

# Criminal Justice for All

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This is a critical juncture for criminal law scholarship. It is not hyperbolic to assert that our criminal justice system is very much in crisis. Just as important, this crisis is widely acknowledged outside of the legal academy—so much so that, notwithstanding meaningful variation in how the problem is diagnosed, we see almost universal agreement throughout scholarly, popular, and political discourse: The criminal justice system needs fixing.

My aim here is not to document this need, but rather to consider the function of legal scholarship in, first, exposing the limits of criminal law as it operates on the ground and, next, generating a path forward.

As a starting point, we might briefly take stock of the ongoing crisis. It turns out that much of the received wisdom upon which the criminal process relies has been undermined.<sup>1</sup> We can usefully disaggregate contemporary criminal justice critique by observing three distinct (albeit overlapping) categories of concern. One is the concern for mass incarceration and its collateral effects, which is primarily—but by no means exclusively<sup>2</sup>—focused on the criminal justice system’s grossly disproportionate impact on African-American men and

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1. See Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L. J. ANN. REV. CRIM. PRO. iii (2015). Judge Kozinski identifies a dozen revelations that have significantly undermined conventionally accepted criminal law truths. For instance, we now have good reason to question the reliability of certain key categories of evidence, including eyewitness identifications, forensic science, human memory, and confessions. Similarly, recent developments have cast in doubt whether, for the most part, jurors follow instructions, prosecutors comply with discovery obligations, police officers are objective, guilty pleas equate with actual guilt, and the burden of proof functions as it ought. Last, empirical evidence has challenged the deterrent value of long-term incarceration. As Judge Kozinski puts it, “We may be spending scarce taxpayer dollars maintaining the largest prison population in the industrialized world, shattering countless lives and families, for no good reason.” *Id.* at xiii.
2. See, e.g., MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 258 (2015) (“[N]umerous people are serving time today for nonviolent offenses, many of them property or petty drug offenses, that would not warrant a sentence in many other countries.”).

its ravaging of communities of color.<sup>3</sup> Another is the concern about wrongful convictions, including convictions of the factually innocent.<sup>4</sup> And last is the concern for unremediated injury—for harms that remain beyond the reach of the criminal law<sup>5</sup>—including unpunished sexual violence.<sup>6</sup>

These three strands of the dominant criminal justice critique have been, and continue to be, shaped by forces outside of the legal academy, to be sure. (Note, for instance, the influence of social movements like Black Lives Matter, sex-positive feminism, and LGBTQ advocacy.) But criminal law scholars have also played a pivotal role in bringing this critique to the fore—which is to say, beyond the bounds of academic discourse. Michelle Alexander’s *The New Jim Crow* is an excellent example,<sup>7</sup> but there are many others. Because the question of scholarly impact is an increasingly pressing one (rightly so), this point is worth stressing.

At its best, criminal law scholarship, whether descriptive or overtly normative,<sup>8</sup> promises to further the justice promised by the criminal justice system. This leaning is almost inevitable when the status quo is so deeply flawed—a consequence of the grim fact that our system is, in so many ways, not functioning as it should. Sustained scholarly attention to the criminal law—via sophisticated doctrinal analysis, groundbreaking empirical work, or

3. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010); PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2010); DOROTHY E. ROBERTS, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).
4. See Brandon L. Garrett, *Claiming Innocence*, 93 MINN L. REV. 1629 (2008); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. (2008); Susan Bandes, *Framing Wrongful Convictions*, 5 UTAH L. REV. (2008); Daniel Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549. See also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470 (2004) (arguing that structural features of our adversary system distort the plea bargaining process).
5. As Mari Matsuda has written, “[t]he kinds of injuries and harms historically left to private individuals to absorb and resist through private means is no accident. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live.” Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2321-22 (1989). For a seminal treatment of women’s overlooked injuries, see Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995) (describing how “the criminal justice system is dominated (incontrovertibly so) by a preoccupation with men and male perspectives.”). For more recent efforts to explore the enforcement-related implications of unremediated harm, see Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 878-80 (2014) (presenting and analyzing empirical data on the underenforcement of hate crimes laws).
6. Unremediated injury is the target of contemporary rape law reform, which seeks to upend a legal regime that still allows the vast majority of sexual violence to go unpunished. See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2750084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2750084).
7. See *supra* note 3.
8. See Robin West, *The Contested Value of Normative Legal Scholarship*, 61 J. LEGAL EDUC. 6 (2016).

the design of grand theory—is bound to open new frames for conceiving and effecting change.

Still, even in an era of great cultural and political receptivity to prescriptive claims, I must temper this view of criminal law scholarship as integral to reconstructing our faulty system. My worry is that scholarly efforts to transform criminal justice will be jettisoned by those whose critical approaches are most desperately needed in this regard. Returning to the three strands of contemporary criminal justice critique (again, mass incarceration, wrongful convictions, and overlooked injury), a core defect that binds together each area of concern is the neglect of marginalized perspectives. Attention to these perspectives is the hallmark of progressive criminal law scholarship. Yet in its most radical—and some would say powerful—instantiation, the criminal justice critique is an argument, not just for ratcheting down the carceral state, but for abandoning it altogether.

I understand the appeal of repudiating the criminal justice system, whether because of its generalized failings (the system is corrupt/racist/patriarchal; it always will be) or based on more narrow grounds (the corrupt/racist/patriarchal system will never respond to X crime). And I appreciate why scholars committed to improving the lot of the most vulnerable among us might not view the criminal law—particularly in its current incarnation—as especially worthy of intellectual investment in reform.<sup>9</sup> That said, I believe this investment is more than justifiable; it is crucial. If critical scholarship on criminal justice ceases to contest the *why* and *how* of criminalization and punishment, the system and the interests it protects will be left intact.<sup>10</sup>

Scholarly disengagement with the workings of our criminal justice system is not the best course, in my opinion, and I say this only partly for pragmatic reasons.<sup>11</sup> For me, the primary impulse—indeed, the imperative—to reorient, rather than ignore or forsake, criminal justice is rooted in our rights as equal citizens. Victoria Nourse, over a decade ago, wrote:

Once upon a time, we thought that the family was a place of privacy, a place where, without question, individuals existed apart from the state. Feminism

9. Recent moves to center vulnerability in legal scholarship can be attributed largely to the work of Martha Fineman. See Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. J. 10 (2010); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008).
10. On occasion, critical scholarship challenges the need for criminal law enforcement while offering alternatives that would not simply leave the system intact. For one significant effort to theorize the absence of criminal law, see Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1167-68 (2015) (offering an “aspirational ethical, institutional, and political framework that aims to fundamentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls.”). McLeod provides a rich account of why we should gradually displace criminal law enforcement with other mechanisms of justice, ultimately “render[ing] ‘prisons obsolete.’” *Id.* at 1168.
11. See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1701-05 (1990) (discussing the problem of transition from the present to the ideal).

changed that, at least in part, by reimagining the family as a set of gendered, and therefore potentially subordinating, relations. I urge that the criminal law be subjected to a similar intellectual transformation, to an imagined economy of relations between citizens and state.<sup>12</sup>

This imagined economy raises formidable questions (doctrinal and theoretical, substantive and procedural) that lie at the heart of public law.<sup>13</sup>

Conceptualizing criminal law as, inevitably, a site of entrenched inequalities and steep power differentials shows why it is a mistake to desert systemic reform. Criminal law is an “institution of governance,”<sup>14</sup> in the end, mediating relations between the individual and the state, just as it mediates relations among individuals. These relations can be just or they can be unjust, and they can be more or less equal; regardless, they will endure.

This proposition sounds abstract, but it is quite tangible to many who work in the trenches of criminal justice. When I served as an Assistant District Attorney in New York County, I was—every day—acutely aware that the proceedings and their eventual outcomes were forging relationships between crime victims and the state, between criminal defendants and the state, and between crime victims and crime perpetrators. So too was I painfully attentive to the hierarchical nature of these ongoing relationships, along with their potential to empower and to disempower. Ultimately, at least to my mind, the meaning of justice in any given case was contingent on this trio of relationships. I tried to take them into account; I tried to promote their best expression. Even so, in these endeavors there were constraints, to say the least.

For example, as a domestic violence prosecutor, I was often struck by the vast terrain of suffering that lay outside the bounds of law. Criminal statutes are premised on a transactional model of crime that decontextualizes violence. The law thereby conceals the realities of domestic violence, which is defined by an ongoing pattern of conduct featuring power and control.<sup>15</sup> Unsurprisingly then, prosecutors who handle domestic violence cases often hear from victims that the crime charged did not constitute the worst of the abuse, usually followed by a painful story of what did.

In recounting their suffering at the hands of an intimate, battered women might reasonably expect understanding and beyond that—remediation, a fuller measure of justice. But prosecutors must explain that the law criminalizes only a sliver of what was endured. Victims thus learn that the criminal law does

12. V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1697 (2003).

13. *Id.* at 1739-40.

14. *Id.*

15. In an earlier piece, I fully developed this argument and proposed a “course of conduct” statute that would address the shortcomings identified. See Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004). I have since refined the proposal. See Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613 (2007); Deborah Tuerkheimer, *Breakups*, 25 YALE J. L. & FEMINISM 51 (2013).

not recognize their violation; nor does it hold abusers truly accountable. As a result, violent domination goes unchecked. To those involved in a case, this is more than a theoretical claim: the state is wholly complicit in the arrangement.<sup>16</sup>

In every criminal prosecution, moreover, there exists a relationship between the state and the defendant; this relationship also squarely implicates equality norms. While a prosecution can undermine these norms, compassionate treatment of a defendant may mitigate this effect. In my experience, nowhere was this possibility more apparent than in New York County's juvenile offender court, where those granted "youthful offender" treatment were closely monitored, both by a judge who genuinely cared about their future selves and by prosecutors willing to contemplate the fullness of each individual defendant's life. I am quite certain that these factors affected not only the ultimate resolution of their cases, but also how defendants perceived the legitimacy of the criminal process and their own standing vis-à-vis the state. The same could be said for cases in which prosecutors arranged to meet with defendants and their attorneys to hear—and factor in—the defendant's version of the incident and his life circumstances. And the same is true of cases in which prosecutorial charging decisions and plea negotiations reflected mercy that too often was in tension with the penalties authorized by law. From the defendant's perspective, the state can be empathetic or ruthless, principled or arbitrary.

My experiences as a prosecutor certainly inform my belief in the importance of critical scholarship on the criminal justice system.<sup>17</sup> While this kind of scholarship has always served a valuable function, it is especially meaningful now, when we find ourselves at an opportune moment to rethink the very mission of criminal law, and then its implementation. Framed by norms of citizenship and equality, criminal law scholarship is uniquely poised to advance understandings of what it means for substantive prohibitions and defenses to be just; for mechanisms of enforcement to be fair and effective; and for our methods of punishment to be sparing and humane.

16. Relatedly, in support of a protection-based understanding of the Equal Protection Clause, Robin West has argued:

[T]he master-slave relationship can be defined, and often has been defined, as a private relationship in which the violent assault by the master of the slave is not a criminal offense (but not vice versa), such that the assaulted slave has no recourse against the assaultive master, no rights that were violated . . . . Unlike the citizen who is protected against such violence, betrayal, and violation, the only way for the slave to avoid the violence of the master or the threat of starvation attendant to his betrayal and violations of trust is for the master's command to be obeyed, his will to be accommodated. This denial of protection against the violence and violation of a master is what defines, to say nothing of legitimizes, the master-slave relationship.

Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 128 (1991).

17. See, e.g., *supra* notes 2-5. For a critique of incremental reform that fails to challenge underlying systems of oppression, see Paul Butler, *The System is Working the Way It's Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419 (2016).