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

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THE MINIMALIST ALTERNATIVE TO ABOLITIONISM: FOCUSING ON THE NON-DANGEROUS MANY

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In *The Dangerous Few: Taking Prison Abolition and Its Skeptics Seriously*, 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 nondangerous 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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I. 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

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[1] See, e.g., Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 30 (2018) (focusing on the movement to end the "prison-industrial context," defined as "the expanding apparatus of surveillance, policing, and incarceration the state increasingly

have also seen law review articles arguing for the demise or radical reorientation of prosecutor 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 "criminal" and "system"[10]) and its adjuncts inevitably

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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 the 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 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 (2021).

[6] Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, *7 (2022) ("Ultimately, this 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* The Abolition & Disability Just. Coal., *Reforms to Avoid*, https://abolitionanddisabilityjustice.com/reforms-to-oppose/ (last visited December 1, 2022) (listing as reforms to avoid the replacement of imprisonment "with other forms of incarceration, such as in a group home, nursing home, drug treatment facility, or hospital.").

[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 Elimination of the Foster System*, https://perma.cc/K7VC-9M2R ("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.").

[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

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 in the legal academy can be gauged in a couple of ways. Sometimes dated from Allegra McLeod's 2015 article, *Prison Abolition and Grounded Justice*,[15] abolitionist scholarship in the legal academy has generated over 200 articles since then, an average of about 30 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

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accounts refers simply to the 'criminal system' or the 'criminal legal system,' omitting any reference to justice.").

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

[12] Paul Butler, *Foreword to the Republication of Affirmative Action and the Criminal Law*, 92 U. COLO. L. REV. 1443, 1448 (2021) ("racial justice is one of the primary objectives of many police and prison abolitionists").

[13] Berger, Kaba & Stein, *supra* note 10 ("it 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 679 ("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.").

[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).

[16] A Westlaw prompt of "advanced: DA(aft 01-01-2015) & abolition /10 prisons or police" entered on December 1, 2022 produced over 400 articles, at least 200 of which endorse or are highly sympathetic to abolitionism.

[17] Fareed Nassor Hyatt, *Abolish Gang Statutes with the Power of the Thirteenth Amendment* (Nov. 10, 2021, Virtual Crim Law Workshop); Cynthia Godsoe, *The Victim/Offender Overlap and Criminal Justice Reform*, Jan. 12, 2022, Virtual Crim Law Workshop); Ben Levin, *Criminal Law Exceptionalism* (March 9, 2022, Virtual Crim Law Workshop); Ngozi Okidegbe, *Beyond Carceral Data* (April 13, 2022, Virtual Crim Law Workshop); Kate Weisburd, *Punishment Exceptionalism and the Future of Decarceration* (May 11, 2022, Virtual Crim Law Workshop); Esther K. Hong, *Transforming the Carceral*

who write about reforming the system rather than abolishing 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 re-orient 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 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, the unhoused, traffic

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State (June 8, 2022, Virtual Crim Law Workshop); Benjamin Hausbrouck, *Reimagining Public Safety* (June 8, 2022, Virtual Crim Law Workshop); Erin R. Collins, *Abolishing the Evidence-Based Paradigm* (Sept. 8, 2022, Virtual Crim Law Workshop).

[18] *See, e.g.*, Kristina Koningisor, *Police Secrecy Exceptionalism*, __ COLUM. L. REV. __ (calling abolitionist arguments "powerful and persuasive," thus requiring consideration of whether better access to police information will "bring about the radical structural changes that are needed"); Lauren Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619, 688 (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 AMERICAN J. L. & INEQUALITY 36, 43 (2022) ("applying the probable cause requirement . . . to the streets would . . . limit . . . detentions and subsequent searches to situations where they 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.").

enforcement, school security, and regulatory searches and seizures—instead be the province of unarmed government officials.[23]

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 system.[24] Prison would not be eliminated but maintained as a possible disposition; police departments would not be dismantled but kept as the enforcer 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 Prison Abolition and Its Skeptics Seriously* in the Harvard Law Review.[26] Frampton sympathizes with the abolitionism movement. But his primary aim is not to endorse it but to confront what he and I both believe is abolitionism's knottiest problem: the widely-held perception that, at least for those who are likely to reoffend violently, some form of state-sponsored detention is necessary.[27] This essay continues the debate that he invites on this topic.

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[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 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] India Thusi, *The Racialized Policing of Vice*, ___ UCLA L. REV. ___ (forthcoming, 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.'").

[25] *See* McLeod, *supra* note 14, at 1161-1162 ("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 Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022).

[27] Id. ("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*

While Frampton makes some plausible suggestions as to why the problem of the dangerous few should not stymie the abolitionist agenda, I think they fall short. The following discussion about abolitionism's implications and possible minimalist alternatives will be limited to prisons and police.

II. 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.

However, even in relatively simpler times, civil law was not considered sufficient. Criminal law developed in all Western countries hundreds of years ago.[30] Moreover, once banishment, torture and public humiliation fell out of fashion and the death penalty considered anathema in

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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' . . . .").

[28] Frampton admits as much. Frampton, *supra* note 25, at 2026 (stating that despite the fact that "politicians (of all stripes and ideologies) have long promised 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. ISS. 1, circa note 15 (2020) (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 generally id.* circa notes 32-74.

the run-of-the-mill case, prison became the punishment of choice,[31] for reasons familiar to 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 crime 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 socio-economic 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 more complicated modern society.[35] While abolitionists suggest that pre-Civil War slave patrols presaged the police,[36] in fact urban police departments grew up independently of them, in reaction to the perception, if not the reality, that cities like New York City, Philadelphia, Baltimore and Cincinnati were

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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, *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, 620 (2000) ("when 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."); 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 (1997) (noting this problem but assuming offenders can subsequently earn sufficient money to pay the fine).

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

[35] LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 68 (1994) (describing the extent to which, by 1800, citizens complained that the constable system "simply could not cope" with modern crime).

[36] Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1817-1818 (2020) ("The roots of modern police can be traced to slave patrols, the Ku Klux Klan, militias, and early police forces.").

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 Richard Nixon, who ran on a law-and-order platform,[39] concluded in 1975 that the prison "is obsolete, cannot be reformed, 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 a six-fold increase in our imprisonment rates in just three decades.[43] Presaging the current abolitionist movement and 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 34, 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, *supra* note 36, 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).

[40] Corrs. Task Force, Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Major Institutions, in A NATION WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION 3, 22-23 (Calvert R. Dodge ed., 1975)).

[41] THOMAS MATHIESEN, THE POLITICS OF ABOLITION: ESSAYS IN POLITICAL ACTION THEORY (1974); MARK MORRIS, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (1976).

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

[43] For a description of the forces that led to mass incarceration, see JEREMY TRAVIS, BRUCE WESTERN & STEVE REDBURN, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Nat'l Res. Council, 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" that aimed at preventing crime both through social programs aimed 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, more adequate aid for the physically and mentally handicapped."[50]

The reason I highlight Menninger is 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, University of San Diego Law Professor Gail Heriot, 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 characterization of calls for justice for victims as "melodramatic."[53] Criticism of Menninger also has come from commentators

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[44] MENNINGER, *supra* note 41, 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 268-270.

[47] *Id*. at 257-258.

[48] *Id*. 262.

[49] *Id*. 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 on to the police. They must help the police.").

[50] *Id*. at 270.

[51] *See* Wikipedia entry for Gail Heriot, https://en.wikipedia.org/wiki/Gail_Heri. Heriot also serves on the National Commission of Civil Rights. *Id*.

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

[53] *Id*. (referring to Menninger, *supra* note 41, at 9-11).

on the left, who saw the rehabilitative approach that he 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 authorize prolonged confinement in facilities that are much like prisons and provide little treatment.[55]

Abolitionists 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 prison substitutes that may be even more harmful to those no longer imprisoned. Rachel Barkow has made the same point by drawing an analogy to the deinstitutionalization movement in the 1970s that emptied state mental hospitals.[56] While that movement, backed both by advocates concerned about warehousing of troubled individuals and small government conservatives wanting to save money, succeeded,[57] it increased crime by people with mental disability and was disastrous for the mental health of many of them.[58] The lack of community alternatives for these people led to homelessness, over-medication in prison-like settings, or detentions in jails and prisons that offered many fewer treatment options than hospitals and often led to harmful

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[54] *See* Francis Cullen, *Rehabilitation: Beyond Nothing Works*, 4 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' sexually violent predator statute in the case of in Kansas v. Hendricks, 521 U.S. 346 (1997), which upheld the constitutionality of post-sentence commitment of "dangerous" sex offenders. Brief of Menninger Foundation et al. in Kansas v. Hendricks, 16-18.

[56] Rachel Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, WAKE FOREST L. REV. *7* (forthcoming, 2023) (arguing that the failure of the deinstitutionalization movement "strongly suggests that the more pessimistic take on the fate of prison abolition is likely the correct one.").

[57] Id.

[58] *See generally* 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).

decompensation.[59] Barkow also describes how calls for defunding the police have led to a 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 (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. 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 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

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[59] *Id*. at 56-60. See also BERNARD E. HARCOURT, FROM THE ASYLUM TO THE PRISON: RETHINKING THE INCARCERATION REVOLUTION, 84 Tex. L. Rev. 1751, 1780 (2006) (describing the "transinstitutionalization" of people with mental illness from hospitals to jails).

[60] *Id*. at 39-40.

[61] *Id*. at 41. *See also*, Grace Manthey, Frank Esposito & Amanda Hernandez, *Despite 'Defunding' Claims, Police Funding Has Increased in Many US Cities*, ABC News (Oct. 16, 2022), https://abcnews.go.com/id=91511971.

[62] McLeod, *supra* note 14, at 1239 ("Although the elimination of the penal state in its current forms is difficult to imagine, so too were many other transformative events . . . 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 41, at 151.

[64] *Id*. at 272.

[65] McLeod, *supra* note 14, at 1124.

[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

guises: victim-offender mediation as a dispute resolution mechanism; reparation panels composed of trained community representatives who hold face-to-face meetings with offenders and devise sanction and compliance schemes; family group conferencing that involve victim, offender and family members in creating a plan for victim reparation and avoidance of future offending; and "sentencing circles" consisting of community discussions of appropriate sanctions.[67] Restorative justice has also found its way into policing, in jurisdictions that attempt to use interrogations and stops as a means of shaming and providing an opportunity for repairing the harm done.[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 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, and 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."[71] Similarly, while violence interrupter programs may reduce crime[72] and

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REINTEGRATION (1989). In that book, Braithwaite claims that restorative justice has been "the dominant model of criminal justice through most of human history." *Id*. at 323.

[67] *See* DAVID O'MAHONY & JONATHAN DOAK, REIMAGINING RESTORATIVE JUSTICE: AGENCY AND ACCOUNTABILITY IN THE CRIMINAL PROCESS 4-5, 6-9 (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, 1509-1510 (2019) (describing the violence interrupter program in Chicago).

[70] O'MAHONEY & DOAK, *supra* note 66, at 183, 200.

[71] *See generally*, Anthony Duff, *Restoration and Retribution*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILIABLE PARADIGMS 43 (Andreas von Hirsch et al. eds., 2003); Kathleen Daly, *Revisiting the Relationship*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33 (Heather Strang & John Braithwaite eds. 2000).

[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) (noting that "In their studies of Violence Interrupters' work in Chicago and Baltimore, social scientists at Northwestern and Johns Hopkins Universities demonstrated that homicide rates

provide community-based prevention,[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, Barkow contends, it may also occasion backlash, especially if associated, as it often is, with communist, socialist or anti-capitalism rhetoric.[77]

Those are points about tactics. The point I want to make is different. Let's assume that, using whatever tactic works, abolitionists get what they want. In the remainder of this essay I want to address whether that 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.

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have decreased in a statistically significant manner, in one neighborhood by over 50 percent.").

[73] Gimbel & Muhammaad, *supra* note 68, at 1510 ("The . . . 'violence interrupters'—all come directly from the communities they serve . . . [t]he 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 65 ("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 because the positive agenda just does not emerge fast enough for people to trust the end of prisons and a backlash emerges.").

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

III. THE NEED FOR PRISONS

President Nixon's commission, Dr. Menninger and his fellow treatmentists, and even many abolitionists believe that prison is a necessary means of dealing with the "dangerous few." But worried about "slippery slopes" and "reformist cooptation,"[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. Dangerousness *is* difficult to define, identifying the 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, while perhaps supporting a radical reduction in prison usage, do not justify eliminating imprisonment as a punishment option when that disposition is the least restrictive way of preventing harm and 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

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[78] Frampton, *supra* note 25, at 2020-2021 (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)" and leaves "the abolitionist particularly vulnerable to reformist co-optation.").

[79] *Id*. at 2037.

[80] *Id*. at 2038-2039.

[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 ("police are not particularly effective at solving crimes and apprehending suspected criminals").

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 the same order he does.

A. What is Dangerousness?

Frampton correctly states that the concept of dangerousness is "surprisingly undertheorized."[83] We have mountains of jurisprudence defining actus reus and mens rea, the appropriate scope of defenses, and 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 a person convicted of capital murder poses a "probability of committing acts of violence."[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 extremely 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]

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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 Loewy, *Culpability, Dangerousness and Harm: Balancing the Factors Upon Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1988) (exploring how dangerousness considerations influence mens rea and defensive doctrines).

[86] Tex. Code Crim. Proc., Art. 37.071(b)(2).

[87] *See, e.g*. Long v. State, 2009 WL 960598, at *3 (Tex. Crim. App. 2009); Chamberlain v. State, 998 S.W.2d 230, 237-38 (Tex. Crim. App. 1999); King v. State, 4553 S.W. 2d 105, 107 (Tex. Crim. App. 1977).

[88] *See generally* John C. Jeffries, *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.").

That principle is supposed to apply in any context in which the government seeks to deprive a person of life, 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, circumstance and result 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 jury must find the person will more likely than not commit or attempt to commit a homicide, sexual assault or aggravated assault unless execution occurs. In the non-capital 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 and efficacy of community-based treatment programs at reducing violence,[92] this latter criterion might often counsel against prison (but, importantly, would not bar it in every case).

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[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 (Cambridge Univ. Press, 2021).

[91] Frampton, *supra* note 25, at 2046 (providing statistics regarding crimes committed in prison).

[92] David Roodman, *The Impacts of Incarceration on Crime* 8 (2017), https://papers.ssrn.com/sol3/papers.cfm? abstract_id=3635864 ("*Most studies find that aftereffects are harmful*: more time in prison, more crime after prison;" also concluding that, even on a "devil's advocate" view, decarceration provides a net social benefit) (emphasis in original); 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:*

The justification for these 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 required to justify the much more significant deprivation of liberty associated with imprisonment. Because even most involuntary hospitalization commitment statutes require, arguably on due process grounds, proof that a person will cause significant bodily injury before commitment on dangerousness grounds may occur,[95] the same should be true in the criminal sentencing setting. Under both the Eighth and Sixth Amendments, the state has no authority to confine a person beyond their maximum sentence.[96] And the Supreme Court has made clear that, as a matter of due process, "the nature and duration of confinement must bear some reasonable relation to the purpose for which the individual is committed,"[97] which requires, I and others have argued, that the state must pursue its preventive aims in the least restrictive manner available to it.[98]

More Policing is Not, 10 CRIMINOL. & 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.").

[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 45% level of certainty).

[94] Gerstein v. Pugh, 410 U.S. 103, 111 (1975) ("The standard for arrest is probable cause").

[95] U.S. v. Sahhar, 917 F.2d 1197, 1203-1204 (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."). 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 (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); Hurd v. Fredenburg, 984 F.3d 1075, 1085 (2d Cir. 2021) (holding that incarceration beyond a mandatory release date violates the Eighth Amendment).

[97] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[98] See Christopher Slobogin, Mark 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 Janus & Wayne 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.[99] 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 were combined with a modernized version of indeterminate sentencing (described briefly above and elaborated on below), there would be many 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 applied the probability, outcome, duration and intervention criteria seriously 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.[100] By one calculation, under a scheme that retained only high risk prisoners beyond their minimum sentence, prison populations could be reduced by 75% within a decade,[101] with a particularly significant impact on Black prisoners, given their disproportionately greater numbers.[102] That is by no means abolition, but it is a minimalist approach that strongly pushes in that direction.

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[99] *See* Slobogin, *supra* note 89, at 37-63.

[100] 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 85%), see Michael Tonry, *Federal Sentencing Reform Since 1984: The Awful as the Enemy of the Good*, 44 CRIME & JUST. 99, 152-153 (2015); Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?* in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 27-72 (Steven Raphael & Michael A. Stoll, eds. 2009).

[101] 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, *supra* note 88, at 131-147, were carried out, the prison population might be reduced by the amount described in the text. Email communication from Ben Grunwald to author, Jan. 17, 2021. Even without use of algorithms, researchers who audited the compositions of the prison populations in three states estimate that, if danger to the community were the only justification for continued confinement, roughly half the prisoners would be released. ANN MORRISON PIEHL, BERT USEEM & JOHN DIIULIO, JR. RIGHT-SIZING JUSTICE: A COST-BENEFIT ANALYSIS OF IMPRISONMENT IN THREE STATES (1999).

[102] *See* Kevin Reitz, *The Compelling Case for Low Violence-risk Preclusion in American Prison Policy*, 38 BEH. SCI. & L. 207 (2020) (making this point).

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.[103] 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, de-licensing Kervorkian and barring Blankenship from running a company would not stop them, some type of confinement 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?

There is no doubt that binary predictions of reoffending are flawed. Most research shows that, at best, experienced professionals err somewhere around 50% of the time when they conclude a person will recidivate.[104] Although that error rate would likely to be much lower if the definition of dangerousness were finetuned in the manner just discussed, clearly some people who are labeled "dangerous" would not commit serious crime if allowed to remain free.[105]

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 years if not imprisoned. But how

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[103] Frampton, *supra* note 25, at 2033-2034.

[104] Randy Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 L. & PSYCHOL. 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.").

[105] Frampton, *supra* note 25, 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.").

does either an expert or the factfinder 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.[106] The evaluator determines which 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.[107] Such an instrument might indicate, for instance, that Person A has particular risk factors—e.g., certain types of convictions or arrests, certain personality traits, certain group associations—that in validation studies were also found in a group 50% of whom committed a violent offense within three years, but indicate that Person B has risk factors found in a group only 10% of whom recidivated violently with three years. Under the criteria set out above only the first person would meet the legal definition of dangerousness.

It turns out that only a small proportion of offenders—probably well under 25% of those who have committed serious crimes—fit that definition,[108] once again suggesting that those designated "dangerous" might be "few" and that prison populations could accordingly be reduced significantly. Additionally, relying on what behavioral scientists call risk management assessment,[109] 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.

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[106] For a general description of risk assessment instruments, *see* Slobogin, *supra* note 89, at 38-42.

[107] *Id*. I address the accuracy, bias and fairness issues connected with these instruments at *id*, at 64-119.

[108] For instance, in one study using the Violence Risk Appraisal Guide, only about 20% of the validation sample fit in risk categories associated with more than a 50% chance of recidivating violently, Grant T. Harris et al., *Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients*, 26 L. & HUM BEHAV. 377, 380, 385 (2002), with recidivism defined broadly to include simple assaults. Id. at 383.

[109] For a description of risk management, *see* SLOBOGIN, *supra* note 89, at 52-56. *See also*, *id*. at 31-32 (summarizing research showing the efficacy of community-based alternatives to incarceration in terms of reducing recidivism).

The reliance on well-validated risk assessment instruments that minimalism might counsel would not eliminate prediction mistakes. But, compared to unstructured (i.e., human) judgment, their outcomes are more accurate and reliable and less prone to the racial and class bias that Frampton rightly associates with the risk assessment enterprise.[110] Further, in a modern indeterminate sentencing regime, risk would be re-evaluated periodically; mistakes can be corrected and success at risk management can be rewarded.[111] Risk assessment instruments also quantify the risk of error, and thus concretize otherwise vacuous likelihood findings and help policymakers visualize the normative judgements 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 re-entry support, some of those who are not kept imprisoned will commit crime 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 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 prison.[112] When to that crime problem is added the

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[110] Sarah Desmarais, Kiersten Johnson & Jay Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCHOL. SERV. 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"); Jennifer Skeem & Christopher Lowenkamp, *Using Algorithms to Address Trade-Offs in Predicting Recidivism*, 38 BEH. SCI. & L. 259 (2020) (showing ways race can be used in constructing an instrument that reduces significantly the "proxy effect" of race). For a discussion of false positives and race, *see* SLOBOGIN, *supra* note 89, at 90-95.

[111] *See* Garner v. Jones, 529 U.S. 244, 251 (2000) (holding that a prolonged hiatus between parole hearings violates the Ex Post Facto Clause if it "create[s] a significant risk of increase 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).

[112] Frampton, *supra* note 25, at 2046 (citing statistics about prison crime).

aforementioned fact that, because it forces association with other criminals and disrupts employment and family life, imprisonment can be criminogenic,[113] 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,[114] 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.[115] Further, the minority of impulsively or sadistically violent prisoners can more easily be kept separate from the majority of high-risk prisoners who (like Kervorkian and Blankenship?) are willing to co-exist peacefully.

The second response of the minimalist recognizes that these moves will not entirely eliminate the criminality associated with prisons. But, on the assumption that those kept in prison beyond the minimum sentence fit in the high-risk category (as defined here), a substantial portion of them (at least 50%) will commit violent crime if allowed freedom. On that assumption, prisons clearly are needed to reduce crime committed against people outside of prison. And, combined with a more humane incarcerative environment, this minimalist regime would produce lower overall crime rates than if prisons were eliminated entirely. Of particular interest to abolitionists, it

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[113] *See supra* note 91.

[114] Numerous such mechanisms have been proposed, although each has its problems. One proposal is to substituteg electronic monitoring for incarceration under certain circumstances. Marsha Weismann, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 NYU REVIEW OF LAW & 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, Human and Effective*, 46 CRIME & JUSTICE 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).

[115] *See* Doran Larson, *Why Scandinavian Prisons are Superior*, THE ATLANTIC, Sept. 24, 2013 (describing significant differences between Nordic and American prisons; also 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 . . . .").

should have a bigger impact on violent crime against people of color, who are disproportionately the victims of the most serious offenses.[116]

D. The Harms of Doing Away with Prison

Crime reduction is not the end game 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; abolitionists are willing to put up with preventable crime to achieve this objective.[117] Frampton provides two reasons why this might be so. First, "it is simply a myth that prisons are playing a large role in keeping us safe."[118] Given our abysmal clearance rates (well below 50% 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.[119] Of course, abolishing prisons will spill *more* of these people on 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."[120] That fact, Frampton believes, "alleviate[s] some of the burden on the abolitionist,"[121] apparently on the Durkheimian view that some amount of social deviance is a necessary part of a well-functioning society.[122]

As Frampton recognizes,[123] the fact that crime will not go away is precisely the reason many, including criminal law minimalists, give for

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[116] BUREAU OF JUSTICE STATISTICS, BLACK VICTIMS OF VIOLENT CRIME, Aug. 9, 2007), https://bjs.ojp.gov/press-release/black-victims-violent-crime (stating that in 2005 Black Americans comprised 13% of the population but 49% of the homicide victims and 15% of non-fatal violent crimes such as rape, sexual assault, robbery, aggravated assault and assault).

[117] *See* McLeod, *supra* note 14, 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.").

[118] Frampton, *supra* note 25, at 2049.

[119] *Id*. at 2049-2050.

[120] *Id*. at 2051.

[121] *Id*.

[122] Durkheim is well-known for his assertion that crime is inevitable, that social deviance is necessary for social change at the same time reaction to its worst forms enhance social cohesion, and that some forms of deviance eventually become societal norms. *See* EMILE DURKHEIM, THE RULES OF THE SOCIOLOGICAL METHOD (1895). Frampton cites his work in support of the proposition in the text. Frampton, *supra* note 25, at 2051 n.213.

[123] Frampton, *supra* note 25, at 2051 (noting that the inevitability of crime "is the realist critique often leveraged against the abolitionist").

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.

Even abolitionists recognize that there must be some consequence for bad behavior.[124] Retributivists would argue that this consequence must be proportionate to the offender's crime and culpability, at least roughly so.[125] For the most serious crimes, restorative justice processes and community-based alternatives to prison are unlikely to fit the bill.[126] 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[127]—a consequential retributivist would balk. Research on "empirical desert," pioneered by Paul Robinson, not only makes clear that most people believe that prison time is deserved for the most serious crimes,[128] but also suggests

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[124] McLeod, *supra* note 14, at 1232-1238, 1228 (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 police and the desire to punish them. See Trevor Gardner, *Law & Order as a Foundational Paradox of the Trump Presidency*, 73 STAN. L. REV. ONLINE 141, 159-160 (2021) (noting the push on the part of abolitionist organizations to criminally punish police misconduct).

[125] 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").

[126] 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).

[127] *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 that society can collectively be held responsible for its role in producing crime by paying the price of reducing the offender's crime and by permitting the introduction of wide-ranging evidence about the worthiness of the defendant to receive compassion).

[128] 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").

that they are less inclined to view as legitimate a government that departs too far from their view of desert, as well as less likely to comply with its laws or cooperate with its enforcement efforts and more likely to take enforcement into their own hands.[129]

I have argued that Robinson overstates the negative impact of a punishment system that fails to adhere to societal views of desert.[130] My own empirical investigation suggests that unless the departure from societal desert-norms is routine and extreme, compliance with the government dictates is not likely to flag.[131] However, a system that explicitly rejected imprisonment as a punishment option is precisely the type of routine and extreme neglect of societal mores that *would* lead to the de-legitimization 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).

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;[132] only prison might provide the

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[129] Paul H. Robinson et. al., *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.").

[130] Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in its Place*, 65 STAN. L. REV. 77, 96-110 (2014) (reporting research suggesting that non-compliance is minimal unless departure from desert is sustained and dramatic).

[131] *Id*.

[132] 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).

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.[133] Rather, the disincentive to commit crime might have to come from 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 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.[134] Scholars have made thoughtful suggestions aimed at offloading

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[133] 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 . . . , driven by irrational impulses, intoxication-impaired judgment, or addiction-based desperation to commit crimes for which the expected punishment far exceeds the expected benefit.").

[134] A sampling: Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NAT. HUMAN BEHAV. 729, 732 (2020) (analysis of 100 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 (S.D.N.Y. 2013) (finding, based on data from 2004 to 2012 in New York City, that black people and Hispanics were more likely to be stopped; that Black and Hispanic people were 30% more likely to be arrested (as opposed to receiving a summons) after being stopped and 14% more likely to be subjected to the use of force during the stop; and that the hit rate for black people and Hispanics (as measured by recovery of contraband, arrests made, or summonses issued following a stop and/or frisk) was 8% lower for black and Hispanic

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 about by an unarmed traffic force,[135] calls involving people with mental illness and the unhoused could be dealt with by the appropriate behavioral professionals,[136] and many misdemeanors and minor felonies could either be decriminalized or handled through citations rather than custodial arrest.[137]

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 likely to flee the jurisdiction should be subject to custodial arrest.[138] Further, the use of force to make such arrests would only be permitted under the same circumstances that civilians may use force, meaning that, in contrast to the rules approved by the Supreme Court, police contemplating force would need first to consider alternatives and, if force is used, would need to ensure it is proportionate to the suspect's.[139] 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

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people than for white people); Megan Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769–770 (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.'").

[135] Jordan Blair Woods, *Decriminalization, Police Authority and 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.

[136] *See* Slobogin, *supra* note 22, at 194-199 (making this point); Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925, 961 (2021) ("we 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.").

[137] The Spangenberg Project, *An Update on State Efforts in Misdemeanor Reclassification, Penalty Reduction and Alternative Sentencing* (Sept. 2010), http://perma.cc/J9BN-6VLU (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.").

[138] Rachel Harmon, *Why Arrest?*, 115 U. MICH. L. REV. 307, 309 (2017) ("our traditional justifications for arrests—starting the criminal process and maintaining public order—at best support far fewer [custodial] arrests than we currently permit.").

[139] Rachel 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.").

techniques that the Supreme Court has recently held may only be carried out if the police have probable cause,[140] 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 crime will be found.[141] Those rules would provide a much more precise definition of dangerousness on the street than current law, which permits the police to make stops and carry out frisks based on "furtive gestures," "evasive actions," and "bulges" under the clothing,[142] and allows them to conduct full searches of the person and the person's belongings in the course of a custodial arrest, even in the complete *absence* of suspicion evidence will be found and even if the crime is a minor one.[143]

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 the police is to harass.[144] They may also be more

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[140] See, e.g., United States v. Jones, 565 U.S. 400 (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 (2018) (holding that a warrant is required to acquire several days-worth of cell site location data).

[141] Slobogin, *supra* note 21, 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).").

[142] 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, 541-543 (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 "[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.").

[143] Knowles v. Iowa, 525 U.S. 113 (1998) (holding that a search incident to arrest may not follow a citation-only arrest); Atwater v. City of Lago Vista, 532 U.S. 318, 365 (2001) (upholding a custodial arrest for a seat belt violation).

[144] *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.").

effective at preventing crime than current police rules,[145] while doing less harm to police-citizen relations.[146] 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 effect as abolition of prisons.[147]

CONCLUSION

Abolition of prisons and police is not the right goal. It would significantly decrease public safety and societal stability. But aggressive criminal law minimalism can move in the abolitionist direction without sacrificing a substantial degree of either safety or stability. 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.[148]

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[145] Jeffrey Fagan, Terry's *Original Sin*, 2016 U. CHI. L. FORUM 43, 79 (2016) (finding reductions in crime for each increase in "probable cause" stops but no reduction in crime for increases in "non-probable cause" stops).

[146] Terry v. Ohio, 392 U.S. 1 (1967), 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'" (quoting LAWRENCE TIFFANY, DONDAL MCINTYRE & DANIEL ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47-48 (1967)). Id. at 14-15 & n. 11.

[147] 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 (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.") to Jocelyn Simonson, *Democratizing Criminal Justice through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1610 (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.").

[148] *Cf*. Anna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. 90, 104 (2020) (acknowledging the acceptability of non-abolitionist "non-reformist reforms" 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.").