AUDITING CRIMINAL JUSTICE MINIMALISM

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ABSTRACT

If *criminal justice minimalism* is a shared principle among criminal law scholars, it can help to clarify the quality of our disagreements. Every normative proposal in the criminal legal literature can be held to the minimalist standard—audited, so to speak, to account for the policy author's minimalist claims. To this end, this Essay proposes a four-step framework by which to evaluate adherence to the minimalist principle, where each step serves as a hub for pointed scholarly debate regarding the path to minimalist criminal justice.

INTRODUCTION

In March of 2015, the Department of Justice published a report on the criminal system of Ferguson, Missouri, a racially diverse suburb of St. Louis. The report found that Ferguson officials had used the city's criminal system as a critical source of city revenue and that associated schemes pumping money into the city's coffers were racially biased.[1] To settle the DOJ lawsuit based on the report, Ferguson agreed to make major changes,

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1. *See* C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015).

> City officials routinely urge [sic] Chief Jackson to generate more revenue through enforcement. In March 2010, for instance, the City Finance Director wrote to Chief Jackson that "unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year. . . . Given that we are looking at a substantial sales tax shortfall, it's not an insignificant issue."

Id. at 2. The report concludes that both the Ferguson Police Department and the Ferguson criminal courts prioritized the generation of city revenue: "The Ferguson municipal court handles most charges brought by FPD, and does so not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue." *Id.* at 42. "The confluence of policing to raise revenue and racial bias thus has resulted in practices that not only violate the Constitution and cause direct harm to the individuals whose rights are violated, but also undermine community trust, especially among African Americans." *Id.* at 6.

among them elimination of police initiatives and actions designed to generate city revenue.[2] The municipality would no longer treat its residents as piggy banks to be cracked open and raided at will.[3]

Few criminal law scholars objected to the Ferguson Report's findings or to DOJ's insistence that Ferguson ratchet down its criminal enforcement regime. In the years following the Ferguson settlement, it seemed that most writing in the criminal legal literature adhered to the principle of *criminal justice minimalism*: no more criminal law and administration than necessary. Broad agreement among criminal law scholars that criminal law and administration should be limited to the bare "necessities" might suggest that minimalism is too vague and generic a normative position to anchor the literature's spirited crime policy debates.

This Essay reaches a different conclusion. It argues that if criminal justice minimalism is a shared principle among criminal law scholars, the principle establishes common ground by which to clarify the quality of our disagreements. Put differently, every normative proposal in the criminal legal literature can be held to the minimalist standard, audited, so to speak, to account for the policy author's minimalist claims. To this end, this Essay proposes a four-step framework by which to evaluate adherence to the minimalist principle where each step serves as a hub for scholarly debate regarding the path to minimalist criminal justice. If we are all more or less criminal justice minimalists, we may find analytical traction by methodically debating whether our stated policy commitments live up to this claim.

2. *See generally* Consent Decree, U.S. v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. 2016), https://www.justice.gov/opa/file/833431/dl?inline [https://perma.cc/77WX-XW35]. "No City or FPD employee will recommend, develop, or implement any law enforcement program, strategy, tactic, or action in order to generate revenue. Any revenue generated by law enforcement actions will be incidental to the public safety purpose." *Id*. at 19. *See also* Press Release, U.S. Dep't of Just. Archives, Justice Department and City of Ferguson, Missouri, Resolve Lawsuit with Agreement to Reform Ferguson Police Department and Municipal Court to Ensure Constitutional Policing (Mar. 17, 2016), https://www.justice.gov/archives/opa/pr/justice-department-and-city-ferguson-missouri-resolve-lawsuit-agreement-reform-ferguson [https://perma.cc/9SEQ-AMGM].

3. *See id.*; *see also* Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529, 533 (2021) ("The Department of Justice's report on Ferguson, which made the country aware of policing for profit, highlighted quota abolition in its Recommendation section.").

I. DIFFICULT CONVERSATIONS

Criminal law scholars generally agree that the U.S. criminal system is excessive in terms of the scope of criminal law and the scale of criminal administration; that this excess creates unwarranted human suffering; and that scholars should work diligently to eliminate this suffering.[4] In this sense, many if not most criminal law scholars present as criminal justice minimalists, adhering to the principle that there should be no more criminal law than necessary.[5]

That said, scholars disagree about several related issues including appropriate remedies and the pace of change. For instance, many litigating within and around the criminal system's excess and moral corruption pursue every available form of relief, contending that flesh-and-blood clients

4. Here, "unwarranted" is used to suggest a distinction between the just and unjust human suffering experienced under the criminal system. *See* KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 8 (Rachel E. Barkow et al. eds., 11th ed. 2022) ("[P]unishment is *intended* to be unpleasant."). *See also* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1649–53 (2010) (discussing and compiling works that find "unjustified suffering in the criminal justice system"); John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009) ("When the state punishes a criminal, it inflicts suffering."). Of note, Daniel Hawara argues that the scale and depth of human suffering under criminal law is a unifying theme in the criminal legal literature. *See* Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. 1847, 1858–61 (2024) ("While one can take different views about where to focus their energy, and while we can debate the efficacy of some actions, the suffering frame reveals that each project can have tangible value in real people's lives—both now and in the future. It seems, then, that a great deal of criminal law scholarship is about making a choice of *whose* suffering we prioritize, with tradeoffs to be made depending on what position one takes.").

5. *See, e.g.*, Benjamin Levin, *Criminal Law Minimalisms*, 101 WASH. U. L. REV. 1771, 1794–95 (2024) ("[W]e define minimalism as a belief in using criminal law (or criminal legal institutions) as little as necessary.") [hereinafter Levin, *Criminal Law Minimalisms*]; W. Robert Thomas, *Does the State Have an Obligation Not to Enforce the Law?*, 101 WASH. U. L. REV. 1883, 1902 (2024) ("[C]riminal law minimalism is a cry for no more criminal law than necessary."). Maximo Langer, the pioneering voice on criminal justice minimalism as discussed in the U.S., similarly describes minimalism as resonant with the *ultima ratio* principle. *See* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. 42, 73 (2020) ("This principle—known in various countries around the world and discussed by a few Anglo-American legal and philosophy scholars—states that criminal law should only be used as a last resort when no other social responses or public measures would suffice to adequately advance a legitimate goal, such as addressing harmful behavior."). In later work, Langer explains that a capacious definition of "penal minimalism" acknowledges a diversity of minimalist approaches and, more pointedly, varying theories of the proper role of the state in society. *See* Máximo Langer, *What is Penal Minimalism?*, 101 WASH. U. L. REV. 2031, 2047 (2024) ("As I explained elsewhere, this definition of the principle [of penal minimalism] tried to remain open to different theories of the state, of punishment, of what a legitimate goal is, and of what it means to adequately advance it.").

deserve nothing less.[6] Conversely, others argue that forms of relief short of decriminalization and decarceration are counterproductive. They find efforts to make police procedures more equitable and prisons and juvenile detention facilities more humane a distraction from the criminal system's fundamental flaws—red lipstick on a large and feral pig.

The claim that conventional reform efforts hinder rather than help might be taken as an example of a "perversity" argument.[7] Perversity arguments hold that a given form of advocacy, though well-intentioned, will inevitably "backfire and exacerbate the problem [it] is trying to solve."[8] Albert Hirschman describes the basic features of the perversity argument in his book on political discourse titled, *The Rhetoric of Reaction*.

> This is at first blush, a daring intellectual maneuver. The structure of the argument is admirably simple, whereas the claim being made is rather extreme. It is not just asserted that a movement or a policy will fall short of its goal or will occasion unexpected costs or negative side effects: rather, so goes the argument, *the attempt to push society in a certain direction will result in its moving all right, but in the opposite direction*. . . . Attempts to reach for liberty will make society sink into slavery, the quest for democracy will produce oligarchy and tyranny, and social welfare

6. Harawa, *supra* note 4, at 1849. *See, e.g.*, id. at 1855 ("With suffering front of mind, it is hard to look at the current state of incarceration in the United States and not want immediate relief regardless of its form for the millions of people who are imprisoned or jailed each year.").

7. This point regarding the recent emergence of perversity arguments echoes a similar argument made by Margo Schlanger. Margo Schlanger, *No Reason to Blame Liberals (Or, the Unbearable Lightness of Perversity Arguments)*, THE NEW RAMBLER (2015) (reviewing NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014)).

8. Meg Holden, *The Rhetoric of Sustainability: Perversity, Futility, and Jeopardy*?, 2 SUSTAINABILITY 645, 646 (2010); *see also*, Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 285 (2023).

The perversity argument bears some resemblance to futility arguments and jeopardy arguments. From a sociological standpoint, such arguments often arise as the result of a breakdown in communication: "Hirschman's schema is an attempt to come to grips with the 'massive, stubborn, and exasperating otherness of others,' and more specifically, 'the systematic lack of communication between groups of citizens, such as liberals and conservatives, progressives and reactionaries.'" Holden, *supra* note 8, at 646 (internal citations omitted). None of this should be taken to argue that the referenced perversity arguments are incorrect (though they very well may be), only that perversity, futility, and jeopardy arguments are more likely to arise under a certain set of social conditions.

> programs will create more, rather than less, poverty. *Everything backfires*.[9]

Perversity arguments are often compared with adjacent modes of argumentation such as futility arguments ("the change will achieve nothing because it fails to acknowledge incontrovertible political, social, or economic laws"[10]) and jeopardy arguments ("the change will threaten to destroy some cherished previous hard-won accomplishment, such as freedom or democracy"[11]). In profiling the perversity argument, Hirschman identified it as a key feature of the conservative politics of the 1990s.[12] But times have changed. Perversity arguments have migrated to leftist U.S. politics, a shift political scientist Jennifer Hochschild characterizes as the "reversal of liberal optimism."[13] To be clear, Hirschman and Hochschild do not argue that perversity arguments are necessarily wrong, only that they are extreme positions that often mark a cultural shift.[14]

In any event, it seems safe to say that conventional criminal law scholars diligently working for criminal justice reform find the claim that their work makes the criminal system worse harsh and off-putting.[15] The truth of the

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9. ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 11–12 (1991) (author's emphasis).

10. Holden, *supra* note 8, at 646.

11. *Id*.

12. *See* Jennifer Hochschild, *How History Has Proven Albert Hirschman's Insight to Be Essential but Also Wrong: The Rhetoric of Reaction: Perversity, Futility, Jeopardy, Albert Hirschman*, 85 SOC. RSCH. 597, 600–03 (2018) ("Scholars and analysts of the left also invoke the rhetoric of futility to describe American racial dynamics.").

13. *Id.* at 604.

> The left—understood as progressives or American-style liberals—has always been constituted by optimism and enthusiasm for new programs. Thomas Paine proclaimed that 'we have it in our power to begin the world over again'; Hirschman similarly describes liberals as believing that history is on our side and that progress is inevitable. Conversely, the right—conservatives, reactionaries—has traditionally been defined in terms of its pessimism and suspicion of new programs. . . . Since the 1970, however, it has frequently been political actors of the left who have asserted that new initiatives have harmful unintended consequences, are futile, or jeopardize cherished values and practices.

Id. at 600–01.

14. Though Hirschman identifies the perversity argument as characteristic of reactionary rhetoric, he refrains from making absolute claims about this brand of argument. *Id*. at 35. "None of this is meant to deny that purposive social action does occasionally have perverse effects. But by intimating that the effect is likely to be invoked for reasons that have little to do with its intrinsic truth value, I intend to raise some doubts about its occurring with the frequency that is claimed." *Id*. at 38.

15. Aliza Hochman Bloom's consideration of several initiatives designed to bring relief to economically-disadvantaged communities illustrates why perversity arguments sometimes seem

matter aside, it is likely difficult to process, much less respond to, the claim that one's earnest efforts to address human misery are having precisely the opposite effect. And yet, the perversity claim may signal a common sensibility across the normative literature: Most criminal law scholars now seem principally motivated to identify and eliminate the criminal system's unwarranted human suffering.

II. A STANDARD PREMISE

We might think, then, of criminal justice minimalism as normative common ground. Indeed, few writing in the criminal legal literature would object to the basic notion that society should not tolerate more criminal law and administration than is necessary. Consider, in this light, the range of the literature's normative positions. Some scholars writing against the grain propose a dramatic expansion of the police ranks in an effort to reduce both homicide rates and incarceration rates.[16] In the same cultural moment, scholars at the opposite end of the policy spectrum deem criminal law and administration unnecessary except as needed to regulate the "dangerous few."[17] Still others insist that we raze the entire system, rejecting the

removed from everyday experience. *See* Aliza Hochman Bloom, *Reviving Rehabilitation as a Decarceral Tool*, 101 WASH. U. L. REV. 1989, 2005–28 (2024). (The penal system would likely appear more just after a ban on juvenile life without parole (LWOP), raising the age cap in juvenile court to twenty-years-old, and expanding parole eligibility for prisoners whose underlying offense was committed before their twenty-first birthday. *See id.* at 2009, 2013, 2015.) The same can be said of Sapir and Rubenstein's efforts to bring minimalist principles from legislatures to criminal courts. *See* Yoav Sapir & Guy Rubinstein, *Minimalist Criminal Courts*, 101 WASH. U. L. REV. 1955, 1967 (2024). Each proposal would make the penal system more fair, credible, and legitimate. Under perversity theory, should we then consider these legitimacy effects a cost that calls into question the obvious and immediate benefits of the underlying policy? This seems a remarkably bold claim, given the stakes.

16. *See, e.g.*, Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J. L. & EQUAL. 85, 103–105 (2022) ("The United States would have to reduce the incarcerated population by around 2 million people and hire half a million more police officers to bring its prisoner-to-police officer ratio in line with the rest of the world . . . The human, social, and economic costs of incarceration would be substantially reduced; homicide and other serious crime would decline; and police violence might also drop. The main downside our proposal would be the costs associated with a significantly greater number of arrests. But these costs pale in comparison to the benefits."); FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 76 (2007) ("The expansion of police manpower was an important part of the 1990s by most measures, and some observers gave credit to larger numbers of police in explaining the crime decline."); PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE 160–61 (2018) ("All the best evidence indicates that police will be essential to any effort to reduce violence.").

17. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1168 (2015) ("Before proceeding further, it bears noting that there may be, in the end, some people who

"dangerous few" exception.[18] These visions for the future of American crime policy are obviously quite different. Yet, their respective architects would each claim the same commitment to deploying no more criminal law and administration than is necessary.

In this sense, criminal justice minimalism's primary weakness may be its primary strength. Minimalism may seem an unreliable normative anchor for the criminal legal literature because one's perception of the meaning of criminal justice minimalism depends on one's sense of the purpose of the criminal system. If a policy advocate understands the purpose of the criminal system to be retribution, certain configurations of the criminal law and administration will be necessary to honor that ancient value. But one's conception of criminal justice minimalism will have different normative implications if the purpose of the system is understood to be deterrence. This is to suggest that values matter and, similarly, that held values are far more meaningful than normative self-identifications like reformer, minimalist, and abolitionist.

Criminal justice minimalism may thus serve as a shared premise to which we can hold each other accountable. It might likewise offer clear lines of criticism, facilitating a more productive discussion of the principles anchoring the normative literature.[19] Taking minimalism (and, by extension, necessity) as the literature's lodestar, we might consider it the basis of a crime policy audit comprised of four steps: (1) held values, (2) a policy objective derivative of these values, (3) a policy design by which to achieve the objective, and (4) an implicit claim that the crime policy itself includes no more criminal law and administration than is necessary to honor the stated values. Each step of the audit offers a site for potential

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are so dangerous to others that they cannot live safely among us, those rare persons referred to in abolitionist writings as 'the dangerous few.'" (citing PRISON RSCH. EDUC. ACTION PROJECT, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 81, 135 (Mark Morris ed., 1976))); Christopher Slobogin, *Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration*, 56 WAKE FOREST L. REV. 97, 103 (2021) ("Even advocates for abolishing prisons always express the important caveat that confinement needs to be retained for the 'dangerous few.'"); George Glass, Note, *A New Criminal Response Framework: Rejecting the "Four Horsemen of the Carceral State"*, 99 IND. L.J. SUPP. 79, 90–91 (2024) ("One of the most common concerns people have with prison abolition is what to do with people who are too dangerous to be among the general population.").

18. *See generally* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2019 (2022).

19. *See id*. "I see some scholars who invoke minimalism as seeking greater clarity and precision in the study of criminal policy and in the articulation of reformist objectives." *Id.* at 1802.

disagreement—a readily discernible hub for effective intellectual engagement.

1. Do I share the policy author's stated criminal justice values?[20]
2. If yes, does the stated policy objective align with our shared values?[21]
3. If yes, does the policy design meet the policy objective?
4. If yes, is every bit of the criminal law and administration incorporated into the policy design necessary, given our shared values and stated objectives?[22]

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20. *See, e.g.*, ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 42 (2011) ("For a wise solution reconcile interests, not positions."); Sarah Cole et al., *"Framing" in Public Initiatives to Advance Racial Equity*, 38 OHIO ST. J. ON DISP. RESOL. 255, 263 (2023) ("In mediation, parties enter with their own framework for issues and conflicts and are often focused on the past or on positions, not interests."); Yassin El-Ayouty, *Challenges Facing Inter-Governmental Political Negotiations Which Are Common to International Business Negotiators: An Analysis of Shared Concerns*, 3 ILSA J. INT'L & COMPAR. L. 829, 839 (1997) ("From the above, it becomes clear that the tenet of modern negotiation, that interests, not positions should be the central focus, has much in common with *Evolutionary Economics*."); Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1727 (2023) ("If African American violent crime victimization and the rate of African American incarceration are both likely to diminish the quality of African American life, but incapacitation often presents as a reasonable and arguably necessary response to serious violent crime, how should the African American community think about its core interests in the penal system?").

21. Scholars have in fact argued normative baselines for criminal justice minimalism. Yoav Sapir and Guy Rubinstein find that criminal justice minimalists believe that a functional criminal justice system is necessary to achieve public safety, but also that penal administration should be used as a last resort. *See* Sapir & Rubinstein, *supra* note 15, at 1957 ("However, minimalists are also deeply concerned over the many negative potential effects of criminalization, enforcement, and punishment. Most minimalists, therefore, hold that for criminal law to be of positive value to society, governments must exercise their penal powers only as a 'last resort.'").

22. Levin makes a similar point about the value of minimalism as a mark of distinction versus the value of minimalism as an evaluative tool that forces reform scholars to (systematically) place all of their cards on the table. Levin, *Criminal Law Minimalisms*, *supra* note 5, at 1797–98.

In his article *The Minimalist Alternative to Abolition: Focusing on the Non-Dangerous Many*, Christopher Slobogin provides an example of a minimalist policy agenda ready for audit in his proposal to downsize police. *See* Christopher Slobogin, *The Minimalist Alternative to Abolition: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 556–57 (2024). Slobogin begins with a nod to a value justifying his proposal (racial equity); suggests a policy objective (racial equity in the enforcement of minor criminal infractions); and offers specific policy proposals (offloading (1) traffic enforcement to

The final question regarding adherence to the minimalist standard can be inverted and, perhaps counterintuitively, still work in the interest of criminal justice minimalism. Does the proposed policy include *enough* criminal law and administration to honor our shared values and meet the stated objective, or does the designated amount fall short of this threshold? We might thus think of the minimalist standard as protecting against both the prospect of too much and too little criminal law and administration.

It bears repeating that this series of questions is based on the premise that we are all, at least in a nominal sense, criminal justice minimalists.[23] Virtually everyone writing in the "change" wing of the criminal legal literature advances a normative agenda and constitutive policy proposals with the understanding that they will utilize no more criminal law and administration than is necessary to venerate their held values. If the commitment to criminal justice minimalism is indeed common among change-oriented criminal law scholars, the minimalist principle lends much-needed structure to our conversations about the future of criminal law. The principle can be used to more clearly communicate the logic underlying our respective positions as to the appropriate "scope and scale"[24] of change. At which point, criminal justice minimalism becomes more than an opportunity for scholarly self-identification: It provides an analytical framework by which to debate the minimalist standard.

The four points of departure on the path to criminal justice minimalism—values, policy objective, policy design, and the necessity claim—drive the framework. If I disagree with another scholar as to held values—specifically, the proper meaning and function of the criminal law—then our values discrepancy should center the normative discussion. *Why are the values driving your crime policy agenda favorable to mine*?[25] If we

"an unarmed traffic force," (2) shifting emergency response involving the mentally ill and unhoused to behavioral professionals, and (3) decriminalizing misdemeanors and minor felonies). *Id.* at 557. Given that these proposals require moving state regulation of the underlying activity outside of the penal field, it seems that each uses no more than the criminal law and penal administration necessary—which is to say, none. *See id.* at 556–57, 560.

23. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324 (Peter Laslett ed. 2d ed., Cambridge Univ. Press 1967) (1690) ("[T]he end of Law is not to abolish or restrain, but *to preserve and enlarge Freedom*." (emphasis added)).

24. Levin, *Criminal Law Minimalisms*, *supra* note 5, at 1774.

25. *See, e.g.*, Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1699–1700 (2023) (arguing that African Americans hold an idiosyncratic values bundle in the field of penal administration).

happen to share the same values, we may disagree as to whether the stated crime policy objective aligns with our shared values. If we manage to agree as to values, and that the stated crime policy objective affirms our shared values, we may instead disagree on whether the proposed policy design will advance the stated policy objective. And if we agree on values, policy objective, and policy design, finding synergy across these three normative categories, we may ultimately disagree as to whether all of the criminal law and administration utilized in the proposed policy is necessary, given our shared pre-commitments. These are, again, readily discernible lines of scrimmage drawn according to the common claim to criminal justice minimalism.

Only after reaching the end of this gauntlet would scholars agree that a given crime policy meets the minimalist standard. Though it may be unlikely that the interlocutors reach the end hand-in-hand, they could identify the source of their disagreement with far more precision. A standard minimalist audit might thus make the literature's policy debates more efficient and constructive, while pushing the field toward analytical coherence.

CONCLUSION

Why do scholarly efforts to chart the future of criminal law often feel like ships passing in the night? It could be that criminal law scholars have yet to establish the terms of the debate. Responsive to this shortcoming, this Essay presents a basic framework for the pursuit of criminal justice minimalism that illuminates both common ground (i.e., the shared claim to minimalism) and clear points of departure.

In terms of application, one can imagine two penal abolitionists wrapped in a debate, one calling for comprehensive abolition now and

forever,[26] the other calling for abolition for all but the "dangerous few."[27] The first maintains that none of it is necessary, not now, not ever. The second disagrees. The two, as abolitionists, might share the same values with their disagreement settling on one of the other analytical hubs: policy objective, policy design, or their respective claims as to the amount of criminal law and administration needed to honor their shared values and advance their shared objective. At which point, minimalism, if indeed a shared premise, presents more as a journey than a specific destination.

26. *See, e.g.*, Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 210 (2021) ("Importantly, these detention policies affect many mixed-status families, meaning that U.S.-citizen children and partners of detained individuals were harmed because of Trump-era immigration detention policies. Such harm is unnecessary and can be alleviated through a process of abolition.") (immigration law); Devin J. McCowan, Note, *The Jurisdiction-Stripping Consent Decree: A Practical Tool Towards Police Abolition*, 98 N.Y.U. L. REV. 2197, 2207–08 (2023) ("Police abolition falls within this long history of abolitionist thought. Police abolition could help us eliminate other structures of harm in our society and help us rethink our relationship with power and hierarchy."); *see also* Barkow, *supra* note 8, at 254 ("Many abolitionists reject what they call 'reformist reforms' that do not contribute to dismantling the existing legal order. For example, some abolitionists reject calls to invest in improvements to prisons or to put in place greater staffing, even if doing so would improve the lives of currently incarcerated people, on the view that this additional funding ultimately expands the role of prisons in society and leads to incarceration being more entrenched overall. Other abolitionists have rejected proposals that would release certain groups of incarcerated people—such as those serving offenses that do not involve violence—because of a concern that excluding others 'entrenches the idea that anybody 'deserves' or 'needs' to be locked up.'").

27. *See, e.g.*, Frampton, *supra* note 18, at 2019 ("Yes, Of Course We Will Still Need to Incapacitate 'The Dangerous Few,' Albeit in a More Humane Setting that Affirms the Basic Dignity of Those Restrained."); Rafi Reznik, *Retributivism Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 186 (2019) ("Abolitionists do not advocate that prison doors be opened today and incarcerated people let out just like that . . . safety remains a top priority: the existence of a 'dangerous few,' those individuals who must be forcefully controlled in order to keep them from harming others, is acknowledged."); Slobogin, *supra* note 17, at 103 ("Even advocates for abolishing prisons always express the important caveat that confinement needs to be retained for the 'dangerous few.'").