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ESSAY

THE DANGEROUS FEW: TAKING SERIOUSLY PRISON ABOLITION AND ITS SKEPTICS

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Prison abolition, in the span of just a few short years, has established a foothold in elite criminal legal discourse. But the basic question of how abolitionists would address "the dangerous few" often receives superficial treatment; the problem constitutes a "spectral force haunting abolitionist thought . . . as soon as abolitionist discourses navigate towards the programmatic and enter the public arena."[1] *This Essay offers two main contributions: it (1) maps the diverse ways in which prison abolitionists most frequently respond to the challenge of "the dangerous few," highlighting strengths and infirmities of each stance, and (2) proposes alternative, hopefully more productive, responses that interrogate and probe the implicit premises (empirical, ideological, or moral) embedded in and animating questions concerning "the dangerous few."*

INTRODUCTION

In the 1970s, with prison populations a fraction of their current size across much of the planet, prison abolition was more than a possibility — to many, it seemed inevitable.[2] Consider the perspective of one federal district judge, in a published opinion, in 1972:

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[1] Nicolas Carrier & Justin Piché, *Blind Spots of Abolitionist Thought in Academia: On Longstanding and Emerging Challenges*, CHAMP PÉNAL/PENAL FIELD, Aug. 10, 2015, para. 6 (quoting Liat Ben-Moshe, *The Tension Between Abolition and Reform*, *in* THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT 84, 90 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013)).

[2] *See* MICHELLE ALEXANDER, THE NEW JIM CROW 8 (2010) ("These days, activists who advocate 'a world without prisons' are often dismissed as quacks, but only a few decades ago, the notion that our society would be much better off without prisons — and that the end of prisons was more or less inevitable — not only dominated mainstream academic discourse in the field of criminology but also inspired a national campaign by reformers demanding a moratorium on prison construction."); Joshua Dubler & Vincent Lloyd, *Think Prison Abolition in America Is Impossible? It Once Felt Inevitable*, THE GUARDIAN (May 19, 2018, 6:00 AM), https://www.theguardian.com/commentisfree/2018/may/19/prison-abolition-america-impossible-inevitable [https://perma.cc/FEQ5-5T4R]. This is not to suggest that the abolitionist tradition dates just to the 1970s. *See, e.g.*, Ralph S. Banay, *Should Prisons Be Abolished?*, N.Y. TIMES, Jan. 30, 1955, at SM13; JOHN BARTLOW MARTIN, BREAK DOWN THE WALLS (1954); FRANK

> I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational.[3]

In retrospect, the widespread assumption that the prison had "lost its raison d'être" was premature.[4]

In the last two decades, however, prison abolitionism has enjoyed a resurgence, both as a rallying cry for activists[5] and as a focus of sustained scholarly inquiry for geographers, sociologists, philosophers, radical criminologists, and others. Legal academia, however, remained curiously impervious to these developments.[6]

Until recently. Over the last half-decade, legal scholars have begun grappling with the challenges and promises of prison abolition. In a 2015 article entitled *Prison Abolition and Grounded Justice*,[7] Professor Allegra McLeod provided the first sustained discussion of prison abolition in legal scholarship;[8] in the 2019 Foreword to the *Harvard Law Review*'s Supreme Court Term issue, *Abolition Constitutionalism*,[9]

TANNENBAUM, CRIME AND THE COMMUNITY (1938); CLARENCE S. DARROW, CRIME AND CRIMINALS: AN ADDRESS DELIVERED TO PRISONERS IN THE CHICAGO COUNTY JAIL (1910); PETR ALEKSEEVICH KROPOTKIN, IN RUSSIAN AND FRENCH PRISONS (London, Ward & Downey 1887). *See generally* Jesse Olsavsky, *Runaway Slaves, Militant Abolitionists, and the Critique of American Prisons, 1830–60*, 91 HIST. WORKSHOP J. 91, 91–92 (2021) (tracing roots of contemporary prison-abolitionist thought to antebellum critiques of prisons).

[3] Dubler & Lloyd, *supra* note 2 (quoting Morales v. Schmidt, 340 F. Supp. 544, 548–49 (W.D. Wis. 1972)).

[4] *See* Loïc Wacquant, *Bourdieu, Foucault, and the Penal State in the Neoliberal Era*, *in* FOUCAULT AND NEOLIBERALISM 114, 121 (Daniel Zamora & Michael C. Behrent eds., 2015) (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH 297–98 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977)).

[5] *See, e.g.*, *End to All Jails, Prisons, and Immigration Detention*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-jails-prisons-detention [https://perma.cc/7N2A-EMQ6] (demanding "[a]n end to all jails, prisons, immigration detention, youth detention and civil commitment facilities as we know them and the establishment of policies and programs to address the current oppressive conditions experienced by people who are imprisoned"); THE RED NATION, THE RED DEAL: INDIGENOUS ACTION TO SAVE OUR EARTH, PART ONE: END THE OCCUPATION 12 (2020), http://therednation.org/wp-content/uploads/2020/04/Red-Deal_Part-I_End-The-Occupation-1.pdf [https://perma.cc/9NBZ-EDP9] (listing the principle that "[w]hat [c]reates [c]risis [c]annot [s]olve [i]t" and noting that the movement "draw[s] from Black abolitionist traditions to call for divestment away from the caging, criminalizing, and harming of human beings").

[6] *See Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1568, 1571 (2019) (noting "lawyers have, for the most part, yet to contemplate prison abolition in any serious way").

[7] Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

[8] Though it was certainly not the first to apply an abolitionist framework to contemporary legal issues. *See, e.g.*, Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 284 (2007) (analyzing through an abolitionist framework "capital punishment, mass incarceration, and police terror as modern extensions of a caste system that originated in slavery and that continues to subjugate black people").

[9] Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

Professor Dorothy E. Roberts cemented abolitionism's place in elite academic legal discourse.[10] A small flood of related scholarship — either expressly adopting an abolitionist lens, or at least responding to abolitionist critiques — has now appeared in leading law reviews.[11] Both the

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[10] *See* Máximo Langer, Response, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 70–76 (2020) (responding to Roberts's *Abolition Constitutionalism)*; Aya Gruber, *Do Abolitionism and Constitutionalism Mix?*, JOTWELL (Feb. 11, 2020), https://crim.jotwell.com/do-abolitionism-and-constitutionalism-mix [https://perma.cc/QE4G-4SW7] (same).

[11] *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform,* 108 CALIF. L. REV. 1781, 1788 (2020); Amna A. Akbar, Response, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97–98 (2020) [hereinafter Akbar, *Democratic Political Economy*]; Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 862 (2021); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 410 (2018) [hereinafter Akbar, *Radical Imagination*]; Mirko Bagaric et al., *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 353 (2021); Josh Bowers, *What If Nothing Works? On Crime Licenses, Recidivism, and Quality of Life*, 107 VA. L. REV. 959, 967, 1052 (2021); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 7 (2022); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017); Andrew Guthrie Ferguson, *Surveillance and the Tyrant Test*, 110 GEO. L.J. 205, 211–13 (2021); Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4047011 [https://perma.cc/F8E7-RWVM]; Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 166 (2021); V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1466 (2019); Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. CRIM. L. 335, 340 (2020); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. (forthcoming 2022) (on file with the Harvard Law School Library); Aya Gruber, Commentary, *Policing and "Bluelining,"* 58 HOUS. L. REV. 867, 933 (2021) (noting "abolitionist ideology . . . is currently experiencing a renaissance in progressive scholarly circles"); M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1212 (2020) ("[An] accounting [of prison's cruelties] may lead to the conclusion that prisons are simply not an ethical response to crime."); Bernard E. Harcourt, *The Critique and Praxis of Rights*, 92 U. COLO. L. REV. 975, 979 (2021); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 203 (2020); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1438 (2021); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1006 (2021) (noting "renewed attention to and scholarship about prison abolition"); Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 526–27 (2022); Allegra M. McLeod, Review Essay, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 653 (2017) [hereinafter McLeod, *Beyond the Carceral State*] (reviewing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015)); Jamelia N. Morgan, Response Essay, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1695 (2021); Jamelia N. Morgan, Essay, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 611 (2021); Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 124 (2019); Alice Ristroph, Essay, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1662 n.139 (2020) (noting "some criminal law scholars have urged professors to 'teach abolition' alongside theories of punishment" (quoting Amna Akbar, *Teaching Penal Abolition*, LAW & POL. ECON. PROJECT (July 15, 2019), https://lpeproject.org/blog/teaching-abolition [https://perma.cc/HJ6T-RUG4])); Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1454 (2021); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1599 (2017); Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111, 113 (2017); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 589 (2017); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 790 (2021).

Harvard Law Review[12] and the *UCLA Law Review*[13] have dedicated symposia to furthering abolitionist perspectives. Abolitionists' "'fugitive' knowledges,"[14] it seems, have finally begun infiltrating even the most rarified spaces of mainstream legal academia.

Today's law students (who, of course, are partially responsible for generating, editing, and promoting such scholarship) seem curious about, and receptive to, abolitionist interventions. It's not just that they have been exposed to scholars like Professors Angela Davis and Ruth Wilson Gilmore in mainstream newspapers,[15] magazines,[16] podcasts,[17] and memes.[18] Their political consciousness has been shaped by two nationwide protest movements centered on racial justice, state violence, and the broader operation of criminal law: those in 2014 and 2015 after the killing of Michael Brown,[19] and those in the summer of 2020 after the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd.[20]

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[12] *Developments in the Law — Prison Abolition*, *supra* note 6; Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019); Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650 (2019).

[13] *Symposium 2022: Toward an Abolitionist Future*, UCLA L. REV., http://www.uclalawreview.org/events/symposium-2022 [https://perma.cc/VS5U-5RNA] (print issue forthcoming 2022).

[14] Liat Ben-Moshe, *Dis-epistemologies of Abolition*, 26 CRITICAL CRIMINOLOGY 341, 344 (2018) (quoting MICHAEL HAMES-GARCIA, FUGITIVE THOUGHT: PRISON MOVEMENTS, RACE, AND THE MEANING OF JUSTICE (2004); STEFANO HARNEY & FRED MOTEN, THE UNDERCOMMONS: FUGITIVE PLANNING AND BLACK STUDY (2013)); ABOLISHING CARCERAL SOCIETY 6 (Abolition Collective ed., 2018) ("Recognizing that the best movement-relevant intellectual work is happening both in the movements themselves and in the communities with whom they organize (e.g., in dispossessed neighborhoods and prisons), [our] journal aims to support scholars whose research amplifies such grassroots intellectual activity.").

[15] *See, e.g.*, Jamelle Bouie, Opinion, *12 Deaths in Mississippi Tell a Grim Story*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/31/opinion/mississippi-prison-deaths.html [https://perma.cc/G2PC-43NM] (arguing "the only way to 'fix' a problem like the American prison system is to end it"); Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/G6BT-8GJX]; Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES, (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/JW2D-VHNB].

[16] *See, e.g.*, Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), https://www.gq.com/story/what-is-prison-abolition [https://perma.cc/D64W-AWQ3].

[17] *See, e.g.*, Politics and More Podcast, *What Would a World Without Prisons Be Like?*, NEW YORKER (Jan. 27, 2020), https://www.newyorker.com/podcast/political-scene/what-would-a-world-without-prisons-be-like [https://perma.cc/5XFA-AVCT].

[18] *See, e.g.*, @rwgilmoregirls, TWITTER (Jan. 26, 2021, 8:13 PM), https://twitter.com/rwgilmoregirls/status/1354236028358422528 [https://perma.cc/9C7U-8WDL].

[19] Diantha Parker, *Protests Around the Country Mark the Moment of Ferguson Shooting*, N.Y. TIMES (Dec. 1, 2014), https://www.nytimes.com/2014/12/02/us/protests-around-the-country-mark-the-moment-of-ferguson-shooting.html [https://perma.cc/QGW5-UJ93].

[20] Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/B9CP-F3KL]; Richard Fausset, *Before Breonna Taylor*

More than two million prisoners (roughly a third of whom are Black) have been incarcerated in the United States at some point throughout their lives,[21] and these historically unprecedented numbers have proven untethered to the vagaries of crime rates.[22] Younger people especially seem to be asking deep and fundamental questions about criminal law: in July 2020, a Gallup survey reported that thirty-three percent of respondents aged eighteen to thirty-four "strongly supported" or "somewhat supported" proposals to "abolish police departments" (with enthusiasm much higher among nonwhite respondents generally).[23] And yet, as Professor Alice Ristroph has argued, the basic way that we teach criminal law to these students — the canonical account of criminal law that generations of legal professionals have received — has remained unchanged since the mid-twentieth century.[24]

Perhaps as a result, then, conversations about prison abolition seem to begin and end with some version of the following exchange:

Skeptic:	Wait, so no more prisons?
Abolitionist:	Yes, that's the basic idea.
Skeptic:	None?
Abolitionist:	Pretty much.
Skeptic:	But you don't really mean you intend to set loose the axe murderers and serial rapists? That's a terrible idea.
Abolitionist:	Well, see . . .

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and George Floyd, There Was Ahmaud Arbery, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/02/28/us/ahmaud-arbery-anniversary.html [https://perma.cc/EU7Q-L2XE]. Of course, these irruptions were "ushered in through a long trajectory of campaigns, mobilizations, and actions [in previous years], often precipitated by violence and death":

> Although we know the names of vast numbers of Black men who have lost their lives to police violence, the women, gender nonconforming people, trans people, and sex workers who are killed are most often relegated to the background. . . . George Floyd's murder became a major catalyst for abolitionist demands in large part because of prior radical organizing.

ANGELA Y. DAVIS ET AL., ABOLITION. FEMINISM. NOW. 18–19 (2022).

[21] John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 713 (2020); *see also* TODD D. MINTON ET AL., BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NO. NCJ 300655, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2019 — STATISTICAL TABLES (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus19st.pdf [https://perma.cc/6CFM-J6XR]; LAUREN E. GLAZE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NO. NCJ 231681, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009, at 2 (2010), https://bjs.ojp.gov/content/pub/pdf/cpus09.pdf [https://perma.cc/PQC2-MYGZ].

[22] *See* Robert Weisberg, *Zimring on Mass Incarceration: Empirical Pessimism and Cautious Reformist Optimism*, 104 MINN. L. REV. 2695, 2698–99 (2020).

[23] Steve Crabtree, *Most Americans Say Policing Needs "Major Changes,"* GALLUP (July 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx [https://perma.cc/527E-W4MA].

[24] *See* Ristroph, *supra* note 11, at 1635; *see also* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1986 (2019).

Abolitionists typically have several different answers they might then offer, and this is, of course, unsurprising; abolitionists "don't hold one uniform vision."[25] But often these standard answers are less than satisfactory to the skeptic: they either offer too few assurances or present watered-down versions of abolitionism that recast the project in decidedly reformist terms. Even those firmly within the abolitionist camp have acknowledged that this issue (the problem of "the dangerous few"[26]) constitutes a "spectral force haunting abolitionist thought," a topic that inevitably arises "as soon as abolitionist discourses navigate towards the programmatic and enter the public arena."[27] And it remains surprisingly undertheorized.[28]

This Essay offers two main contributions to the burgeoning dialogue around abolition: it (1) maps the ways in which prison abolitionists most frequently respond to the challenge of "the dangerous few," and (2) proposes alternative ways in which the question could be more productively answered (or, less charitably, parried). To be sure, these responses do not settle the debate, and I do not expect or intend to provide solutions that fully mollify the skeptic. But I also hope to make the case that the absence of a bulletproof rejoinder is not a reason to dismiss the abolitionist project. Rather, this Essay proceeds from three assumptions: first, that prison abolitionism has much to offer both criminal law scholars and those interested in criminal justice reform (especially those wary of the project's radical aims); second, that inadequate attention to the problem of "the dangerous few" pretermits more meaningful engagement with abolitionism; and finally, that legal scholars have something important to contribute to this discussion.

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[25] MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 198 (2020).

[26] Sometimes rendered "the terrible few." *See, e.g.*, Ruth Wilson Gilmore, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 15 (2007) (attributing phrase to abolitionist Ruth Morris).

[27] Carrier & Piché, *supra* note 1, para. 6 (quoting Ben-Moshe, *supra* note 1, at 90); *see also* LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 123 (2020) [hereinafter BEN-MOSHE, DECARCERATING DISABILITY] ("By far the most common question asked of abolitionists is, but what should be done with those deemed as having the most challenging or dangerous behaviors?"); Ben-Moshe, *supra* note 1, at 90 ("A question raised often in the context of abolition of prisons and institutions 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' . . . ."); Paul Horwitz, *Some Questions About the Harvard Law Review and Its Scholarly Treatment of Prison Issues*, PRAWFSBLAWG (Dec. 21, 2019, 12:16 PM), https://prawfsblawg.blogs.com/prawfsblawg/2019/12/is-the-harvard-law-review-very-serious-or-kinda-unserious-about-prison-issues.html [https://perma.cc/8GYW-DKJ5].

[28] *See* Carrier & Piché, *supra* note 1, paras. 4, 11 (noting dearth of sustained scholarly attention to "the dangerous few" question).

I. THREE INCOMPLETE RESPONSES

When answering what should be done with "the dangerous few," abolitionists seem to offer a few discrete responses to skeptics and each other. Sometimes these responses bleed into one another, with abolitionists offering a combination of two or three answers. While I have substantial affinity for each of these approaches — indeed, I think they are each largely *right* on some basic level — all three have important limitations. In crudely reductionist terms, they are the "yes," "no," and "maybe" (or, perhaps, "later") answers to the question whether abolitionism is compatible with the preservation of some form of prison-like institution. I consider (necessarily simplified versions of) these perspectives below.

A. Answer #1: "Yes, Of Course We Will Still Need to Incapacitate 'The Dangerous Few,' Albeit in a More Humane Setting that Affirms the Basic Dignity of Those Restrained."

One of the most common abolitionist responses to the question of "the dangerous few" is to concede that for a very limited class of dangerous persons, some form of restraint will remain necessary.[29] We can dismantle the "prison industrial complex"[30] — freeing from cages the vast majority who do *not* need to be incarcerated — without compromising public safety. But the abolitionist does not deny society's right to defend itself from a certain subset of particularly dangerous individuals: "Those who do exhibit persistent patterns of behavior defined as dangerous[] require restraint or limited movement for specific periods of their lives."[31] Prison abolition, on this view, requires "reimagin[ing] security, which will involve the abolition of policing and imprisonment *as*

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[29] *See generally* Herman Bianchi, *Abolition: Assensus and Sanctuary*, *in* ABOLITIONISM: TOWARDS A NON-REPRESSIVE APPROACH TO CRIME (Herman Bianchi & René van Swaaningen eds., 1985), *reprinted in* 1 JUST. POWER & RESISTANCE 47, 53–54 (2017); Willem de Haan, *Redresser les Torts: L'Abolitionnisme et le Contrôle de la Criminalité*, 25 CRIMINOLOGIE, no. 2, 1992, at 115.

[30] Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998, 12:00 PM), https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex [https://perma.cc/5JXY-2ND8]. Professors Dan Berger and Emily Hobson have identified perhaps the earliest use of the term in a statement issued by a group of North Carolina prisoners seeking to unionize in 1974. *See* N.C. Prisoners' Lab. Union, *Goals of the North Carolina Prisoners' Labor Union* (Sept. 27, 1974), *reprinted in* REMAKING RADICALISM, A GRASSROOTS DOCUMENTARY READER OF THE UNITED STATES, 1973–2001, at 170, 171–72 (Dan Berger & Emily K. Hobson eds., 2020).

[31] FAY HONEY KNOPP ET AL., PRISON RSCH. EDUC. ACTION PROJECT, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 129 (1976).

we know them . . . and abolish[ing] imprisonment as the *dominant* mode of punishment."[32]

There is significant appeal to this position, particularly given the vast number of individuals presently incarcerated with no discernible benefit to "public safety" as traditionally conceived. The Brennan Center for Justice has estimated that almost forty percent of prisoners are "unnecessarily incarcerated" in the United States[33] and the ACLU's "Campaign for Smart Justice" posits we can have a fifty percent reduction while "building a new vision of safety and justice,"[34] while some academics insist that (using advanced technological surveillance) we could reduce the prison population by over ninety percent without any adverse effect on public safety.[35] Whichever methodologies one adopts, the numbers are massive.[36] Indeed, if we could decarcerate to the point where only "the dangerous few" remained behind bars, the thinking goes, abolitionists could claim an extraordinary victory.[37] And, of course, this position presents abolitionism in a version most likely to be immediately palatable to the broadest audience.[38]

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[32] ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT 90 (2016) (emphasis added); *cf.* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 110 (2003) [hereinafter DAVIS, ARE PRISONS OBSOLETE?] (discussing "the ultimate aim of dismantling the prison system as the *dominant* mode of punishment" (emphasis added)). I am indebted to Professor Tommie Shelby for first highlighting these passages (and his suggestion that they hint at a qualified version of abolitionism's most radical incarnations).

[33] James Austin et al., *How Many Americans Are Unnecessarily Incarcerated?*, 29 FED. SENT'G REP. 140, 142–43 (2016).

[34] ACLU SMART JUST., BLUEPRINT FOR SMART JUSTICE: ALABAMA 4–5 (2018), https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-AL.pdf [https://perma.cc/A7JS-XHNL] (the plans for each state express the same goal); *see also Smart Justice*, ACLU, https://www.aclu.org/issues/smart-justice [https://perma.cc/3KRK-7J52]; *cf.* Naomi Murakawa, *Mass Incarceration Is Dead, Long Live the Carceral State!*, 55 TULSA L. REV. 251, 251 (2020) (book review) ("No one defends 'mass incarceration.' Not in so many words. Newt Gingrich and Van Jones link arms in the elite bipartisan coalition #cut50, pledging to halve the prison population.").

[35] Bagaric et al., *supra* note 11, at 355.

[36] *But see generally* Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL'Y REV. (forthcoming 2022), https://ssrn.com/abstract=3931603 [https://perma.cc/3QAK-Y6L7] (offering sophisticated accounting of the ways in which competing values might shape an optimal decarceration strategy and noting that many race-neutral strategies might exacerbate racial disparities).

[37] *See* McLeod, *supra* note 7, at 1171 ("[T]he question of the danger these few may pose can be deferred for some time as decarceration could by political necessity only proceed gradually. And so the question of the dangerous few ought not to eclipse or overwhelm the urgency of a thorough consideration of abolitionist analyses and reformist projects of displacement of criminal regulation by other regulatory approaches.").

[38] Nick Herbert, Opinion, *The Abolitionists' Criminal Conspiracy*, THE GUARDIAN (July 27, 2008, 10:00 AM), https://www.theguardian.com/commentisfree/2008/jul/27/prisonsandprobation.youthjustice [https://perma.cc/EP99-TPGN] ("What do the abolitionists really want? If it's the end of all custody, including for the most serious and dangerous offenders, then we can dismiss their demands as truly silly.").

But in ceding this ground to our skeptical interlocutor, the abolitionist ventures down a slippery slope,[39] blurring the lines between prison abolition and other species of less ambitious criminal justice reform (on both the political left and right).[40] Indeed, Professor Máximo Langer argues that those "penal abolitionists that do not take the ideal of 'a society without prisons' all the way down . . . can be understood not actually as penal abolitionists, but as embracing some version of criminal law minimalism."[41] Is that which separates the abolitionist, the Brennan Center, and the Koch Brothers simply an empirical dispute about how few "the dangerous few" really are? My concern here is not to police the boundaries of "abolition" or who may properly use the label "abolitionist," but rather to reiterate a concern many abolitionists have previously recognized: "[T]he irresolution of the problem of the 'dangerous few' appears to transform abolitionism into a *de facto* minimalist posture. Why even stick to the massively unknown and/or misunderstood abolitionist identity if what is at stake is to reaffirm" the legitimacy (and even desirability) of carceral solutions to harmful wrongdoing?[42]

Conceding the necessity of prisons for "the dangerous few" seems to leave the abolitionist particularly vulnerable to reformist co-optation. As McLeod notes, there has been an "increasing invocation of 'abolition' by academic elites and other prominent voices seeking to harness the excitement surrounding abolition towards other more limited goals,"[43] some quite distinct from "the ultimate eradication of the prison as a site of state violence and social repression."[44] Is a call to "recenter policing's fundamental nature as a public good"[45] properly understood as an abolitionist project? Does "repudiat[ing]" American policing's historical

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[39] Indeed, some have questioned whether such a posture should qualify as "abolitionist." For a thoughtful essay promoting "criminal law minimalism" (and contrasting this approach to abolition), see Langer, *supra* note 10, at 58–59.

[40] *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262–63 (2018).

[41] Langer, *supra* note 10, at 58; *cf.* Ben-Moshe, *supra* note 1, at 90–91.

[42] Carrier & Piché, *supra* note 1, para. 8; *see also* Langer, *supra* note 10, at 59 ("I would characterize this position as *backtracking to criminal law minimalism*.").

[43] Columbia Ctr. for Contemp. Critical Thought, *Abolition Democracy 9/13: Prison Abolition*, YOUTUBE, at 59:30 (Feb. 4, 2021), https://www.youtube.com/watch?v=Ew6PlZYhTa4&t=3570s [https://perma.cc/TE7E-5AZQ] (remarks of Allegra McLeod) (citing Phillip Atiba Goff, *Perspectives on Policing: Phillip Atiba Goff*, 4 ANN. REV. CRIMINOLOGY 27 (2021); Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), https://bostonreview.net/articles/tracey-l-meares-public-good-gone-bad [https://perma.cc/8BNE-KYJG]).

[44] Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 217 (2000).

[45] Meares, *supra* note 43.

roots in anti-Blackness, and "empower[ing] those tasked with maintaining public safety with a different [mission]," suffice?[46] Abolitionists can, and do, take issue with these articulations of the abolitionist project,[47] but the critical point is this: both of these vaguer, modest reframings are consistent with a world in which we retain a prison system resembling the status quo, albeit much smaller (perhaps recast in "public good" terms) and reserved for "the dangerous few."

The concern here goes beyond handwringing over ideological purity; the consensus that formed in the United States in the 1970s around incapacitating "the dangerous few" should serve as a cautionary tale for those interested in the issue today. As Professors Franklin Zimring and Gordon Hawkins demonstrate, our reliance on incapacitation as the principal justification for criminal punishment is of surprisingly "recent vintage."[48] This dominance, Zimring and Hawkins argue, arose largely by default: by the mid-1970s, both the left and right were "united in hostility" to the rehabilitative ideal[49] (while separate scholarly and popular attacks undermined public faith in imprisonment's role in deterrence and retribution).[50] Indeed, when "rehabilitation" was excised from the California Penal Code in 1976, the development was endorsed "by a coalition that included police chiefs, district attorneys, Quakers, the American Civil Liberties Union, and the Prisoners Union."[51] Most notable for our purposes, however, is the ascendance during this period among liberal reformers (perhaps best represented by the National Council on Crime and Delinquency) of the belief that prisons should "be reserved for a select group of especially dangerous repeat offenders in regard to whom social defense required an incapacitation strategy."[52] In this belief, liberals found common ground with law-and-order conservatives who similarly touted the social benefits of cleansing the streets of

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[46] Goff, *supra* note 43, at 28 ("One meaning of police abolition, then, is simply a call to abolish this mission and empower those tasked with maintaining public safety with a different one. Although the word abolition may seem frightening to some, the notion of interrupting the historical legacy of explicit anti-Blackness should not be.").

[47] *See, e.g.*, Derecka Purnell, *What Does Police Abolition Mean?*, BOS. REV. (Aug. 23, 2017), https://bostonreview.net/articles/derecka-purnell-how-will-we-be-safe-police [https://perma.cc/TS86-AKDV] (arguing "Meares's post-abolition transformational call is at best unclear and, at worst, a liberal version of broken windows policing"); Columbia Ctr. for Contemp. Critical Thought, *supra* note 43, at 47:55–50:30, 59:30–1:00:35 (critiquing Meares and Goff).

[48] FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION 3 (1995).

[49] *Id.* at 9.

[50] *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 5–9 (1981).

[51] ZIMRING & HAWKINS, *supra* note 48, at 9.

[52] *Id.* at 10 (discussing Nat'l Council on Crime & Delinquency, *The Nondangerous Offender Should Not Be Imprisoned*, 4 CRIME & DELINQUENCY 449 (1973)); *see also* ARYEH NEIER, CRIME AND PUNISHMENT 140–43 (1976).

society's criminal element (albeit in a more sweeping "general incapacitation" sort of way).[53] The two ideological camps had starkly different views about the ideal scope of imprisonment, of course, but the rest (as they say) is history:

> [B]ecause participants on both sides of the ideological debate on crime control accepted some form of incapacitation as a residual rationale for imprisonment, it was unlikely that either ideological camp would place a high priority on careful scrutiny of either the ethical requirements or the empirical aspects of incapacitative imprisonment. . . . [In a public mood dominated by fear and punitiveness in the 1980s], the expansionist notion of general incapacitation was an easy winner. . . . Once the legitimacy of incarcerating offenders for incapacitative reasons was accepted, public sentiment tended to favor strongly the expansionist version of that strategy. . . . Having at least in some instances accepted the legitimacy of incapacitation as a basis for imprisonment policy, the liberal prison reductionists could provide no convincing limiting principle to serve as a barrier to expansionist domination.[54]

The demonstrated pitfalls of too readily agreeing upon the necessity of incapacitating "the dangerous few" — and the limitations of many mainstream reformers' focus on "nonviolent, nonserious, . . . nonsexual" offenders[55] — should inform contemporary debates.[56]

B. Answer #2: "No, Because 'the Dangerous Few' Are Products of Social Pathologies, Of Which the Prison Is Both Symptom and Cause; Prison Abolition Insists We Confront the Root Causes of Criminality."

A different response that prison abolitionists sometimes offer — one that emphatically rejects the inevitability of prison-like institutions to incapacitate "the dangerous few" — insists on interrogating why it is that society produces such individuals in the first instance.[57] On this view, abolishing prisons is a necessary, though not sufficient, condition for eliminating the sorts of *social* pathologies (for example, capitalism, patriarchy, white supremacy) that generate the *individual* pathologies characterizing "the dangerous few." The abolitionist's critique here is

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[53] *See, e.g.*, ZIMRING & HAWKINS, *supra* note 48, at 10–11.

[54] *Id.* at 11–12.

[55] GOTTSCHALK, *supra* note 11, at 165; *see id.* at 165–95; DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 11 (2019).

[56] And, indeed, it is precisely for this reason that some abolitionists insist that "those advocating for community inclusion . . . begin with the most 'severe' cases when calling for and implementing the move out of institutions." BEN-MOSHE, DECARCERATING DISABILITY, *supra* note 27, at 124; *see id.* at 125 (citing work of Professor Jerome Miller in closing Massachusetts juvenile institutions in the 1970s and Fay Honey Knopp's prioritization of working with sexually violent offenders). For more, see generally JEROME G. MILLER, LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS (1991), and KNOPP ET AL., *supra* note 31.

[57] *See* McLeod, *supra* note 12, at 1618–20; Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not "Transformative Justice." Here's Why.*, THE APPEAL (Feb. 5, 2018), https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645 [https://perma.cc/BB88-KBGX].

twofold: prisons are themselves criminogenic, but also, prisons are criminogenic because they distill and reproduce deeper social inequalities that currently necessitate their existence. Thus, "the dangerous few" are not some immutable historical inevitability, but rather the predictable byproduct of a diseased society; if the broader abolitionist project prevails, there will be no need to incapacitate "the dangerous few" because they will (gradually, over time) cease to exist. Or, as Emma Goldman, both a frequent prisoner and a prison abolitionist, lyrically put it:

> Poor human nature, what horrible crimes have been committed in thy name! Every fool, from king to policeman, from the flatheaded parson to the visionless dabbler in science, presumes to speak authoritatively of human nature. The greater the mental charlatan, the more definite his insistence on the wickedness and weaknesses of human nature. Yet, how can any one speak of it today, with every soul in a prison, with every heart fettered, wounded, and maimed? . . . With human nature caged in a narrow space, whipped daily into submission, how can we speak of its potentialities?[58]

Contemporary abolitionists sometimes sound a similar note, recognizing (perhaps embracing) the utopian and speculative nature of the undertaking. Such abolitionists insist they seek "[n]ot so much the abolition of prisons but the abolition of a society that could have prisons."[59] And if it's difficult to imagine what such a world might look like, that's precisely the point.[60]

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[58] EMMA GOLDMAN, *Anarchism: What It Really Stands For*, *in* ANARCHISM AND OTHER ESSAYS 53, 67–68 (3d rev. ed. 1917); *see also* EMMA GOLDMAN, *Prisons: A Social Crime and Failure*, *in* ANARCHISM AND OTHER ESSAYS, *supra*, at 115.

[59] STEFANO HARNEY & FRED MOTEN, THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY 42 (2013).

[60] *See, e.g.*, JACKIE WANG, CARCERAL CAPITALISM 297–98 (2018) ("[I]t is easier to imagine the end of the world than it is to imagine a world without prisons. . . . But what if — instead of reacting to these charges [of unrealistic, utopian, impractical thinking] with counterarguments that persuasively demonstrate that the abolitionist position is the only sensible position — we instead strategically use these charges themselves as a point of departure to show how the prison itself is a problem for thought that can only be unthought using *a mode of thinking that does not capitulate to the realism of the Present?*"); BEN-MOSHE, DECARCERATING DISABILITY, *supra* note 27, at 111 ("[Critics contend that prison abolition] is based on a utopian vision of the world and of human nature; and that it is unrealistic to espouse this worldview in the world we currently occupy. I hope to demonstrate how all these critiques of abolitionary movements, who work toward a noncarceral society, can be conceptualized as strengths . . . ."); ABOLISHING CARCERAL SOCIETY, *supra* note 14, at 4 ("Abolitionist politics is not about what is possible, but about making the impossible a reality.").

Of course, abolitionists are not the first radicals to resist the demand for detailed blueprints ahead of time. *See* SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 226 (1970) ("The classic trap for any revolutionary is always, 'What's your alternative?' But even if you could provide the interrogator with a blueprint, this does not mean he would use it: in most cases he is not sincere in wanting to know. In fact this is a common offensive, a technique to deflect revolutionary anger and turn it against itself. Moreover, the oppressed have no job to convince all people. All *they* need to know is that the present system is destroying them."); *cf.* THOMAS MATHIESEN, THE POLITICS OF ABOLITION 11–28 (1974) (introducing the concept of "the unfinished").

Such rhetoric might seem off-putting to the uninitiated, but it wasn't too long ago that the relationship between social deprivation, criminality, and punishment occupied a more prominent place in criminal law debates. Consider Professor Jeffrie G. Murphy's work probing the validity of retributivism if the majority of wrongdoing in the United States was simply an inevitable byproduct of bourgeois society, stemming from "(1) need and deprivation on the part of disadvantaged members of society, and (2) motives of greed and selfishness that are generated and reinforced in competitive capitalist societies" (that is, alienation that precludes the "development of genuine communities to replace mere social aggregates").[61] Or Judge Bazelon's insistence that the "sense of excitement or accomplishment, . . . frustration, desperation, and rage" that fuels the violent criminal stems from "dehumanizing social conditions," which the criminal law has a moral obligation to center and address.[62] (Or the biting critiques in law reviews of such "welfare criminology" and its naïve assumptions about the causes of crime.[63]) The legal conversation has moved elsewhere, with criminal law scholars no longer bothering themselves with questions about the origins of "dangerous" behavior.[64] And so today's first-year law students are trained to consider "*why* punishment is justified" for individual offenders and are equipped with a "vocabulary to dignify any prior pro-punishment intuitions they may hold,"[65] but rarely are they asked to consider the relationship between punishment and social solidarity (or to think about crime in anything other than a hyperindividualistic and episodic way).[66] Perhaps the abolitionist's insistence that we consider the social origins of "the dangerous few," as well as her claim that "the dangerous few" need not always exist, is an overdue corrective to this trend.

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[61] Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFS. 217, 234 (1973) (discussing WILLEM BONGER, CRIMINALITY AND ECONOMIC CONDITIONS (1916)).

[62] David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 402 (1976); *see also* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 MINN. J.L. & INEQ. 9, 21–23 (1985).

[63] Stephen J. Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275, 1275 (1976).

[64] Perhaps because of the (spectacular) failure of such debates to gain any real traction in the courts. *See* Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 100–07 (2011).

[65] Ristroph, *supra* note 11, at 1660–61.

[66] *See id.* at 1632 (discussing James Comey's insulted reaction to the term "mass incarceration" and his emphasis that each defendant was treated as an individual, "charged individually, represented individually by counsel, convicted by a court individually, sentenced individually, reviewed on appeal individually, and incarcerated. That added up to a lot of people in jail, but there was nothing 'mass' about it" (quoting JAMES COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 150 (2018))); *see also* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1500 (2016).

But for all the advantages of this answer, it too is unsatisfying in several basic ways. First, even if prison abolition succeeds in decimating the ranks of "the dangerous few" — a laudable and worthwhile achievement — the existence of just a residual fraction of this class still poses the same theoretical problem. Even if Answer #2 is ninety-eight percent "right," the stubborn persistence of just a few of "the dangerous few" would still present the same dilemma for the abolitionist to confront. It would be a smaller problem, to be sure, but (eventually) a problem nonetheless. And, of course, it may take us several generations to find out. Second, politicians (of all stripes and ideologies) have long promised that criminality would vanish under alternative social or economic arrangements; the twentieth century witnessed "wars on crime" on both sides of the Iron Curtain, either implicitly or explicitly promising to neutralize their societies' "dangerous few."[67] To date, proof of concept is lacking.[68] Finally, as a matter of rhetorical strategy, this answer seems to require a leap of faith (that is, acceptance of an eventual evaporation of "the dangerous few") that the skeptical interlocutor is already predisposed to reject. Those most concerned with the question of "the dangerous few" seem the least likely to accept the abolitionist's assurances that "the dangerous few" will wither away under a postrevolutionary social arrangement.

C. Answer #3: "Maybe, But the Question Misapprehends What Prison Abolition Is and What Prison Abolitionists Do; It's a Red Herring that We Can Address Later."

A final dominant approach — which seems ascendant, at least in abolitionist discourse in the United States — is to parry the question altogether, on the grounds that it assumes and tends to reinforce a distorted understanding of abolitionism. Though sometimes coupled with

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[67] *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); Rhiannon Lee Dowling, Brezhnev's War on Crime: The Criminal in Soviet Society, 1963–1984 (2017) (Ph.D. dissertation, University of California, Berkeley) (discussing the Soviet Union's gradual acceptance of the persistence of criminality), https://digitalassets.lib.berkeley.edu/etd/ucb/text/Dowling_berkeley_0028E_17090.pdf [https://perma.cc/2F22-SF9K].

[68] *Cf.* NATHANIEL HAWTHORNE, THE SCARLET LETTER 39 (Brian Harding & Cindy Weinstein eds., Oxford Univ. Press 2007) (1850) ("The founders of a new colony, whatever Utopia of human virtue and happiness they might originally project, have invariably recognized it among their earliest practical necessities to allot a portion of the virgin soil as a cemetery, and another portion as the site of a prison."). *But see* David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 112 (Norval Morris & David J. Rothman eds., 1995) ("The most popular sanctions [in seventeenth- and eighteenth-century colonial towns] included fines, whippings, mechanisms of shame (the stock and public cage), banishment, and of course, the gallows. What was not on the list was imprisonment."). I am indebted to Professor Anne Coughlin for the Hawthorne quote.

the previous responses, Answer #3 neither concedes nor rejects the inevitability of prison-like institutions to incapacitate "the dangerous few" of tomorrow; it insists, instead, that an incessant focus on the incapacitation of this group fundamentally misses the central thrust of abolitionist theory and praxis.

The problem with the question of "the dangerous few," on this account, is that it mistakes prison abolition for an exclusively *negative* project (that is, the closing of prisons), when in fact it is a "framework [that] entails . . . developing and implementing other *positive* substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems."[69] The effort to dismantle the prison-industrial complex is "not merely a practice of negation — a collective attempt to eliminate institutionalized dominance over targeted peoples and populations — but also a radically imaginative, generative, and socially productive communal (and community-building) practice."[70] Abolitionists insist that it is "not just deconstructive and critical; it is reconstructive and visionary, pushing for a radical reimagination of the state and the law that serves it."[71] The *real* work of abolition is done "away from prisons — in shelters, health clinics, schools, and in battles over government budget allocations."[72] Thus, as Angela Davis writes, while "decarceration [is] our overarching strategy," the abolitionist program "envision[s] a continuum of alternatives to imprisonment — demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance."[73] By foregrounding "the dangerous few," the skeptic steers the conversation toward the least interesting (and arguably least important) part of the abolitionist program.[74]

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[69] McLeod, *supra* note 7, at 1163 (emphasis added) (discussing Critical Resistance and the Prison Moratorium Project).

[70] Rodríguez, *supra* note 12, at 1576; *see id.* at 1577 ("Consider abolition as both a long accumulation and future planning of acts, performed by and in the name of peoples and communities relentlessly laboring for their own physiological and cultural integrity as such." (emphasis omitted)).

[71] Akbar, *Radical Imagination*, *supra* note 11, at 479.

[72] Alexander Lee, *Prickly Coalitions: Moving Prison Abolitionism Forward*, *in* CR10 PUBL'NS COLLECTIVE, ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 109, 111 (2008).

[73] DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 107.

[74] *See, e.g.*, Kushner, *supra* note 15 ("'I get where you're coming from,' [Gilmore] said. 'But how about this: Instead of asking whether anyone should be locked up or go free, why don't we think about why we solve problems by repeating the kind of behavior that brought us the problem in the first place?' She was asking [a group of children] to consider why, as a society, we would choose to model cruelty and vengeance.").

In a similar vein, some abolitionists answer that the question mistakes prison abolition for a fully realized political program, whereas it is more fruitfully considered an "ethical framework"[75] or "(dis)epistemology."[76] McLeod has proposed that this "abolitionist ethic" contrasts with a more moderate reformist orientation insofar as it: (1) "identifies more completely the dehumanization, violence, and racial degradation of incarceration . . . in the basic structure . . . of penal practices"; (2) "is oriented toward displacing criminal law as a primary regulatory framework and replacing it with other social regulatory forms";[77] (3) "captures the intensity that ought to be directed to transforming the regulation of myriad social problems through punitive policing and incarceration";[78] (4) insists that "conflict, shame, discomfort, and ambivalence" attach to carrying out criminal punishment, in part "to make available broader imaginative horizons within which we are able to govern ourselves";[79] and (5) "opens the space for a transformational politics involving different individual actors, groups, and communities to address the problems that haunt criminal law administration," rather than "correctional experts."[80] Professor Dylan Rodríguez has similarly described abolition as "a practice, an analytical method, a present-tense visioning, an infrastructure in the making . . . ."[81] Similar formulations abound.[82] Again, the final resolution of the question of "the dangerous few" is largely beside the point (or, at least, is beside the point for the foreseeable future).

A final version of this answer is that focusing on "the dangerous few" diverts attention from "actually existing abolitionism" (that is, the anticarceral work that individuals and groups that identify as prison abolitionists are currently doing).[83] Much of recent abolitionist scholarship is devoted to documenting and analyzing such efforts (a move that itself reflects an abolitionist vision of justice "grounded in experience rather

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[75] McLeod, *supra* note 7, at 1185.

[76] BEN-MOSHE, DECARCERATING DISABILITY, *supra* note 27, at 112.

[77] McLeod, *supra* note 7, at 1207.

[78] *Id.* at 1208.

[79] *Id.* at 1210.

[80] *Id.* at 1217.

[81] Rodríguez, *supra* note 12, at 1578.

[82] *See, e.g.*, LISA GUENTHER, SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES 61 (2013) ("This is what abolition looks like: . . . the creation of new ways of thinking, seeing, feeling, speaking, and experiencing a world . . . ."); Akbar, *Radical Imagination*, *supra* note 11, at 460–73; Kushner, *supra* note 15 ("What I love about abolition . . . and now use in my own thinking — and when I identify myself as an abolitionist, this is what I have in mind — is the idea that you imagine a world without prisons, and then you work to try to build that world." (quoting Professor James Forman Jr.)).

[83] *See* Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/8GGX-YNQV].

than proceeding primarily from idealized and abstract premises").[84] It is in this spirit that McLeod chronicles the work of the #LetUsBreathe Collective[85] and that Professors Amna Akbar, Sameer Ashar, and Jocelyn Simonson attend to "actually existing modes of resistance" being articulated by social movements and organizations like Black & Pink, #Not1More, and local groups comprising the Movement for Black Lives.[86] Abolition, such scholarship (either implicitly or explicitly) argues, is thus less "a theoretical or analytical discourse about revolutionary strategy" and more "an ethical discourse about revolutionary practice."[87] And accordingly, formulating a correct "abolitionist stance" on the eventual dilemma posed by "the dangerous few" is simply secondary to more pressing organizational questions (like how to secure incremental victories on the path to abolition that do not inadvertently bolster, launder, or reinforce carceral institutions).[88]

But such deflection on the question of "the dangerous few" has drawbacks: foremost, it can be understood as downplaying or dismissing the safety of those most at risk of harm from interpersonal violence (and the gravity of such harm itself). Consider the *Statement on Gender Violence and the Prison Industrial Complex*, authored in 2001 by Critical Resistance and INCITE! Women of Color Against Violence, and endorsed by a broad range of abolitionist organizations.[89] Prompted by a then-recent article that largely evaded a direct response to the problem (Jim Thomas and Sharon Boehlefeld's *Rethinking Abolitionism: What*

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[84] McLeod, *supra* note 12, at 1617.

[85] *See id.* at 1613–14.

[86] Akbar et al., *Movement Law*, *supra* note 11, at 848; *see id.* at 824 & n.4, 851 n.113, 866; *see also* Amna Akbar, *The Movement for Black Lives Offers an Abolitionist Approach to Police Reform*, LAW & POL. ECON. PROJECT (Jan. 23, 2018), https://lpeproject.org/blog/the-movement-for-black-lives-offers-an-abolitionist-approach-to-police-reform [https://perma.cc/XL8M-95CZ].

[87] *Cf.* DAVID GRAEBER, FRAGMENTS OF AN ANARCHIST ANTHROPOLOGY 6 (2004) (offering admittedly caricatured descriptions of Marxism and Anarchism, respectively).

[88] *See, e.g.*, Akbar, *Democratic Political Economy*, *supra* note 11, at 98–106 (discussing "non-reformist reforms"); Akbar, *Radical Imagination*, *supra* note 11, at 408; Mariame Kaba, Op-Ed, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose [https://perma.cc/QU6Z-NERL], *reprinted in* MARIAME KABA, WE DO THIS 'TIL WE FREE US 70 (Tamara K. Nopper ed., 2021); *Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE (May 14 2020), https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing [https://perma.cc/8JPG-NNED].

[89] *Gender Violence and the Prison-Industrial Complex: Statement by Critical Resistance and INCITE! Women of Color Against Violence*, *in* COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 223 (2016); *see* INCITE! Women of Color Against Violence & Critical Resistance, *The Critical Resistance INCITE! Statement on Gender Violence and the Prison Industrial Complex*, *in* ABOLITION NOW!, *supra* note 72, at 15, 15–17 (discussing genesis of the statement).

Do We Do With Henry?[90]), the statement challenged abolitionists to center "the needs of survivors of domestic violence and sexual violence,"[91] including the need "to ensure safety in the community"[92] in the absence of carceral solutions:

> While prison abolitionists have correctly pointed out that rapists and serial murderers comprise a small number of the prison population, we have not answered the question of how these cases should be addressed. The inability to answer the question is interpreted by many antiviolence activists as a lack of concern for the safety of women.[93]

Poet, lawyer, and activist Reginald Dwayne Betts voiced similar concerns two decades later:

> We need to figure out how to have the abolition conversation in a way that is not downplaying the actual harm of selling crack in 1988, of stealing a car, of raping a woman, of murdering anyone . . . domestic violence ringing out like a goddamn anthem. And I just want a talk of abolition that is as muddy as those facts.[94]

To be clear, I do not mean to suggest that proponents of Answer #3 generally *are* indifferent to the safety of those individuals most vulnerable to harm at the hands of "the dangerous few." To the contrary, much of today's abolitionist activism was nurtured by a Black feminist tradition that surfaced and centered "the interconnections between interpersonal violence against women and the racial and gender violence of policing and imprisonment."[95] But the insistence that the abolitionist need not directly answer the question of "the dangerous few," the strategic evasion underlying Answer #3, can be deeply unsatisfying, particularly when the uneven distribution of risk posed by radical

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[90] Jim Thomas & Sharon Boehlefeld, *Rethinking Abolitionism: "What Do We Do with Henry?" Review of de Haan,* The Politics of Redress, *in* WE WHO WOULD TAKE NO PRISONERS: SELECTIONS FROM THE FIFTH INTERNATIONAL CONFERENCE ON PENAL ABOLITION 14 (Brian D. MacLean & Harold E. Pepinsky eds., 1993) (book review).

[91] INCITE! Women of Color Against Violence & Critical Resistance, *supra* note 89, at 15.

[92] *Id.*

[93] *Gender Violence and the Prison-Industrial Complex*, *supra* note 89, at 225 (footnote omitted).

[94] Elisabeth Houston, *"The Difference Between Prison and America Unsettles Me": A Conversation with Reginald Dwayne Betts*, L.A. REV. BOOKS (July 2, 2020), https://lareviewofbooks.org/article/the-difference-between-prison-and-america-unsettles-me-a-conversation-with-reginald-dwayne-betts [https://perma.cc/8NVZ-SC42].

[95] EMILY L. THUMA, ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE 2 (2019) (emphasizing that "[t]hese mobilizations were spearheaded by radical women of color and antiracist white women, many of them lesbian-identified"); *see also* ANGELA Y. DAVIS ET AL., *supra* note 20, at xi ("Yet as abolition becomes more influential as a goal, its collective feminist lineages are increasingly less visible, even during moments made possible precisely *because* of feminist organizing, especially that of young queer people of color whose pivotal labor and analysis is so often erased."); *id.* at 10. ("[W]e recognize that the highest costs are often experienced by those most vulnerable: people living and organizing, without pay, from within prisons and other carceral sites and those working, without pay, in movements and grassroots organizations.").

decarceration lies at the core of the skeptic's concern. Deferring such central questions also stands in tension with the immediacy and urgency undergirding abolitionist scholarship and activism; as organizer, educator, and author Mariame Kaba has warned, "[a]cceding, as some do, to 'prison in the meantime'" may be antithetical to fostering "[t]he conditions in which abolitionist approaches [can] flourish."[96] 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.

II. FOUR ALTERNATIVE/ADDITIONAL RESPONSES

The preceding Part takes seriously the most frequent abolitionist responses to the question, "What do we do with 'the dangerous few'?", considering the merits and drawbacks of each. In this Part, the Essay moves on from the descriptive, presenting some alternative ways of tackling the challenge. As the reader will see, these alternative approaches are more *responses* rather than *answers* to the question of "the dangerous few"; they remain fragmentary. And they borrow from and repurpose insights that others — both inside and outside the abolitionist camp — have already contributed. But rather than seeking to evade or dodge the skeptic's concern, these responses take it head-on: they aim to interrogate and probe the implicit premises (empirical, ideological, or moral) embedded in and animating questions concerning "the dangerous few."

Before diving in, however, it is worth flagging an ambiguity that often plagues good-faith conversations about "the dangerous few." The question whether the existence of "the dangerous few," and the value of incapacitating such individuals, can justify the reliance on prisons under social conditions as they exist in contemporary America is distinct from the question whether prison-like institutions have any place in the reimagined future abolitionists (or perhaps fellow travelers) might hope to eventually build. Abolitionists, and their skeptics, are concerned with both questions.[97] But conversations about abolition often go awry when

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[96] Mariame Kaba with Rachel Herzing, *Transforming Punishment: What Is Accountability Without Punishment?*, *in* MARIAME KABA, *supra* note 88, at 132, 137.

[97] *Compare* ANGELA Y. DAVIS ET AL., *supra* note 20, at 16, 26 ("Why *Now*." *Id.* at 16. "[A]mid profound structural oppression and violence, there are spaces of possibility where imagination and creativity can thrive. Taken together, the examples in this book — a fraction of an emergent ecology — form a mosaic of what is made possible by abolition feminism, not in a prescriptive sense but rather to show that a new world is possible: already we are collectively building one." *Id.* at 26.), *with* Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, MEDIUM: LEVEL (Oct. 30, 2020), https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894 [https://perma.cc/3BTA-LFPS], *reprinted in* KABA, *supra* note 88, at 3 ("Even if the criminal punishment system were free of racism, classism, sexism, and other isms, it would not be capable of effectively addressing harm.").

one party is focused on the role of prisons and punishment in a well-ordered society, while the interlocutor privileges the nonideal conditions we encounter today (particularly when these foci are not explicitly stated). So, at the outset, it's worth clarifying that I am chiefly interested in prison abolition in the here and now, in the ways in which the abolitionist challenge can help us excavate and critique the historical processes that have produced a society in which prisons play such a central role.

A. Defining "the Dangerous Few"

To insist upon the necessity of prisons to protect society from "the dangerous few" presupposes the existence of such a class of dangerous persons (and, perhaps, some consensus regarding who qualifies). Assuming we have a means of accurately distinguishing these individuals from the rest of us — a distinct problem I get to in section II.B — is there actually a *sort* of dangerous person for whom caging is the only solution? And, if so, what is its genealogy? These questions are thornier, and far more historically contingent, than they might initially appear.

Tracing the origins of the "dangerous being" — a phrase likely first used by Belgian criminologist Adolphe Prins and the influential Italian school of positivist criminology in the early twentieth century[98] — seems like a productive place to begin. To be sure, the existence of individuals who engage in bizarre, horrific, and largely inexplicable wrongdoing predates this vocabulary.[99] But the criminal law's orientation toward such offenders has changed over time, and it has not been until more recently that "penal practice and then penal theory . . . tend[ed] to make of the dangerous individual the principal target of punitive intervention."[100] Classical concepts like "culpability," late nineteenth-century reformers insisted, were "too obscure and metaphysical": "It is not necessary to consider criminals as responsibles, semi-responsibles, irresponsible — that concerns only the philosophers. It is necessary to consider them as very

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[98] Michel Foucault, *About the Concept of the "Dangerous Individual" in 19th-Century Legal Psychiatry*, 1 INT'L J.L. & PSYCHIATRY 1, 10–14, 16 (1978). For more on Prins, see Yves Cartuyvels, *Adolphe Prins and Social Defence in Belgium: The Reform in the Service of Maintaining Social Order*, 17 GLOSSAE: EUR. J. LEGAL HIST. 177 (2020).

[99] Foucault, *supra* note 98, at 3–6 (discussing early nineteenth-century cases that prompted psychiatry's invention of "homicidal monomania," *id.* at 6).

[100] *Id.* at 10; *see also id.* at 13 ("One can see the series of shifts required by the anthropological school: from the crime to the criminal; from the act as it was actually committed to the danger potentially inherent in the individual; from the modulated punishment of the guilty party to the absolute protection of others. . . . Neither the 'criminality' of an individual, nor the index of his dangerousness, nor his potential or future behavior, nor the protection of society at large from these possible perils, none of these are, nor can they be, juridical notions in the classical sense of the term.").

dangerous, dangerous, semi-dangerous[,] and not dangerous. Only that, and nothing else should be considered."[101]

Such ideas migrated from Europe to elite American legal circles in the early twentieth century, where they received "a warm and sympathetic reception,"[102] soon dovetailing with eugenicist thinking throughout the Progressive Era and beyond.[103] While much of the "science" of positivist criminology seems antiquated (or downright silly) today, we often forget how "much of the heritage of positivism and specifically its focus on dangerous persons and their penal incapacitation" haunts contemporary legal thought and policy.[104]

A comprehensive account of criminal law's invention of "the dangerous few" is outside the scope of this Essay, but for present purposes, the point is to underscore the category's contingency (and, perhaps, its indeterminacy). Consider the following two plausible candidates for membership in "the dangerous few":

Murad K. became one of the most prolific and notorious killers in the United States throughout the 1990s: he admitted to poisoning to death as many as 130 individuals.[105] His grim proclivities were apparent as early as the 1950s, when he proposed "medical experimentation" on living prisoners "as a form of execution," in lieu of the traditional forms of capital punishment proscribed by law.[106] Described by coworkers as "awkward, grim, . . . quick to anger and unpredictable,"[107] Murad K. reveled in his notoriety: when his killing spree began in June 1990, he boasted of his exploits to journalists, explaining that he met his first victim over dinner and killed her days later in his Volkswagen

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[101] David Garland, *The Criminal and His Science*, 25 BRIT. J. CRIMINOLOGY 109, 118 (1985) (quoting Emile Faguet, *quoted in* William M. Smithers, *The 1910 Meeting of the International Union of Penal Law*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 381, 382 (1911)).

[102] Cesare Lombroso, *Introduction* to GINA LOMBROSO FERRERO, CRIMINAL MAN, ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO, at xi, xix (1911); *see also* T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 J. CRIM. L. & CRIMINOLOGY 111, 123–25 (2013).

[103] *See* Jonathan Simon, *"The Criminal Is to Go Free": The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 790–92 (2020).

[104] Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135, 2137 (2006).

[105] Keith Schneider, *Dr. Jack Kevorkian Dies at 83; A Doctor Who Helped End Lives*, N.Y. TIMES (June 3, 2011), https://www.nytimes.com/2011/06/04/us/04kevorkian.html [https://perma.cc/3TGS-6BWJ].

[106] Jack Kevorkian, Abstract, *Capital Punishment or Capital Gain*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 50, 50 (1959).

[107] Schneider, *supra* note 105.

van.[108] He was also undeterrable, killing one of his victims just hours after his release from police custody stemming from a separate killing.[109] Not until he was convicted of murder in 1999 did his killing spree end.[110]

Donald B.'s basic worldview has always been pretty simple: "It's like a jungle, where a jungle is survival of the fittest."[111] Although already notorious regionally for buying off judges, he came to national attention in 2010, when toxic gas on his property exploded, incinerating and burying twenty-nine men.[112] Prior to the explosion, authorities had attempted repeatedly to change Donald B.'s dangerous behavior through noncriminal sanctions, including hundreds of citations and civil fines totaling millions of dollars.[113] To no avail. After the explosion, Donald B. demonstrated an almost sociopathic lack of remorse, blaming the men's death on "an act of God"[114] and publishing a deranged manifesto from his prison cell.[115] Upon his release, Senator Mitch McConnell's former chief of staff called him "a walking, talking case study for the limitation of a prison's ability to rehabilitate."[116]

Our protagonists, the reader may have guessed, are Dr. Murad "Jack" Kevorkian and Massey Energy CEO Don Blankenship, who nearly won the West Virginia Republican primary for the U.S. Senate in May 2018.[117]

The point here is not simply that prison is rarely where we house those who are most responsible for inflicting the greatest harm on others — although abolitionists can and do make this essential point.[118]

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108 Lisa Belkin, *Doctor Tells of First Death Using His Suicide Device*, N.Y. TIMES, June 6, 1990, at A1.

109 Schneider, *supra* note 105.

110 *Id.*

111 Jeff Goodell, *Don Blankenship: The Dark Lord of Coal Country*, ROLLING STONE (Nov. 29, 2010, 5:00 PM), https://www.rollingstone.com/culture/culture-news/don-blankenship-the-dark-lord-of-coal-country-184288 [https://perma.cc/RH8G-DPS8].

112 *Id.*

113 *See id.*; Ian Urbina, *Coal Company Hit with E.P.A.'s Largest Civil Penalty*, N.Y. TIMES (Jan. 17, 2008), https://www.nytimes.com/2008/01/17/us/17cnd-mine.html [https://perma.cc/Y36G-4UA2].

114 Goodell, *supra* note 111.

115 Steven Mufson, *Spurned by Trump and GOP, Coal Baron Don Blankenship Seeks a Second Chance in West Virginia*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/business/economy/spurned-by-trump-and-gop-coal-baron-don-blankenship-seeks-a-second-chance-in-west-virginia/2018/05/22/27cd16a4-522d-11e8-9c91-7dab596e8252_story.html [https://perma.cc/RQ52-LTMC].

116 Josh Holmes (@HolmesJosh), TWITTER (May 3, 2018, 7:28 PM), https://twitter.com/holmesjosh/status/992184152073166848 [https://perma.cc/Q36N-22QY].

117 *Election Results: Morrisey Defeats Blankenship in West Virginia Senate Primary*, N.Y. TIMES (May 9, 2018, 5:35 PM), https://www.nytimes.com/interactive/2018/05/08/us/elections/results-west-virginia-senate-primary-elections.html [https://perma.cc/EY4S-JGV6].

118 *See, e.g.*, Viviane Saleh-Hanna, *Black Feminist Hauntology: Remember the Ghosts of Abolition?*, 12 CHAMP PÉNAL / PENAL FIELD 1, 59 (2015) ("When criminology segregates the serial killer from heads of state it re-enforces the belief that they are a product of individual pathology as opposed to structures of domination. Only by segregating our definition of serial killing from historic

Rather, it is to probe the assumption that a stable consensus exists concerning who "the dangerous few" might be. Plausible arguments could be made that both Dr. Kevorkian and Mr. Blankenship should qualify as a member of "the dangerous few," and I suspect millions of Americans would agree.[119] We could pick other contested bogeymen: the abortion doctor,[120] the young superpredator,[121] the sadistic police officer,[122] the school shooter,[123] the white-supremacist terrorist.[124] The point is that the *type* of person our skeptical interlocutor believes should qualify for membership in "the dangerous few" might diverge sharply

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and contemporary acts of genocide, enslavement, and colonial domination can criminologists conclude that the dangerous are 'few' and that they have become a-typical actors of violence." (footnote omitted)); *cf.* DERECKA PURNELL, BECOMING ABOLITIONISTS 8 (2021) ("People often ask me, 'What will we do with murderers and rapists?' Which ones? The police kill about a thousand people every year, and potentially assault, threaten, and harm hundreds of thousands more. After excessive force, sexual misconduct is the second-most-common complaint against cops."); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 854–55 (2019) (contrasting criminalization of petty gambling with social acceptance of "[w]agering over international currencies, entire cities' worth of mortgages, the global supply of wheat needed to avoid mass starvation, or ownership of public corporations," *id.* at 854 (footnote omitted)); Levin, *supra* note 11, at 1449, 1466 (expressing wariness of "wage-theft discourse," *id.* at 1466, but recognizing that "wage theft may operate as property crime on a grand scale: according to one estimate, minimum wage violations in the United States account for over $15 billion in losses annually, an amount greater than all other property crime combined," *id.* at 1449); Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year [https://perma.cc/TN5R-PBEV] (comparing total civil asset forfeitures to total burglary losses).

119 Though because these intuitions tend to track with our political priors, I further suspect that most of those willing to recognize one of these two candidates as members of "the dangerous few" would be unlikely to recognize the other as a member of the same class.

120 Monica Davey, *On Trial's Sidelines, Abortion Foes Are Divided*, N.Y. TIMES (Jan. 10, 2010), https://www.nytimes.com/2010/01/11/us/11roeder.html [https://perma.cc/MDW2-SEQG] (discussing assassination of Dr. George Tiller).

121 State v. Belcher, 268 A.3d 616, 618 (Conn. 2022) (ordering resentencing where "sentencing court substantially relied on materially false information in imposing [the defendant's] sentence, specifically, on the court's view that the defendant was a 'charter member' of a mythical group of teenage 'superpredators'"); Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 165–68 (2000).

122 Susan Block, *Sadistic Policing*, COUNTERPUNCH (June 5, 2020, 12:00 AM), https://www.counterpunch.org/2020/06/05/sadistic-policing [https://perma.cc/X7B5-37EP]. *But see* Tatum Regan, *Prison Abolition and Jailing Killer Cops*, LEFT VOICE (July 15, 2020), https://www.leftvoice.org/prison-abolition-and-jailing-killer-cops [https://perma.cc/S6WA-MSBS].

123 *But see* John Woodrow Cox, *Should Teen School Shooters Spend the Rest of Their Lives in Prison?*, WASH. POST (Nov. 24, 2019), https://www.washingtonpost.com/local/should-teen-school-shooters-spend-the-rest-of-their-lives-in-prison/2019/11/23/b96cc6f8-0baf-11ea-8397-a955cd542d00_story.html [https://perma.cc/C7LZ-2A4Z] (noting at least ten underage school shooters had been released from prison in the United States and none are known to have subsequently committed serious crimes).

124 *See* PURNELL, *supra* note 118, at 157–63 (arguing that U.S. militarism has had a profound influence on many mass shooters and that "[i]f we truly want to save lives in the US and beyond, we have to join in the traditions of activists who fight to end policing, wars and military operations across the globe," *id.* at 176).

from the broader community's. By the same token, our skeptic must acknowledge the likely incongruity between those whom others deem appropriate for caging and those whom our skeptic genuinely believes are *not* members of this class. No less than *crime*,[125] superficially stable and antecedent categories like *violence* (and *violent offender*) have "contested and contingent parameters."[126] The (profoundly gendered, raced, classed) process of defining "the dangerous few" is fraught with ambiguity.

Here the skeptical interlocutor might interject: "Well, let's leave the politics aside; we can all agree that certain 'sexual predators' are the *sort* of person we're talking about here." If such narrowing has intuitive appeal, there's good reason: our legal culture has effectively taken judicial notice of the "frightening and high" (Justice Kennedy's words) recidivism rate of such dangerous individuals.[127] As the Court has explained, the "rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%, whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%."[128] This empirical claim has not only permeated popular culture, but it has also

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[125] The reemergence of the term "social murder," a nineteenth-century phrase highlighting the bourgeoisie's *lack* of criminal responsibility for premature deaths stemming from capitalist exploitation, speaks to this point. As Frederick Engels wrote:

> When one individual inflicts bodily injury upon another, such injury that death results, we call the deed manslaughter; when the assailant knew in advance that the injury would be fatal, we call his deed murder. But when society places hundreds of proletarians in such a position that they inevitably meet a too early and an unnatural death, one which is quite as much a death by violence as that by the sword or bullet; when it deprives thousands of the necessaries of life, places them under conditions in which they *cannot* live — forces them, through the strong arm of the law, to remain in such conditions until that death ensues which is the inevitable consequence — knows that these thousands of victims must perish, and yet permits these conditions to remain, its deed is murder just as surely as the deed of the single individual; disguised, malicious murder, murder against which none can defend himself, which does not seem what it is, because no man sees the murderer, because the death of the victim seems a natural one, since the offence is more one of omission than of commission. But murder it remains. . . . [T]he working-men's organs, with perfect correctness, characterise [this phenomenon] as social murder . . . .

FREDERICK ENGELS, THE CONDITION OF THE WORKING-CLASS IN ENGLAND IN 1844, at 95–96 (Florence Kelley Wischnewetzky trans., reprt. 1950) (1845) (footnotes omitted); *see* Stella Medvedyuk et al., *The Reemergence of Engel's Concept of Social Murder in Response to Growing Social and Health Inequalities*, SOC. SCI. & MED., Nov. 2021, at 1.

[126] Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 599 (2011); *see also* DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 8 (2021) (exploring "slippery" definition of categories like "violence" and "violent offender").

[127] McKune v. Lile, 536 U.S. 24, 34 (2002) (plurality opinion); *accord* Smith v. Doe, 538 U.S. 84, 103 (2003) ("The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.'" (quoting *McKune*, 536 U.S. at 34)).

[128] *McKune*, 536 U.S. at 33 (quoting U.S. DEP'T OF JUST., A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER, at xiii (1988)).

provided the legal rationale for the proliferation of sex offender registry requirements and other collateral consequences, and the retroactive extension of those requirements to those convicted of older sex offenses.[129] There's one problem: the sole "study" cited by the Supreme Court to support this body of law is a 1986 article in *Psychology Today*, subsequently mentioned in a Department of Justice manual in 1988, that "did not even pretend to be a scientific study."[130] In fact, "study after study" has shown that "[i]n reality, sex offenders have among the lowest same-crime recidivism rates of any category of offender."[131]

Animating much of our thinking about criminal law and policy in recent decades is "the story of an imagined monstrous other — a monster who is not quite human like the rest of us . . . a monster we and our children have to be protected from at any price."[132] But the proven historical malleability of this category should raise red flags; what if this story itself is "deadly [and] dishonest," obscuring other forms of normalized harm and violence that go unaddressed?[133] Unraveling how, exactly, we draw the boundaries around "the dangerous few" — and tracing the history of how these subjects came to dominate criminal law thinking — is much harder than it first appears.

B. Identifying the Dangerous Few (or, Utopianism Revisited)

But let's assume, with sufficient back-and-forth, an agreement could be reached by most parties that there exists some *type* of person who meets a workable definition of "the dangerous few" that we collectively develop. Let's posit that this group, in fact, exists in some concrete sense. Then we face a greater problem: how does our criminal legal system ascertain, at an individual level, who is the ordinary wrongdoer (for whom a carceral response is not essential) and who is the member

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[129] *See* Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 495–96 (2015).

[130] David Feige, *The Supreme Court's Sex Offender Jurisprudence Is Based on a Lie*, SLATE (Mar. 7, 2017, 11:47 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/sex_offender_bans_are_based_on_bad_science.html [https://perma.cc/TYZ7-8HA4]; *see* Ellman & Ellman, *supra* note 129, at 498; *see also* Rachel Aviv, *The Science of Sex Abuse*, NEW YORKER (Jan. 6, 2013), https://www.newyorker.com/magazine/2013/01/14/the-science-of-sex-abuse [https://perma.cc/QA3L-WKHF].

[131] Feige, *supra* note 130; *see* Ellman & Ellman, *supra* note 129, at 500–08 (discussing studies). Courts are now beginning to question our "common sense" understanding about the risk posed by recidivist sex offenders, as well as the data purportedly undergirding these assumptions. *See* Does #1–5 v. Snyder, 834 F.3d 696, 704–05 (6th Cir. 2016) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is "frightening and high."'" *Id.* at 704 (quoting *Smith*, 538 U.S. at 103)); Commonwealth v. Torsilieri, 232 A.3d 567, 584–85 (Pa. 2020).

[132] SERED, *supra* note 55, at 11.

[133] *Id.*

of this special class? The category of "the dangerous few" has utility as an organizing principle only to the extent that we have reliable mechanisms for identifying who is, and who is not, a member. And, on this score, even a rudimentary survey of how criminal law has functioned throughout United States history paints a bleak picture. Prison abolition is often dismissed as a "utopian" project, "promis[ing] a heaven-on-earth that will never come to pass" while ignoring the realities of human nature and the long, lived experience of deviance in our society.[134] But, when it comes to thinking about "the dangerous few," perhaps it is worth emphasizing that it is the skeptical interlocutor who — in imagining or assuming some perfect mechanism by which our criminal justice system could identify "the dangerous few" — is guilty of such utopian thinking.[135]

It is not just that the skeptic has overlooked flaws in how we traditionally adjudicate guilt and innocence in America; it is the *nature* of these errors that makes them particularly pernicious. The hypercarceral politics of the United States have always been profoundly racialized,[136] with constructs of Blackness, criminality, and dangerousness intertwined since at least the wake of the Civil War.[137] (Some radicals have even posited that the "racial . . . antipathies" of white decisionmakers in the criminal legal realm are simply "ineradicable."[138]) Other "shifts in the wider political economy" in recent decades have also fueled the

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[134] Roger Lancaster, *How to End Mass Incarceration*, JACOBIN (Aug. 18, 2017), https://jacobinmag.com/2017/08/mass-incarceration-prison-abolition-policing [https://perma.cc/GU5Z-4TLU]; *see also* Viviane Saleh-Hanna, *Taking Too Much for Granted: Studying the Movement and Re-assessing the Terms*, *in* THE CASE FOR PENAL ABOLITION 43, 44 (W. Gordon West & Ruth Morris eds., 2000).

[135] Indeed, it is literally the stuff of (usually dystopian) science fiction. *See* Langer, *supra* note 10, at 67–68 (emphasizing the dystopian quality of literature and movies like Phillip K. Dick's *Minority Report* (citing MINORITY REPORT (20th Century Fox 2002)). Notably, "people of color are practically, and sometimes quite literally, nonexistent" in many such imagined futures. *See* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 12 (2019).

[136] *See* Angela Y. Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, *in* THE HOUSE THAT RACE BUILT 264, 265 (Wahneema Lubiano ed., 1997); Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 266 (2021).

[137] *See* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS 3–4 (2010).

[138] Memorandum from Antonin Scalia, J., U.S. Sup. Ct., to the Conference (Jan. 6, 1987), *in* No. 84-6811 — *McClesky v. Kemp*, THURGOOD MARSHALL PAPERS, LIBRARY OF CONGRESS ("I do not share the view, implicit in [Justice Powell's draft] opinion that an effect of racial factors upon [the] sentencing [of the defendant to death] . . . would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.").

emergence of the "carceral state";[139] as Professor Paul Butler bluntly put it: "In criminal cases poor people lose most of the time . . . because in American criminal justice, poor people are losers. Prison is designed for them."[140] The longstanding (perhaps intractable) dysfunctions of criminal legal administration in the United States should engender profound skepticism about any claims to being able to accurately target only "the dangerous few."

Concrete examples abound. Consider everything we know about the United States's relationship with capital punishment, and in particular our failed efforts to rationalize the imposition of such sanctions since 1976. "Future dangerousness" is not the only consideration that matters when capital sentences are meted out (and the Supreme Court has shown some ambivalence about the criterion's role in the capital sentencing process altogether),[141] but when one studies capital trials closely, "[i]t is hard to exaggerate the impact of the incapacitation rationale [for capital sentencing] in America today."[142] Guided by state sentencing criteria inviting (and, in some jurisdictions, requiring) jurors to determine whether the offender is so dangerous he or she must be put to death, American prosecutors, judges, and jurors have given us a remarkable case study on efforts to identify "the dangerous few" for the past forty-five years.[143] And the result? A system that is permeated with, and perhaps exists to perpetuate, racism.[144] A system that regularly

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139 GOTTSCHALK, *supra* note 11, at 7. *But see* McLeod, *Beyond the Carceral State*, *supra* note 11 (challenging Gottschalk's suggestion that a "racial justice frame" to understanding the rise of the carceral state "necessarily obscures political-economic or other important considerations").

140 Paul D. Butler, Essay, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

141 *Compare* Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976) (plurality opinion) (emphasizing retribution and deterrence, while allowing that "[a]nother purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future"), *with* Atkins v. Virginia, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting) ("The Court conveniently ignores a third 'social purpose' of the death penalty — 'incapacitation of dangerous criminals . . . .'" (quoting *Gregg*, 428 U.S. at 183 n.28 (plurality opinion))).

142 Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 VA. L. REV. 1123, 1126 (2018).

143 *See* Barefoot v. Estelle, 463 U.S. 880, 898 (1983) (rejecting challenge to use of expert psychiatric testimony on question of "future dangerousness" and observing that accepting contention that "expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made"); Jurek v. Texas, 428 U.S. 262, 274–75 (1976) (plurality opinion) ("The fact that such a [future dangerousness] determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.").

144 To many critics, the experience of the last several decades proves that the death penalty "has not been, and cannot be, administered in a manner that is compatible with our legal system's fundamental commitments to fair and equal treatment." Austin Sarat, *The Rhetoric of Race in the "New Abolitionism," in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 260, 263 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006). Others go

identifies as "the dangerous few" individuals who are factually innocent of the crime itself.[145] A system that has grown more arbitrary in its application with every passing year.[146]

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deeper, insisting the problem with capital punishment is not that it is administered in a discriminatory fashion, but that it is an "immoral practice[] [that has] flourished in the United States to impose a racist order." Roberts, *supra* note 8, at 284.

Either way, it is hard to ignore the overwhelming evidence of racial discrimination in who is selected for death. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 3 (2016) ("The Court [has] paid surprisingly scant attention in its constitutional rulings to the death penalty's long and ignoble history of race-based use, a history shaped by the practice of slavery and an intractable post–Civil War legacy of racial discrimination. At a moment when policing and mass incarceration are under scrutiny for gross racial disparities, attention to the death penalty helps illuminate the way that race has been woven into the history of American criminal justice and yet often ignored by the courts."); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 260–61 (2015); *see also* Sarat, *supra*, at 280 n.29 (citing, for example, David C. Baldus et al., Symposium, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 566 (2002); Glenn L. Pierce & Michael L. Radelet, Symposium, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 70 (2002); RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 41 (2003), https://www.aclu-md.org/sites/default/files/field_documents/md_death_penalty_race_study_0.pdf [https://perma.cc/MZE8-BWNX]).

145 According to the Death Penalty Information Center (DPIC), at least 187 individuals (mostly Black) condemned to death have been exonerated since 1973. *See Innocence Database*, DEATH PENALTY INFO. CTR. (2022), https://deathpenaltyinfo.org/policy-issues/innocence-database [https://perma.cc/9EYV-H5EY]. This figure omits those who were executed but possibly innocent: DPIC has identified at least twenty cases where the condemned was executed despite "strong evidence of innocence." *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent [https://perma.cc/Q4PH-Y8RD]; *see, e.g.*, JAMES S. LIEBMAN ET AL., THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION, at ix (2014).

146 FRANK BAUMGARTNER ET AL., DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 351 (2018) ("There is no question that the modern death penalty has continued with the flaws of its historical predecessor, and then some. Not only is it just as arbitrary, just as biased, and just as flawed as the pre-*Furman* system, but it has added to these flaws increased levels of geographical focus on the South, even more concentration in just a few jurisdictions, . . . average periods of delay now measured in the decades, [and] odds of reversal well over 50 percent . . . . A reasoned assessment based on the facts suggests not only that the modern system flunks the *Furman* test but that it surpasses the historical death penalty in the depth and breadth of the flaws apparent in its application."); BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 227 (2017); *see also* Corinna Barrett Lain, *Three Observations About the Worst of the Worst, Virginia-Style*, 77 WASH. & LEE L. REV. ONLINE 469, 470 (2021) ("Given that the death penalty doesn't just exist in the abstract — it is fundamentally about the *who*, the worst of the worst — it only seems fitting to take this moment to set the record straight about who we execute generally . . . . First, we execute the severely mentally ill. Second, we execute offenders who have themselves been terrorized, offenders who are just as much a product of profound violence as they are its perpetrators. And third, we execute not for exceptionally bad crimes, but rather for the exceptionally bad luck of having poor representation, or being in a county where the prosecutor has a proclivity for capital charges, or committing Black-on-White crime. Take these categories away, and the death penalty is an empty shell."); Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1656 (2019) ("Studies of juries, prosecutors, and psychologists all indicate that predictions of future dangerousness [in the capital sentencing context] are no better than random guesses.").

The law of juvenile sentencing — which has undergone major changes in the last decade[147] — offers similar lessons. Here, the Court has expressly baked into the law an inquiry into whether the accused is a member of "the dangerous few": only the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," may receive life-without-parole (LWOP) sentences under the Eighth Amendment.[148] Those who received mandatory LWOP sentences in decades past, before the Supreme Court announced this rule, have become eligible for resentencing, too.[149] While these rulings have reduced the number of individuals serving LWOP sentences, the tepid and uneven implementation of this command is revealing. In Louisiana, prosecutors "have sought to re-impose life without parole [sentences] in approximately [thirty] percent of cases" in which previous LWOP sentences were vacated; in Michigan, prosecutors have identified sixty percent of those children entitled to resentencing to constitute the "worst of the worst" for whom LWOP should be reimposed.[150] As of February 2020, more than thirty percent of those resentenced in Mississippi have had sentences of LWOP reimposed (notwithstanding legal representation from a small army of leading nonprofit organizations).[151] Again, race is a central part of the story: "[B]lack children were already significantly more likely than their white peers to be sentenced to life without parole" before *Miller*, but the disparities have widened substantially over the past decade.[152] As one notorious Louisiana District Attorney candidly admitted: "We're basically guessing on these cases."[153]

Henry Montgomery's story offers a sobering case study of how our understanding of "the dangerous few" has changed over time, and how it hasn't. In 1963, seventeen-year-old Montgomery (who is Black) was skipping eleventh-grade class when he was confronted by a white Baton

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147 Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 539 (2017).

148 Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016)*; see also* Miller v. Alabama, 567 U.S. 460, 479 (2012).

149 *See Montgomery*, 136 S. Ct. at 734.

150 CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 7 (2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf [https://perma.cc/X8WD-ACSD].

151 MISS. OFF. OF STATE PUB. DEF., JUVENILE LIFE WITHOUT PAROLE IN MISSISSIPPI 2 (2020), http://www.ospd.ms.gov/REPORTS/Juvenile%20Life%20without%20Parole%20report%2002-2020.pdf [https://perma.cc/74UR-BWR8].

152 Marshall, *supra* note 146, at 1661 & n.193 ("Of new cases tried since 2012, approximately 72% of children sentenced to life without parole have been Black — as compared to approximately 61% before 2012." *Id.* at 1661 n.193 (alteration omitted) (quoting CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 150, at 2)).

153 Jessica Pishko, *"We're Basically Guessing on These Cases": Louisiana's Disastrous Resentencing Hearings*, THE NATION (Dec. 22, 2017) (quoting Leon Cannizzaro, then–District Attorney of Orleans Parish, Louisiana), https://www.thenation.com/article/archive/were-basically-guessing-on-these-cases-louisianas-disastrous-resentencing-hearings [https://perma.cc/4ZBV-7988].

Rouge police officer; Montgomery panicked, shot the officer to evade arrest, and promptly confessed.[154] Montgomery initially received a death sentence, but the Louisiana Supreme Court reversed in 1966. The Klu Klux Klan burned one hundred crosses across the state (including one near the grounds of the state capitol) on the eve of the child's trial, and the local government had declared the first day of trial a holiday memorializing the dead officer.[155] After a retrial, Montgomery was sentenced to LWOP;[156] for more than a half-century, he has maintained a pristine disciplinary record at Louisiana State Penitentiary (Angola).[157] And then a remarkable development: in 2016, Montgomery won a landmark victory at the Supreme Court, establishing the retroactive applicability of *Miller v. Alabama*[158] for those prisoners (like Montgomery) sentenced to mandatory LWOP as children in decades past.[159] Condemning a child to die in prison, the Court emphasized, would only be proper in the most "exceptional" of circumstances;[160] Justice Scalia, dissenting, complained that the majority's opinion made "imposition of that severe sanction a practical impossibility."[161] And yet Montgomery remained imprisoned for another 2123 days. His release on parole was denied twice, the second time in 2019 by a parole official who solemnly explained that the seventy-two-year-old (and partially deaf) Montgomery showed a "lack of maturity" by not completing more classes in prison.[162] Only after international outcry did his imprisonment end, after fifty-seven years, in late 2021.[163]

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154 *Youth Ruled Able to Stand Murder Trial*, TIMES (Shreveport, La.), Jan. 11, 1964, at 8-B.

155 State v. Montgomery, 181 So. 2d 756, 760 (La. 1966). The U.S. Supreme Court briefly noted this feature of the case in 2016 but only obliquely referenced "public prejudice" marring the initial trial. Montgomery v. Louisiana, 577 U.S. 190, 194 (2016).

156 State v. Montgomery, 242 So. 2d 818, 818 (La. 1970).

157 Liliana Segura, *Henry Montgomery Paved the Way for Other Juvenile Lifers to Go Free. Now 72, He May Never Get the Same Chance*, THE INTERCEPT (June 2, 2019, 8:00 AM), https://theintercept.com/2019/06/02/henry-montgomery-juvenile-life-without-parole [https://perma.cc/QWA4-3XD7] ("Montgomery had collected only 23 write-ups total during his time at Angola — a remarkable record for a near-lifetime spent behind bars.").

158 567 U.S. 460 (2012).

159 *See Montgomery*, 577 U.S. at 212–13 (2016).

160 *Id.* at 213.

161 *Id.* at 227 (Scalia, J., dissenting).

162 Segura, *supra* note 157; *see* Samantha Michaels, *A 72-Year-Old Juvenile Lifer Won a Landmark Supreme Court Ruling, But Louisiana Won't Let Him Out of Prison*, MOTHER JONES (April 12, 2019), https://www.motherjones.com/crime-justice/2019/04/henry-montgomery-juvenile-lifer-louisiana-denied-parole [https://perma.cc/JF34-99QU].

163 Rebecca Santana, *Henry Montgomery, At Center of Juvenile Life Debate, Is Free*, AP NEWS (Nov. 17, 2021), https://apnews.com/article/crime-louisiana-montgomery-henry-montgomery-f74f4e7351b3d72bd1ce1685279c9727 [https://perma.cc/9MLF-YGGD].

In a similar vein, it is worth remembering that the United States has a prison for those it has deemed (repeatedly, in official statements, credulously accepted by much of the country) "the worst of the worst": the detention camps at Naval Station Guantanamo Bay.[164] Yet of the twenty orange-clad prisoners first deposited there amidst international fanfare on January 11, 2002,[165] only two remain as of April 2022; just thirty-seven of the nearly 800 prisoners eventually transported to the island are still being held, and half of those prisoners have been cleared for transfer.[166] To be clear, some of the individuals the United States military has detained (and tortured[167]) at Guantanamo Bay may have been responsible for inflicting grievous harm on others; some may have inflicted additional harm if not detained. But now, more than two decades into the prison's existence, it is undeniable that the vast majority of those imprisoned at Guantanamo Bay were never "the worst of the worst." Our confidence otherwise — and the confluence of fear, hatred, and Islamophobia nourishing this certitude — should serve as an object lesson for those who would trust the government's abilities to ascertain (accurately and without bias) who constitutes "the dangerous few" moving forward.

Of course, highlighting these injustices may not move the needle: we seem to have a great deal of tolerance for inaccuracy in our criminal

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164 *DoD News Briefing; January 28, 2002 — 11:29 a.m. EST*, AVALON PROJECT, https://avalon.law.yale.edu/sept11/dod_brief142.asp [https://perma.cc/CJ4P-P3XT] (statement of Rear Admiral John Stufflebeem) ("[T]his is an extremely . . . vetted process. . . . These are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others. So that is well established."); Editorial, *Call Them Prisoners of War*, S.F. CHRONICLE (Jan. 22, 2002), https://www.sfchronicle.com/opinion/editorials/article/Call-them-prisoners-of-war-2881855.php [https://perma.cc/6LR9-YUR6] ("Clearly, these deadly inmates don't deserve sympathy. They remain violent and dangerous, 'the worst of the worst,' the Pentagon says. But they amount to captured soldiers and should be accorded prisoner of war status."); Editorial, *Rights Groups Play to Captive Audience*, N.Y. DAILY NEWS, Jan. 22, 2002, at 28 ("[Osama Bin Laden's] minions shipped to Guantanamo are the worst of the worst — soulless killers. . . . America, as evidenced at Guantanamo, treats humanity — even in its lowest form — humanely.").

Because I am referring to the U.S. Naval Station as opposed to the geographic location, I use the U.S. Navy's spelling ("Guantanamo") rather than the Spanish spelling ("Guantánamo"). *See generally* JENNIFER K. ELSEA & DANIEL H. ELSE, CONG. RSCH. SERV., R44137, NAVAL STATION GUANTANAMO BAY: HISTORY AND LEGAL ISSUES REGARDING ITS LEASE AGREEMENTS (2016).

At the time of this writing, I am a consultant for one of the remaining Guantanamo Bay detainees and his defense team.

165 Carol Rosenberg, *They Were Guantánamo's First Detainees. Here's Where They Are Now.*, N.Y. TIMES (May 18, 2021), https://www.nytimes.com/2021/03/27/us/politics/guantanamo-first-prisoners.html [https://perma.cc/3GMH-MM4G].

166 *The Guantánamo Docket*, N.Y. TIMES (Apr. 26, 2022), https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html [https://perma.cc/PU2N-55H8].

167 Mark P. Denbeaux et al., How America Tortures (Dec. 2, 2019) (unpublished manuscript), https://ssrn.com/abstract=3494533 [https://perma.cc/FE3N-8GB2] (discussing torture at CIA Black Sites and at Guantanamo Bay).

legal system today, and (Blackstone's ratio[168] notwithstanding) many Americans seem happy to countenance some number of "innocents" being wrongly convicted to ensure that the "guilty" do not go free.[169] The sense of "collective disgrace" and "shame" in overreliance on prisons that prompted radical decarceration in other countries seems lacking in the American context.[170] There is no reason to think it would be any different when it comes to identifying "the dangerous few."[171]

But candor requires the skeptic to confront the following point (particularly if we are committed to shunning utopian thinking in this discussion): any system that continues to cage "the dangerous few" in the United States will also necessarily cage many people who do *not* need to be caged, and those individuals will overwhelmingly be poor and nonwhite.

C. Incarcerating the Dangerous Few Does Not Eliminate the Harm They Cause

In one of the few pieces of abolitionist scholarship expressly framed around the problem of "the dangerous few," the authors open by introducing the reader to "Henry":

> Henry is affable, bright, and articulate. He can also be very, very nasty, and he is currently confined in the most maximum section of Illinois' death row. Among his other crimes, he blew away one victim by inserting a shotgun into her vagina and pulling the trigger. He then slit her boyfriend's throat and left him for dead. His death sentence was commuted to life following constitutional challenges to Illinois' death penalty, but he was again sentenced to death after fatally stabbing a fellow prisoner. Confined to death row, he tried to stab yet another prisoner. . . . [Recently,] Henry revealed some reflective self-awareness: "I used to think I was a racist. Then I realized that I just didn't like nobody."[172]

Henry's story is awful and chilling for several reasons, and for many it is the unfathomable damage people like Henry sometimes cause that

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[168] "[I]t is better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

[169] *See* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1067–68 (2015). For a rejoinder urging greater asymmetry in favor of the defendant in criminal adjudication, see Laura I. Appleman, Response, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91, 91 (2015).

[170] McLeod, *Beyond the Carceral State*, *supra* note 11, at 693 (discussing Finnish criminal reforms in the early 1970s).

[171] *See, e.g.*, Jefferson C. Knighton et al., *How Likely Is "Likely to Reoffend" in Sex Offender Civil Commitment Trials?*, 38 LAW & HUM. BEHAV. 293, 300 (2014) (finding that more than half of jurors in commitment trials for "sexually violent predators" thought that a one percent chance of a new sex crime sufficed to demonstrate that it was "likely," and more than ninety-seven percent thought that a twenty-five percent chance sufficed). *See generally* Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* (Univ. of Va. Sch. of L., Va. Pub. L. & Legal Theory Research Paper No. 2021-14, 2021), https://ssrn.com/abstract=3787018 [https://perma.cc/HM87-B382] (discussing distortions in valuing liberty interests of those accused of criminal wrongdoing).

[172] Thomas & Boehlefeld, *supra* note 90, at 14.

makes prison abolition seem, at best, imprudent. But the part that interests me (for present purposes) is a curious oversight by the authors: prison, it seems, did nothing to keep Henry from engaging in extraordinarily harmful acts. Indeed, Henry appears to have committed just as many murders and attempted murders *inside* prison as he did *outside*.

Accepting as true the premise that "the dangerous few" exist as a meaningful category (but see section II.A) and that reasonably accurate mechanisms exist to identify them (but see section II.B), the incapacitation of this class in prisons is typically presented as a way to eliminate the harm they might inflict. This is, of course, one of the chief functions of the prison: out of sight, out of mind. But here we should remember our Bentham, who (writing about both incarceration and transportation) emphasized that such incapacitation was more about relocating rather than eliminating criminal wrongdoing:

> *Incapacitation*; rendering a man incapable of committing offences of the description in question any more: understand in the present instance *in the same place* — the only place (it should seem) that was considered as worth caring about in this view. . . . Mischievously or otherwise, for *a body to act in a place*, it must be there. Keep a man in New South Wales, or anywhere else out of Britain, for a given time: he will neither pick a pocket, nor break into a house, nor present a pistol to a passenger, on any spot of British ground within that time.[173]

Prison does not eliminate the ability of "the dangerous few" to harm others, and it never has; it simply redirects that violence to more isolated places and less worthy (or, to the skeptic, more worthy) recipients. Prisons are "geographical solution[s] to socio-economic problems."[174] Or, as Justice Thomas cavalierly put it (in a case involving the brutal beating and rape of an incarcerated transgender woman named Dee Farmer): "Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, '[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . .'"[175]

Determining just how much violence occurs inside jails and prisons in the United States is notoriously difficult,[176] but some studies identify

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[173] Jeremy Bentham, *Panopticon Versus New South Wales*, *reprinted in* 4 THE WORKS OF JEREMY BENTHAM 173, 183 (Edinburgh, William Tait 1843).

[174] Ruth Wilson Gilmore, *Globalisation and U.S. Prison Growth: From Military Keynesianism to Post-Keynesian Militarism*, RACE & CLASS, Mar. 1999, at 171, 174.

[175] Farmer v. Brennan, 511 U.S. 825, 858 (1994) (Thomas, J., concurring in the judgment) (alterations in original) (quoting McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991)). *But see* Emma Kaufman & Justin Driver, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 542–48 (2021) (noting that the Supreme Court's prison law jurisprudence selectively and inconsistently depicts prisons as volatile and violent).

[176] Nancy Wolff et al., *Measuring Victimization Inside Prisons: Questioning the Questions*, 23 J. INTERPERSONAL VIOLENCE 1343 (2008) (reviewing literature and underscoring "the importance

breathtakingly high rates. According to a recent Department of Justice report: "[I]n 2011 and 2012, 3.2 percent of all people in jail, 4.0 percent of state and federal prisoners, and 9.5 percent of those held in juvenile detention reported having been sexually abused in their current facility during the preceding year."[177] Extrapolating from this data, the study's lead author estimated that "nearly 200,000 people were sexually abused in American detention facilities in 2011."[178] Most of these incidents involved staff abusing prisoners, not prisoners abusing prisoners.[179] 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." (By way of comparison, the Department of Justice estimated that 243,800 people experienced rape or sexual assault *outside* of prison in the United States in 2011.[180])

Noting that such quintessentially "criminal" conduct continues unabated — we could similarly highlight other interpersonal violence, illicit drug use, or extortion in prison[181] — doesn't go far enough. In prisons, a wide range of harmful conduct becomes lawful and commonplace, though in any other setting we would recognize it as criminal.[182] As Corey Devon Arthur, a prisoner in New York, writes: "In my 43 years

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of question wording when attempting to measure sexual and physical victimization" in carceral settings, *id.* at 1357).

177 David Kaiser & Lovisa Stannow, *The Shame of Our Prisons: New Evidence*, N.Y. REV. BOOKS, Oct. 24, 2013 (citing ALLEN J. BECK ET AL., BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: NATIONAL INMATE SURVEY, 2011–12, at 6 (2013), https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf [https://perma.cc/2ZDJ-LTW9]; ALLEN J. BECK ET AL., BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012: NATIONAL SURVEY OF YOUTH IN CUSTODY, 2012, at 4 (2013), https://bjs.ojp.gov/content/pub/pdf/svjfry12.pdf [https://perma.cc/FX4E-FFLF]).

178 *Id.*

179 *Id.*

180 JENNIFER L. TRUMAN & MICHAEL PLANTY, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2011, at 2 (2012), https://www.bjs.gov/content/pub/pdf/cv11.pdf [https://perma.cc/F253-2XBU]. Note, however, that the term "sexual abuse" has a broader definition for the *Sexual Victimization in Prisons and Jails* and *Sexual Victimization in Juvenile Facilities* studies than in the *Criminal Victimization* study.

181 *See* Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html [https://perma.cc/X2XG-3UAK]; Kate Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours,* N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html [https://perma.cc/T7ZU-2MTX].

182 *Cf.* Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 129 (1977) ("Prisons, it is obvious, differ in numerous respects from free society. . . . [T]his Court has repeatedly recognized the need for major restrictions on a prisoner's rights.").

of life, I've been strip-frisked over 1,000 times."[183] The first time was when he was arrested at age fourteen: two shouting NYPD officers took Arthur to a holding cell, where he was ordered to lower his boxers, face the officers, lift his penis and testicles, and expose his anus for their inspection.[184] Such searches — which Arthur has been subsequently subjected to hundreds of times as a state prisoner — are generally "authorized,"[185] though often experienced by prisoners as a form of sexual violence.[186] Professor India Thusi makes a similar point in a recent article, arguing that while certain connections between the incarceration of girls and sexual violence are widely recognized, we have failed to adequately appreciate the ways in which the state "has routinely sexually assaulted [incarcerated] girls by mandating regular, nonconsensual touching and searches of the most intimate parts of girls' bodies."[187] A similar reframing could be used to describe other threats, restraints, or forcible separations that are the lifeblood of carceral settings, as some liberals argued in critiquing (*as criminal*) the Trump Administration's "family separation policy."[188] Relatedly, utterly banal and harmless conduct — like sending a tweet or a text message to a loved one — becomes

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183 Corey Devon Arthur, *I've Been Strip-Frisked over 1,000 Times in Prison. I Consider It Sexual Assault*, MARSHALL PROJECT (Feb. 4, 2021, 10:00 PM), https://www.themarshallproject.org/2021/02/04/i-ve-been-strip-frisked-over-1-000-times-in-prison-i-consider-it-sexual-assault [https://perma.cc/HAJ8-H6EZ].

184 *Id.*

185 N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 4910, CONTROL OF & SEARCH FOR CONTRABAND 7 (July 27, 2021), https://doccs.ny.gov/system/files/documents/2021/12/4910_0.pdf [https://perma.cc/4PMU-B2RG].

186 Arthur, *supra* note 183. Family members visiting their incarcerated loved ones, and sometimes attorneys, may experience such violations, as well. *See* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 194 (2015) (describing experience of being strip-searched when visiting client); Gary A. Harki, *Strip Searched: From a 1-Year-Old to 83, Virginia Prisons Tell Visitors to Submit or Risk Permanent Ban*, VIRGINIAN-PILOT (Jan. 17, 2020, 12:50 PM), https://www.pilotonline.com/government/virginia/vp-nw-strip-search-20200117-dhhc6ia3nvhqtgz5xmbtojgx5e-story.html [https://perma.cc/K9JM-XGZE].

187 I. India Thusi, *Girls, Assaulted*, 116 NW. U. L. REV. 911, 913 (2022); *see also* BEN-MOSHE, DECARCERATING DISABILITY, *supra* note 27, at 124 ("Incarceration and institutionalization are not considered violence against a person or group of people, such as boarding schools for indigenous people, while spitting on an attendant or guard is considered an act of violence."); Mianta McKnight, *Lessons on Abolition from Inside Women's Prisons*, *in* ABOLISHING CARCERAL SOCIETY, *supra* note 14, at 211, 211–12 (underscoring centrality of intimidation and violence by prison officials inside women's prisons).

188 Editorial Board, Opinion, *Let's Not Mince Words. The Trump Administration Kidnapped Children.*, WASH. POST (Oct. 21, 2020), https://www.washingtonpost.com/opinions/lets-not-mince-words-the-trump-administration-kidnapped-children/2020/10/21/9edf2e20-13b0-11eb-ba42-ec6a580836ed_story.html [https://perma.cc/58VP-B94M].

a serious felony when undertaken by a prisoner.[189] There are multiple senses in which the prison is "the scene of [the] 'crime' itself."[190]

So where does this get us? Even if, in fact, there is a class of irredeemably dangerous people — and even if, somehow, we could ascertain who these individuals were in an accurate and unbiased way — imprisonment of "the dangerous few" does not magically resolve the problem of criminal harm. Only if we view the prison as the new New South Wales to our Britain can this be true, but of course, our prisons are porous: people, ideas, viruses, and capital flow in and out.[191] To this the skeptic might answer: "Well, better them than me" — clarifying that their interest in caging "the dangerous few" is not about stopping such individuals from harming others, but stopping them from harming *us*. None of this is unfamiliar: McLeod has described the "fetish of finality," our country's deeply rooted cultural acceptance of the idea that a criminal conviction (and the commencement of punishment) marks the end of our moral concern for the offender.[192] But this seems like an important stance to probe. Such callousness to victimization seems hard to defend, particularly if we accept as true (1) the arguments advanced in the preceding section (that is, that caged alongside "the dangerous few" will necessarily be many individuals, disproportionately poor and nonwhite, who are not members of this class), and (2) that dignity still matters, even for those condemned to prison.[193]

D. The Dangerous Few Are Mostly Free Right Now Anyway

Also implicit in the skeptic's question ("What do we do with 'the dangerous few'?") is the assumption that, were "the dangerous few" at liberty to walk amongst us, free society would become an unrecognizably dangerous and scary place. "We are accustomed" — in part, no doubt, to depictions of policing in popular culture[194] — "to believing that people get caught for committing crimes."[195] But this is not really

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189 *See, e.g.*, Nash v. State, 293 So. 3d 265, 266 (Miss. 2020) (upholding twelve-year sentence for possession of contraband cell phone after misdemeanor arrestee asked jailer to charge his cell phone); *see also* Hannah Riley, *Just Let People Have Cellphones in Prison*, SLATE (Feb. 15, 2021, 9:00 AM), https://slate.com/news-and-politics/2021/02/cellphones-in-prisons.html [https://perma.cc/7WEU-TNZ2].

190 GUENTHER, *supra* note 82, at 61.

191 *See* Shreya Subramani, Essay, *Productive Separations: Emergent Governance of Reentry Labor*, 47 FORDHAM URB. L.J. 941, 943–44 (2020).

192 McLeod, *supra* note 7, at 1211–13.

193 On "dignity" and mass incarceration, see Jonathan Simon, *Dignity and Its Discontents: Towards an Abolitionist Rethinking of Dignity*, 18 EUR. J. CRIMINOLOGY 33 (2020); Cullors, *supra* note 12, at 1694.

194 *See, e.g.*, Dan Taberski, *Headlong: Running from COPS* (2019), https://podcasts.apple.com/us/podcast/headlong-running-from-cops/id1459118695 [https://perma.cc/4RS3-QKNH].

195 Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 48 (2020).

true: despite the massive number of people we imprison, the skeptic's nightmare scenario is not far from the status quo. Once again, accepting as true the premise that "the dangerous few" constitute a meaningful category (but see section II.A), that reasonably accurate mechanisms exist to identify them (but see section II.B), and that prison could effectively eliminate the harm such individuals cause (but see section II.C), it is simply a myth that prisons are playing a large role in keeping us safe.

Again, the point here is not simply that criminal law's articulation of "all the deepest injuries" (in Professor Herbert Wechsler's words)[196] elides much of the most grievously harmful wrongdoing in society,[197] but rather something more mundane. Despite a voluminous legal literature on policing and victims' rights, criminal law scholars rarely address the fact that police are not particularly effective at solving crimes and apprehending suspected criminals.[198] As Professor Shima Baradaran Baughman's recent study of "clearance rates" over the past fifty years demonstrates, most of those who commit murder and the vast majority of those who commit rape "get away with their crimes."[199] "[W]e live in a world," she writes, "where, much more often than not, crimes go unsolved and unaccounted for."[200]

The figures are even more pronounced when the harmed party is Black, an unsurprising finding given the historical coupling of overcriminalization and underprotection of marginalized communities throughout American history.[201] A recent investigation by journalists into 55,000 killings in selected cities over the past decade, for example, shows that nearly 26,000 did not even result in an arrest.[202] The arrests that did occur were not distributed evenly: "[w]hile police arrested someone in 63 percent of the killings of white victims, they did so in just 47 percent of those with black victims."[203] In Boston, the killing of a white person led to an arrest at double the rate of the killing of a Black person.[204] In cases where an arrest is not made within ten days, it is highly

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196 Ristroph, *supra* note 11, at 1652 (quoting Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952)).

197 *See supra* note 118 and accompanying text.

198 Baughman, *supra* note 195, at 55.

199 *Id.*

200 *Id.*

201 RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1431–32 (2016).

202 Wesley Lowery et al., *Murder with Impunity: An Unequal Justice*, WASH. POST (July 25, 2018), http://wapo.st/black-homicides [https://perma.cc/C7YC-6X7S].

203 *Id.*

204 *Id.*

unlikely that one will ever be made.[205] And, of course, an arrest does not always result in a prosecution; a prosecution does not always result in a conviction; and a conviction does not always result in a lengthy prison sentence.[206]

Clearance rates drop precipitously (despite being far easier to manipulate[207]) when we examine serious crimes other than killings. According to Bureau of Justice Statistics data, there are between "15 to 20 million felony victimizations annually in the United States, and fewer than 1 million of these cases end in conviction."[208] Baughman estimates that only one of ten "known" rapes leads to a criminal conviction, and of course the well-documented underreporting problems for sexual violence complicate efforts to calculate a precise figure.[209] Impunity is the norm.

Finally, we should remember that many of those who are arrested, convicted, and punished eventually reenter the free world. This includes hundreds of individuals convicted after 9/11 for terrorism-related offenses, many of whom have affiliations with al Qaeda, the Taliban, the Islamic State, Hezbollah, and other terrorist organizations (though the recidivism rates for this group of individuals are shockingly low).[210]

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[205] Kimbriell Kelly & Steven Rich, *For Unsolved Cases Lasting a Year, Finding the Killer Becomes Nearly Impossible*, WASH. POST (Dec. 28, 2018), https://wapo.st/3MeNEzD [https://perma.cc/EP2X-VNPU].

[206] *See* Baughman, *supra* note 195, at 65–73 (noting significant declines at each stage).

[207] *See, e.g.*, Bernice Yeung et al., *When It Comes to Rape, Just Because a Case Is Cleared Doesn't Mean It's Solved*, PROPUBLICA (Nov. 15, 2018, 10:00 AM), https://www.propublica.org/article/when-it-comes-to-rape-just-because-a-case-is-cleared-does-not-mean-solved [https://perma.cc/E256-AK4K] ("The Baltimore County Police Department, for example, reported to the public that it cleared 70 percent of its rape cases in 2016, nearly twice the national average. In reality, the department made arrests about 30 percent of the time, according to its internal data. The rest were exceptionally cleared.").

[208] BRIAN FORST, IMPROVING POLICE EFFECTIVENESS AND TRANSPARENCY: NATIONAL INFORMATION NEEDS ON LAW ENFORCEMENT 2 (2008), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/forst.pdf [https://perma.cc/6627-8LQQ].

[209] Baughman, *supra* note 195, at 66–67, 111. Highlighting the gap between total criminal offenses and arrests may overstate the problem, however, if a smaller number of "persistent offenders" are in fact responsible for the bulk of the wrongdoing. *See, e.g.*, Örjan Falk et al., *The 1% of the Population Accountable for 63% of All Violent Crime Convictions*, 49 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 559 (2014). On the other hand, it may be that police officers — under pressure to inflate their clearance rates — regularly put "bodies on bodies" or otherwise improperly attribute unsolved crimes to individuals who committed a single offense. *See* Weihua Li & Jamiles Lartey, *As Murders Spiked, Police Solved About Half in 2020*, MARSHALL PROJECT (Jan. 12, 2022, 6:00 AM), https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020 [https://perma.cc/R2JC-HS7D] (quoting Kevin Rector, *"Bodies on Bodies:" Baltimore Police Increasingly Accusing the Dead of Murder*, BALT. SUN (May 23, 2018, 12:00 PM), https://www.baltimoresun.com/news/crime/bs-md-ci-cleared-by-exception-20180430-story.html [https://perma.cc/NCH3-MKVD]). I am indebted to Professor Carissa Byrne Hessick for her engagement on these points.

[210] Omi Hodwitz, *The Terrorism Recidivism Study (TRS): Examining Recidivism Rates for Post-9/11 Offenders*, PERSPS. ON TERRORISM, Apr. 2019, at 54, 62.

It includes almost a million people legally required to register as "sex offenders,"[211] and an outside-of-prison "felonry" approximately twenty million strong.[212] "The dangerous few," to the extent they comprise a meaningful category in the first place, are *already* amongst us.

None of the foregoing is intended to minimize or denigrate the fear of interpersonal violence that animates the skeptic's question, or downplay the differential exposure to such harm that exists along axes of race, gender, class, sexuality, and more. But here it's worth returning again to the realist critique often leveraged against the abolitionist: "[T]here is reason be leery of utopian hopes [regarding crime prevention] because crime . . . seems to be a normal aspect of human life . . . [and] is found in varying degrees in all modern nations."[213] The likely permanence of deviance certainly doesn't take the issue off the table, but I think it does alleviate some of the burden on the abolitionist: in all likelihood, we have all already shared a bus, a classroom, a pew, or an office with a member of "the dangerous few."

CONCLUSION

Perhaps most importantly, as with each of the other rejoinders I've advanced here, these are conversations we should be having anyway. For decades now, we have been moving toward a paradigm where actuarial risk assessments manage penal sanctions,[214] where violent crime has ceased to be just an important political issue, and instead has become a core organizing feature of contemporary governance.[215] The specter of "the dangerous few" has been haunting criminal law discourse in the United States for a long time, with disastrous results. Emphasis on paltry crime clearance rates foregrounds an important point that abolitionists often make: "If incarceration worked to secure safety, we would be the safest nation in all of human history."[216] Of course, it does not follow that prison abolition is necessarily the solution. But perhaps renewed attention to this issue — to the ways in which we chronically misapprehend the magnitude of the risks we already endure (and turn

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[211] Steven Yoder, *Why Sex Offender Registries Keep Growing Even as Sexual Violence Rates Fall*, THE APPEAL (July 3, 2018), https://theappeal.org/why-sex-offender-registries-keep-growing-even-as-sexual-violence-rates-fall [https://perma.cc/L5J8-S9V9].

[212] Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795 (2017). On "felonry," see generally Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563 (2018).

[213] LaMar T. Empey, *Crime Prevention: The Fugitive Utopia*, *in* HANDBOOK OF CRIMINOLOGY 1095, 1095 (Daniel Glaser ed., 1978) (citations omitted) (citing EMILÉ DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (G.E.G. Catlin ed., 1938) (1895)).

[214] *See generally* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007).

[215] *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

[216] SERED, *supra* note 55, at 7.

to criminal law for solace) — can be one of many fruitful conversations the abolitionist challenge provokes.

To be sure, the alternative responses I have advanced here are partial and incomplete answers to the skeptical interlocutor. But my hope is that they may persuade the skeptic that there is more to abolitionism than might meet the eye, and that the lack of a fully satisfactory answer to the question of "the dangerous few" shouldn't by itself render the abolitionist project incoherent or worthy of dismissal.

To the contrary, the (overdue) arrival of abolitionist perspectives in legal academia has generated a rich and diverse scholarship on a range of topics — challenging everything from how we think about the Reconstruction Amendments[217] to the drawbacks of body-worn cameras.[218] It has insisted upon the necessity of grappling with the afterlives of slavery and settler colonialism if we are to understand (and dismantle) "today's carceral punishment system"[219] and centered important questions of political economy and theories of the state within the criminal law debate.[220] Our thinking about the criminal law, and the movement to end mass incarceration, is richer for these provocations.[221] Rather than an awkward question to be dodged, a debate about "the dangerous few" is as good a place as any to begin this dialogue.

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[217] *See generally* Roberts, *supra* note 9.

[218] *See* sources cited *supra* note 88.

[219] Roberts, *supra* note 9, at 7; *see also, e.g.*, McLeod, *supra* note 12, at 1617; Akbar, *Radical Imagination*, *supra* note 11, at 449.

[220] Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 38–58) (on file with the Harvard Law School Library).

[221] Kushner, *supra* note 15 ("I feel like a movement to end mass incarceration and replace it with a system that actually restores and protects communities will never succeed without abolitionists. Because people will make compromises and sacrifices, and they'll lose the vision. They'll start to think things are huge victories, when they're tiny. And so, to me, abolition is essential." (quoting James Forman, Jr.)).