere. The next Part further clarifies and justifies the scope of my eliminativism.

VI. LIMITS

People are not going to stop talking about criminal law, and it is important to understand what they mean when they do so. Describing criminalisation also requires us to understand what is *called* criminal law in particular institutional settings. In U.S. courts the conclusion that something *is* a criminal law triggers a particular set of interpretive and constitutional rules. The rule of lenity applies to criminal laws; the right to counsel requires that attorneys be provided at public expense in serious felony cases[214] but not civil cases;[215]; and due process of law requires proof of guilt beyond a reasonable doubt in criminal trials.[216]

Even in the latter cases, however, the criminal label makes the difference—and that is where my eliminativism stops. We do need a concept that enables us to capture the mode of governance through which the criminal label is imposed. Which invites the question: Won't we just end up having the same debates about criminalisation as we now have about criminal law? Aren't *crime* and *criminal* essentially contested, too? Indeed, it might be thought that focusing on *criminal law* simplifies things—whatever crime or criminals may be in the abstract, only certain acts and people are treated as *criminal by law.*

As it has developed, criminalisation operates at an intermediate level of abstraction. It covers more than *criminal law* but less than *crime* or *criminal*. This scope is appropriate to the legitimacy problem that preoccupied Hobbes and which the present crisis throws into sharp relief. Inasmuch as we are concerned with state legitimacy, we are concerned with what the state *does or ought to do.* Crime or criminality that *does not* have any implications for what the state does or ought to do, doesn't implicate the state's legitimacy. But criminalisation *does* have such implications and thus *does* implicate the state's legitimacy.

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213. Nicola Lacey, *Approaching or Re-Thinking the Realm of Criminal Law?*, 14 CRIM. L. & PHIL. 307, 311 (2020).

214. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

215. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

216. *See* In re Winship, 397 U.S. 358 (1970).

Does it do so in distinctive ways, though? Malcolm Thorburn and Vincent Chiao defend a "public law conception" of criminal systems which holds that the regulatory state governs through crime in ways that are not fundamentally different from how it governs more generally.[217] Chiao acknowledges that different forms of legal regulation raise "to a greater or less degree, questions of justifying coercive public authority" and that criminal systems are "distinctive" because they "tend[] to be so bluntly devastating."[218] But he urges that criminal systems are "functionally continuous with many other forms of coercive state power"—that is, they're designed to accomplish very similar goals."[219] Suppose it is descriptively implausible or unhelpful to identify the function of all criminal law as (say) the preservation of civic order. It might be equally implausible or unhelpful to identify some function of criminalisation that distinguishes criminalisation from other modes of governance.

It also might be doubted whether doing so would be worth the trouble. Take Texas's S.B. 8, which imposes statutory fines on any person who "performs or induces" or "knowingly engages in conduct that aids or abets the performance or inducement of an abortion."[220] Are these criminal or civil fines? Does it really matter*?* As a matter of U.S. doctrine, the "criminal" label has consequences. But maybe we should discard that doctrine or acknowledge that it exists without taking its conceptual premise seriously. The statute will have whatever content it has and operate in whatever way it operates regardless.

It's true that applying the label "criminal" to S.B. 8 wouldn't change anything about its content or operation. But neither does placing a "CAUTION" sign near an area under construction change anything about the relevant hazards or whether passers-by should pay heightened attention to their surroundings. Those hazards would exist, and passers-by would benefit from paying heightened attention regardless. Still, the sign is useful—it informs people that the hazards exist and that they should, well, exercise caution. Likewise, the decision to apply the "criminal" label would—assuming that the label was warranted—convey information about S.B. 8.

What information? Here, there is no getting around the need to develop a theory of what makes the criminal label different. Again, however, we

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217. *See* CHIAO, *supra* note 17; Chiao, *supra* note 17; Thorburn, *supra* note 17.

218. Chiao, *supra* note 17, at 149, 159.

219. *Id.* at 158-59.

220. TEX. HEALTH & SAFETY CODE § 171.208(a)(1)-(2). For an argument that S.B. 8 is "criminal" under U.S. doctrine, see Guha Krishnamurthi, *Are S.B. 8's Fines Criminal?*, 101 TEX. L. REV. ONLINE 141 (2022).

don't have to start from scratch. We can borrow from, build upon, and critique existing criminalisation theory. At the same time, we don't have to forget everything we have learned through explorations of what makes criminal *law* different—factually exceptional in respect to burdens, if nothing else.

In critiquing functional definitions of criminal law, Ristroph distinguishes between the normative *functions* and the normative *effects* of criminal laws. She denies that criminal law has "a single overriding purpose" that fits any of the leading normative *functions* of punishment—retribution, deterrence, incapacitation, rehabilitation.[221] But she maintains that criminal laws always have a certain normative *effect*—they degrade the status of people labelled as criminals.

The precise content and means of status-degradation varies. Being labeled a criminal "deprives [people] of some of the goods that members of a polity not so designated enjoy—physical liberty, money, equal dignity and social standing, various civil and political rights, eligibility for various government benefits, and so forth."[222] Some of this happens through what are in Lacey's criminalisation schema "formal" means. A person convicted of a felony may be punished in accordance with a legislatively specified mandatory minimum term of imprisonment and face "registration obligations; ineligibility for public employment; denial of licensure in other occupations; bans on gun ownership; ineligibility for public housing and other welfare benefits; curtailment of parental rights; exclusion from juries and from public office; and … disenfranchisement."[223] But informally "the use of arrests and interventions short of conviction" can be used to exclude particular groups of people from public spaces[224] and serve as "information-gathering and regulatory devices, by which the government can identify and track non-citizens … or flag and monitor specific individuals as potential troublemakers."[225] Increased exposure to state coercion and the concomitant *prospect of* punishment degrades status as well.

Now, Ristroph formulates her insight as one about *criminal law*. But its value doesn't turn on her jurisprudence. We've seen that a focus on effects is a theme in criminalisation theory. We can reframe her insight into the effects of *criminal law* as an insight into *criminalisation* because in her usage, "it's the same picture."[226] Ristroph's positive "criminal law" *just is*

221. Ristroph, *Carceral Curriculum*, *supra* note 15, at 1703.
222. *Id.* at 1698.
223. Ristroph, *Public Ordering*, *supra* note 15, at 80.
224. *Id.* at 81.
225. *Id.*
226. *See They're The Same Picture*, KNOW YOUR MEME, https://knowyourmeme.com/memes/theyre-the-same-picture.

formal and substantive criminalisation. And we *should* reframe it, because criminal law *and* positivism carry baggage that we are unlikely to shed anytime soon.

Words don't have inherent meaning; the capacity for language may be innate,[227] but the identity of the concepts we attach to particular signs is psycho-socially determined.[228] Accordingly, there's nothing inherent in the phrase *criminal law* that makes it an unsuitable label for the phenomena named by *criminalisation.* As a matter of psycho-social reality, however, *criminal law* carries baggage in the United States that justifies us in choosing a different label. *Criminalisation* is unburdened by the latter baggage and enriched by an emergent scholarly tradition that centers state agency—just what is needed at the present moment. And it does not exclude insights about its subject matter that have been gleaned using the criminal-law frame.

CONCLUSION

I mentioned William of Ockham earlier, invoking the principle of parsimony for which he is best known. Fairness to his scholastic contemporaries requires acknowledging that they had no preference for an ontologically cluttered universe.[229] For my part, I've said nothing about U.S. criminal law that hasn't already been said in one way or the other. I'll therefore conclude by engaging what may be Ockham's most distinctive contribution to philosophy and highlighting this Essay's distinctive contribution to a growing skeptical literature.

Ockham caused a major stir with his *nominalism*—his denial that particular things shared common natures.[230] Thus, dogs existed but "dog" was only a mental construct, a name (hence "nominal") for members of the *canis familiaris* species. More than being unnecessary, Ockham regarded the idea of extra-mental "universals" encompassing all particular things with common natures as incoherent—such universals *could not* exist.[231]

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227. *See* Noam Chomsky, *A Review of B.F. Skinner's "Verbal Behavior,"* 35 LANGUAGE 26 (1959); STEPHEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE (1994).

228. *See* Michael Tomasello, *The Social Bases of Language Acquisition*, 2 SOC. DEV. 67 (1992); Michael Tomasello, *Language is Not an Instinct*, 10 COGNITIVE DEV. 131 (1995); Nicholas Evans & Stephen C. Levinson, *The Myth of Language Universals: Language Diversity and its Importance for Cognitive Science*, 32 BEHAV. & BRAIN SCIS. 429 (2009).

229. *See* Spade, *supra* note 84 ("[A]s usually stated, [Ockham's Razor] is a sentiment that most philosophers, medieval or otherwise, would accept. Few philosophers endorse an *unnecessarily* large ontology.").

230. *Id.*

231. *Id.*

I've taken some inspiration from nominalism in focusing attention on the particularities of U.S. criminal systems. But the problem with the concept of criminal law *isn't* that it's a universal, in Ockham's sense. So is criminalisation, after all. Nor must criminal law be eliminated because it is incoherent or imprecise, or even because we can describe the world without it. Even those who exclude cars, bikes, and buses from their metaphysics on the ground that such objects can be reduced to more fundamental properties and patterns presumably make use of such concepts before crossing the street.[232]

The problem with the concept of criminal law is that it is imprecise and unnecessary *in ways that are potentially harmful.* Ironically, what makes criminal law's elimination urgently important is closely related to what has been said to make criminal law exceptional. The exceptional burdens imposed by criminal systems stand in exceptional need of justification. It is therefore exceptionally important that we get the content, scope, and severity of criminal systems right. Criminalisation theory equips us to understand and explain those systems to laypeople *without* inviting us into debates that have produced a stalemate within general jurisprudence and which—owing to the specific history of *the* criminal law—are at least as likely to break in favor of pro-carceral conceptions of crime and criminality as not.

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232. Among the most ontologically austere metaphysics of which I'm aware are JAMES LADYMAN AND DON ROSS, EVERY THING MUST GO: METAPHYSICS NATURALIZED 4 (2010) (denying "it is … helpful to conceive of either the world, or particular systems of the world … as 'made of' anything at all); TRENTON MERRICK, OBJECTS AND PERSONS 59 (2003) (denying that baseballs can break windows on the ground that only their atomic constituents are causally effective).

Human beings are boundedly rational,[233] interdependent,[234] diffident,[235] and breakable.[236] We can't do without concepts any more than we can do without politics. We need concepts that equip us to describe the political systems we have created, as well as to address the problems to which they give rise. But we cannot afford to retain concepts that obfuscate and perpetuate morally illegitimate status quos. To understand and confront the crisis that criminal systems have generated in the United States, we need to eliminate criminal law.

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233. *See* Ricardo Viale, *Why Bounded Rationality?*, *in* ROUTLEDGE HANDBOOK OF BOUNDED RATIONALITY 11 (2020) (summarizing research which demonstrates that humans are "limited in their computational, processing, and storage abilities" and "tend to make the smallest possible effort in terms of attention and processing.").

234. *See* BENEDICTUS DE SPINOZA, *Ethics*, *in* SPINOZA: THE COMPLETE WORKS 331 (Samuel Shirley trans., 2002) ("Therefore, nothing is more advantageous to man than man. Men, I repeat, can wish for nothing more excellent for preserving their own being than that they should all be in such harmony in all respects that their minds and bodies should compose, as it were, one mind and one body, and that all together should endeavor as best they can to preserve their own being, and that all together they should aim at the common advantage of all.").

235. *See* HOBBES, *supra* note 168, at 87 ("[F]rom … equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing, which neverthelesse they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their owne conservation, and sometimes their delectation only,) endeavor to destroy, or subdue one an other. And from hence it comes to passe, that where an Invader hath no more to feare, than an other mans single power; if one plant, sow, build, or possesse a convenient Seat, others may probably be expected to come prepared with forces united, to dispossesse, and deprive him, not only of the fruit of his labour, but also of his life, or liberty. And the Invader again is in the like danger of another."); *see also* Alice Ristroph, *Hobbes on "Diffidence" and the Criminal Law*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 23, 31 (Markus D. Dubber ed., 2014).

236. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623 (1958) ("[S]uppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace, and could extract the food they needed from the air by some internal chemical process. In such circumstances (the details of which can be left to science fiction) rules forbidding the free use of violence and rules constituting the minimum form of property—with its rights and duties sufficient to enable food to grow and be retained until eaten—would not have the necessary nonarbitrary status which they have for us, constituted as we are in a world like ours."). *Accord* SPINOZA: THE COMPLETE WORKS, *supra* note 234, at 331 ("[W]e can never bring it about that we should need nothing outside ourselves to preserve our own being and that we should live a life quite unrelated to things outside ourselves.").