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ESSAY

The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many

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In The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, published in the* Harvard Law Review*, Thomas Frampton proffers four reasons why those who want to abolish prisons should not budge from their position even for offenders who are considered dangerous. This Essay demonstrates why a criminal law minimalist approach to prisons and police is preferable to abolition, not just when dealing with the dangerous few but also as a means of protecting the non-dangerous many. A minimalist regime can radically reduce reliance on both prisons and police, without the loss in crime prevention capacity and legitimacy that is likely to come with abolition.*

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INTRODUCTION

Abolitionism—the idea that the criminal justice system as we know it ought to be eradicated—is extremely popular in the legal academy these days. Prisons and police agencies are the main targets.[1] But in the recent past we have also seen law review articles arguing for the demise or radical reorientation of prosecutors' offices,[2] the defense bar,[3] forensic science laboratories,[4] pretrial detention,[5] and criminal courts[6]—as well as calls for eliminating related institutions such as involuntary civil commitment,[7] immigrant deportation,[8] and foster care.[9] The rationale for these proposals is that the criminal system (abolitionists often avoid putting the adjective "justice" between

1. *See, e.g.*, Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6 (2018) (focusing on the movement to end the "prison industrial context," defined as "the expanding apparatus of surveillance, policing, and incarceration the state increasingly employs to solve problems caused by social inequality, stifle political resistance by oppressed communities, and serve the interests of corporations that profit from prisons and police forces").

2. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1564 (2020) (making "the argument for turning away from public prosecutors and restoring prosecution to the people"); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 173 (2022) ("I argue that truly transformative change requires prosecutors to cede expertise and power to communities, as well as divest from prosecutorial and other law enforcement funding while supporting investment in truly independent community supports.").

3. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013) ("Gideon [v. Wainwright, the Supreme Court decision that announced a constitutional right to counsel] . . . stands in the way of the political mobilization that will be required to transform criminal justice.").

4. Maneka Sinha, *Radically Reimagining Forensic Methods*, 73 ALA. L. REV. 879, 887 (2022) ("this Article begins to radically reimagine the forensic system by applying an abolitionist framework to the problem of forensic reform.").

5. René Reyes, *Abolition Constitutionalism and Non-reformist Reform: The Case for Ending Pretrial Detention*, 53 CONN. L. REV. 667, 674–75 (2021).

6. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 7 (2022) ("[T]his Article underscores the necessity of abolishing criminal courts as sites of coercion, violence, and exploitation and replacing them with other social institutions, such as community-based restorative justice and peacemaking programs, while investing in the robust provision of social, political, and economic resources in marginalized communities.").

7. *See Reforms to Avoid*, ABOLITION & DISABILITY JUST. COAL., https://abolitionanddisabilityjustice.com/reforms-to-oppose/ (last visited Feb. 3, 2024) [https://perma.cc/AJ4Q-3KSG] (listing the replacement of imprisonment "with other forms of incarceration, such as in a group home, nursing home, drug treatment facility, or hospital" as reforms to avoid).

8. Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1045 (2021) ("By introducing deportation abolition as a possible horizon for immigrant scholarship and advocacy, this Article pushes legal scholarship to focus on what might be required to end deportation.").

9. Erin Miles Cloud, *Toward the Abolition of the Foster System*, S&F ONLINE (2019), https://sfonline.barnard.edu/toward-the-abolition-of-the-foster-system/ [https://perma.cc/V44Z-MHEW] ("The reality is that both the criminal legal and the foster systems are rooted in deeply violent historical narratives about Black bodies that do more to promote punishment than safety.").

"criminal" and "system"[10]) and its adjuncts inevitably produce a carceral state that does more harm than good,[11] especially to people of color.[12]

There are usually caveats to these proposals. Abolitionist scholars often caution that abolition cannot happen all at once but rather must be gradual.[13] Many of them also allow that some vestige of prison and policing may need to be maintained to deal with the "dangerous few."[14] But the goal is to end the system we have in place.

The extent to which abolitionism has gained influence among law scholars in recent times can be gauged in a couple of ways. Sometimes dated from Allegra McLeod's 2015 article *Prison Abolition and Grounded Justice*,[15] modern abolitionist scholarship in the legal academy has generated well over three hundred articles since then, an average of forty per year.[16] Roughly half of the papers presented at the Virtual Criminal Workshop, a two-year-old online series sponsored by several law schools, resonate with abolitionist themes.[17] And many scholars who write about reforming the system rather than abolishing

10. Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619, 620 (2018) ("Framed as deep structural critiques, a new cluster of critical accounts refers simply to the 'criminal system' or the 'criminal legal system,' omitting any reference to justice.").

11. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/V4DS-66BU] ("The prison industrial complex (PIC) systematically undermines the very values and things we need to be healthy." (quoting Rose Braz, abolitionist)).

12. Paul Butler, *Foreword to the Republication of* Affirmative Action and the Criminal Law, 92 U. COLO. L. REV. 1443, 1446 (2021) ("[R]acial justice is one of the primary objectives of many police and prison abolitionists . . . .").

13. Berger et al., *supra* note 11 ("[I]t is inaccurate to cast abolitionists as opposed to incremental change. Rather, abolitionists have insisted on reforms that reduce rather than strengthen the scale and scope of policing, imprisonment, and surveillance.").

14. Reyes, *supra* note 5, at 678 ("Abolitionism does not necessarily deny that there may be a 'dangerous few' who require some degree of constraint for public safety. Yet the number of such persons is likely to be vanishingly small relative to the total number of the incarcerated . . . ." (citation omitted)).

15. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015). Of course, there are many forebears, including ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); and MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). *See also infra* notes 39–50 and accompanying text.

16. A Westlaw prompt of "advanced: DA(aft 01-01-2015) & abolition /10 prisons or police" entered on December 31, 2023 produced over 570 articles, at least 300 of which endorse or are highly sympathetic to abolitionism.

17. Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment*, 70 UCLA L. REV. 1120 (2023); Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319 (2022); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381 (2022); Ngozi Okidegbe, Beyond Carceral *Data* (Virtual Crim. L. Workshop, Apr. 13, 2022); Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305 (2023); Esther K. Hong, *Transforming the Carceral State* (Virtual Crim. L. Workshop, June 8, 2022); Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685 (2022); Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403 (2022).

it nonetheless emphasize that their proposals are not inconsistent with the abolitionist agenda.[18]

While I am not an abolitionist, I do adhere to what Maximo Langer has called "criminal law minimalism."[19] In 2005, I published an article titled *The Civilization of the Criminal Law*, which aimed to reorient the system toward preventive justice rather than retributive justice and argued that prison should be a last resort.[20] More recently, I endorsed a system that reserves prison for the most serious offenders and that releases even these individuals at the end of (low) minimum sentences unless they are found to pose a high risk of committing violent crime.[21] In the policing context, I have argued for the replacement of stop and frisk—probably the most controversial policing practice—with a regime that permits street stops only if the police have probable cause to believe a crime or an attempted crime has occurred.[22] I have also argued that many jobs currently carried out by armed officers—including dealing with people who are mentally ill and the unhoused and carrying out traffic enforcement, school security, and regulatory searches and seizures—instead be the province of unarmed government officials.[23]

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18. *See, e.g.*, Christina Koningisor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 682 (2023) (calling abolitionist arguments "powerful and persuasive," thus requiring a critical consideration of whether better access to police information will "bring about the radical structural changes that are needed"); Laura I. Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619, 688–89 (referring to abolition of prisons as a possible solution to carceral labor).

19. Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44 (2020) ("For criminal law minimalism, the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role relative to the one it has played in the United States.").

20. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 128 (2005) (stating that "[t]he ultimate objective of this Article is to present a defense of a prevention system as a replacement for, rather than in addition to, our current criminal justice system," but still contemplating the continued existence of detention facilities).

21. Christopher Slobogin, *Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration*, 56 WAKE FOREST L. REV. 97, 109 (2021) ("The hypothesis of this Article, which needs to be given a fair test, is that a system of preventive justice offers the single most potent, and most realistic, mechanism for bringing about significant reform of the American criminal punishment system.").

22. Christopher Slobogin, *Equality in the Streets: Using Proportionality Analysis to Regulate Street Policing*, 2 AM. J.L. & EQUAL. 36, 43 (2022) ("[A]pplying the probable cause requirement . . . to the streets would . . . limit . . . detentions and subsequent searches to situations where [police] observe or have another good basis for believing that a person has engaged or is engaging in an attempted crime as defined by the law of the jurisdiction.").

23. Christopher Slobogin, *Police as Community Caretakers:* Caniglia v. Strom, 2021 CATO SUP. CT. REV. 191, 216:

> An expansive interpretation of *Caniglia v. Strom*'s rejection of a freestanding caretaker exception would help curb both police misuse of force and police use of pretexts to pursue illegitimate agendas . . . [and] might also provide doctrinal support for the

But the abolitionist agenda would probably find these types of suggestions too modest or perhaps even repugnant, at least as endpoints, because they still work within the existing system.[24] Prison would not be eliminated but maintained as a possible disposition; police departments would not be dismantled but kept as the enforcers of laws meant to detect, deter, and prosecute violent and potentially violent crime against persons. As abolitionists put it, under these sorts of minimalist proposals, some people would still be the subject of illegitimate state-sanctioned violence, both on the streets and in prison "cages."[25]

One of the more thoughtful works in the abolitionist genre comes from Thomas Frampton, who recently published *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics* in the *Harvard Law Review*.[26] Frampton sympathizes with the abolitionism movement. His primary aim, however, is not to endorse it but to confront what he and I both believe is abolitionism's knottiest problem: the widely held perception that, for those who are likely to reoffend violently, retaining some form of state-sponsored detention is necessary.[27] This Essay continues the debate that he invites on this topic. While Frampton makes some plausible suggestions as to why the problem of the

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> fledgling movement to de-police those government services that, whatever might be the tradition, do not require the intervention of armed individuals trained to fight crime . . . .

24. I. India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576, 1589 (2023) (contending that abolitionism is based in part on a "principle of futility" that "suggests that it is futile to expend additional resources reforming institutions that have proven resistant to change, particularly where they have a legacy of oppression"); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 314 (2018) (observing that those who focus on reducing the number of people in prison as opposed to abolishing prison "risk playing into a dynamic by which 'criminal justice reform's first step—relief for nonviolent drug offenders—could easily become its last' " (quoting JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 230 (2017))).

25. *See* McLeod, *supra* note 15, at 1161–62:

> By a "prison abolitionist ethic," I intend to invoke and build upon a moral orientation elaborated in an existing body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force.

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

27. *Id.* at 2031 ("It is the nagging sense that the question of 'the dangerous few' *is* critically important for both abolitionists and nonabolitionists to directly confront, in all its muddy difficulty, that animates the remainder of this Essay."); *see* Liat Ben-Moshe, *The Tension Between Abolition and Reform*, *in* THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT 83, 90 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013) ("A question raised often . . . is what to do with those deemed as having the most challenging behaviors. In the prison abolition circuits this discussion is known as 'what to do with the dangerous few' . . . .").

dangerous few should not stymie the abolitionist agenda, I think they fall short.

Part I of this Essay briefly recounts how prisons and police came to exist, reminds us about some of the earlier efforts to reduce their scope, and explains why the alternatives that abolitionists have offered so far cannot completely replace them. Part II then directly rebuts Frampton's arguments as to why we should nonetheless do away with prisons. In the course of doing so, it lays out a minimalist response to abolition. Although Frampton does not discuss policing, Part III rounds out the picture by offering a minimalist alternative to abolition of the police as well.

I. THE INEVITABILITY OF PRISONS AND POLICE

Interpersonal harms are inevitable, whether we call them crimes or something else. Barring a complete transformation of what makes humans human, people will intentionally or recklessly injure or threaten to injure other people, take others' property through force or fraud, traffic dangerous products, and abuse official power for a range of reasons—hatred, anger, or fear, a sense of entitlement or need, ambition, greed, jealousy, or a simple calculation that they can get away with it. While abolitionists gesture toward a utopian society where crime does not exist, that society is unfathomable, if only because no society in known history has ever approached it.[28]

In theory, the response to crime could consist entirely of civil remedies. When a person causes physical harm, damages could be assessed, as often occurred during the medieval era.[29] When property is taken, trespass, conversion, and other common law doctrines could come into play. Fraud and related issues might be resolvable through the law of contract. In none of these regimes would prison play a role.

Even in relatively simpler times, however, civil law was not considered sufficient. Criminal law developed in all Western countries hundreds of years ago.[30] Moreover, once torture, other forms of physical

28. Frampton admits as much. Frampton, *supra* note 26, at 2026 (stating that despite the fact that "politicians (of all stripes and ideologies) have long promised that criminality would vanish under alternative social or economic arrangements . . . [t]o date, proof of concept is lacking").

29. Dennis J. Baker, *Tracing a Thousand Years of Subjective Fault as the Fulcrum of Criminal Responsibility in Common Law*, 56 CRIM. L. BULL. 5 (2020), https://ssrn.com/abstract=3467446 (click "Open PDF in Browser") [https://perma.cc/SV3D-RW9Z] (describing the medieval system of "tariffs" for wrongdoing and stating that "[t]here were very few wrongs that were crimes in the proper sense; indeed, for most wrongs, compensation served as a substitute for true punishments, such as capital punishment or mutilation").

30. *See id.* at 7–14, 7 nn.32–74 (describing the development of criminal law in Britain from the Anglo-Saxons to the Angevin Empire).

punishment, and public humiliation fell out of fashion and the death penalty became anathema in the run-of-the-mill case, prison became the punishment of choice,[31] for reasons familiar to all criminal law professors. At least for the most serious violent harms, civil law and restitution do not bring sufficient moral condemnation to satisfy either victims or society at large.[32] Indigent people, who comprise the majority of harm-doers arrested for crimes of violence, cannot afford damages or restitution, so some other sanctioning mechanism is necessary.[33] And richer individuals may be quite willing to pay, literally, for crime, which would exacerbate already deep socioeconomic chasms in multiple ways.[34] Finally, there are the "dangerous few" (or many?) who might need to be detained to prevent further harm, an issue discussed at length below.

Parallel to the development of prisons came the creation of organized police forces, as constables and the private "hue and cry" proved incapable of dealing with the burgeoning harms associated with a more complicated modern society.[35] Abolitionists suggest that pre–Civil War slave patrols presaged the police.[36] That may have been true in the South. But, at least in the North, urban police departments grew

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31. ADAM JAY HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 57–58 (1992) (describing the rise of prisons as the result of reformers wanting to move away from corporal punishment like whipping and executions and toward rehabilitation through removal from bad influence); Anna Bindler & Randi Hjalmarsson, *The Persistence of the Criminal Justice Gender Gap: Evidence from 200 Years of Judicial Decisions*, 63 J.L. & ECON. 297, 308 (2020) (describing how the abolition of capital punishment and exile in England led to a significant increase in the use of prisons).

32. *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 621 (1996):

> [W]hen fines are used as a substitute for imprisonment, the message is likely to be that the offenders' conduct is being priced rather than sanctioned. And while we might believe that charging a high price for a good makes the purchaser suffer, we do not condemn someone for buying what we are willing to sell;

see also, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1548–50 (1984) (explaining that for crimes like robbery, murder, rape and burglary, there are clear community standards that support prohibition, but only weak agreement on the costs of crime, which argues for a sanction (criminal) rather than a pricing (civil) model).

33. Steven D. Levitt, *Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines*, 17 INT'L REV. L. & ECON. 179, 180–81 (1997) (noting this problem but assuming offenders can subsequently earn sufficient money to pay the fine).

34. *Id.* at 180 (noting this problem but assuming fines can be ratcheted upward accordingly).

35. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 68 (1993) (describing the extent to which, by 1800, citizens complained that the constable system "simply could not cope" with modern crime). For a description of the "hue and cry" (which conscripted crime victims and their neighbors in investigating crime) and its replacement by police in England in the early nineteenth century, see Sam Bass Warner, *Investigating the Law of Arrest*, 31 J. CRIM. L. & CRIMINOLOGY 111, 111–12 (1940).

36. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1817–18 (2020) ("The roots of modern police can be traced to slave patrols, the Ku Klux Klan, militias, and early police forces.").

independently of developments in the South, in reaction to the perception, if not the reality, that cities like New York City, Philadelphia, Baltimore, and Cincinnati were among the "most crime-ridden . . . in the world."[37] State and federal police organizations soon followed these municipal entities due to the inefficiency and corruption of many local law enforcement officials and the increasing interstate mobility of criminals.[38]

Were these developments inevitable? Perhaps not. But every country in the world has prisons and police. So a world without them is hard to imagine, as much as abolitionists urge us to do so.

It is not for lack of trying. Even the Commission on Criminal Justice Standards established by President Nixon, who ran on a "law-and-order" platform,[39] concluded in 1975 that the prison "is obsolete, cannot be reformed, [and] should not be perpetuated through the false hope of forced 'treatment'; it should be repudiated as useless for any purpose other than locking away persons who are too dangerous to be allowed at large in free society."[40] Numerous other individuals, writing well before the recent resurgence of abolitionism in the legal academy, pushed for a world with minimal detention and few or repurposed police.[41]

Rather than cataloguing all of these forebears, only one such visionary will be mentioned here, by way of illustration. In *The Crime of Punishment*,[42] Karl Menninger, a psychiatrist, inveighed against the American criminal legal system as far back as 1966—well before racially tinged tough-on-crime politics led to a movement in favor of determinate sentencing and to a sixfold increase in our imprisonment rates in just three decades.[43] Driven by the belief that prison is "evil"

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37. GEORGE L. KIRKHAM & LAURIN A. WOLLAN, JR., INTRODUCTION TO LAW ENFORCEMENT 33 (1980); *see also* FRIEDMAN, *supra* note 35, at 69 (noting that calls for a police force in Philadelphia came after the military had to be called in to quell an anti-Catholic riot).

38. KIRKHAM & WOLLAN, JR., *supra* note 37, at 35–37.

39. *See* Terence McArdle, *The 'Law and Order' Campaign That Won Richard Nixon the White House 50 Years Ago*, WASH. POST. (Nov. 5, 2018, 7:00 AM), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/ [https://perma.cc/PV9U-D97E].

40. Corr. Task Force, Nat'l Advisory Comm'n on Crim. Just. Standards & Goals, *Major Institutions*, *in* A NATION WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION 3, 22–23 (Calvert R. Dodge ed., 1975).

41. *See, e.g.*, THOMAS MATHIESEN, THE POLITICS OF ABOLITION: ESSAYS IN POLITICAL ACTION THEORY (1974) (examining Scandinavian penal policy and advocating for the abolition of prisons); PRISON RSCH. EDUC. ACTION PROJECT, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 11 (1976) (promoting the notion that "the only way to reform the prison system is to dismantle it").

42. KARL MENNINGER, THE CRIME OF PUNISHMENT (1966).

43. *Id.* at 28. For a description of the forces that led to mass incarceration, see NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

and "ruined" people, especially the poor and people of color,[44] Menninger called for changes that would "lead to a transformation of prisons, if not to their total disappearance in their present form and function."[45] He advocated for "community safety centers" aimed at preventing crime both through social programs directed at the general populace and through treatment of those who violated social norms.[46] By "treatment," Menninger meant not just psychiatric modalities but anything that might move the person in "a different direction," including job opportunities, education, and family engagement.[47] At bottom, he wanted a "therapeutic attitude," not a punitive one.[48] He also recognized that police were ill-suited to many of the tasks that society thrust upon them.[49] He cited August Vollmer, a progenitor of American police science, in urging police departments "to help get better housing in slum areas, better schools, more health clinics for children, improved welfare services for indigents, and more adequate aid for the physically and mentally handicapped."[50]

I highlight Menninger not only to emphasize that abolitionist-oriented thinking is hardly new. I also do so because the reactions to *The Crime of Punishment* presage the challenges to modern-day abolitionism. Not surprisingly, conservatives have derided Menninger's stance. For instance, Gail Heriot, a law professor and an occasional columnist for the *National Review*,[51] wrote that "thinking like [Menninger's] is part of why the nation suffered soaring rates of crime in the late 1960s, 1970s and into the 1980s";[52] she was particularly incensed by Menninger's willingness to characterize as "melodramatic" calls for justice for victims.[53] Criticism of Menninger has also come from commentators on the left, who saw the rehabilitative approach that he

44. MENNINGER, *supra* note 42, at 74–76. Presaging modern abolitionism, Menninger also declared: "I suspect that all the crimes committed by all the jailed criminals do not equal in total social damage that of the crimes committed against them." *Id.* at 28.

45. *Id.* at 251.

46. *Id.* at 268–70.

47. *Id.* at 257–58.

48. *Id.* at 262.

49. *Id.* at 277 ("What I am proposing here is simply that the public take seriously the difficulties and complexities of insuring the peace, and take a hand in the matter rather than dumping all the responsibility onto the police. They must help the police.").

50. *Id.* at 270.

51. *See Gail Heriot*, NAT'L REV., https://www.nationalreview.com/author/gail-heriot/ (last visited Feb. 3, 2024) [https://perma.cc/GJ8B-SKNC]. Heriot also serves on the U. S. Commission on Civil Rights. *Gail Heriot*, U.S. COMM'N ON C.R., https://www.usccr.gov/about/gail-heriot (last visited Feb. 3, 2024) [https://perma.cc/93D4-99F3].

52. Gail Heriot, *Karl Menninger's* The Crime of Punishment, VOLOKH CONSPIRACY (Nov. 21, 2018, 5:03 AM), https://reason.com/volokh/2018/11/21/karl-menningers-the-crime-of-punishment/ [https://perma.cc/P5CJ-K2R8].

53. *Id.* (referring to MENNINGER, *supra* note 42, at 9–11).

endorsed as an abysmal failure, in part because of research suggesting that rehabilitative programs did not work but primarily because of its perceived coercive paternalism.[54] The latter image was strengthened in the 1990s, when the Menninger Foundation supported "sexually violent predator" laws that authorized prolonged confinement in prison-like facilities and provided little treatment.[55]

Abolitionists today are likely to face the same challenges. They may not endorse a full-throated treatment regime, especially one managed by the government. But their unwillingness to consider prison as a disposition and police as a mechanism for dealing with antisocial behavior triggers the same complaints as Menninger's proposal—insufficient concern about public safety and victims and an increased potential for substitutes that may be even more harmful than prison or police. Rachel Barkow illustrates the point by drawing an analogy to the deinstitutionalization movement in the 1970s that emptied state mental hospitals.[56] That movement—backed both by advocates concerned about warehousing of troubled individuals and small-government conservatives wanting to save money—succeeded in the sense that many mental institutions were closed.[57] But it increased crime by people with mental disabilities and proved disastrous for the mental health of many previously institutionalized individuals.[58] The lack of community alternatives for people with severe mental disabilities led to homelessness, overmedication in prison-like settings, and detention in jails and prisons that offered many fewer treatment options than hospitals and often led to harmful decompensation.[59] Barkow also describes how calls for defunding the police have led to a

54. *See* Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 320–21 (2013) (a well-known criminologist noting that, by the mid-1970s, many criminologists, including Cullen himself, had rejected some of Menninger's views, because "rehabilitation-as-evil" had become "part of criminological orthodoxy").

55. The Menninger Foundation filed an amicus brief in support of Kansas's sexually violent predator statute in the case of Kansas v. Hendricks, 521 U.S. 346, 350 (1997), which upheld the constitutionality of post-sentence commitment of "dangerous" sex offenders. Brief of the Menninger Foundation et al. as Amici Curiae in Support of Petitioner at 16–18, *Hendricks*, 521 U.S. 346 (No. 95-1649), 1996 WL 470942.

56. Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 247, 254 (2023) (arguing that the failure of the deinstitutionalization movement "strongly suggests that the more pessimistic take on the fate of prison abolition will ultimately prove correct").

57. *Id.* at 256–57, 306–07.

58. *See generally* E. FULLER TORREY, THE INSANITY OFFENSE: HOW AMERICA'S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS (2008) (arguing that deinstitutionalization has led to an increase in violent crime by people with mental illness, as well as an increase in the harm experienced by those people and their families).

59. *Id.* at 56–60; *see also* Barkow, *supra* note 56, at 307–14; Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1784 (2006) (describing how people with mental illness were "transinstitutionalized" from hospitals to jails).

backlash even among communities of color,[60] resulting in *greater* funding for police departments in many cities.[61]

Abolitionists like McLeod dismiss these sorts of observations on the ground that all radical change meets resistance and that persistence can ultimately result in success, pointing in particular to the history of slavery and its abolition.[62] But while the end of slavery was easy to envision even in the mid-nineteenth century (after all, it did not exist in half the country), the end of prisons and police is a much harder sell, even to those who are sympathetic to abolitionism. For instance, although Menninger believed that, for most people, treatment could take place in the community, he also stated that "[t]emporary and permanent detention will perhaps always be necessary for a few, especially the professionals" (albeit in a "facility" more therapeutic than prison).[63] While he recognized that much of what police do had nothing to do with interdicting crime, he called for more, not less, police training and funding to ensure they could carry out the myriad functions they had to perform.[64] McLeod herself sometimes sounds the same note; she states that today maintenance of prisons and policing may be necessary "where the rituals of the criminal process may perform important and desirable societal work, or at least for which we can conceive presently of no other appropriate response," and specifically mentions dealing with murders and rapes as examples.[65]

The most popular substitute for prisons and police among abolitionists is restorative justice, modern versions of which have been around since the mid-1970s.[66] Restorative justice comes in a number of iterations: victim-offender mediation as a dispute resolution mechanism; reparation panels composed of trained community representatives who hold face-to-face meetings with offenders and

60. Barkow, *supra* note 56, at 289–90.

61. *Id.* at 291; *see also* Grace Manthey, Frank Esposito & Amanda Hernandez, *Despite 'Defunding' Claims, Police Funding Has Increased in Many US Cities*, ABC NEWS (Oct. 16, 2022, 7:34 AM), https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971 [https://perma.cc/XX2F-7HUC] ("Of 109 budgets analyzed, 91 agencies have upped police funding by at least 2%.").

62. McLeod, *supra* note 15, at 1239 ("Although the elimination of the penal state in its current forms is difficult to imagine . . . so too were many other transformative events . . . [such as] the abolition of slavery, the end of the British Empire, the end of the Cold War, and the embrace of gay marriage around the world.").

63. MENNINGER, *supra* note 42, at 251.

64. *Id.* at 272.

65. McLeod, *supra* note 15, at 1224.

66. For a general introduction to restorative justice, written by the person often considered to be its modern progenitor, see JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989). Braithwaite claims that restorative justice has been "the dominant model of criminal justice through most of human history." John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999).

devise sanction and compliance schemes; family group conferencing that involves the victim, offender, and family members in creating a plan for victim reparation and avoiding future offending; and "sentencing circles" consisting of community discussions of appropriate sanctions.[67] Restorative justice has also found its way into policing, especially in jurisdictions that attempt to use interrogations and stops as a means of shaming and repairing the harm done by suspects.[68] Another crime control innovation that does not involve the police at all is the development of violence interrupter programs, which rely on people who were once incarcerated to roam neighborhoods and snuff out gang and other community tensions before they develop into open hostilities.[69]

These approaches may avoid the heavy-handed, state-run "treatment" alternatives contemplated by Menninger. But partly for that reason, they are not likely to be effective at dealing with many harms that occur in the community. Even the most vigorous proponents of restorative justice admit that it cannot deal with every type of criminal behavior—in particular, cases involving repeat offenders, victims or defendants who do not want to meet, or ambiguous facts that require investigation are not easily resolvable through restorative justice mechanisms.[70] Most proponents also accept that restorative justice should incorporate some element of punishment, including prison.[71] Similarly, while violence interrupter programs may reduce crime[72] in a way that relies on the community more than the

67. *See* DAVID O'MAHONY & JONATHAN DOAK, REIMAGINING RESTORATIVE JUSTICE: AGENCY AND ACCOUNTABILITY IN THE CRIMINAL PROCESS 4–9 (2017).

68. *Id.* at 5–6 (discussing how interrogators use shaming "as a positive tool to encourage offenders to reflect on their actions, make amends for their wrongdoing and thereby be reintegrated back into the moral community").

69. V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1509–10 (2019) (describing the violence interrupter program in Chicago).

70. O'MAHONEY & DOAK, *supra* note 67, at 183, 200.

71. *See* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 133 (2019) (arguing vigorously for restorative justice practices, but recognizing they cannot replace prison altogether); R.A. Duff, *Restorative Punishment and Punitive Restoration*, *in* WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT 367, 368 (Michael Tonry ed., 2011) ("Once we understand what restoration must involve in the context of criminal wrongdoing, and what retribution can mean in the context of criminal punishment, we will see that restoration is not only compatible with retribution and punishment, but requires it.").

72. *See, e.g.*, Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109, 131 (2013) ("In their studies of Violence Interrupters' work in Chicago and Baltimore, social scientists at Northwestern and Johns Hopkins Universities demonstrated that homicide rates have decreased in a statistically significant manner, in one neighborhood by over 50 percent.").

government,[73] they depend on the willingness of gang members and other targets to change their ways;[74] if these people are not "ready" for mediation and alternative interventions, arrest and punishment are the typical response for serious crime.[75]

Barkow makes points like these and suggests that abolitionists might disserve their cause by insisting on abolition as the end goal.[76] The abolitionist stance may reset the frame of analysis in a constructive way. But more likely, Barkow contends, it will occasion backlash, especially if associated, as it often is, with communist, socialist, or anti-capitalist rhetoric.[77]

Those are points about tactics. The point I want to make is different. Let us assume that, using whatever tactic works, abolitionists get what they want. In the remainder of this Essay, I want to address whether this would be a good thing. In *The Dangerous Few*, Frampton pushes us in the direction of answering that question affirmatively. I want to push back.

II. THE NEED FOR PRISONS

For President Nixon's Commission, Dr. Menninger and his fellow "treatmentists," and even some abolitionists, prison is a distasteful but necessary means of dealing with the "dangerous few."

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73. *See* Gimbel & Muhammad, *supra* note 69, at 1510 ("The . . . 'violence interrupters'—all come directly from the communities they serve. . . . The model stresses the importance of trust between the interrupters and their 'clients'—people either directly involved or at a high risk of getting involved in violent conflict.").

74. Tony Cheng, *Violence Prevention and Targeting the Elusive Gang Member*, 51 LAW & SOC'Y REV. 42, 58–59 (2017) ("[Gang outreach workers] avoid[ ] troubling clients . . . by deeming early signs of noncompliant behavior as signs of nonreadiness. Ideally, these nonready individuals never become clients in the first place. . . . The fear of getting played is also [a] form of losing face for [street outreach workers].").

75. Farhang Heydari, *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696, 754 (2022):

> [T]here will always be situations that require the coercive power of the state—not as a first resort, but as the last. Violent individuals will need to be restrained; mental health interventions will be needed, some of them involuntary. Even summonses and desk appearance tickets eventually need to be enforced.

76. Barkow, *supra* note 56, at 319:

> It is hard to see how a political coalition emerges for the ambitious positive agenda abolition requires, especially given the history of smaller-scale efforts like deinstitutionalization. And even if the positive agenda were pursued, it will not eliminate all crime. Because the negative agenda depends on the positive one, it is all too easy to see how things will go bust. The positive agenda cannot emerge fast enough for people to trust the end of prisons because crime will continue to occur in the meantime.

77. *See* Roberts, *supra* note 1, at 46 (stating that "[m]any abolition theorists" argue that abolitionism "requires radically overhauling the U.S. capitalist economy and replacing it with a socialist or communist system").

But worried about "slippery slope[s]" and "reformist co-optation,"[78] Frampton is not ready to make that concession. He provides four reasons for this stance: The first is that defining "dangerousness" is "much harder than it first appears."[79] The second is that, even if we can define dangerousness in a satisfactory manner, identifying who meets that definition is a "utopian" enterprise that will be rife with error and biased against the poor and people of color.[80] Third, the overall harm prevented by imprisonment of the dangerous few, however defined and identified, may well be exceeded by the harm it does to those who are incarcerated, given the huge number of crimes that occur behind prison walls.[81] And fourth, our extremely low clearance and conviction rates mean that, even if these three hurdles can be overcome, in the end, prisons are simply not good at keeping us safe from most of those who are dangerous.[82]

The predicates for each of these claims cannot be disputed. As I concede below, dangerousness *is* difficult to define, identifying who is dangerous is even more difficult, an immense amount of crime occurs in prisons, and our inability to detect and deter crime is embarrassing. But the criminal law minimalist does not see any of these reasons as sufficient grounds for abolishing prisons. Rather, they are valid critiques that may support a radical reduction in prison usage but do not justify eliminating imprisonment as a punishment option when it is the only means of preventing harm or when available non-prison dispositions are so antithetical to retributive and utilitarian norms that they are destabilizing. Analogous considerations also counsel against abolition of the police. While Frampton's observations do support a minimalist view, they fall short of justifying abolition.

The following discussion takes up each of Frampton's reasons to discount concerns about the dangerous few in turn and explains why they fail to justify abolition of prisons in light of minimalist alternatives. Part III makes a similar effort with respect to policing.

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78. Frampton, *supra* note 26, at 2020–21 (stating that, if it is conceded that some offenders might need to be imprisoned if prisons can be improved, "the abolitionist ventures down a slippery slope, blurring the lines between prison abolition and other species of less ambitious criminal justice reform (on both the political left and right)," which leaves "the abolitionist particularly vulnerable to reformist co-optation").

79. *Id.* at 2037.

80. *Id.* at 2037–39.

81. *Id.* at 2046 ("Prisons thus relocate whatever harm might have been committed by those who are incarcerated, while simultaneously producing a large pool of people who are uniquely vulnerable to harm committed by those we might not otherwise have thought of as 'the dangerous few.' ").

82. *Id.* at 2049 ("[P]olice are not particularly effective at solving crimes and apprehending suspected criminals.").

A. What Is Dangerousness?

Frampton correctly states that the concept of dangerousness is "surprisingly undertheorized."[83] We have mountains of jurisprudence defining the actus reus and mens rea of crimes, the appropriate scope of defenses, and the type of punishment that certain people or certain crimes "deserve." But despite long recognizing that dangerousness is relevant at sentencing,[84] and even when defining crime,[85] the criminal law has had very little to say about what is meant when someone is designated as "dangerous."

As just one example, take the Texas death penalty statute, which allows executions to be based on a jury finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[86] Probability and violence are not defined in the statute, and the Texas Court of Criminal Appeals has assiduously avoided pouring content into those terms.[87] So, in theory, a person can be executed in Texas even when they are unlikely to hurt anyone, outside or inside of prison, or even when the anticipated harm is merely a simple assault.

The principle of legality demands that the type of conduct that can lead to punishment be set out in statute and avoid unnecessary ambiguity.[88] That constitutional principle is supposed to apply in any context in which the government seeks to deprive a person of life,

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83. *Id.* at 2018.

84. Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed, and that there be taken into account the circumstances of the offense, together with the character and propensities of the offender.").

85. *See generally* Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283, 299–30 (1988) (exploring how dangerousness considerations influence mens rea and defensive doctrines).

86. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (West 2007).

87. *See, e.g.*, Long v. State, No. AP-75,539, 2009 WL 960598, at *3 (Tex. Crim. App. 2009) (finding it settled law in Texas that the word "probability" need not be defined for a jury); Chamberlain v. State, 998 S.W.2d 230, 237–38 (Tex. Crim. App. 1999) ("It is well settled that no jury charge defining these terms [probability, deliberately, criminal acts of violence, and continuing threat to society] is required."); King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977) (explaining that all words in the Texas criminal code are to be understood within their ordinary usage in common language and thus do not require explicit definition).

88. *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985):

> The rule of law . . . means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection.

liberty, or property.[89] Yet it is routinely ignored when it comes to deprivations of life or liberty based on dangerousness.

In previous work, I have argued that, just as the actus reus for crime usually consists of conduct, result, and circumstance elements, along with mens rea requirements, dangerousness should be defined in terms of four variables: (1) the probability that (2) a particular outcome (3) will occur within a specific time frame (4) in the absence of a specified intervention (in this case, execution or imprisonment).[90] Under this scheme, a death penalty statute like Texas's might require that, before a person may be found sufficiently dangerous to be executed, the state must show beyond a reasonable doubt that the person will more likely than not commit or attempt to commit a homicide, sexual assault, or aggravated assault if confined in the general prison population rather than on death row. It should also have to periodically meet the same burden every year until the person is executed. In the noncapital setting, the probability and outcome criteria might remain the same, but findings would also have to be made that the outcome will occur within the period bounded by the maximum sentence and, most importantly, that no non-prison alternative would just as effectively prevent that outcome. Given the inability, well-documented by Frampton,[91] of many prisons to prevent crime within prisons, and the equally well-documented criminogenic impact of imprisonment compared to the efficacy of community-based treatment programs at reducing violence,[92] this latter criterion might often

89. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

90. CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK 45–56 (2021).

91. Frampton, *supra* note 26, at 2046 (providing statistics regarding crimes committed in prison).

92. David Roodman, *The Impacts of Incarceration on Crime*, OPEN PHILANTHROPY PROJECT 8 (Sept. 2017), https://arxiv.org/ftp/arxiv/papers/2007/2007.10268.pdf [https://perma.cc/R7K4-4P7A] (concluding that "[*m*]*ost studies find that aftereffects are harmful*: more time in prison, more crime after prison" and also that, even on a "devil's advocate" view, decarceration provides a net social benefit); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1082 ("[W]e can tentatively estimate that incarceration causes about 7 percent of total crime: 1 percent because of in-prison crime, 2 percent because of prison-induced recidivism, and 4 percent because of the impact of incarceration on the delinquency of inmates' children."). *See generally* Michael Tonry, *Less Imprisonment Is No Doubt a Good Thing: More Policing Is Not*, 10 CRIMINOLOGY & PUB. POL'Y 137, 137–38 (2011):

> The effects of imprisonment on individual deterrence are most likely perverse; people sent to prison tend to come out worse and more likely to reoffend than if they had received a lesser punishment. . . . [T]entative but not yet conclusive evidence indicates that imprisonment is criminogenic and increases released inmates' rates of reoffending.

counsel against prison. But, importantly, it would not bar incarceration in every case.

The justifications for requiring the probability, outcome, durational, and need-for-prison strictures can be drawn from constitutional law. If probable cause (often quantified at something close to a more-likely-than-not standard[93]) is required to make an arrest,[94] it should be the minimum threshold for the much more significant deprivation of liberty associated with imprisonment. Because proof that a person will cause significant bodily injury is required even before civil commitment on dangerousness grounds may occur,[95] the same should be true in the criminal sentencing setting. Under both Eighth and Sixth Amendment jurisprudence, the state has no authority to confine a person beyond their maximum sentence,[96] reasoning that has led some courts to require release whenever the law mandates it (a mandate that could be based on a finding that the person no longer poses a significant risk of reoffending).[97] And the Supreme Court has made clear that, as a matter of due process, "the nature and duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed."[98] This declaration requires, as I and others have argued, that the state pursue its preventive aims in the least restrictive manner available.[99]

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93. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327 (1982) (survey of judges finding that, on average, probable cause is equated with a forty-five percent level of certainty).

94. Gerstein v. Pugh, 420 U.S. 103, 111 (1975) ("The standard for arrest is probable cause . . . .").

95. United States v. Sahhar, 917 F.2d 1197, 1203–04 (9th Cir. 1990) (noting that the standards found in the federal commitment statute, which are "not dissimilar to those employed by many states for general civil commitment, and do much to ensure the fairness and accuracy of the commitment process," permit commitment "only if the court finds by clear and convincing evidence that the person suffers from a mental disease or defect and thus poses a substantial risk of bodily injury to another or serious property damage" (citation omitted)). *But see* Jones v. United States, 463 U.S. 354, 365 (1983) ("This Court never has held that 'violence,' however that term might be defined, is a prerequisite for a constitutional commitment.").

96. United States v. Booker, 543 U.S. 220, 232 (2005) (holding that the Sixth Amendment requires that any fact that increases a defendant's sentence beyond the maximum sentence authorized by the facts established by a plea or a jury verdict must be admitted by the defendant or proven to a jury beyond a reasonable doubt).

97. *See, e.g.*, Hurd v. Fredenburgh, 984 F.3d 1075, 1085 (2d Cir. 2021) (holding that incarceration beyond a mandatory release date violates the Eighth Amendment).

98. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

99. *See* Christopher Slobogin, Mark R. Fondacaro & Jennifer Woolard, *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children*, 1999 WIS. L. REV. 185, 212–13; Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 358–59 (2003).

Much more can be said about all of this.[100] The important point for present purposes is that, while Frampton is correct that dangerousness is an egregiously vague concept, it is not inevitably so. The criminal law minimalist would argue that "dangerousness" can and should be cabined through legal doctrine. And if that is done, the concept of the "dangerous few" is no longer incoherent.

That conclusion has two significant implications for the debate over abolitionism. First, if the dangerousness guidelines I just described were adopted and combined with a modernized version of indeterminate sentencing (described briefly above and elaborated on below), there would be far fewer people in prison. Less serious offenders might not go to prison at all. And while serious offenders might serve the minimum prescribed sentence, a parole board that diligently applied the probability, outcome, duration, and intervention criteria would release tens of thousands of offenders who today are forced to serve their full sentence or something close to it in obeisance to high mandatory minima and truth-in-sentencing laws.[101] By one calculation, under a scheme that retains only high-risk prisoners beyond their minimum sentence, prison populations could be reduced by seventy-five percent within a decade[102]—with a particularly significant impact on Black prisoners, given their disproportionately greater numbers.[103] That is by no means abolition, but it is a minimalist approach that strongly pushes in that direction.

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100. *See* SLOBOGIN, *supra* note 90, at 37–63 (explicating the rationale for the probability, outcome, duration, and intervention criteria and arguing that statistically derived algorithms that identify the risk of reoffending posed by criminal defendants could be useful in enabling the state to pursue its preventive aims in the least restrictive manner available).

101. For a description of the incarceration-producing effects of mandatory minima (which require that offenders serve a minimum sentence for certain crimes) and truth-in-sentencing laws (which require that offenders serve most of their sentence, typically eighty-five percent), see Michael Tonry, *Federal Sentencing "Reform" Since 1984: The Awful as Enemy of the Good*, 44 CRIME & JUST. 99, 152–53 (2015) and Steven Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?*, *in* DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 27, 27–72 (Steven Raphael & Michael A. Stoll eds., 2009).

102. Ben Grunwald has developed a statistical model that can help calculate the impact of various adjustments to sentencing policies. Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL'Y REV. 1 (2022). Under his model, assuming that reforms of the type outlined here and described in more detail in my book JUST ALGORITHMS were carried out, the prison population might be reduced by the amount described in the text. SLOBOGIN, *supra* note 90, at 131–47; E-mail from Ben Grunwald, Professor of L., Duke Univ. Sch. of L., to author (Jan. 17, 2021) (on file with author). Even without the use of algorithms, researchers who audited the compositions of the prison populations in three states estimated that, if danger to the community were the only justification for continued confinement, roughly half of the prisoners would be released. *See* ANNE MORRISON PIEHL, BERT USEEM & JOHN J. DILULIO, JR., RIGHT-SIZING JUSTICE: A COST-BENEFIT ANALYSIS OF IMPRISONMENT IN THREE STATES 6–8, 12–14 (1999), https://media4.manhattan-institute.org/pdf/cr_08.pdf [https://perma.cc/XZ8B-MQGU].

103. *See* Kevin R. Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, 38 BEHAV. SCIS. & L. 207, 216 (2020).

The second implication of forcing legislatures and courts to abide by the principle of legality in defining dangerousness is that doing so allows meaningful conversation about what dangerousness means. In suggesting otherwise, Frampton highlights two individuals: Jack Kervorkian, the doctor who was so committed to helping people commit suicide that he did so within hours of being released from prison for the same offense, and Donald Blankenship, who psychopathically ignored clear warnings that workers would (and eventually did) die from toxic gas in his mines and remained unapologetic for the disaster.[104] Accepting Frampton's characterization of Kervorkian and Blankenship as undeterrable, there appears to be a high probability that both will kill again if allowed to persist in their chosen occupations. If, for some reason, delicensing Kervorkian and barring Blankenship from running a company would not stop them, some type of confinement beyond their minimum term might in fact be the right disposition. If there is any hesitation about concluding they belong within the dangerous few who should be in prison, it should not derive from confusion about the concept of dangerousness but rather from concerns about whether we can accurately identify who fits within it.

B. Who Is Dangerous?

Frampton correctly points out that we are not very good at evaluating an offender's risk of reoffending. Most research shows that, at best, experienced professionals are right somewhere around fifty percent of the time when they conclude a person will commit a violent crime.[105] That figure is well below the threshold required for proof beyond a reasonable doubt. However, it is much better than chance, given the low base rate for serious crime.[106] Further, if the definition of dangerousness were fine-tuned in the manner just discussed—to require a *more-likely-than-not* showing of *serious violent crime* within a *specified period* in the *absence of incarceration*—the number of people considered high-risk would be much reduced,[107] thus also reducing type I error. Even so, there is no doubt that some people who are labeled

104. Frampton, *supra* note 26, at 2033–34.

105. Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 LAW & PSYCH. REV. 43, 63 & n.63 (1994) ("[R]recent studies suggest that one out of every two people predicted to be violent would go on to engage in some kind of legally relevant, violent behavior.").

106. *See* Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 112–13, 113 n.61 (1984) (explaining that even relatively poor risk assessment in absolute terms is better than "flipping a coin" given low crime base rates).

107. *See infra* note 111.

"dangerous" under this definition would not commit serious crimes if allowed to remain free.[108]

A related problem is the difficulty of evaluating whether a particular individual meets the dangerousness criteria. It is all well and good to require, as the previous Section argued, that the government show a person is "likely" to commit a serious offense within the next few years if not imprisoned. But how does either an expert or the fact finder figure out whether a person meets that standard, other than through fiat?

The relatively recent advent of statistically derived risk assessment instruments has helped with both challenges. A well-validated instrument is comprised of risk factors that can categorize people into groups (today ranging in number from three to ten, depending on the instrument), each of which is associated with a different rate of reoffending, ideally focused on specified types of offenses within a specified time period.[109] The evaluator determines what risk factors, if any, a given individual has, which then enables one to ascertain the risk category into which the individual best fits, within specified confidence levels.[110] Such an instrument might indicate that *Person A* has particular risk factors—for example, certain types of convictions or arrests, certain personality traits, certain group associations—that in validation studies were also found in a group fifty percent of whom committed a violent offense within three years. At the same time, it might indicate that *Person B* has risk factors found in a group only ten percent of whom recidivated violently within three years. Under the criteria set out above, only *Person A* would meet the legal definition of dangerousness.

It turns out that only a small proportion of offenders—probably well under twenty percent of those who have committed serious crimes—fit that definition,[111] once again suggesting that those designated "dangerous" might be "few" and that prison populations could accordingly be reduced significantly. Additionally, relying on

108. Frampton, *supra* note 26, at 2044 ("States will also necessarily cage many people who do *not* need to be caged, and those individuals will overwhelmingly be poor and nonwhite.").

109. For a general description of risk assessment instruments, see SLOBOGIN, *supra* note 90, at 38–42.

110. *Id.* For more detail on how I would address the accuracy, bias, and fairness issues connected with these instruments, see *id.* at 64–119.

111. For instance, in one study using the Violence Risk Appraisal Guide, only about twenty percent of the validation sample fit in risk categories associated with more than a fifty percent chance of recidivating violently, with recidivism defined broadly to include simple assaults. Grant T. Harris, Marnie E. Rice & Catherine A. Cormier, *Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377, 380, 383, 385 (2002).

what behavioral scientists call risk management assessment,[112] experts could determine, either at the front end or after the minimum sentence has been served, that a person's risk factors are best addressed outside of prison rather than in it, further reducing imprisonment rates.

The reliance on well-validated risk assessment instruments that this version of minimalism counsels would not eliminate prediction mistakes. But, compared to unstructured (i.e., human) judgment, the outcomes reached by such instruments are more accurate and reliable.[113] More important to abolitionists, these tools are also less prone to the racial and class bias that Frampton rightly associates with the risk assessment enterprise.[114] Further, in a modern indeterminate sentencing regime, risk would be reevaluated periodically; mistakes can be corrected, and success at risk management can be rewarded.[115] Risk assessment instruments also quantify the risk of error[116] and thus concretize otherwise vacuous likelihood findings and help policymakers visualize the normative judgments that need to be made in both defining dangerousness and identifying who fits that definition.

In the end, neither false negatives nor false positives can be avoided when it comes to assessing risk. Even with competent in-prison rehabilitation programs and the availability of reentry support, some of those who are not kept imprisoned will commit crimes they would not have otherwise committed. But they will commit fewer crimes and fewer of those crimes will be serious than in a world without prisons. And with respect to false positives—Frampton's principal concern—it

112. For a description of risk management, see SLOBOGIN, *supra* note 90, at 52–56. For a summary of research showing the efficacy of community-based alternatives to incarceration in terms of reducing recidivism, see *id.* at 31–32.

113. Sarah L. Desmarais, Kiersten L. Johnson & Jay P. Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCH. SERVS. 206, 206 (2016) ("There is overwhelming evidence that risk assessments completed using structured approaches produce estimates that are more reliable and more accurate than unstructured risk assessments.").

114. *See* Christopher Slobogin, Response, *Presumptive Use of Pretrial Risk Assessment Instruments*, 72 AM. U. L. REV. F. 133, 141–43 (2023) (recounting several studies in the pretrial setting finding that such instruments reduce racial disparity compared to unstructured judgment); *see also* Jennifer Skeem & Christopher Lowenkamp, *Using Algorithms to Address Trade-Offs Inherent in Predicting Recidivism*, 38 BEHAV. SCIS. & L. 259, 275 (2020) (showing ways race can be used in constructing an instrument that reduces significantly the "proxy effects" of race). For a discussion of false positives and race, see SLOBOGIN, *supra* note 90, at 90–95.

115. *See* Garner v. Jones, 529 U.S. 244, 244–46 (2000) (holding that a prolonged hiatus between parole hearings violates the Ex Post Facto Clause if it "create[s] a significant risk of increased punishment" relative to the sentence contemplated at the time of sentencing); Kansas v. Hendricks, 521 U.S. 346, 353 (1997) (holding that confinement based on dangerousness must be reviewed periodically).

116. *See* SLOBOGIN, *supra* note 90, at 39–42 (explaining how risk assessments instruments such as the Violence Risk Appraisal Guide, the Non-violent Risk Assessment, the Correctional Offender Management Profiling for Alternative Sanctions tool, the Public Safety Assessment and the HCR-20 can provide quantified estimates of recidivism for particular groups or individuals).

should be remembered that an individual who is erroneously labeled one of the "dangerous few" has, by definition, committed a crime, usually a serious one. Then the question—for both the abolitionist and the criminal law minimalist—becomes whether the potential harm of imposing imprisonment on these people outweighs the harm to others that would result from abolishing prison.

C. The Harms of Prison

Frampton calls attention to the truly horrifying amount of crime that occurs within prisons.[117] When to that crime problem is added the aforementioned fact that—because it forces association with other criminals and disrupts employment and family life—imprisonment can be criminogenic,[118] the argument against prison dispositions is substantially strengthened.

The minimalist response to this argument is twofold. First, if prison populations are reduced in the manner suggested above or through other minimalist mechanisms,[119] they will be both less crime infested and less likely to be breeding grounds for crime. As the Scandinavian and German experience with prisons illustrates, less crowded facilities make it possible for prisons to simultaneously function safely and be oriented toward rehabilitation.[120] Further, the minority of impulsively or sadistically violent prisoners can more easily be kept separate from the majority of high-risk prisoners who (perhaps like Kervorkian and Blankenship) are willing to coexist peacefully.

The second response of the minimalist recognizes that these moves will not entirely eliminate the criminality associated with

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117. Frampton, *supra* note 26, at 2046 (citing statistics about prison crime).

118. *See supra* note 92.

119. Numerous such mechanisms have been proposed, although each has its problems. One proposal is to substitute electronic monitoring for incarceration under certain circumstances. Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 237, 246 (2009) (describing alternatives to incarceration that could help "dismantle mass incarceration," including electronic surveillance, although also noting the latter's net-widening effects). Another is to shorten prison sentences across the board. Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 492, 494 (2017) (proposing that "[i]nmates over a designated age, say 35, who have served more than a specified period, say 3 years, and every inmate who has served more than 5 years should be eligible to apply for release," although noting the American public is not likely to accept such a regime).

120. *See* Doran Larson, *Why Scandinavian Prisons Are Superior*, ATLANTIC (Sept. 24, 2013), https://www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949/ [https://perma.cc/42DW-D7Q7] (describing significant differences between Nordic and American prisons, noting the ubiquity of "open prisons" in Sweden that allow offenders to come and go, and stating that even "northern Europe's closed facilities operate along the lines of humanism that American prisons abandoned early").

prisons. But, on the assumption that those kept in prison beyond the minimum sentence fit in the high-risk category, a substantial portion of them (at least fifty percent under the definition proposed above) will commit violent crime if allowed freedom. On that assumption, prisons are clearly needed to reduce crime committed against people outside of prison. And, combined with a more humane carceral environment, this minimalist regime would produce lower overall crime rates than if prisons were eliminated entirely (after all, even today's prisons account for less than one percent of all crime).[121] Of particular interest to abolitionists, it would significantly reduce violent crime against people of color, who are disproportionately the victims of the most serious offenses.[122]

D. The Harms of Doing Away with Prison

Crime reduction is not the endgame for many abolitionists, however. The primary goal is to prevent the disproportionate "caging" of people who are poor, especially poor people of color, in conditions that denigrate their humanity. To achieve this objective, abolitionists are willing to put up with preventable crime.[123] Frampton provides two reasons why this might be so. First, he says, "[I]t is simply a myth that prisons are playing a large role in keeping us safe."[124] Given our abysmal clearance rates (well below fifty percent for most crimes) and the fact that, even in a tough-on-crime era, most prisoners are released, he correctly observes that many of the dangerous few are walking among us right now, despite our massive incarceration rates.[125] Of course, abolishing prisons will spill *more* of these people onto the streets. But Frampton's second reason for discounting this concern (here quoting Emile Durkheim) is that "crime . . . seems to be a normal aspect of human life . . . [and] is found in varying degrees in all modern nations."[126] That fact, Frampton believes, "alleviate[s] some of the burden on the abolitionist,"[127] apparently on the Durkheimian view that

121. *See* Pritikin, *supra* note 92, at 1082.

122. *Black Victims of Violent Crime*, BUREAU OF JUST. STAT. (Aug. 9, 2007), https://bjs.ojp.gov/press-release/black-victims-violent-crime [https://perma.cc/LM3D-DSZ9] (stating that in 2005, Black Americans comprised thirteen percent of the population but forty-nine percent of the homicide victims and fifteen percent of nonfatal violent crimes such as rape, sexual assault, robbery, aggravated assault, and assault).

123. *See* McLeod, *supra* note 15, at 1171 ("Reducing social risk by physically isolating and caging entire populations is not morally defensible, even if abandoning such practices may increase some forms of social disorder.").

124. Frampton, *supra* note 26, at 2049.

125. *Id.* at 2049–50.

126. *Id.* at 2051.

127. *Id.*

some amount of social deviance is a necessary part of a well-functioning society.[128]

As Frampton recognizes,[129] the fact that crime will not go away is precisely the reason many, including criminal law minimalists, give for retaining prison. More specifically, minimalists argue that prison's incapacitative function can be effective at diminishing violent crime—the one type of antisocial activity that even Durkheim might agree has little or no social value. But if what has been said up to this point is still not an adequate response to abolitionism, consider retributivism and general deterrence, the other traditional purposes of punishment besides incapacitation.

Even abolitionists recognize that there must be some consequence for bad behavior.[130] Retributivists would argue that this consequence must be proportionate to the offender's crime and culpability, at least roughly so.[131] For the most serious crimes, restorative justice processes and community-based alternatives to prison are unlikely to fit the bill.[132] Even if they did so in theory—perhaps based on the sense that even the worst conduct (or perhaps especially the worst conduct) is the product of biology and upbringing over which the offender has little or no control[133]—a consequential

128. Durkheim is well-known for his assertion that crime is inevitable, that social deviance is necessary for social change, that reaction to its worst forms enhances social cohesion, and that some forms of deviance eventually become societal norms. *See* EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (George E.G. Catlin ed., Sarah A. Solovay & John H. Mueller trans., Free Press 1962) (1895). Frampton cites sources referencing Durkheim's work in support of the proposition in the text. Frampton, *supra* note 26, at 2051 n.213.

129. Frampton, *supra* note 26, at 2051 (noting that the inevitability of crime is "the realist critique often leveraged against the abolitionist").

130. McLeod, *supra* note 15, at 1228, 1232–38 (arguing for a significant reconceptualization of retributive responses to crime, but also noting their "intuitive appeal," and conceding the need for "the creation of additional spaces of liberatory security separate from the criminal arm of the state—spaces in which harm is prevented and just conditions are manifest at a small scale"). One of the more interesting tensions in the abolitionist literature is between the goal of abolishing the criminal legal system and the desire to punish police for their misconduct. *See* Trevor George Gardner, *Law and Order as the Foundational Paradox of the Trump Presidency*, 73 STAN. L. REV. ONLINE 141, 159–60 (2021) (noting the push on the part of abolitionist organizations to criminally punish police misconduct).

131. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines,* 40 AM. CRIM. L. REV. 19, 66 (2003) ("In all cases the goal [of retribution] is to achieve proportionate punishment, where more harm means greater punishment.").

132. At least for less serious crimes, retribution can be achieved through alternatives to prison. Robert E. Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71, 85 tbl.II (1995) (evaluating the "punitive bite" of various intermediate sanctions).

133. *See, e.g.*, Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 58 (1985) (arguing

retributivist would balk. Research on the average citizen's views about appropriate punishments makes clear that most people believe that prison time is deserved for the most serious crimes.[134] More importantly, research pioneered by Paul Robinson also suggests that, when punishment departs from the public's views on desert, people are less inclined to view the government as legitimate, less likely to comply with its laws and cooperate with its enforcement efforts, and more likely to take enforcement into their own hands.[135]

I have argued that Robinson overstates the negative impact of a punishment system that fails to adhere to societal views of desert.[136] My own empirical investigation suggests that unless the departure from societal desert norms is routine and extreme, compliance with government dictates is not likely to flag.[137] However, a system that explicitly rejects imprisonment as a punishment option even for crimes like murder, sexual assault, and armed robbery—and even for individuals who are dangerous under any definition of the term—is precisely the type of routine and extreme neglect of societal mores that *would* lead to the delegitimization dangers that Robinson outlines. In contrast, a minimalist regime would take retributive instincts into account by creating a desert-defined prison time for most felonies (although, again, most felons would serve only the minimum sentence, with prison time—up to the retributively defined maximum—imposed only on the dangerous few).

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that society can collectively be held responsible for its role in producing crime by requiring punishment to be reduced and by permitting the introduction of wide-ranging evidence about the worthiness of the defendant to receive compassion).

134. Joseph E. Jacoby & Francis T. Cullen, *The Structure of Punishment Norms: Applying the Rossi-Berk Model*, 89 J. CRIM. L. & CRIMINOLOGY 245, 274 (1998) (in a study posing eight crime vignettes, "[a] majority of respondents favored imprisonment for all offenses, with the exception of larceny of property worth $10").

135. Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2003 (2010) (reporting research indicating "that a criminal justice system [that] produces systematic injustices can generate negative attitudes toward that system" and "that those negative attitudes can lead to diminished intentions to defer to, cooperate with, and comply with the law"); *see also* Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277, 277 (2022):

> When the community observes the criminal law as regularly doing injustice or failing to do justice, the law's reputation as a reliable moral authority suffers. This loss in moral credibility tends to reduce people's willingness to defer to the law's demands and undermines criminal law's ability to make people internalize its norms. And where the disillusionment arises from criminal law's perceived failure to do justice, it can provoke vigilantism.

136. Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 96–110 (2013) (reporting research suggesting that noncompliance is minimal unless departure from desert is sustained and dramatic).

137. *Id.*

In short, abolition of prison would seriously undermine retributive goals, whether viewed from a deontological or utilitarian perspective. It is even easier to see why rejection of prison as a possible punishment would seriously undermine deterrence. The gain from crime would not need to be significant for would-be criminals to ignore the threat of having to sit through mediation with the victim, make restitution, participate in a treatment program, or engage in community service;[138] only prison might provide the necessary disincentive in such situations. Thus, from the general deterrence perspective as well, abolition does not make sense. Here again a minimalist approach that retained prison as an option would seem to fare much better.

However, if the minimalist regime that I have been describing were in place, the only type of people who would face prolonged prison time would be those in the higher-risk categories. It is possible that many of these individuals are not deterrable by the specter of a prison sentence, no matter how long it is.[139] Rather, the disincentive to commit crime might have to come from the fear of being caught.

III. WHY WE NEED THE POLICE, BUT IN A MINIMALIST WAY

Right now, of course, the job of catching criminals belongs to the police. It is not clear who would take over that job if police forces were abolished. Perhaps, following Frampton's version of Durkheim, there would be no concerted effort to nab wrongdoers. But then even restorative and rehabilitative efforts would often go for naught. If some sort of enforcement entity did exist, it would have to be armed, since many criminals—especially those thought to be the dangerous few—are armed. And since it would be important to make clear that the people

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138. *Cf.* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 173–77 (1968) (explaining why it may be rational to commit crime, for instance, when the punishment is light enough or the probability of escaping detection is high enough). Advocates for restorative justice might argue otherwise. *See, e.g.*, John Braithwaite, *Minimally Sufficient Deterrence*, 47 CRIME & JUST. 69, 105 (2018):

> It seems unlikely that a society would face crime risks from insufficient passive general deterrence [e.g., prison] if it takes seriously shame management and education [e.g., restorative justice] about the curriculum of crimes and if it puts into place a credible peak as a last resort in its pyramid of dynamic deterrence.

But even this article states that "[w]e cannot completely do without passive general deterrence, but a minimally sufficient quantum of it delivered by the model I propose here may be enough to achieve the limited work general deterrence can do." *Id.*

139. David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 94–95 (2013) ("[A] significant number of our criminals today are not deterrable . . . [and] are driven by irrational impulses, intoxication-impaired judgment, or addiction-based desperation to commit crimes for which the expected punishment far exceeds the expected benefit.").

doing the arresting had authority to do so, they would need some symbol of authority, a badge or a uniform. In short, we would need police. Without them, even the deterrence bought by fear of apprehension disappears.

That does not mean that we need the police we have today. Police abuse of traffic stops, stops and frisks, and misdemeanor and drug arrests is well-documented, with its impact wreaking particular havoc on communities of color.[140] Scholars have made thoughtful suggestions aimed at offloading many police duties to other entities in an effort to reduce racialized police-citizen confrontations and the violence that often ensues. Traffic stops could be carried out by an unarmed traffic force,[141] calls involving people with mental illness and the unhoused could be dealt with by the appropriate behavioral professionals,[142] and many misdemeanors and minor felonies could either be decriminalized or handled through citations rather than custodial arrests.[143]

A criminal law minimalist might carry this downsizing of the police function even further through doctrinal development paralleling how minimalism could play out in the prison setting. On this view, only those thought to be the dangerous few or highly likely to flee the

140. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 740–41 (2020) (analysis of nearly one hundred million traffic stops showing that contraband was more likely to be found after traffic stops of white drivers than of Black and Hispanic drivers); Floyd v. City of New York, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013) (finding, based on data from 2004 to 2012 in New York City, that Black and Hispanic people were more likely to be stopped; that Black and Hispanic people were thirty percent more likely to be arrested (as opposed to receiving a summons) after being stopped and fourteen percent more likely to be subjected to the use of force during the stop; and that the hit rate for Black and Hispanic people (as measured by recovery of contraband, arrests made, or summonses issued following a stop and/or frisk) was eight percent lower for Black and Hispanic people than for white people); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769–70 (2018) ("We find that black people are arrested at more than twice the rate of white people for nine of twelve likely-misdemeanor offenses: vagrancy, prostitution, gambling, drug possession, simple assault, theft, disorderly conduct, vandalism, and 'other offenses.' ").

141. *See* Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 756–59 (2015) (proposing that "the bulk of noncriminal traffic enforcement . . . be removed from the hands of the police," and detailing such a system).

142. *See* Slobogin, *supra* note 23, at 194–99 (making this point); Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 961 (2021) ("[W]e impose legal sanctions regularly against the mentally ill, or the homeless, and little changes. Not only may these individuals be lacking in culpability, but they also may not have the capability to take responsibility for the situation that brought the police there.").

143. *See* SPANGENBERG PROJECT, AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING 1 (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_tsp_reclassification_report.authcheckdam.pdf [https://perma.cc/KP5P-T4A9] (calling for widespread, full decriminalization of minor offenses as a cost-saving measure that would ease "problems with overcrowding, over-burdened prosecutors and public defenders with unfeasible caseloads and understaffing").

jurisdiction should be subject to custodial arrest.[144] Further, the use of force to make such arrests would only be permitted under the same circumstances that civilians may use force. This would mean that, in contrast to the rules approved by the Supreme Court, police contemplating physical restraint or use of weapons would need to first consider alternatives and, if force is used, would need to ensure it is proportionate to the suspect's;[145] in short, force could be used only against the dangerous, and deadly force only against those who pose an imminent threat of serious bodily harm. Stops could also be limited to the dangerous few. Based on the observation that stops and frisks are at least as invasive as the technological policing techniques that the Supreme Court has recently held require probable cause,[146] I have argued that stops should only occur when police can demonstrate that they have probable cause to believe an individual has committed the actus reus for attempt and that searches after stops and arrests should only occur when the police have probable cause to believe that a weapon or evidence of a crime will be found.[147] These rules would provide a much more precise definition of dangerousness on the street than current law—which allows the police to make stops and carry out frisks based on "furtive gestures," "evasive actions," and "bulges" under the clothing[148] and permits them to conduct full searches of the person in the course of any custodial arrest, even in the complete *absence* of suspicion that evidence will be found and even if the crime is a minor one.[149]

144. *See* Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 309 (2016) ("[O]ur traditional justifications for arrests—starting the criminal process and maintaining public order—at best support far fewer [custodial] arrests than we currently permit.").

145. *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1120 (2008) ("[T]he law of justification provides a natural and powerful framework for evaluating the force used by law enforcement officers.").

146. *See, e.g.*, United States v. Jones, 565 U.S. 400, 404–05 (2012) (holding that a warrant is required for prolonged tracking using signals from a GPS device attached to a car); Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) (holding that a warrant is required to acquire several days' worth of cell site location data).

147. Slobogin, *supra* note 22, at 43 ("If technological tracking and searches of digital records require probable cause that evidence of crime will be found, stops and frisks should require probable cause that a crime has been committed (in the case of stops) or that evidence of crime will be found (in the case of frisks).").

148. David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501, 541–43 (2018) (noting that in Philadelphia, "in audits conducted in 2014–2016, of 220 frisks based on a 'bulge,' only one weapon was seized, a hit rate of less than 0.5%," and that "[f]risks conducted where officers reported that suspects failed to take their hands out of their pockets, were not 'cooperative,' engaged in furtive movements, or were stopped in high-crime areas were similarly unproductive," with "frisks based on these factors in 288 cases yield[ing] only a single weapon.").

149. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (upholding a custodial arrest for a seat belt violation).

Like minimalist imprisonment rules, these types of minimalist policing rules would be much more effective than police abolition at preventing crime and catching criminals. At the same time, they would significantly reduce the number of people subject to the coercive power of the state and enhance the legitimacy of government in the eyes of those who believe the primary job of today's police is to harass.[150] They may also be more effective at preventing crime than current police rules,[151] while doing less harm to police-citizen relations.[152] As Frampton points out, police do not come close to catching everyone who does bad things. But failing to try or leaving that job up to the "community" would have the same delegitimizing effects as the abolition of prisons.[153]

CONCLUSION

One way to think about the abolitionist argument is that it is deontological all the way down. This version of abolitionism posits that institutionalization of prisons and police is, like slavery, simply wrong; regardless of whether, on balance, prisons and police do more good than

150. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) (describing the delegitimizing effects of police misuse of low-level criminal law enforcement and stating that "the real problem of policing [is that] at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic").

151. Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 72, 79 (finding reductions in crime for each increase in "probable cause" stops but no reduction in crime for increases in "non-probable cause" stops).

152. *Terry v. Ohio*, the Supreme Court's leading case on stop and frisk, recognized the problem, stating that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups," and asserting that such stops "cannot help but be a severely exacerbating factor in police-community tensions . . . particularly . . . where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.' " 392 U.S. 1, 14–15 n.11 (1968) (first alteration in original) (first quoting PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 183 (1967); and then quoting LAWRENCE TIFFANY, DONDAL MCINTYRE & DANIEL ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47–48 (1967)).

153. For a sense of the controversy about the extent to which the community should be involved in criminal justice issues and the difficulty of identifying what community means, compare John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 711, 718–21 (2020) ("The democratization movement . . . rests on conceptually problematic and empirically dubious premises about the makeup, preferences, and independence of local 'communities.' It relies on the proudly counterintuitive claim that laypeople are largely lenient and egalitarian, contrary to a wealth of social scientific evidence."), with Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) ("Collective mechanisms of resistance and contestation build agency, remedy power imbalances, bring aggregate structural harms into view, and shift deeply entrenched legal and constitutional meanings.").

harm, abolition of a system that causes racially disparate impacts and cages people is morally mandated. This Essay does not respond to that argument. Like Frampton's, its focus is entirely consequentialist. From that perspective, I have argued, the abolition of prisons and police is not the right goal. It would significantly decrease public safety and seriously destabilize society.

But there is another alternative to the current regime. Aggressive criminal law minimalism can move in the abolitionist direction without sacrificing a substantial degree of either safety or stability. By fine-tuning definitions of risk and relying on validated means of assessing it, the criminal legal system can zero in on the "dangerous few" and, in doing so, significantly reduce the use of prisons, the impact of the police, and the racial disparities that currently infect arrests and sentencing. Frampton's defense of abolitionism does not succeed. But it does help sharpen the ways criminal law minimalism can achieve reforms that even some abolitionists may be willing to accept.[154]

154. *Cf.* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020) (acknowledging the acceptability of non-abolitionist "non-reformist reform[s]" that "provide[ ] a framework for demands that will undermine the prevailing political, economic, social system from reproducing itself and make more possible a radically different political, economic, social system").