THE PRICE OF CRIMINAL LAW SKEPTICISM: TEN FUNCTIONS OF THE CRIMINAL LAW

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A growing trend in philosophical commentary about penal justice is what I loosely call "criminal law skepticism." The scholarship I have in mind does not simply urge caution or a more judicious use of the criminal law to address social problems. Instead, its thrust is more sweeping and radical; it presents reasons to doubt that the criminal law as presently constituted should continue to exist at all. I make no concerted effort to categorize the several varieties or motivations for this trend; their forms and underlying rationales are diverse and frequently humane. No single argument can refute them all. Instead, I respond by describing the price that might be incurred if these skeptics were to achieve their objective. I list ten valuable functions served by the criminal law as it currently exists, several of which are too seldom appreciated in philosophical commentary. No case for criminal law skepticism is complete unless efforts are made to explain how alternatives to the criminal law can achieve these functions or afford to dispense with them.

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I.

John Gardner remarks:

> One needs to pray in aid all of the valuable functions of criminalizing and punishing people in order even to get close to an adequate justification . . . Since criminalization and criminal punishment are prima facie such abhorrent

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> practices, they need all the justificatory support they can get, and any valuable function they may have, however modest, may under some conditions make all the difference between the justifiability and the unjustifiability of the practices.[1]

Much of what follows seeks to expand on Gardner's remark. I do so by describing ten valuable functions I believe the criminal law performs. Each of the factors I mention contributes, to some degree, to a *justification* of the criminal law—as long as a "justification" is construed to refer to the reasons that show the institution to be worth preserving, even in the face of countervailing considerations.[2] My strategy is unabashedly pluralistic, which I take to be a departure from orthodoxy among penal theorists. For mysterious reasons, the pluralism that is so prevalent elsewhere in normative ethics is conspicuously absent when we turn to philosophical commentary about the justification of criminal law and punishment.[3] In the latter context, the very word "pluralist" is typically replaced by the word "mixed"—a somewhat pejorative term that seldom appears in other moral and legal contexts. Gardner's claim notwithstanding, many theorists persist in assigning punishment a *single* function—to give offenders what they deserve or to reduce crime, for example. I believe it is simplistic to allow the fate of the criminal law to stand or fall depending on how well it achieves a single objective.[4] I try to correct this tendency by collecting ten of the

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1. John Gardner, *The Functions and Justifications of Criminal Law and Punishment*, *in* Offences and Defences 201, 203, 204 (John Gardner ed., 2007). In the same vein, Gardner remarks elsewhere that "the real problem . . . is not that the Hartian defense of punishment is too mixed but that it is not mixed enough." See his *Introduction* in H.L.A. Hart, Punishment and Responsibility, at xxix (2d ed., 2008).

2. Gardner further comments on the oddity of supposing that anything that qualifies as an *important* function of the criminal law would be thought immaterial to its justification. Gardner, *The Functions*, *id.* at 204.

3. Of course, there are many exceptions. For a few examples, see Mitchell N. Berman, *The Justification of Punishment*, *in* The Routledge Companion to Philosophy of Law 212 (Andrei Marmor ed., 2012); Mitchell M. Berman, *Two Kinds of Retributivism*, *in* Philosophical Foundations of Criminal Law 433 (R.A. Duff & Stuart P. Green eds., 2011); Michael T. Cahill, *Punishment Pluralism*, *in* Retributivism: Essays on Theory and Policy 25 (Mark D. White ed., 2011); and Hadar Dancig-Rosenberg & Tali Gal, *Criminal Law Multitasking*, 18 Lewis & Clark L. Rev. 893 (2014).

4. I regard my pluralistic approach as perfectly compatible with retributivism as I understand it. For a defense of this compatibility, see Douglas Husak, *Why Legal Philosophers (including Retributivists) Should be Less Resistant to Risk-Based Sentencing*, *in* Risk-Based Sentencing 33 (Julian Roberts, J.W. de Keijser, & Jasper Ryberg eds., 2019).

diverse and important features of criminal justice that would be difficult or impossible to replicate if the criminal law as we know it were abolished or radically transformed. Some of these functions have been discussed extensively, whereas others receive relatively little attention from legal philosophers. My account is necessarily superficial. I make no effort to prioritize these functions in order of importance or to resolve the likely conflicts among them. Nor is the number *ten* magical; readers are welcome to add (or even to subtract a bit) from this list as they like. My impetus is simply to describe many of the valuable functions of the criminal law that are sometimes neglected but contribute to its justification.

At the same time, I make no sustained effort to respond to a charge that purports to show that some good consequences of a given institution (such as criminal justice) should *not* enter into its justification. Intuitively, it might seem that a few benefits must be excluded from consideration. For example, any system of criminal justice provides jobs to countless individuals who would be forced to seek gainful employment elsewhere if some versions of criminal law skepticism were implemented. Can the fact that prison guards receive paychecks possibly count in favor of retaining our system of criminal justice and count against downsizing it? Consequentialist defenses of most any institution encounter this challenge, and I have no original suggestion about how to meet it. My inclination is to say the creation of jobs *is* a good that should be counted among those that an institution achieves, but the *extent* of this good does not make a significant contribution to the justifiability of the institution overall. Most of the ten functions of the criminal law I list are unlike the foregoing example. One job can be replaced with another, but the valuable functions I mention below are more difficult to replicate.

More to the point, is there any urgency to offer a justification of the criminal law itself? I fear that there is. I collect these ten features in order to combat what I take to be a growing scholarly trend. An increasing number of commentators embrace a wide variety of positions that lack a unifying theme—apart from their adherence to a loosely defined thesis I call "criminal law skepticism." The legal theorists I have in mind do not simply urge caution or a more judicious use of the criminal law to address social problems. These ideas are widely accepted,[5] even though support for them

5. *See* Douglas Husak, Overcriminalization (2008).

may be less deep than many legal philosophers suppose.[6] Instead, the thrust of criminal law skepticism is more sweeping and radical; it presents reasons to doubt that the criminal law as it is constituted at present should continue to survive at all. If the criminal law is indeed "broken," or a "lost cause," as some commentators allege, no simple fix is possible.[7]

Philosophers of criminal law have several different grounds for accepting some version of criminal law skepticism, and I make almost no effort to recount them. Quite a few of these reasons, I am sure, rest on simple confusions. They either misconstrue what the criminal law *is* or presuppose a defective normative framework for how to evaluate it. Just as many others, however, do *not* rest on confusions. Even so, it would be fruitless to attempt to construct meaningful generalizations about the position these critics take. I confess that I sympathize with many of their motivations; there is much about the criminal law of which we should be skeptical. I offer the briefest sketch of some of their animating concerns, most but not all of which I share: First, our institutions of penal justice are astronomically expensive, and the opportunity costs of this massive outlay lead some commentators to conclude that the criminal law should be replaced. Crime can be prevented more efficiently and humanely by addressing its root, socioeconomic causes. We do more to curtail drug abuse, for example, by treating offenders than by locking them up. In addition, the penal law empowers officials with tools of repression, which they invoke most frequently against minorities. It is used as a subterfuge to perpetuate class dominance, and at the very least adds to racial tensions. Arguably, it lacks standing to judge persons whose criminal behavior is due to socioeconomic deprivations that societies should do more to rectify. Moreover, it too often mistakenly punishes individuals who are innocent. We simply cannot make correct judgments with enough certainty to retain confidence in criminal justice institutions. In addition, it is hard to see how law itself could possess moral authority to coerce conformity with its directives—especially when one attends to the details of how legislation is actually created. Most importantly of all, it inflicts major hardships on offenders

6. *See* Douglas Husak, *The Politicization of Overcriminalization*, *in* REFORMING CRIMINAL JUSTICE 25 (Eric Luna ed., vol. I, 2017). *See also* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

7. *See, e.g.*, Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 LAW Q. REV. 225 (2000).

for reasons many philosophers find normatively indefensible: it seemingly treats them as a mere means to a greater good, for example.

Each of the foregoing allegations should be familiar to criminal law theorists. No one should be surprised to learn that many of those philosophers who are sensitive to these difficulties are not content merely to *improve* our systems of criminal justice, but aspire to radically transform them or even to get rid of them altogether. Although I do not believe that the arguments of these criminal law skeptics ultimately succeed, I admit we should applaud the underlying motivations of many of those philosophers who advance them. A large dose of skepticism about the criminal law is healthy.

A preliminary challenge awaits anyone who purports to evaluate criminal law skepticism. This problem involves uncertainty about the very *nature* of the criminal law. If we start with very different conceptions of what the penal law *is*, we would expect to differ about whether or why it should be preserved. Quite a few versions of criminal law skepticism *are* rooted in disagreement about the nature of the penal law, and it would be helpful to contrast those that are from those that are not. Although any particular conception about the nature of the criminal law may beg questions about whether it should be retained, I will begin by simply *stating* (rather than by defending) the view I favor: I presuppose that the criminal law is best understood as that body of law that subjects those who breach its directives to *state punishment*. And "punishment," as I construe it, is an intentionally imposed deprivation that expresses condemnation. If a legislator creates what he calls a crime, but proceeds to deny that anyone who commits it should ever be punished, I doubt we would find his proposal to be intelligible.[8] What mechanism could prevent police or prosecutors from enforcing a validly enacted penal statute? The foregoing account facilitates an understanding of the issue I propose to address: What are the important functions of a domain of law that renders those who engage in given kinds of conduct eligible for a state response that intentionally inflicts hard treatment and condemnation? What would be lost if we failed to maintain penal justice institutions in roughly their present form?

8. *But see* James Edwards, *Criminalization Without Punishment*, 23 LEGAL THEORY 69 (2017); and R.A. DUFF, THE REALM OF CRIMINAL LAW, esp. ch. 1 (2018). For a response to the claim that criminalization can exist without punishment, *see* Douglas Husak, *Wrongs, Crimes, and Criminalization*, 14 CRIM. L. & PHIL. (forthcoming 2020).

I trust I need not labor to support my claim that the phenomenon of criminal law skepticism is genuine before I turn to the price I believe its adherents are likely to pay if their pleas are heeded. Beyond question, clear examples are plentiful, so for the most part I will take this trend for granted. But some instances can be tricky to identify, since quite a few of the positions I take to express it are hedged with qualifications and refinements that threaten to undermine their use as illustrations of the thesis I propose to scrutinize. Even so, I present a handful of examples of criminal law skepticism with no effort to understand why their proponents endorse them. I am certain that any number of additional instances could be produced by anyone conversant with recent scholarship in criminology or the philosophy of criminal law.

Those legal philosophers who explicitly favor *abolitionism* provide the clearest examples. Although the term is more familiar in the context of punishment than in that of the criminal law itself,[9] and is especially prominent in debates over incarceration,[10] radical abolitionists frequently recommend that the entire apparatus of criminal justice should be dismantled. A number of "critical criminologists" have long called for "abandon[ing] crime as a conceptual tool."[11] Anyone who believes this movement represents a tiny academic fringe need only browse the bibliographies in recent issues of journals such as *Contemporary Justice Review*.[12] But I count a number of legal philosophers as criminal law skeptics even though they stop short of explicitly endorsing abolitionism. In my judgment, many (but not all) champions of *restorative justice* fall into this camp.[13] If justice is said to be served by a private arrangement between victim and offender, the

9. For one of many such examples, *see* MICHAEL J. ZIMMERMAN, THE IMMORALITY OF PUNISHMENT (2011).

10. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1166 (2015).

11. *See, e.g.*, Louk H.C. Hulsman, *Critical Criminology and the Concept of Crime*, 10 CONTEMP. CRISES 63 (1986).

12. *See* Michael J. Coyle & Judah Schept, *Penal Abolition and the State: Colonial, Racial and Gender Violences*, 20 CONTEMP. JUST. REV. 399, 402–03 (2017).

13. Niels Christie, for example, famously indicts the criminal law for "steal[ing] the conflict" between victims and offenders. See his *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977).

resultant disregard for the public dimension of crime threatens to distort penal justice beyond recognition.[14]

Several other criminal law skeptics package themselves as less revolutionary and more mainstream in their political ideology. Their central aspiration is to collapse the boundaries between tort and crime and to bring the penal and civil law into closer conformity. What this agenda entails for the fate of criminal justice as we know it varies from one theorist to another. Although these views have been around for quite a while, I sense that the numbers of commentators who subscribe to them are growing. A handful of examples are as follows. In 1977, Randy Barnett welcomed the "death throes of the old and cumbersome . . . criminal justice system."[15] Joseph Ellin subsequently defends *restitutionism*, which "advocate[s] the abolition of criminal law. The idea is that criminal law as a body of rules, along with most prisons and police, would be abolished. Most of what is now considered a crime would be treated as a tort."[16] Vincent Chiao, to cite a more recent example, supports what he calls "the public law conception of the criminal law."[17] According to this account, the criminal law is simply one of many rule-enforcing institutions whose function is to "contribute[] to making social cooperation under the rule of law possible." He continues: "The public law conception represents criminal institutions as functionally continuous with many other forms of coercive state power. . . . [T]he public law conception adopts an unapologetically revisionist attitude toward received legal categories generally, and the civil-criminal (or criminal-regulatory) distinction in particular."[18]

I gather it is clear that the phenomenon of criminal law skepticism is genuine. I also believe the phenomenon is somewhat more prevalent among criminal law theorists today. Why might this be so? Trends in philosophy can be difficult to fathom, but one possible explanation merits special emphasis. In some respects, criminal justice is a victim of its own success. When violent crime rates are high and persons feel unsafe, they tend to demand greater amounts of security and are willing to have fewer misgivings

14. See the collection of papers in Theo Gavrielides, ed., ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE (2018).

15. Randy Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 280 (1977).

16. Joseph Ellin, *Restitutionism Defended*, 34 J. VALUE INQUIRY 299, 299 (2000).

17. Vincent Chiao, *What is the Criminal Law For?*, 35 LAW & PHIL. 137 (2016).

18. *Id.* at 158–59.

about how to achieve it. When crime rates are low, these demands recede. In most Western industrialized countries, including the United States, the incidence of violent crime is lower than at any time in a generation or more. My speculation, then, is that skepticism is a luxury we are able to afford when we have less *need* of criminal law and punishment.

Any attempt to go further to understand, identify, and categorize each of the many species of criminal law skepticism would require a separate undertaking. It also would reveal that no *single* effort to discredit it would succeed: some efforts would be forceful against some varieties of criminal law skepticism, but would leave others wholly untouched.[19] Although I clearly believe we are warranted in retaining the criminal law in roughly its present form, no *one* argument will demonstrate that we are correct to do so. In what follows, therefore, I will depart from more familiar philosophical methodology by making no serious effort to respond to the many arguments marshalled in favor of criminal law skepticism. Instead, the main point of this paper is to describe the *price* we would be likely to pay if we become too skeptical. I collect ten important functions served by the criminal law that at best would be jeopardized and at worst would be sacrificed altogether if the criminal justice system were radically transformed. I doubt that most of those legal philosophers who embrace skepticism about the criminal law fully appreciate what they are in danger of losing. Of course, some of these functions could be easier to preserve by a particular version of skepticism that is not especially sweeping or radical.[20] But I am sure some skeptics are prepared to give up several of the functions of the criminal law I recount, whereas others would be led to devise an ingenious way to try to retain them. But the loss of any of the ten functions I describe would represent a heavy price I believe we should be unwilling to pay.

II.

In what follows, I will collect ten important functions of existing systems of criminal law and punishment that would be very difficult to preserve if criminal law skepticism were implemented. I regard these purposes as

19. Needless to say, the writings of criminal law skeptics have stimulated a massive wave of rejoinders. For one example, see Jesper Ryberg, *Restitutionism: A Self-Defeating Theory of Criminal Justice*, 38 Soc. Theory & Prac. 279 (2012).

20. I thank Roni Rosenberg for pressing this point.

distinct, even though some overlap. My treatment is necessarily cursory; an extended discussion of each could be (and often *has been*) the topic of a separate monograph. My point is this: if these functions are valuable, as I believe them to be, criminal law skeptics should be challenged to describe how their proposals can succeed in performing them. Alternatively, skeptics might contend that the loss of one or more of these functions is a price worth paying in light of the advantages their reforms would bring about. But before we can decide whether such trade-offs are acceptable, we must appreciate what criminal law skepticism is likely to cost.

1. Crime Reduction

On just about every account, an important function of criminal law and punishment is to reduce the incidence of criminal conduct, understood as behavior that the state has authoritatively pronounced ought not to be done. The criminal law itself succeeds in such reduction primarily through incapacitation, specific deterrence, and general deterrence—although the criminal law need not even resort to *threats* of punishment when it retains a good deal of credibility and thus is able to motivate voluntary compliance with its norms. This is surely the best candidate for the single justificatory function of the criminal law—although, of course, I emphatically deny the latter should be thought to *have* a single justification. Still, this function is *so* important that it tends to preoccupy the attention of both criminal law skeptics as well as their opponents. Those who deny that criminal law and punishment *do* reduce crime often move directly from this allegation to skepticism.[21] In turn, a few of their critics are quick to concede that if these skeptics were correct in their conviction—that is, if it were true that criminal law and punishment did not reduce crime—they would join their adversaries and embrace skepticism as well.[22] As a result, discussions of crime reduction can come to dominate debates between criminal law skeptics and their opponents.

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21. Many scholars argue that "prisons don't work." By this claim, they mean that prisons don't work *to reduce crime.* Of course, it does not follow that punishments other than incarceration do not reduce crime or do not work for *other* purposes. For skepticism about the efficacy of prisons, see JOHN F. PFAFF, LOCKED IN (2017).

22. *See, e.g.*, VICTOR TADROS, WRONGS AND CRIMES, esp. 49 (2016); and his THE ENDS OF HARM 279 (2011).

For my part, I believe the evidence supports the conclusion that criminal law and punishment *do* reduce crime through each of the foregoing mechanisms—that is, through incapacitation,[23] specific deterrence,[24] and general deterrence.[25] Robert Apel and Daniel Nagin describe as "overwhelming" the evidence that the existence of criminal law and punishment reduce crime.[26] For three reasons, however, I make no attempt to defend this conclusion: First, the controversy about crime reduction is almost entirely empirical, and thus lies somewhat beyond the expertise of most legal philosophers. Second, since the debate has been waged so extensively elsewhere, I have nothing original to contribute to it. Finally and most importantly for present purposes, the case against a given form of skepticism should not be thought to depend solely on this controversy. In what follows, I describe nine additional functions I believe are performed by criminal law and punishment. In light of the attention focused on crime reduction, many of these functions (and the last eight in particular) tend to be overlooked. Skeptics not only must show how their alternative is able to reduce crime, but also should be pressed to explain how many or all of these subsequent functions can be served as well—unless they are prepared to argue that our society can afford to dispense with them.

2. The Expressive Function

Both friends and foes of criminal law skepticism tend to acknowledge that the criminal law as presently constituted serves an important *expressive* function. Convicted defendants are not merely held *liable*, they are pronounced *guilty*. This judgment publicly condemns; it communicates a message other legal judgments lack: it authoritatively labels the defendant as a criminal, with all of the resonance and social meaning this term conveys.[27]

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23. *See* Shawn D. Bushway, *Incapacitation*, *in* Reforming Criminal Justice, *supra* note 6, at 37 (vol. IV).

24. *See* Daniel S. Nagin, Francis T. Cullen, & Cheryl Lero Johnson, *Imprisonment and Re-Offending*, *in* Crime and Justice: A Review of Research 38 (Michael Tonry ed., 2009).

25. *See* Daniel S. Nagin, *Deterrence*, *in* Reforming Criminal Justice, *supra* note 6, at 19 (vol. IV).

26. Robert Apel & Daniel S. Nagin, *General Deterrence*, *in* The Oxford Handbook of Crime and Criminal Justice 179, 199 (Michael Tonry ed., 2011).

27. For one of many accounts, *see* Grant Lamond, *What is a Crime?*, 27 Oxford J. Legal Stud. 609, 610 (2007).

Although Joel Feinberg is rightly credited with having called attention to the importance of expression in the philosophy of criminal law, it is sometimes forgotten that he included four distinct tasks that "presuppose the expressive function and would be difficult or impossible without it": *authoritative disavowal*, *symbolic nonacquiescence*, *vindication of the law*, and *absolution of others*.[28] To add to these distinctive functions, contemporary expressivists contrast at least three perspectives from which the content of an expressive message might be understood: the *first-party* perspective (speaker's meaning); the *second-party* perspective (audience meaning); and the *third-party* perspective (conventional or sentence meaning).[29] For present purposes, however, I need not expound on these vantage points, prioritize them, or choose one as more central than another. In keeping with the pluralism that animates this paper, I contend that *each* of these perspectives is important and capable, to some extent or another, of contributing to a justification of criminal law and punishment.

A week does not pass without invoking expressivist concerns in favor of a new criminal law (or a novel application of an existing law). Literally hundreds of examples could be produced. On the very day of this writing, the *New York Times* published an account of a female concert attendee in the U.K. who realized that a man standing next to her had placed his cellphone under her skirt and snapped a picture.[30] The police released the perpetrator because the picture was not deemed sufficiently "graphic" to amount to a crime. A public outcry ensued, and a bill to make "upskirting" illegal was subsequently introduced. Lucy Frazer, a member of Parliament, said that criminalization would send "a clear message that this behavior will not be tolerated."[31] The unmistakable implication is that the failure to punish would suggest that upskirting is tolerable and/or is not taken seriously. In a related vein, calls to repeal or to relax the enforcement of an existing criminal law are often met with the rejoinder that any such change would "send the wrong message." This retort is perhaps the most familiar

28. Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING 95, 101–05 (Joel Feinberg ed., 1970).

29. *See* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS, esp. 19 (2015).

30. Kimiko de Freytas-Tamura, *U.K. Government Backs Bill to Make "Upskirting" a Crime*, N.Y. TIMES, June 15, 2018.

31. *Id.*

basis on which calls to decriminalize the use of a given drug are resisted.[32] Additional examples of this phenomenon could be cited.[33]

How might criminal law skeptics preserve this expressive function? At the present time, alternative means to effectively indicate that the state regards a given kind of conduct as serious and worthy of condemnation are not readily available.[34] Perhaps sustained publicity campaigns, such as those waged against drunk driving and littering, could provide viable substitutes for the criminal law. But the resources to sustain these campaigns are limited, and the public has a short attention span. Other possible means to demonstrate that some kinds of conduct are worthy of public condemnation are removed from serious consideration for independent reasons. For example, shaming mechanisms are occasionally defended as inexpensive and effective, but are typically taken off the table because they are too degrading and humiliating for a liberal society to tolerate. Unless criminal law skeptics are willing to risk losing the ability to communicate the message that given kinds of conduct are taken seriously and deserving of condemnation by a polity, states may have little choice but to retain the criminal law in something close to its present form.

3. The Unavailability of Insurance to Reimburse Defendants for Damages

The criminal law is crucial in determining which losses are covered by insurance when defendants are made to pay for the harms they cause. If the criminal law were abolished or radically altered, the implications for insurance markets would potentially be cataclysmic. It is hard to see how this important function could survive a fundamental dismantling of criminal justice institutions.

All commentators appreciate the importance of compensating innocent victims for the losses caused by defendants who are at fault. Obviously, few culpable wrongdoers have the resources to make victims whole without some device to spread losses over persons as well as over time. In the United

32. Partnership for Drug-Free Kids, *Legalizing Marijuana Sends Wrong Message to Young People, Kerlikowsje Says* (Jan. 18, 2013), https://drugfree.org/learn/drug-and-alcohol-news/legalizing-marijuana-sends-wrong-message-to-young-people-kerlikowske-says/.

33. Roni Rosenberg persuasively identifies "revenge pornography" as an additional illiustration.

34. *See* Dan Kahan, *Punishment Incommensurability*, 1 BUFF. J. CRIM. L. 691 (1998).

States, insurance is the primary mechanism for distributing these losses and thus for ensuring that victims are compensated. But *some* losses *are* not and presumably *should* not be spread through the defendant's insurance pool. Foremost among these are the losses caused by criminal activity.[35]

Liability insurers have long excluded coverage for tort claims caused by criminal activity.[36] Liability insurance contracts typically contain clauses that deny reimbursement for harms arising out of intentional injuries by the insured. Many such contracts contain additional clauses that specifically state that the insurer will not pay for tort claims due to criminal acts, even when the resulting injuries were unintentional. These clauses eliminate coverage for the foreseeable injuries caused by any "criminal act," as well as for injuries related to specific crimes such as molestation or abuse. Many liability insurance contracts also include provisions that exclude coverage for punitive damages, and some courts allow insurance companies to refuse to pay for punitive damages even in the absence of explicit language.

Many of those legal philosophers who endorse criminal law skepticism aspire to eliminate incarceration. Much about this aspiration should be applauded: monetary fines are and ought to be a preferable sanction when defendants have the means to pay. This alternative is especially attractive when "day fines" are calibrated to the wealth or income of defendants.[37] But it is unthinkable—it would literally never occur to defendants—to suppose they could simply pass the cost of their fines onto their insurance companies. But if the criminal law is radically transformed and a defendant incurs a monetary penalty for what is presently criminal behavior, on what basis could his insurance company deny him reimbursement? Perhaps skeptics foresee that fines too should wither away along with incarceration. But how, then, are states to ensure compliance with rules presently denominated as criminal?

The reasons for the foregoing exclusions from insurance contracts are especially significant for present purposes. Textbooks typically offer economic explanations: the state has an interest in decreasing crime, and moral

35. *See* Tom Baker, *Liability Insurance at the Tort/Crime Boundary*, *in* FAULT LINES: TORT LAW AND CULTURAL PRACTICE 66–79 (David M. Engel & Michael McCann eds., 2009).

36. Mary Coates McNeeley, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941).

37. *See* Douglas Husak, *Kinds of Punishment*, *in* MORAL PERPLEXITIES AND LEGAL PUZZLES: THE WORK OF LARRY ALEXANDER 22–38 (Heidi Hurd ed., 2018).

hazard ensues whenever defendants are not made to pay the full cost of their harmful activities. But this explanation is dubious. *All* liability insurance creates the potential for moral hazard. Drivers are more likely to be negligent, for example, when they aware their insurance companies will pay for the harms they inflict. Why, then, is insurance for criminal activity any different? Unless there is something special about the criminal law that makes the problem of moral hazard more worrisome,[38] the economic rationale for "crime exclusion" clauses in insurance contracts is inexplicable. Of course, many criminal law skeptics deny that anything *is* distinctive about the criminal law. In reality, however, these insurance exclusions reflect normative concerns about the propriety of insulating people from the consequences of their criminal behavior. Indeed, when enforcing these exclusions, courts commonly refer in moralistic terms to the public policy concerns that would be raised if insurance for crime were available. Thus liability insurance separates crime from tort, not merely because of moral hazard, but also because of normative objections to lumping criminals along with tortfeasors in the liability insurance pool. Again, these objections presuppose that something is special about the criminal law that differentiates it from tort.

Consider one of many concrete problems criminal law skeptics would need to address. Handguns are owned in perhaps 30 million households throughout the United States today. A standard homeowners' insurance policy ordinarily covers liability for accidents involving guns. But these policies exempt coverage for intentional harms, or even for harms resulting from any criminal act involving guns.[39] In some states, for example, lawful gun owners commit offenses by storing their weapons improperly. How would these insurance clauses be interpreted or rewritten if criminal law skepticism were implemented? As far as I am aware, these issues are off the radar screen of most skeptics.

Thus the principles governing insurance are instrumental in drawing the boundary between tort and crime. Criminal law skeptics face an uphill struggle in explaining how their proposals will affect the insurance

38. Without further explanation, Richard Posner calls the moral hazard caused by criminal activity "acute." *See* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1203 (1985).

39. Tom Baker & Thomas O. Farrish, *Liability Insurance and the Regulation of Firearms*, *in* SUING THE GUN INDUSTRY 292 (Timothy D. Lytton ed., 2005).

implications if this boundary were redrawn or obliterated. In the absence of a criminal justice system, insurance policies might conceivably cover defendants for all of the losses they cause or the fines they incur, whether or not they are presently denominated as criminal. This would be a terrible idea, and it is hard to imagine any legal philosopher would openly embrace it. Alternatively, insurance policies could explicitly identify specific kinds of conduct they would not cover. Without calling it a "crime," a policy could deny coverage for harassment or molestation, for example. But it is difficult to see how this alternative does not simply reintroduce the criminal category without using the label. Perhaps a third option could be devised, although my powers of imagination are not up to the task. I conclude that criminal law skepticism should be resisted without some innovative solution to how it would preserve the normative rationales that presently govern insurance markets.

4. Suppression of Non-Legal Violence and Vigilantism

A well-functioning state protects its citizens from wrongful harm. In its efforts to achieve this objective, it confers on the state a near-monopoly on the use of violence, thus suppressing the tendency to resort to self-help that bypasses official legal channels. How important is this function? More specifically, how much extra-legal violence should we anticipate if a mode of criminal law skepticism is implemented and the criminal law as we know it is radically transformed? Obviously, no one should profess much confidence in her answer to this question; *inter alia*, we don't know how much such violence our legal system suppresses at the present time.[40] How might we move beyond mere conjecture to quantify the significance of this function? At least two possibilities seem promising. First, we might try to determine how much extra-legal violence occurs in parts of the world where a criminal justice system is largely ineffective. Cultural differences, however, would make these findings hard to apply to Western contexts. Alternatively, we might try to determine how much self-help in developed countries is explained by perceptions that our system of criminal justice fails to discharge its duty of protecting citizens. This latter possibility might

40. Among many complexities and uncertainties is the extent to which vengeance against wrongdoers is pursued through tort. *See* Maria Guadalupe Martinez Alles, Tort Remedies as Meaningful Responses to Wrongdoing, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW (Paul B. Miller & John Oberdiek eds., forthcoming 2020).

enable us to make rough headway in identifying the extent to which the criminal justice system suppresses tendencies toward vigilante actions.

What happens in developed countries when persons believe their criminal justice system is unable or unwilling to protect them? Many such persons do not remain passive but take extra-legal measures to protect themselves. I will describe as "vigilantes" those persons who regard their extra-legal actions as justified. In academic circles, vigilantes have a bad reputation, conjuring up images of murders of physicians by opponents of abortion as well as lynchings of minorities by white-robed racists. A more nuanced picture emerges in cases in which the predicament of the vigilante evokes more sympathy. If the state fails to protect women from repeated instances of domestic violence, for example, how *should* we recommend victims to behave? A body of respectable scholarship regards preventive harm by battered women as non-culpable and justified rather than merely excused.[41] According to this rationale, the use of deadly force against their aggressors is classified as permissible instead of simply undeserving of punishment. But prospective victims of domestic violence are not the only group to evoke sympathy for employing extra-legal self-help. Recent history offers numerous examples of groups that have resorted to vigilantism rather than suffer victimization.

In an important new book, Paul and Sarah Robinson describe several instances of vigilantism in United States history.[42] For present purposes, I construe their monograph to have three central themes. First, persons resort to vigilantism when they perceive that the criminal justice system is failing to protect them. When ordinary persons doubt the state's commitment to preventing wrongful harm and doing justice, they become more likely to take matters into their own hands. *Ceteris paribus*, one would expect that the more effective a system is (or is perceived to be) in preventing violence and ensuring justice, the lower the probability that citizens will take extra-legal means to secure these ends. Second, legal officials—police, prosecutors, and judges—are often complicit in these vigilante efforts. Police are more prone to "testilie" when they are confident arrestees are guilty but are unable to provide reliable evidence of their belief because of legal "technicalities." They pretend to have issued Miranda warnings or

41. For a list of references and a response to this scholarship, see Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 1 (2006).

42. PAUL H. ROBINSON & SARAH M. ROBINSON, SHADOW VIGILANTES (2018).

to have observed the legal requirements governing search and seizure, for example, even though they know they have not done so. Prosecutors, in turn, add charges they would not otherwise have brought against defendants who they believe have escaped their just deserts in prior legal encounters. For example, O.J. Simpson would almost certainly not have spent so many years in prison for theft had he not been thought to have been falsely acquitted in his earlier murder trial. Robinson and Robinson provide ample reason to conclude that complicity in illegal action on the part of legal officials—which they describe as "shadow vigilantism"—is prevalent and can be more damaging to the legal fabric than classic vigilantism.[43] Third, the public often (although of course not always) applauds the actions of vigilantes. Even though the criminal justice system in the United States instills more confidence than that of many countries, only 29 percent of respondents in a Gallup poll expressed a "great deal" or "quite a lot" of confidence in it.[44] The success of a host of blockbuster movies—involving Dirty Harry, Charles Bronson, and a rash of comparable characters—shows that huge swaths of the public approve of vigilantes when the criminal justice system is thought to have failed its citizens. In this genre I include the enduring popularity of superheroes like Batman and Spiderman, whose daily routines are devoted to catching villains who elude the bumbling and incompetent efforts of ordinary police.

The belief that the criminal justice system is ineffective in protecting innocent citizens from wrongful harm has additional repercussions. Most scholars are correct to believe that rates of lethal violence are significantly higher in the United States than in other Western industrialized countries because of the prevalence and availability of handguns. Owners cite self-defense as their main rationale for keeping guns in the house. Scholars tirelessly point out that handguns may do more harm than good to the very individuals who own them. But perceptions matter. Unfortunately, no one has a very good idea how to reduce the existing stock of guns throughout the country without steps that would threaten civil liberties.[45] But any measure that would increase confidence in the ability of the criminal justice

43. *Id.* at 195–97.

44. Frank Newport, *Americans' Confidence in Institutions Edges Up*, GALLUP (June 26, 2017), https://news.gallup.com/poll/212840/americans-confidence-institutions-edges.aspx.

45. Douglas Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 LAW & PHIL. 437 (2004).

system to protect persons might undercut the primary motivation for procuring guns. Over time, one would hope that increased security brought about by further improvements in criminal justice would help to reduce rates of gun ownership in the United States and thus make our statistics about lethal violence more closely resemble those in other countries.

When the criminal justice system is ineffective in preventing wrongful harm and giving offenders their just deserts, vigilantism may well be justified. But even though careful thought may reveal that the moral record of vigilantes in the United States is more balanced than many academics tend to believe, my present point is not to defend an all-things-considered judgment about the general phenomenon. Instead, my main contention is that it is clearly preferable to minimize the incentives for these extra-legal remedies in the first place. Vigilantism would almost certainly wane if the criminal justice system were perceived to be more effective in preventing crime and giving culpable wrongdoers the punishments they deserve. Thus a penal system can expect to reduce vigilantism by earning credibility with the public.[46] I fear, however, that the implementation of various strains of criminal law skepticism could well exacerbate existing tendencies to resort to extra-legal measures to prevent wrongful harm. Again, no one can be at all certain of these effects in the absence of details about the harm-prevention plans of those legal philosophers who would fundamentally revise our penal system. But skeptics must at least worry about how drastic reforms might increase resort to self-help, which the criminal law in its present form seems reasonably effective in curbing.

5. The Powers of Legal Officials

The existence of a *criminal* enactment gives special powers to legal officials in addition to the power to punish. Most significantly, police have the power to arrest and prosecutors have the power to charge when wrongdoing is denominated as criminal. If the line between the penal and non-penal law were blurred or obliterated altogether, what would become of these powers? Would police and prosecutors no longer exist?[47] Or would police be permitted to arrest persons who they reasonably suspect to have

46. Robinson & Robinson, *supra* note 42, at 219.

47. Quite a few criminal law skeptics advocate the abolition of police. For references, *see Police Abolition: A Curated Collection of Links*, The Marshall Project (May 30, 2018), https://www.themarshallproject.org/records/3382-police-abolition.

breached a contract? Would prosecutors be able to charge persons who they believed to have committed a tort? If the more radical criminal law skeptics succeed, it is hard to see why the state would have a need for legal officials whose primary responsibility is to arrest and prosecute, since at present these powers are exercised against those who are thought to have committed a *crime* rather than some other kind of legal wrong.

Before criminal law skeptics consign these officials to the ranks of the unemployed, we should keep in mind that police can be effective in preventing culpable wrongdoing before it occurs, even without utilizing their power to arrest. Widespread use of stop, question, and frisk (SQF) is credited by many for helping to achieve the remarkable decrease in violence throughout much of the United States, especially in New York City.[48] Under the Fourth Amendment, police are allowed to conduct a "Terry-stop" when they have a reasonable suspicion that a crime has been, is being, or is about to be committed by the suspect. Raymond Kelly, the NYPD Chief throughout much of the crime drop, claims that "in conjunction with a variety of other methods and strategies, [SQF] has helped to drive crime down in New York City and to make the streets safer for everyone."[49] Although the use of SQF has become less popular and more infrequent since the election of Bill de Blasio as Mayor, the City continues to stop and question dozens of suspects each day.[50] In light of its probable crime-preventive effects, few commentators call for the total abolition of the practice of SQF.[51] Criminal law skeptics should explain how their proposals would impact the powers of legal officials—or whether they are prepared to abolish the powers of these officials altogether.[52]

Careful thought about the role these officials play creates additional reservations about some versions of criminal law skepticism. The issue is not simply whether and under what conditions states should have the *ex post*

48. For an account of the New York City crime drop, *see* FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE (2011).

49. RAY KELLY, VIGILANCE 274 (2015).

50. *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/en/stop-and-frisk-data (last visited Nov. 2019).

51. *But see* L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73 (2017).

52. *See* Douglas Husak, *Police and Racial Discrimination: Throwing out the Baby with the Bath Water*, *in* THE ETHICS OF POLICING AND IMPRISONMENT 87 (Molly Gardner & Michael Weber eds., 2018).

power to punish. States also need to decide when they should have the authority to ensure compliance with norms *ex ante* through the direct use of coercive force. A special category of *crime* demarcates the kinds of wrongs for which this power is reserved. As Gabe Mendlow points out, "when you're selling loose cigarettes, the police may take them from your hand. When you're making a bomb, the police may escort you from your laboratory. When you're absconding with stolen goods, the police may stop you and seize them."[53] With respect to nonpenal norms, however, *ex ante* and *ex post* powers typically diverge. Except perhaps in extraordinary circumstances, no one proposes that states use their coercive powers to prevent torts or breaches of contract before they occur. With crimes, however, the situation is otherwise. Criminal law skeptics should be pressed to explain how existing official powers to ensure compliance with norms would be affected if their proposals were implemented.

6. The Costs and Accuracy of Adjudication

Consider also the fate of persons alleged to have committed an illegal act. When a felony is charged against a defendant of moderate means, the costs of his defense are incurred by the Public Defender, dispersed throughout the citizenry through taxation. Although nearly all commentators agree that public defenders are grossly underfunded and overworked throughout the United States,[54] the prospect of abolishing their offices altogether could only make matters worse. At least *some* gains in justice are achieved by ensuring that persons accused of a serious crime are afforded a defense.

The costs of adjudicating non-criminal wrongdoing, by contrast, are typically borne by private individuals. When a defendant is sued for breach of contract or a tort, for example, almost no one proposes that he be provided a defense at public expense. And when a plaintiff sues for personal injury, she usually pays for her own representation through a contingency fee. Thus the existing distinction between the criminal and civil law helps to establish the boundary at which the state is willing to invest resources in ensuring that injustice is avoided and innocent persons are not held liable. How would

53. Garbiel S. Mendlow, *Why Is It Wrong to Punish Thoughts?*, 127 YALE L.J. 2342, 2370 (2018).

54. *See* Eve Brensike Primus, *Defense Counsel and Public Defense*, in REFORMING CRIMINAL JUSTICE, *supra* note 6, at 121 (vol. III).

criminal law skeptics decide what public services to fund when laws are breached? If their theories were implemented, would accused wrongdoers be expected to incur the expense of clearing their name? Or would public resources be expended to resolve legal disputes that presently are treated as non-criminal?

On a related point, consider the impact of some modes of criminal law skepticism on the goal of ensuring some degree of *accuracy* in legal adjudication. Without a publicly funded defense, one would expect that rates of false positives would increase, and persons would be subjected to penal sanctions despite their innocence. In what is currently conceptualized as the criminal domain, this outcome is universally regarded as disastrous. At present, of course, the U.S. Constitution requires the standard of proof for a criminal conviction to be *beyond a reasonable doubt*, whereas a mere *preponderance of the evidence* is usually all that is need to impose civil liability.[55] This crucial difference reflects the widely shared sentiment that it is a far greater injustice to convict the innocent than to acquit the guilty.[56] If criminal law skeptics had their way, how would our legal system be able to avoid this greater injustice? Would a single standard of proof be used for all legal disputes? If not, and a higher standard were used for some but not others, on what basis would this line be drawn in the absence of something approximating the criminal law as it presently exists?

In short, both because of the desirability of public representation of criminal defendants and the need for a high standard of proof to convict the guilty, our criminal justice system exhibits its commitment to protect the innocent from the hard treatment and condemnation of punishment. Although most criminal law skeptics trumpet their theories as pro-defendant, their reforms might make the foregoing commitments more difficult to honor.

7. Proportionality

The severity of sanctions for criminal wrongs is governed by the principle of proportionality—a principle I regard as central to desert. I construe this

55. *In re Winship*, 397 U.S. 358 (1970).

56. Even consequentialists who would decrease the standard of proof for criminal liability agree that false positives are a greater injustice than false negatives in the criminal domain. *See* Larry Laudan, The Law's Flaws: Rethinking Trials and Errors? (2016).

principle as follows: *ceteris paribus, the severity of the punishment that is deserved should be a function of the seriousness of the offense.* Admittedly, applications of this principle to particular cases present at least five problems that have proved intractable: (1) What makes one crime more serious than another? Is there a single scale along which the seriousness of all crimes can be ranked? (2) What makes one punishment more severe than another? Is the metric of punishment severity wholly objective, or are the subjective reactions of the person who is punished relevant in gauging the severity of given instances of punishment? (3) What is the function that relates the seriousness of crime to the severity of punishment? Is it linear, or does it have a more complex shape? (4) What issues does the *ceteris paribus* clause preclude from consideration under the scope of proportionality? How much or how little does this clause preclude? (5) How is the punishment system anchored to achieve *cardinal* proportionality? What role, if any, do social conventions play in the answer?[57]

Because each of the foregoing problems seems insurmountable, some commentators (who may or may not regard themselves as criminal law skeptics) have called for a sentencing policy that dispenses with proportionality altogether.[58] For two reasons, however, this response is hasty and ill-advised. First, no good theory of punishment and sentencing has emerged to take the place of a retributive theory in which proportionality plays a central role. Efforts to defend a wholly consequentialist theory, or a non-consequentialist alternative that dispenses with proportionality and desert, encounter devastating problems of their own. Risk-based sentencing, for example, has come under heavy fire.[59] It is best not to abandon a principle with lots of intuitive support in the absence of a preferable option. Punishment and sentencing must proceed according to *some* set of normatively defensible considerations, and no rival to a theory that awards a crucial role to proportionality and desert is on the horizon. Second, intuitions favoring proportionate punishment are deeply ingrained and stubbornly persistent.

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57. For further thoughts, *see* Douglas Husak, *The Metric of Punishment Severity: A Puzzle About the Principle of Proportionality*, *in* PROPORTIONALITY, PUNISHMENT, AND JUSTICE—MAKING THE PUNISHMENT FIT THE CRIME (Michael Tonry ed., forthcoming 2019).

58. *See* Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 MOD. L. REV. 216 (2015).

59. *See* RISK-BASED SENTENCING, *supra* note 4.

To my mind, it is nearly unthinkable that punishment severity would be wholly decoupled from offense seriousness.[60] The strong commitment to doing justice produces not just a demand for punishment but also a judgment that sets its extent to the offender's blameworthiness.[61] I will return to this point below.[62]

It is a truism that the sanctions imposed for non-criminal wrongs pay much less attention to the principle of proportionality.[63] When civil liability is at stake, officials need not grapple with *any* of the five issues I admitted to be so difficult. For example, a driver can incur tens of millions of dollars in damages and face economic ruin (absent insurance) by being only a tiny bit negligent if he crosses the median and happens to strike a bus full of professional athletes. Few would propose that the criminal response to this conduct should be comparable in severity to its civil counterpart. The reason for this disparity is simple. Criminal liability is governed by the norms of *retributive justice*, whereas civil liability is governed by those of *corrective justice*, and the logic of the two domains is entirely distinct. Theorists differ greatly in the details of how they explicate the principles of retributive and corrective justice. In the criminal context, however, a response must respect the constraints of desert, so sanctions are inevitably governed by proportionality constraints. Defendants may deserve punishment when no harm has been caused at all—as when a defendant commits an inchoate offense such as conspiracy, solicitation, or attempt. When the rationale is to *compensate* victims for harms actually caused, however, proportionality has no obvious application. Since the significance of proportionality is so different in each domain, a criminal law skeptic must be pressed to explain what role proportionality would play when the criminal law is fundamentally reconfigured. As before, I do not insist that this challenge is insurmountable. I only insist that it must be met.

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60. *See* Douglas Husak, *Proportionality in Personal Life* (unpublished manuscript) (on file with author).

61. Paul H. Robinson & John M. Darley, Justice, Liability and Blame: Community Views and the Criminal Law (1995).

62. *And see* Zimmerman, *supra* note 9.

63. Courts have struggled to apply a proportionality principle to *punitive damages*, which straddle the criminal/civil dichotomy.

8. Crimes as Public Wrongs

Some of the less familiar reservations about criminal law skepticism can be introduced by the thesis that whatever conduct is criminalized should amount to a *public* wrong.[64] Criminal law is an instance of state authority, and necessarily requires a political as well as a moral theory to rationalize it. Many legal philosophers (who otherwise agree about very little) find the idea of a public wrong to be unintelligible or otherwise unattractive.[65] But there are many possible ways to explain the sense in which the state must have a substantial interest in prohibiting whatever wrongs are subjected to punishment.[66] *One* strategy begins by trying to understand the objections that would become trenchant if the public dimension of criminal conduct were lost. Consider, for example, the recent outcry about the ongoing revelations of acts of sexual harassment by powerful men in entertainment and business. In many such cases, victims had accepted substantial amounts of monetary compensation from those who had harassed them.[67] A defendant would be unlikely to pay this amount unless the settlement included a nondisclosure clause that precluded the victim from going public with her story. But many commentators criticize victims for not coming forward and thereby increasing the likelihood that perpetrators will re-offend.[68] Reasonable minds disagree about what individual victims should do in the face of these criticisms. Should third parties be quick to fault them for accepting more money for their silence than they may earn in their lifetimes?[69] Nonetheless, these critics have a point. New Jersey has recently enacted legislation that would void contractual clauses that

64. *See* R.A. Duff & Sandra Marshall, *Crimes, Public Wrongs, and Civil Order*, 13 Crim. L. & Phil. 27 (2019).

65. *See, e.g.*, Michael Moore, *Liberty's Constraints on What Should be Made Criminal*, *in* Criminalization: The Political Morality of the Criminal Law 198 (R.A. Duff et al. eds., 2014); and James Edwards & A.P. Simester, *What's Public About Crime?*, 37 Oxford J. Legal Stud. 105 (2017).

66. *See* R.A. Duff, The Realm of Criminal Law (2018).

67. *See* Jim Rutenberg, *The Cost of Silence on Abuse Claims Is a Long-Delayed Reckoning*, N.Y. Times, Oct, 23, 2017, at A1.

68. Gretchen Carlson, *How to Encourage More Women to Report Sexual Harassment*, N.Y. Times, Oct. 10, 2017, https://www.nytimes.com/2017/10/10/opinion/women-reporting-sexual-harassment.html.

69. At least one of these settlements included a payment of $32 million. *See* Rutenberg, *supra* note 67.

prevent victims from telling their stories, and other states are expected to follow suit.[70]

I need not take a firm position on the wisdom of nondisclosure agreements for sexual harassment settlements, as no single example should distract us from the larger point. I mention this issue to illustrate one of the several matters at stake in deciding whether a given kind of wrong should be deemed as public or private. When a driver accidentally damages my car, almost no one has reservations about allowing me to accept monetary compensation for my loss and not to proceed further. If a voluntary agreement is reached between perpetrator and victim, the matter is presumably concluded. Is the foregoing example of sexual harassment comparable? In this case, it is hardly obvious that a nondisclosure agreement between victim and offender should be allowed to bring the issue to a close. When these agreements are enforced, any *public* interest in ongoing harassment remains unmet. Thus those who believe that perpetrators should not be permitted to buy silence have a powerful reason to classify the conduct on the public rather than on the private side of the divide.

If skeptics succeed in calling the criminal law itself into question, it might be difficult to make sense of the foregoing considerations. What role would the public continue to play in a radically reconfigured system of criminal justice? Would *all* legal disputes be public? Or would *none* be? If a line between the public and the private would continue to be drawn, what would be its foundation? And would it not simply reintroduce the criminal category under a different guise? These questions pose further challenges for criminal law skeptics.

9. The Public Demand for Justice

Some movements to rethink the criminal category are driven by scholarly argument but seldom informed by sociological reality.[71] Despite a movement spearheaded by well-meaning academics, I detect no groundswell of support among the general public to fundamentally revamp the criminal law as it currently exists. Even those members of the public who tend to

70. Elizabeth A. Harris, *"Business as Usual" on Secret Settlements, Even in Era of #MeToo*, N.Y. Times, June 15, 2019, at A1.

71. I have in mind the kinds of considerations famously described by Emile Durkheim, The Division of Labor in Society (Free Press ed.1984) (1893).

agree that the criminal justice system punishes too many persons with too much severity can be heard to complain when leniency is afforded to certain kinds of offenders. The best candidates to illustrate this phenomenon depend on one's political ideology. Among liberals, justice is said to be denied when police are not punished for using excessive force against unarmed minorities, when prosecutors are reluctant to indict white collar criminals, or when sexual offenders escape their just deserts. Among conservatives, justice is said to be denied when illegal aliens are allowed to enter the country and evade deportation, or when restrictions on abortions are relaxed. In these cases and others, the public demands *justice*—by which I gather they mean some form of *punishment*.

These sociological facts are crucial and cannot be ignored by skeptical reformers. I am doubtful that alternative means to sanction wrongdoers and mollify victims would be adequate to satisfy those who call for justice. If the criminal law were fundamentally altered, all bets would be off as to how the public in general and victims in particular would respond.[72] In view of the ubiquity of the foregoing demands, one can only wonder how citizens would react to a systematic call to dismantle the criminal justice system. Few criminal law skeptics purport to have any sociological evidence about how their ideas are likely to be received in a democratic state.

Skeptics might reply that these calls for justice are barbaric residues of our darker emotions. But how can they be so sure? Paul Robinson cites a wealth of social science research to show the strong desire among lay persons that serious wrongdoers be punished. He supports this conclusion through a wide variety of methods from representatives of different disciplines: questionnaires to laypersons, behavioral economics studies, game theories, and cross-cultural investigations. Neurobiological data also demonstrate that the punishment of offenders causes a positive hedonic impact by activating the reward system of the brain. The intuition that wrongdoers should be made to suffer deprivations is shared not only by victims but also by uninvolved third parties—a phenomenon described as "altruistic punishment." Paul Rozin concludes that "[m]oral judgment and the condemnation of others, including fictional others and others who have not harmed the self, is a universal and essential feature of human

72. *See* Diane Whiteley, *The Victim and the Justification of Punishment*, 17 CRIM. JUST. ETHICS 42 (1998).

social life."[73] Similar sentiments have been expressed by developmental psychologists such as Jerome Kagan, who includes this intuition as one of "a limited number of universal moral categories that transcend time and locality."[74] Anthropologist Donald Brown, in his exhaustive review of the cross-cultural data, contends that intuitions surrounding justice and punishing transgressors are a "human universal."[75] Robinson thus concludes that experts from multiple disciplines concur that the intuition to punish wrongdoers is a key part of what it means to be a member of the human species. And this intuition affects behavior. When injustice is regularly tolerated and injustice is unpunished, members are less likely to maintain allegiance to their group. The belief that the penal justice system is unable or unwilling to sanction wrongdoers is a central motivation for taking the law into one's own hands—a phenomenon on which I have already commented.[76] In short, the public generally and victims in particular derive great satisfaction when they perceive that justice is done. When justice is denied, by contrast, they express frustration and disappointment. We should not be quick to deem these widespread intuitions as unenlightened or unjustifiable.[77] If doing justice is indeed essential for social cohesion, criminal law skeptics tamper with the penal law at their peril.[78]

Notice that my account thus far assigns a purely *instrumental* role to justice: it placates both victims and the public while removing the frustrations caused by injustice. In all likelihood, these effects produce a wealth of further goods, such as an increased willingness to cooperate and conform to law. In any event, I have not relied on a claim that often is singled out as the chief bone of contention between retributivists and their consequentialist adversaries: that adherence to a principle of retributive justice is an *intrinsic* good. In the present context, I have two reasons for not defending this claim. First, it is notoriously controversial, and I hope to rely on functions of criminal law that are not so hotly disputed. Second, if conformity with retributive justice *is* an intrinsic good, whatever goodness it achieves is

73. Paul Rozin et al., *The CAD Trial Hypothesis*, 76 J. Personality & Soc. Psychol. 574, 574 (1999).

74. Jerome Kagan, The Nature of the Child 118 (1984).

75. Donald E. Brown, Human Universals 138 (1991).

76. *See* Husak, *supra* note 4.

77. *See* Shawn Nichols, Bound: Essays on Free Will and Responsibility (2015).

78. Paul H. Robinson, *Natural Law & Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors*, 2013 U. Ill. L. Rev. 433.

probably miniscule. Remarkably, some retributivists identify the intrinsic good allegedly gained by conformity with retributive justice as the *most* important or even the *only* function of criminal law and punishment.[79] In my judgment, this intrinsic good—if it exists at all—cannot be sufficiently weighty to offset the many negative effects of criminal justice emphasized by criminal law skeptics.[80] But the *instrumental* good of justice is massive and should be enough to give these skeptics pause. The public would not thank criminal law skeptics for their efforts if many of these instrumental goods were sacrificed.

10. Collateral Consequences

Quite a few of the harms suffered by offenders take place *after* their "official punishment" has ended. The practices and policies I have in mind are generally called "collateral consequences." Offenders bear not only the hardship and condemnation sentencing officials intend to inflict, but also a host of harms resulting from decisions by other state actors as well as by private parties. As I describe below, offenders can be denied any number of benefits and opportunities.[81] It is futile to ask whether any or all of these collateral consequences should be conceptualized within the ambit of punishment itself.[82] The best position may be that they are *not* a part of punishment if we adopt the perspective of the punisher, but *are* a part of punishment if we adopt the perspective of the defendant. If we focus not only on what punishers intend but also on what happens to offenders as a result, these collateral consequences must be included in any attempt to answer the justificatory questions philosophers of law have posed about punishment since the time of Plato.[83]

Consider some of the most commonly imposed collateral consequences of crime in place today. Restrictions on *employment* constitute the most

79. *See* Michael S. Moore, Placing Blame (1997).

80. *See* Douglas Husak, *Why Punish the Deserving?*, *in* The Philosophy of Criminal Law 393 (2010).

81. For details, *see* Zachary Hoskins, Beyond Punishment? A Normative Account of Collateral Restrictions on Offenders (2019).

82. *See* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 Notra Dame L. Rev. 301 (2015).

83. *See* Adam J. Kolber, *Unintentional Punishment*, 18 Legal Theory 1 (2012).

familiar type. Some of these practices seem punitive and are not designed to prevent subsequent harms. More typically, however, these restrictions are intended to ban persons from a particular job in which they are thought to pose an elevated risk of further wrongdoing—especially when the persons who are most prone to be victimized comprise a vulnerable group. In many states, for example, those convicted of drug or sex offenses are permanently barred from obtaining a teaching license. Similar disqualifications apply to fostering or adopting children, obtaining a driver's license, serving on a jury, possessing a firearm, or enlisting in the military. The next most common category of collateral consequence pertains to housing. Federal regulations permit local authorities to evict tenants who engage in unlawful activity and are quick to deny occupancy to applicants with criminal histories. Specifically, federal law allows housing authorities to conduct criminal background checks on applicants, requires them to deny residence to those convicted of specified offenses, and permits them to withhold housing from anyone who has engaged in violent, drug-related, or other illegal conduct that might threaten health or safety. As a result, many persons with criminal records are effectively denied public housing.

But the more far-reaching class of collateral consequences does not require the person to be *convicted* or even *charged* with a criminal offense. Instead, they are triggered by a mere *arrest*—permitted when the police have *probable cause* to believe a person is engaged in criminal activity. The total impact of these effects dwarf those predicated on conviction.[84] Deprivations that require a mere arrest affect astounding numbers of people; approximately 25 percent of the adult population in the United States have an arrest record for actual or alleged conduct not involving a traffic offense. Easily accessed criminal intelligence databases are filled with information about people who can be monitored because of the risk they are thought to pose. Thus some seventy million Americans are potentially affected by adverse collateral consequences that result from their interaction with the criminal justice system. For perhaps the majority of arrestees, their greatest fear is not the threat of conviction and punishment itself, but rather their ensuing criminal record. Collateral consequences resulting from an arrest are both formal (de jure) and informal

84. See the description of the *managerial* model of criminal justice in Issa Kohler-Hausmann, Misdemeanorland (2017).

(de facto).[85] In his seminal book on criminal records, James Jacobs alleges that the need to balance the goal of preventing crime with the civil liberties of persons who interact with the criminal justice system is "one of the greatest law enforcement challenges of our time."[86]

Collateral consequences have a bad reputation among legal theorists. For a number of reasons, quite a few reformers who are appalled by the size and scale of the criminal justice system in the United States have called for an end to most or all of the collateral consequences I have described. Criminal law skeptics are likely to regard it as an *advantage* of their reforms if collateral consequences could no longer be imposed. This position, like many of those held by skeptics, is motivated by humane concerns. Re-entry of prisoners into society is incredibly hard, and these difficulties need not be exacerbated by additional barriers.[87] Some have even recommended the enactment of laws to outlaw some of the kinds of discrimination I have described—much as we ban discrimination on grounds of race or religion.[88] And if the case for not allowing *conviction* to worsen employment and housing prospects is compelling, the argument against allowing a mere *arrest* to do so is even stronger. As I have indicated, fully a quarter of the adult population of the United States is subject to the harms that can result from a mere arrest, and no one seriously disputes that persons with an arrest record are treated more harshly than those without such a record at every stage of the criminal justice process. Just as importantly for my purposes, *private* parties respond similarly to arrestees. Of private employers who replied to a survey, 92 percent say they require a background check for some or all jobs and admit to drawing a negative inference if the record of the applicant is not clean.[89] To add insult to injury, these practices place an especially heavy burden on minorities, thereby raising protests from liberals and prioritarians alike.

If the use of these collateral consequences is so socially undesirable, how can they form the basis of a challenge to criminal law skepticism? My answer is as follows. Despite the legitimate concerns of their opponents, it would be difficult to categorically *reject* the permissibility of each of the

85. *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

86. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 30 (2015).

87. *See* BRUCE WESTERN: HOMEWARD: LIFE IN THE YEAR AFTER PRISON (2018).

88. *See* the discussion in Gabriel J. Chin, *Collateral Consequences*, *in* REFORMING CRIMINAL JUSTICE, *supra* note 6, at 371 (vol. IV).

89. JACOBS, *supra* note 86.

collateral consequences I have described. Reflection about the nature of our relationships with one another in our capacity as private agents helps to illustrate the problems we would face if we did not use collateral consequences in our everyday lives. Inasmuch as three-year recidivism rates are as high as 68 percent, no one should be quick to fault persons for treating a conviction as predictive of future problems. As John Monahan observes, "It has long been axiomatic in the field of risk assessment that past crime is the best predictor of future crime. All actuarial risk assessment instruments reflect this empirical truism."[90] In light of these facts, are we really so certain that negative inferences should *not* be drawn—even when they are predicated on a mere arrest? Job seekers with a spotless record might have a valid complaint against a government policy requiring private employers to treat a criminal record as irrelevant.[91] And should state or private elementary schools be criticized for refusing to hire a teacher who had been arrested for child abuse? Would we be paranoid to discharge a housekeeper we learned had been arrested for stealing from her former employer? Of course, we would prefer to have better evidence than an arrest record to make informed decisions about our business and social interactions. In the absence of more reliable data, however, it is rational to act on the best evidence available to us. Thus the rationale that underlies the imposition of several collateral consequences is difficult to discredit.

For present purposes, the important point is that the foregoing measures are collateral consequences of *crime*—or of an *arrest* for crime. To what would these collateral consequences attach if *not* to crime—the very category skeptics propose to reconceptualize? If some modes of criminal law skepticism were implemented, public and private parties might be deprived of valuable information on which to make rational decisions in their economic and personal interactions. Alternatively, they might make decisions on the basis of even more unreliable information than a conviction or arrest. Even so, one might continue to challenge my supposition that some of the collateral consequences I have described are legitimate. If each of them is objectionable, they cannot form a sound basis to resist criminal law skepticism. I have no doubt that the use of collateral consequences could be

90. John Monahan, *Risk Assessment in Sentencing*, *in* REFORMING CRIMINAL JUSTICE, *supra* note 6, at 77, 87 (vol. IV).

91. JACOBS, *supra* note 86, at 282.

greatly improved throughout the United States today. I maintain, however, that something significant would be lost if no collateral consequence could be imposed—an outcome that might follow from the adoption of some versions of criminal law skepticism.

CONCLUSION

I have described a loosely knit trend I have labeled "criminal law skepticism" and gestured toward a few penal theorists who I take to defend a version of it. I have departed from conventional philosophical practice by not attempting to reconstruct or respond to their arguments directly. Instead, my strategy has been indirect: I describe the *costs* that are likely to be incurred by their revisionist views. I have identified ten valuable functions performed by existing systems of criminal law—functions that would be difficult or impossible to reproduce if skeptical ideas were put into practice. Each of these functions, I believe, contributes to a *justification* of the criminal law. Thus institutions of criminal law and punishment should not be thought to draw support from a single normative rationale. Here, as elsewhere in moral and legal philosophy, pluralism provides the better justificatory strategy.

Can whatever the criminal law skeptic recommends as a substitute for existing systems of penal justice perform some or all of the foregoing ten functions? It is impossible to say. *Perhaps* some of the features I have listed could be replicated if states were to adopt a radically different system. I re-emphasize that different versions of skepticism have distinct features and implications, and no single argument addresses them all. I have deliberately avoided an assessment of the details of any particular skeptical theory. Even if these details were examined, however, no serious evaluation could be undertaken without specifying what is proposed to *replace* existing systems of penal justice. As every philosopher knows full well, criticizing an idea is much easier than defending a better alternative. Here is where many criminal law skeptics fall short. Without a detailed account of what is alleged to be preferable to our system of penal justice, an examination of a particular strain is necessarily incomplete. But skeptics of any stripe should be challenged to explain why the foregoing ten functions are unimportant or could somehow be preserved. Of course, we should continue to make every effort to make the criminal law more effective and just. Many of the sensible ideas

to improve the status quo involve the creation of a multitude of "doors" to better secure penal justice. Nothing I say here should be interpreted to indicate that I resist these ideas. My point is that these innovations should not be construed to block access to what I believe to be the main corridor of penal justice. Legal philosophers should appreciate the full price that almost certainly would be paid if matters were otherwise.