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## *ARTICLES*

### WHAT IF NOTHING WORKS? ON CRIME LICENSES, RECIDIVISM, AND QUALITY OF LIFE

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*We accept uncritically the “recidivist premium,” which is the notion that habitual offenders are particularly blameworthy and should be punished harshly. In this Article, I question that assumption and propose a radical alternative. Consider the individual punished repeatedly for hopping subway turnstiles. As convictions accumulate, sentences rise—to weeks and ultimately months in jail. At some point, criminality comes to signal something other than the need for punishment. It signals the presence of need. Perhaps, the recidivist was compelled by economic or social circumstances. Perhaps, he was internally compulsive or cognitively impaired. The precise problem matters less than the fact that there was one. No rational actor of freewill would continue to recidivate in the face of such substantial and increasing sentences. My claim is that, in these circumstances, it would be better to just stop punishing.*

*To that end, I offer a counterintuitive proposal, which is to provide “crime licenses” to recidivists. But I limit this prescription model to*

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*only a collection of quality-of-life offenses, like drug possession, vagrancy, and prostitution. My goals are at once narrow and broad. I present the crime license as a modest opportunity to test bolder concepts like legalization, prison abolition, and defunding police. I situate the provocative proposal within a school of social action called “radical pragmatism,” which teaches that radical structural change is achievable, incrementally. I draw upon successful prescription-based, radical-pragmatic reforms, like international addiction-maintenance clinics, where habitual drug users receive free heroin in safe settings. I endorse “harm reduction,” the governance philosophy that grounds those reforms. And I imagine our system reoriented around harm reduction, with crime licenses as one pragmatic, experimental step in that direction.*

INTRODUCTION.....	961
I. QUALITY OF LIFE.....	972
A. Defining Order.....	973
B. Enforcing Order.....	978
II. CRIME-CONTROL GOVERNANCE.....	985
A. Doing Something.....	986
B. Doing Something Slightly Different.....	988
C. What Works?.....	993
III. HARM-REDUCTION GOVERNANCE.....	999
A. A Radically Different Frame.....	1001
B. Harm Reduction and Human Capabilities.....	1010
C. Letting Go.....	1013
D. Doing Something Radically Different.....	1018
IV. CRIME LICENSES.....	1027
A. Which Offenses?.....	1028
B. Screening.....	1033
C. Prepaid Licenses.....	1036
D. Hidden Licenses.....	1041
E. Grassroots Licenses.....	1046
CONCLUSION.....	1049

*“Sometimes nothing can be a real cool hand.”*

—Paul Newman as Luke Jackson, *Cool Hand Luke* (1967)

## INTRODUCTION

Speaking on the subject of prison-based rehabilitation, the influential sociologist, Robert Martinson, famously proclaimed that “nothing works.”<sup>1</sup> Martinson would eventually take a rosier view.<sup>2</sup> But the slogan took on a life of its own. Over the past half century, the mantra that “nothing works” has served as something of an indictment of the entire enterprise of rehabilitation and most other innovative attempts to reshape the criminal-legal system.<sup>3</sup>

I am not so sure that Martinson was wrong, however. Or, rather, he might have been right in a wholly unappreciated way. Consider the proclamation that *nothing works*. My claim is not that no reform works, but that there is a particular form of negative reform—simply put, *doing nothing*—that might work surprisingly well. At least in some contexts, a viable *first* step forward could be for the criminal-legal system to just stop—to stand down, to do nothing, to let go. And, controversially, doing *nothing* could work best for the very offenders our criminal-legal system currently hits hardest—longtime *recidivists*.

My claim, here, is contingent and almost wholly unproven. I do not mean to announce authoritatively: *Doing nothing works!* To the contrary, I merely pose the question of whether doing nothing could work—and when, why, and for whom.<sup>4</sup> More to the point, I provide moral and prudential reasons to doubt our prevailing premises about the “recidivist premium,”<sup>5</sup> and I offer ideas to test my hypothesis naturally.<sup>6</sup> Concretely, I propose *crime licenses*—prescriptions for longtime offenders to engage in conduct otherwise criminally proscribed.<sup>7</sup> But I limit my analysis and

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<sup>1</sup> Robert Martinson, What Works?—Questions and Answers About Prison Reform, Nat'l Affs., Spring 1974, at 22, 48.

<sup>2</sup> Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 Hofstra L. Rev. 243, 244 (1979).

<sup>3</sup> Franklin E. Zimring, The Great American Crime Decline 28, 192–93 (2007) (“Dr. Martinson’s message, ‘Nothing Works,’ became not simply a description of the impacts of correctional programming but a default characterization of most governmental efforts to cope with the crime problem.”).

<sup>4</sup> *Infra* Parts III–IV.

<sup>5</sup> *Infra* Part III; see, e.g., George P. Fletcher, The Recidivist Premium, 1 Crim. Just. Ethics 54, 55 (1982) (using the term “recidivist premium” to describe the sentencing enhancement for repeat offenders); see also Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in the Age of Broken Windows 159–62 (2019) (using the term “additive imperative” for the same concept).

<sup>6</sup> *Infra* Part IV.

<sup>7</sup> *Infra* Part IV.

proposal to one set of crimes only—low-level, quality-of-life offenses, including recreational drug possession and use, panhandling, vagrancy, subway turnstile hopping, unlicensed vending, and prostitution.<sup>8</sup> In sum, my novel contribution is the counterintuitive claim that we could all be made better by immunizing some recidivists against arrest, prosecution, and punishment—and, perhaps more surprisingly, that the circumstances under which crime licenses are likeliest to work are somewhat obvious and predictable.<sup>9</sup>

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Quality-of-life offenses typically involve *malum prohibitum* (or, at most, relatively trivial and largely victimless *malum in se*) conduct over which reasonable minds disagree already.<sup>10</sup> Plausible policy perspectives range from legalization or decriminalization to heavy-handed enforcement. And, at least with respect to marijuana policy, current approaches span the spectrum—not only across jurisdictions but also sometimes within a given jurisdiction longitudinally. New York City, for instance, has observed such a shift. During the Giuliani and first Bloomberg mayoral administrations, authorities concentrated

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<sup>8</sup> *Infra* Part I.

<sup>9</sup> To my knowledge, only one scholar has argued for anything even analogous to the immediate proposal. In a forthcoming article, Christopher Lewis pushes for a recidivist sentencing discount, based on prevailing inequities and criminogenic social conditions. Christopher Lewis, *The Paradox of Recidivism*, 70 *Emory L.J.* (forthcoming 2021). To a degree, Lewis's article and my own are compatible, and we have traded drafts. In the places where our ideas overlap, I cite him accordingly. Our reasoning is often different. And I go substantially further than him in advocating for categorical immunity to commit certain crimes. More importantly, we adopt different conceptual frames for our respective claims, though we both briefly draw on the reasoning of the "capabilities approach." *Infra* notes 254–66 and accompanying text. But I build my reforms principally around theories of harm reduction and radical pragmatism, upon which Lewis does not rely. Finally, my analysis is limited to the special context of quality-of-life enforcement and adjudication, whereas Lewis is concerned principally with felony convictions and traditional sentences of imprisonment.

<sup>10</sup> See Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 *Wake Forest L. Rev.* 211, 279–80 & n.318 (2012) (discussing disagreement over the blameworthiness of *malum prohibitum* conduct); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *Colum. L. Rev.* 1655, 1666–67 n.44 (2010) (discussing offenses that "lack inherent blameworthiness" and noting that "a community is more likely to demand criminal condemnation for a given killer than a given graffiti artist, prostitute, drug possessor, turnstile hopper, or public urinator"); *infra* note 352 and accompanying text (discussing shifting conceptions of disorder).

enforcement energies on the localized practice of full-custodial arrest for marijuana offenses.<sup>11</sup> But, over the past few years, the city has almost abandoned its reliance on arrest (at least for simple possession of marijuana).<sup>12</sup> And, of course, as of this writing, several jurisdictions have legalized recreational marijuana altogether.<sup>13</sup> With respect to a borderline offense like marijuana possession, a licensing regime could serve as a pilot program, enabling a jurisdiction to test run decriminalization, without adopting the policy categorically.

It might seem strange to decriminalize criminal conduct for a finite population only—particularly for only the most noncompliant offenders. But it is not so farfetched. There are even existing models to which we could look for guidance. At the beginning of the twentieth century, American municipalities established addiction-maintenance clinics, where doctors were authorized to prescribe opiates to recreational drug users in safe settings.<sup>14</sup> Indeed, the medical community considered this palliative approach to be the standard of care—at least once other interventions failed. The operating philosophy was harm reduction, not law enforcement.<sup>15</sup> And, though the existing data are limited, it seemed to have worked well until it was abandoned in favor of a criminal war on drugs.<sup>16</sup>

More to the point, internationally, a number of cities and countries have updated the addiction-maintenance model. In Vancouver, Canada, and throughout Switzerland and Portugal, government-run clinics provide patients with free, uncontaminated, and comparatively safe narcotics for use in sterile, medically supervised facilities.<sup>17</sup> The data-keeping is robust, and the results are remarkable.<sup>18</sup> Communities have enjoyed an uptick in quality of life in neighborhoods where illegal drug markets formerly flourished.<sup>19</sup> Overdose deaths have dropped dramatically.<sup>20</sup> And drug-dependent individuals have more readily managed to remain

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<sup>11</sup> *Infra* notes 56–60 and accompanying text (discussing “broken windows” policing).

<sup>12</sup> *Infra* note 136 and accompanying text.

<sup>13</sup> See, e.g., *infra* notes 309–14 and accompanying text (discussing marijuana reform).

<sup>14</sup> Josh Bowers & Daniel Abrahamson, *Kicking the Habit: The Opioid Crisis, America’s Addiction to Punitive Prohibition, and the Promise of Free Heroin*, 80 *Ohio St. L.J.* 787, 794–95 (2019) (discussing historical addiction-maintenance programs).

<sup>15</sup> *Infra* notes 210–12 and accompanying text (describing harm reduction).

<sup>16</sup> *Infra* notes 315–17 and accompanying text.

<sup>17</sup> Bowers & Abrahamson, *supra* note 14, at 797–804.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 804.

<sup>20</sup> *Id.* at 801.

socially integrated—less affected by the most destructive aspects of not only drug abuse but also the criminal-legal war against it.<sup>21</sup>

There is nothing obviously exceptional about drug policy. Just as the contemporary American drug war is counterproductive and even criminogenic, so too other forms of “punitive prohibition” are counterproductive and criminogenic.<sup>22</sup> Isolation and othering produce antisocial behavior. And blame and shame produce isolation and othering. A prescription model, by contrast, holds promise as a problem-solving approach—as *problem-solving crime*, if you will. The starting point is an understanding that “what we did before simply was not working.”<sup>23</sup> The means are grassroots political action, self-help, and a tolerance for offending. And the primary end is harm reduction.

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Normative and instrumental concerns remain, of course. On the one side, there are the conventional law-and-order objections. Why give crime licenses to the very offenders who violate law most frequently—to the purportedly unmanageable recidivists who are (perceived to be) most deserving of punishment? Would crime licenses, in turn, engender resentment and resistance from law-abiding laypeople? Could crime licenses cause popular confusion about the legality of conduct? And what of moral hazard?<sup>24</sup> Take the last objection, for instance. Arguably, habitual offenders would have strong and perverse incentives to commit *more* crimes to earn crime licenses. But there are ways, as I detail, for regulators to design a particular crime license such that recipients remain unaware of it.<sup>25</sup> In any event, the concern could be addressed adequately simply by setting licensing prices high enough. At the right price, no rational offenders would calculate the benefit of a crime license to

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<sup>21</sup> *Id.* at 805.

<sup>22</sup> *Infra* note 141 and accompanying text (discussing criminogenic consequences of quality-of-life policing and adjudication). See Craig Reinerman & Harry G. Levine, Punitive Prohibition in America, *in* *Crack in America: Demon Drugs and Social Justice* 321–33 (Craig Reinerman & Harry G. Levine eds., 1997).

<sup>23</sup> James L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement* 106 (2001).

<sup>24</sup> *Infra* notes 391–405 and accompanying text (responding to objections).

<sup>25</sup> *Infra* notes 412–18 and accompanying text (discussing “acoustic separation” and crime licenses).

outweigh the punishment costs—the cumulative lifetime penalty—that must be *prepaid* to receive it.<sup>26</sup>

Consider, for instance, the seed of this project—a case from my former career as a public defender in Bronx County, New York. I had a client who had amassed well over thirty prior misdemeanor convictions for subway turnstile hopping (or “theft of services”). Theft of services is an A-level misdemeanor, punishable by up to a year in jail.<sup>27</sup> However, offenders rarely face much, if any, time. Initial offenses tend to result in noncriminal dispositions. Subsequent offenses lead to misdemeanor convictions and days or, at most, weeks in jail. The longest sentences—months behind bars—are reserved for those few offenders, like my client, who do not (or cannot) stop. This is the “recidivist premium” in action. Escalation is the rule.

For my client, this translated to a plea offer of nine months. After pushing unsuccessfully for less, I quipped in frustration: “We would all be better off if the city would just give my client a lifetime transit pass.” It was a joke. But it was also true. My client and his community would have been better off, and the system and society would have been better off. Deterrence had not worked. Incapacitation had cost the city tens of thousands of dollars and had imposed serious social consequences. And, unsurprisingly, the city’s infamously harsh jails had failed to do anything to rehabilitate him.<sup>28</sup> More to the point, in order to rehabilitate my client, the system would have had to reckon with what was wrong and how to fix it. The retributive assumptions of the *recidivist premium* dictate that my client was a willing scofflaw or worse—that he was on notice of what the law forbade, and still he persisted.<sup>29</sup> He needed to be taught a lesson, and it was his responsibility to learn from it. But recidivism does not

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<sup>26</sup> *Infra* notes 393–94 and accompanying text (discussing price setting).

<sup>27</sup> N.Y. Penal Law § 165.15(3) (McKinney 2018).

<sup>28</sup> See, e.g., Torture Island’s Final Sentence: Rikers, One of America’s Most Notorious Jails, is to Close, *Economist* (Oct. 26, 2019), <https://www.economist.com/united-states/2019/10/26/rikers-one-of-americas-most-notorious-jails-is-to-close> [<https://perma.cc/PAR8-S84X>] (describing conditions at New York City’s “most notorious jail”). See generally Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, Imprisonment & Reoffending, 38 *Crime & Just.* 115, 116, 121 (2009) (discussing criminogenic effects of incarceration); Don Stemen, The Prison Paradox: More Incarceration Will Not Make Us Safer, *Vera Inst. Just.* 2–3 (July 2017) (same); Benjamin Ewing, Prior Convictions as Moral Opportunities, 46 *Am. J. Crim. L.* 283, 330 (2019) (same).

<sup>29</sup> *Infra* notes 124–34 and accompanying text (discussing rationales for the recidivist premium).

inexorably screen for blameworthiness. At a certain point, it screens for the precise opposite.<sup>30</sup>

Why had legal coercion—in the form of increasingly punitive carceral sticks—failed to cow my client? The least plausible explanation is human agency and corresponding poor choice—that my client elected freely to break the rules. Likelier, he suffered from a pressing constraint on his will—some form of internal compulsion or situational duress. Why was his “crime-resistance capital” so low?<sup>31</sup> Why did he shell out so much (repeated and ever-longer stints in jail) for seemingly so little (free transit rides)? Simply put, at a certain point (reached long before he became my client), his crimes stopped paying. And that is precisely the point. Logically, his particular course of recidivism screened optimally for a crime license.<sup>32</sup> It demonstrated the ineffectiveness and injustice of his personal cycle of crime, capture, and escalating punishment.

To be sure, an optimal screen is not a perfect screen. Even a well-designed crime license would leave room for some games-playing at the margins. But “Blackstone’s Ratio” teaches us that a just system abhors inappropriate penalties more than unwarranted windfalls.<sup>33</sup> And this concern with inappropriate punishment is of particular relevance in the context of quality-of-life policing. Much of the work of many modern police departments consists of state attempts to use stops and arrests for low-level offenses to maintain public order and exert social control over predominately poor and minority populations.<sup>34</sup> These groups disproportionately shoulder the significant costs and very real dangers of

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<sup>30</sup> *Infra* notes 228–31 and accompanying text (discussing recidivism as a screen for socioeconomic deprivation or internal compulsion or irrationality).

<sup>31</sup> Louis Michael Seidman, *Entrapment and the “Free Market” for Crime*, in *Criminal Law Conversations* 493, 499–500 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009); see also *infra* notes 222–27 and accompanying text (discussing luck, freewill, and the “American Dream”).

<sup>32</sup> See *infra* notes 374–90 and accompanying text (discussing optimal screening).

<sup>33</sup> *Infra* notes 407–10 and accompanying text (discussing “Blackstone’s Ratio” and unwarranted windfalls).

<sup>34</sup> See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117, 1119, 1122 (2008) (observing that most criminal court cases are petty nonfelony cases); Alec Karakatsanis, *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System* 39, 59 (2019) (noting that nationally more people are arrested for marijuana offenses than all violent crimes combined); Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* 40–42 tbl.2.1 (1979) (describing study of Connecticut criminal court in which 58% of cases were “crimes against public morality” or “crimes against public order”).



inequitable and coercive policies and practices.<sup>35</sup> It is no coincidence that so many infamous police killings started with efforts to combat perceived low-level disorder and rule-breaking. Officers suspected Eric Garner of selling loose cigarettes without a tax stamp and George Floyd of passing a counterfeit bill.<sup>36</sup> These are the stakes of petty-crime enforcement.

But these tragic incidents (and our current cultural moment) raise the contrary objection that my crime-license proposal would be piddling—*too little, too late*. I am sensitive to the worry. Today, we find ourselves in a moment of movement, with growing consciousness and even modest enthusiasm for radical ideas, like “defunding police” and “abolishing prisons.”<sup>37</sup> So, why am I shying away from big steps now? I am on the record, almost a decade ago, calling for the wholesale decriminalization of *malum prohibitum* conduct.<sup>38</sup> Why not argue for at least as much here? Why settle for the incremental approach? The answer is that it is easy enough to get on a soapbox and demand sweeping structural reform when there is little hope of it happening. But, especially in times like these, when the doors of opportunity pry open, the need grows to lay the appropriate groundwork—to determine what works and what does not and to push to persuade the unpersuaded-but-persuadable.<sup>39</sup> Pragmatism

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<sup>35</sup> *Infra* notes 99–109 and accompanying text; Paul Heaton, Sandra Mayson & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 *Stan. L. Rev.* 711 (2017) (discussing disparate impact and “downstream consequences” of quality-of-life policing, prosecution, and punishment).

<sup>36</sup> See Al Baker, J. David Goodman & Benjamin Mueller, Beyond the Chokehold: The Path to Eric Garner’s Death, *N.Y. Times* (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/6A7S-TRT2>] (“This was not a chance meeting on the street. It was a product of a police strategy to crack down on the sort of disorder that, to the police, Mr. Garner represented.”); see also Josh Bowers, Annoy No Cop, 166 *U. Pa. L. Rev.* 129, 210–11 (2017) (discussing the death of Eric Garner); *Utah v. Strieff*, 136 *S. Ct.* 2056, 2071 (2016) (Sotomayor, J., dissenting) (“They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.”).

<sup>37</sup> See Dorothy E. Roberts, The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism, 133 *Harv. L. Rev.* 1, 7–8 (2019); Paul Butler, Abolition Is Better Than Reform, and It Is Not Dangerous (Aug. 4, 2020) (unpublished manuscript) (on file with author); Karakatsanis, *supra* note 34, at 83 (endorsing “abolition of the police, closing jails and prisons, reparations, new paradigms of restorative justice, and broader economic divestment from punishment”).

<sup>38</sup> Bowers & Robinson, *supra* note 10, at 279–80 n.318; see also Alexandra Natapoff, Misdemeanor Decriminalization, 68 *Vand. L. Rev.* 1055, 1058 (2015) (overviewing rationales for the decriminalization of misdemeanors).

<sup>39</sup> See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 *Harv. L. Rev.* 1331, 1385–86 (1988) (“[U]ntil whites recognize the hegemonic function of racism and turn their efforts toward neutralizing

counsels a measure of caution.<sup>40</sup> Social movements depend upon political will, and political will is shaped by proof of success.<sup>41</sup>

But there is likewise a danger of missing the moment. So, small steps must be taken deliberately, with an appropriate focus on radical change. Roberto Mangabeira Unger sketched an attractive frame for this approach to social action, which he labeled “radical pragmatism”—a style of “political experimentalism” or “existential bootstrapping” that consists of “using the smaller variations that are at hand to produce the bigger variations that do not yet exist.”<sup>42</sup> According to Unger, “it is about changing the context of established arrangement and assumed belief, little by little and step by step, as we go about our business.”<sup>43</sup> He distinguished this form of incrementalism from the incrementalism characteristic of classical American pragmatism—a “shrunk pragmatism” that, per Unger, too often leads only to “standing and waiting” and “singing in our chains.”<sup>44</sup> Instead, the aim is to keep the radical objective always in sight while relying upon “piecemeal, experimental revision” to “shorten the distance” to structural reformation and to define more sharply the appropriate contours of the radical agenda and reformation.<sup>45</sup> In a nutshell:

Society and culture may be so arranged as either to extend or to narrow the distance . . . . Our interest is to narrow this distance . . . . [T]he

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it, African-American people must develop pragmatic political strategies. . . . It is a struggle to create a new status quo through the ideological and political tools that are available . . . maneuvering within and expanding the dominant ideology to embrace the potential for change.”); see also Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *Harv. C.R.-C.L. L. Rev.* 301, 307 (1987) (arguing that structural change is sometimes best achieved incrementally and that “[t]he CLS critique of piecemeal reform is familiar, imperialistic and wrong”).

<sup>40</sup> *Infra* notes 157–64 and accompanying text (discussing classical and radical pragmatism); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 284 (1998) (discussing experimentalism as a means for the “incremental realization” of social goals).

<sup>41</sup> *Infra* notes 432–40 and accompanying text (discussing pragmatic efforts to build political support).

<sup>42</sup> Roberto Mangabeira Unger, *The Self Awakened: Pragmatism Unbound* 8, 43 (2007).

<sup>43</sup> *Id.* at 43; see also Roberto Mangabeira Unger, *The Critical Legal Studies Movement* 110 (1986) (discussing “opportunities for experimental revisions of social life in the direction of the ideals we defend,” pursued “piecemeal rather than only all at once”).

<sup>44</sup> Unger, *supra* note 42, at 1, 6.

<sup>45</sup> *Id.* at 7 (“[O]ur societies and cultures may be so arranged as to facilitate and to organize their own piecemeal, experimental revision. We then shorten the distance between routine moves within a framework and exceptional moves about the framework.”).

primary mode of transformative politics is radical reform, the piecemeal transformation of the structure that may nevertheless become radical in outcome if cumulatively pursued under a certain conception . . . . [W]hat this goal entails is a *high-energy democracy*—a democracy that raises the temperature and hastens the pace of politics and that multiplies occasions for the *creation of counter models of the future in different localities and sectors*.<sup>46</sup>

Today, we have just such a “high-energy democracy,” but we do not quite know what to do with it.<sup>47</sup> We do not know precisely what we want. There is no generally accepted understanding of what it means to, say, defund the police or abolish prisons.<sup>48</sup> Radical activists and sympathetic academics offer a range of prescriptions, often rooted in notions of harm reduction or adjacent theories.<sup>49</sup> Short of categorically closing down institutions, dismantling police forces, or entirely stripping department budgets, these movements need test cases to determine, in the offing, what is practical and appropriate. This is hard work. But, consistent with the virtues of federalism, we may experiment with the “creation of counter models of the future in different localities and sectors” in efforts to discern the shape of ideas in practice.<sup>50</sup>

<sup>46</sup> RSA, *Freedom, Equality, and a Future Political Economy*, YouTube (Dec. 11, 2013), [https://www.youtube.com/watch?v=\\_CBW3aFvxVs&ab](https://www.youtube.com/watch?v=_CBW3aFvxVs&ab) [<https://perma.cc/2DBE-ZV3G>] (emphasis added) (beginning at 4:36 and continuing at 5:02, 8:37, and 16:37).

<sup>47</sup> *Id.* at 16:37.

<sup>48</sup> See Butler, *supra* note 37, at 20 (“[A]bolition remains under-theorized, including on the important question of precisely what it is that its advocates want to abolish . . . . And what will the police do, if ‘locking people up’ is no longer part of their job description?”); Roberts, *supra* note 37, at 6 (“It is hard to pin down what prison abolition means.”).

<sup>49</sup> See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. Rev.* 1156, 1156 (2015) (arguing in favor of “gradual decarceration”); Butler, *supra* note 37, at 20–21 (distinguishing between different conceptions of abolition and different types of abolitionists, including “justice abolitionists” and “instrumental abolitionists”); Roberts, *supra* note 37, at 7–8 (noting that abolition is premised upon the notion that “we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems”); Allegra McLeod, *Envisioning Abolition Democracy*, 132 *Harv. L. Rev.* 1613, 1615 (2019) (“Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live.”).

<sup>50</sup> RSA, *supra* note 46, at 16:48; see also Patrick Sharkey, *Why Do We Need the Police?*, *Wash. Post* (June 12, 2020), <https://www.washingtonpost.com/outlook/2020/06/12/defund-police-violent-crime/> [<https://perma.cc/6UMK-NLBH>] (proposing “a demonstration project that is both more cautious and more radical than the call to defund the police,” and demanding “rigorous testing” of the pilot program); *infra* notes 419–27 and accompanying text (discussing radical experimentation, localism, and the virtues of federalism).

In this vein, my proposal for crime licenses is akin to the now-defunct Capitol Hill Autonomous Zone (“CHAZ”) in Seattle, Washington. The CHAZ was a grassroots experiment in eliminating police from a particular geographic area; my proposal would be an experiment in eliminating enforcement against a particular population. At the time I initially drafted this Article, the future of the CHAZ remained unclear. I predicted that the collective would likely collapse under its own anarchic weight.<sup>51</sup> But, even so, I noted that we could learn from the effort. The alternative, I suggested, was that the CHAZ might thrive and reveal a viable, unorthodox social order. Obviously, that did not happen. But, even so, I imagine that some former participants still perceive the experiment as other than a total failure—that they experienced moments of beauty where others saw only disorder and violence. This is the nature (and virtue) of experimentation. We take risks and then track and learn from substantive and tactical missteps and successes. We anticipate what we can; we prepare for pitfalls; we wish for the best; and we debate, democratically, about our means, ends, and results.<sup>52</sup>

This is not to say that anything goes—just that the radical pragmatist need only formulate a hypothesis, develop plausible means to test it, and establish criteria to evaluate progress toward the preestablished revolutionary goal. For this project, the hypothesis is that sometimes *the best first step to promote a healthy social order is to stop ordering people around*. The means are to transition resources and authority (somewhat) from law enforcement to social services. And the goal is to replace (to the extent possible) entrenched structures of hierarchy with a commitment to individual and collective wellbeing.<sup>53</sup> It would be a mistake, of course, to stop with crime licenses, autonomous zones, or anything else. All such proposals are, at best, fragments of a mosaic—piecemeal reforms

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<sup>51</sup> And it arguably did. After a series of shootings, the mayor issued a dispersal order and the police moved in. Brendan Kiley, Ryan Blethen, Sydney Brownstone & Daniel Beekman, *Seattle Police Clear CHOP Protest Zone*, *Seattle Times* (July 1, 2020), <https://www.seattletimes.com/seattle-news/seattle-police-clearing-chop-protest-zone/> [<https://perma.cc/5P8P-UW4R>]. We can debate whether law enforcement intervention constitutes a collapse or dismantlement. In any event, the CHAZ had its problems and is now no more.

<sup>52</sup> *Infra* notes 196–204 and accompanying text (discussing radical pragmatism).

<sup>53</sup> Sharkey, *supra* note 50 (“The idea that residents and local organizations can play a central role in creating safe and strong communities is not new, and it is not particularly controversial. And yet we have never made the same commitment to these groups that we make to law enforcement . . . We have models available, but we’ve made commitments only to the police and the prison system.”).

designed to close the gap between here and there. Thus, the Movement for Black Lives has not only deemphasized policing but also highlighted the significance of social work.<sup>54</sup> A holistic methodology demands negation and addition—a pull back from *criminal legalism* and a commitment to alternative harm-reduction measures.<sup>55</sup> On this reading, a prescription model would constitute only a part of a broader social movement, consisting of much more than *tolerance for rule breaking*. In fact, a holistic reform agenda would lay bare an ugly truth about the prevailing paradigm's relationship to the very idea of *tolerance*: it is *punitive prohibition* that is the *too-tolerant regime*—too tolerant of fractured lives and fractured communities, of food and housing insecurity, of employment and education inequities, of economic and racial subordination. Ours is a system that tolerates all but tolerance for those who offend the *status quo*.

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This Article proceeds in four parts. In Part I, I examine “broken windows” policing theory and its entrenched assumptions about supposedly appropriate or preordained meanings of disorder and quality of life. I discuss the manner by which legal officials, in fact, use crime-making and discretion to settle upon and coercively impose subjective conceptions of these contested concepts. I then trace New York City's recent history with broken windows policing. I look to the city's experience because it is a paradigmatic example of quality-of-life policing in practice and, more to the point, because data are there. In Part II, I situate quality-of-life policing within the dominant landscape of crime-control governance. And I explain what it means to be a recidivist within that archetype. In Part III, I sketch alternative modes of social organization, oriented principally around harm reduction and related ideas, like forgiveness, human capabilities, autonomy, public health, social solidarity, and human flourishing. I survey positive examples of radical-pragmatic experiments—particularly international and domestic drug reforms. And I compare the results with conventional criminal-legal approaches. In Part IV, I examine the parameters of a defensible crime

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<sup>54</sup> Phillipe Copeland, *Let's Get Free: Social Work and the Movement for Black Lives*, 5 J. Forensic Soc. Work 3 (2016).

<sup>55</sup> *Infra* Sections III.C–D.

license. And I outline three potentially effective designs. I then return to New York City to discuss a grassroots radical-pragmatic experiment already underway. Finally, in the conclusion, I visit the question of whether the upheavals of our current historical moment have made radical-pragmatic structural reform more or less viable.

### I. QUALITY OF LIFE

In 1982, James Q. Wilson and George Kelling penned a groundbreaking *Atlantic Monthly* essay, entitled “Broken Windows: The Police and Neighborhood Safety.”<sup>56</sup> The authors claimed that “disorder and crime are usually inextricably linked.”<sup>57</sup> Starting from that premise, they advocated concentrating enforcement efforts on quality-of-life offenses—what John Jeffries called “street-cleaning” statutes—in efforts to make at-risk neighborhoods more livable and less amenable to disorder as well as the more serious and violent crime that may follow in its wake.<sup>58</sup>

The influence of the essay cannot be overstated. Franklin Zimring called it the most important work of its kind in a half century, sparking a conceptual shift in urban policing.<sup>59</sup> But, from its inception, broken windows relied upon a somewhat flawed assumption—simply put, that “people agree on the extent of the problems they face in their communities . . . [and] appropriate levels of order.”<sup>60</sup> In fact, disorder is (and always has been) at least somewhat in the eye of the beholder. Descriptively and prescriptively, disorder is more a matter of shifting preference than an established and discernible empirical fact or moral truth.

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<sup>56</sup> James Q. Wilson & George L. Kelling, Broken Windows, *Atlantic*, Mar. 1982, at 29.

<sup>57</sup> *Id.* at 31; see also Wesley G. Skogan, Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods 10–11 (1990) (“[W]hatever the link between [disorder and crime] is, it is powerful. . . . [A] neighborhood’s reputation for tolerating disorder invites outside troublemakers. . . . [A] concentration of supposedly ‘victimless’ disorders can soon flood an area with serious, victimizing crime.”).

<sup>58</sup> Wilson & Kelling, *supra* note 56; John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 215 (1985).

<sup>59</sup> Zimring, *supra* note 3, at 35.

<sup>60</sup> Skogan, *supra* note 57, at 9; see also *id.* at 5 (rejecting “the popular view [that] disorder is not immutable, and that it has reflected ethnic and class cleavages in society”); *id.* at 52 (rejecting the notion that “conventional definitions of order merely reflect the distribution of white, middle-class views about public deportment”).

*A. Defining Order*

Legal rules that regulate disorder are no different than the legal rules that describe most all peripheral offenses.<sup>61</sup> As Issa Kohler-Hausmann concluded in her seminal and exhaustive treatment of misdemeanor enforcement in New York City: “No philosophers or public intellectuals have, to my knowledge, offered deep rigorous thinking about what justice demands in response to these types of low-level crimes.”<sup>62</sup> This is not to say that all perceptions of social harm are relative. To the contrary, some social scientists—dubbed “punishment naturalists”—have discovered remarkable consistency across communities and cultures in perceptions of the comparative blameworthiness of “core” *mala in se* crimes.<sup>63</sup> But such uniformity largely evaporates as severity decreases. It becomes more difficult, if not impossible, to discern the badness of less bad behavior—if it is bad in the first instance. There is, in other words, no natural order to disorder.

In fact, some “urban utopians” have even prized purported disorder, which they claim provides “deliverance from the saddling traditions and burdensome expectations of town life.”<sup>64</sup> In this spirit, those with a “positive taste for disorder” have relocated to cities for centuries, often paying premiums for smaller and shabbier spaces.<sup>65</sup> And authors and artists—from Tom Waits, to John Steinbeck, to Supreme Court Justice

<sup>61</sup> Donald Braman, Dan M. Kahan & David A. Hoffman, Some Realism About Punishment Naturalism, 77 U. Chi. L. Rev. 1531, 1557 (2010) (discussing offenses on the “periphery of crime . . . outside of the ‘core’ of wrongdoing”).

<sup>62</sup> Kohler-Hausmann, *supra* note 5, at 265.

<sup>63</sup> Braman, Kahan & Hoffman, *supra* note 61, at 1535 (“Punishment Naturalists . . . perceive not conflict but consensus, not cultural heterogeneity but biological uniformity. As they read the evidence . . . ‘human intuitions of justice about core wrongdoing . . . are deep, predictable, and widely shared.’” (quoting Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 Minn. L. Rev. 1829, 1892 (2007))). See generally Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law*, at xv (1995) (reporting studies of community intuitions about culpability).

<sup>64</sup> Skogan, *supra* note 57, at 7 (quoting Harvey Cox, *The Secular City: Secularization and Urbanization in Theological Perspective* 43 (1966)); see also Richard Sennett, *The Uses of Disorder: Personal Identity & City Life*, at xvi (1970) (arguing that, as compared with the “self-imposed tyranny” and “safe and secure slavery” of conventional life, “dense, disorderly, overwhelming cities can become the tools to teach men to live with this new freedom”). See generally Jane Jacobs, *The Death and Life of Great American Cities* 15 (1961) (criticizing as paternalistic the efforts of urban planners to enforce their own notions of order apart from the needs of city dwellers).

<sup>65</sup> Skogan, *supra* note 57, at 5 (“[U]rban utopians argue that city dwellers have a positive *taste* for disorder, and that it is an aspect of life worth celebrating.”).

William O. Douglas—have romanticized the very individuals that law and traditional society consider derelicts.<sup>66</sup> For the romantics, a more freewheeling lifestyle promotes certain human virtues—like self-expression, autonomy, and inclusivity.<sup>67</sup> By comparison, the mainstream prefers stability and predictability.

I do not mean to question the status quo perspective that the purportedly disordered existence is inferior—foolish, if chosen; unfortunate, if not. It is not lost on me, after all, that the free spirits are a more privileged lot—predominantly white men who lionize societal exit, even as they enjoy the means to come and go as they please. Henry David Thoreau may have spent two years on Walden Pond, but his mother did his laundry.<sup>68</sup> The reality for many disadvantaged inner-city residents is starkly different. They are often too concerned with safety and subsistence to indulge bohemian “lives of high spirits rather than hushed, suffocating silence.”<sup>69</sup> Look no further than Justice Thomas’s powerful dissent in *Chicago v. Morales*, where he channeled the anxieties of the “good, decent people who must struggle to overcome their desperate situation,

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<sup>66</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (Douglas, J.) (“If some carefree type of fellow is satisfied to work just so much, and no more, as will pay for one square meal, some wine, and a flophouse daily, but a court thinks this kind of living subhuman, the fellow can be forced to raise his sights or go to jail as a vagrant.” (quoting Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 *Crim. L. Bull.* 205, 226 (1967))); see also Tom Waits, *Heart of a Saturday Night*, *on Heart of a Saturday Night* (Asylum Records 1974); John Steinbeck, *Cannery Row* (1945); Nelson Algren, *The Texas Stories of Nelson Algren* (1995); W.H. Davies, *The Autobiography of a Super-Tramp* (1908). Significantly, there is an entire popular music genre—punk—that fetishizes the disordered life. The Talking Heads, *Don’t Worry About the Government*, *on Talking Heads: 77* (Sire Records 1977) (sarcastically: “My building has every convenience/It’s gonna make life easy for me/It’s gonna be easy to get things done.”); Iggy Pop, *Lust for Life*, *on Lust for Life* (RCA Records 1977) (“Here comes Johnny Yen again/With the liquor and drugs and a flesh machine/He’s gonna do another striptease.”). See generally Michael Azerrad, *Our Band Could Be Your Life: Scenes from the American Indie Underground 1981–1991* (2001) (examining hardcore punk movement).

<sup>67</sup> Justice Douglas once recast perceived vagrancy in just such a way: “These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.” *Papachristou*, 405 U.S. at 164.

<sup>68</sup> Henry David Thoreau, *Walden* (1854); Donovan Hohn, *Everybody Hates Henry*, *New Republic* (Oct. 21, 2015), <https://newrepublic.com/article/123162/everybody-hates-henry-david-thoreau> [https://perma.cc/ZYR6-G3LQ] (discussing Thoreau’s laundry).

<sup>69</sup> *Papachristou*, 405 U.S. at 164.



against all odds, in order to raise their families, earn a living, and remain good citizens.”<sup>70</sup> Thomas was sensitive to the tension between the luxury of one man’s liberty and the terror of another’s insecurity. But it does not follow that the state must command a certain quality of life and enforce it at the business end of a bayonet.<sup>71</sup> A state may strive instead to provide all people with the capabilities to create the lives they want to lead, where they want to lead them.<sup>72</sup> To put a finer point on it, the best way to fix a broken window may be to replace the pane, not capture and convict a culprit. This is all to say that the logic of criminal-legal control operates on the false assumption of a binary choice—chaos or the police state.

To this, a positivist could reply that what I call a “police state” is just law in action—albeit in a highly coercive form. This is how criminal law works. It takes sides.<sup>73</sup> Disorder is, on this reading, whatever codes call it, and, thereafter, people are obliged to take that definition as it comes.<sup>74</sup> This position is coherent and even descriptively accurate (depending, to a degree, on the legitimacy of the lawgiver and enforcer and the corresponding system of “command and control”).<sup>75</sup> But it sidesteps a deeper set of substantive questions directly relevant here: What types of

<sup>70</sup> *City of Chicago v. Morales*, 527 U.S. 41, 115 (1999) (Thomas, J., dissenting).

<sup>71</sup> Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 37 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28600, 2021) (finding, contrary to conventional wisdom, that “not prosecuting marginal nonviolent misdemeanor defendants substantially reduces their subsequent criminal justice contact”); Mychal Denzel Smith, *Incremental Change Is a Moral Failure: Mere Reform Won’t Fix Policing*, *Atlantic* (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/police-reform-is-not-enough/614176> [<https://perma.cc/XR69-RWH5>] (rejecting the proposition that “in order to stop the violence of the hood you must impose the violence of the state . . . to protect the people from themselves, to enforce the discipline their culture lacks”).

<sup>72</sup> See Tracey L. Meares & Tom R. Tyler, *The First Step Is Figuring out What Police Are for*, *Atlantic* (June 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/first-step-figuring-out-what-police-are/612793/> [<https://perma.cc/5W23-TKEE>] (endorsing a “new focus [that] should include state support for activities that may not be called ‘policing,’ but that every citizen of this country deserves”); Smith, *supra* note 71 (“The city could put more trash cans here, if keeping this neighborhood . . . clean . . . were important.”); *infra* notes 255–56 and accompanying text (discussing the literature on the “capabilities approach”).

<sup>73</sup> Bowers, *supra* note 36, at 131 (“The state manages my existence in public spaces. It picks sides.”).

<sup>74</sup> See generally Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) (providing a positivist understanding of how rules and sanctions compel behavior).

<sup>75</sup> Jeremy Waldron, *The Concept and the Rule of Law*, 43 *Ga. L. Rev.* 1, 13–14 (2008) (“Not every system of command and control that calls itself a legal system *is* a legal system. We need to scrutinize it a little—to see how it works—before we bestow . . . the appellation [of] ‘law.’”).

behaviors should a state make subjects of criminal-legal coercion? Under what circumstances? Positive law does not begin to respond to these inquiries. It tells us only that we are “vulnerable to coercive sanctions” if we act contrary to it.<sup>76</sup> A. John Simmons has labeled this a “positional duty,” which we should not conflate with a moral duty:

[W]hile the President of the United States, the manager of the Yankees, and the dishwasher at Joe’s all have positional duties, the Spanish Inquisitors, a leader of the Gestapo, and a member of the Ku Klux Klan all have positional duties in precisely the same sense. The positional duty to help exterminate the Jews and the positional duty to turn in the Yankee lineup card are on a par, as far as the relation between the act and the position is concerned.<sup>77</sup>

A positional duty cannot tell us much, if anything, about contested conceptions of the *good life* or the kinds of disorder that may threaten it.<sup>78</sup> It cannot instruct us as to how we ought to structure an existence, or when and whether it is *appropriate* for the state to compel that particular structure, pursuant to its own particular conception of disputed normative notions of the right order.<sup>79</sup> As Richard Rorty observed:

[O]ne is not going to find a set of necessary and sufficient conditions for goodness which will enable one to find the Good Life, resolve moral dilemmas, grade apples, or whatever. There are too many different sorts of interests to answer to, too many kinds of things to commend and too many different reasons for commending them.<sup>80</sup>

To the extent order-maintenance offenses express anything beyond mere commands to obey, it is often just a message about who is in power, who is culturally dominant, whose tastes count, whose notions of harm control. This is, of course, the central thesis of the critical legal studies

<sup>76</sup> A. John Simmons, *Moral Principles and Political Obligations* 17 (1979).

<sup>77</sup> *Id.* at 17–18; see also *id.* at 23 (“[T]he fact that I have a ‘legal obligation’ or a ‘duty of citizenship’ will be a morally neutral fact; nothing will follow from this fact about any moral constraints on my actions. . . . If I am morally bound to obey the law or to be a good citizen, the ground of this bond will be independent of the legal and political institutions in question . . .”).

<sup>78</sup> Lewis, *supra* note 9 (manuscript at 38–39) (“[T]here is no clear consensus on the true nature of wellbeing. And there may be good reasons for governments and government officials to remain neutral between competing conceptions of the good.”).

<sup>79</sup> Cf. *infra* notes 287–93 and accompanying text (discussing the importance of individualization to evaluate demands of justice, mercy, and “normative guilt and innocence”).

<sup>80</sup> Richard Rorty, *Philosophy and the Mirror of Nature* 307 (1979).

movement—that the powerful use law in a political manner to pick winners and subjugate losers.<sup>81</sup> It is through this lens that we can ask and try to answer questions why powder cocaine is punished less harshly than crack; why deadly (and noxious) smoking tobacco is legal; why harmful sugar is almost wholly unregulated; why wage theft and other forms of rapacious capitalism are largely tolerated; why day trading is a legitimate profession; why prostitution and gambling typically are not. The takeaway is not that regressive taxation is more socially costly than, say, aggressive panhandling, blocking street or pedestrian traffic, or damaging city property by tearing down confederate statues.<sup>82</sup> The takeaway is only that some forms of conduct that potentially produce disorder or diminish qualities of life are conventional subjects of criminal-legal punishment; others are not.<sup>83</sup> Even if the “harm principle” is fairly implicated by a given type of borderline behavior, this tells us only that the conduct is fair game—that the state may (or may not) decide to label it impermissible disorder and prohibit it punitively.<sup>84</sup> Even Wesley Skogan, a policing proponent, appreciated the point: “The only real difference between crime and many [noncriminal] disorders is that politicians have not enacted some widely agreed upon values into law.”<sup>85</sup>

<sup>81</sup> See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1442 (2016). See generally Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy* (1983) (arguing that a legal education reproduces existing social hierarchies by inculcating law students into particular political attitudes and by preparing them to participate in the hierarchical role of the lawyer).

<sup>82</sup> The satirical newspaper, *The Onion*, recently published a piece poking fun at just such a dichotomy. *Protestors Criticized for Looting Businesses Without Forming Private Equity Firm First*, *Onion* (May 28, 2020), <https://www.theonion.com/protestors-criticized-for-looting-businesses-without-fo-1843735351> [<https://perma.cc/6P25-G4LR>]. For a more sophisticated evaluation of violent political protests, see generally Avia Pasternak, *Political Rioting: A Moral Assessment*, 46 *Phil. & Pub. Affs.* 384 (2019) (arguing that political riots can take permissible forms even in democratic states).

<sup>83</sup> Karakatsanis, *supra* note 34, at 32 (“[O]ne cannot typically be prosecuted for [racial discrimination or sexual harassment], even though it might cause a lot of harm. The political system has chosen to pursue these other important goals without resort to the criminal system.”); Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* 17 (2001) (“Everyday forms of tax evasion . . . are also disorderly. Insider trading, insurance misrepresentation, police corruption, and police brutality: these are all disorderly. Yet they figure nowhere in the theory of order-maintenance policing.”).

<sup>84</sup> Harcourt, *supra* note 83, at 210–11 (“The harm principle . . . does not address the relative importance of harms. . . [W]e inevitably must look beyond the harm principle. . . . We must access larger debates in ethics, law, and politics—debates about power, autonomy, identity, human flourishing, equality, freedom. . . .”).

<sup>85</sup> Skogan, *supra* note 57, at 5; see also Karakatsanis, *supra* note 34, at 26 (“[P]olitical power influences what we decide to criminalize. . . . [O]ur criminal laws are not an objective

*B. Enforcing Order*

In any event, the law as written does not define conclusively the practical form of punitively prohibited disorder. To the contrary, legislators enact more petty public-order offenses than frontline enforcers could or would ever see fit to enforce categorically.<sup>86</sup> As Bill Stuntz observed, “the less serious the crime, the more likely it is that the legislature has authorized punishments no one really wishes to impose.”<sup>87</sup> In such circumstances, code law describes the bare outline only; police and prosecutors fill in the details.

This is no new phenomenon, even if the methodology has changed in the past half century. Previously, law enforcers relied upon vague vagrancy statutes to compel a particular perspective of appropriate public order.<sup>88</sup> Now, statutes are comparatively precise, but public-order offenses are so plentiful—and so widely flouted—that police and prosecutors retain ample discretion to select from “menu[s].”<sup>89</sup> This is part and parcel of what Stuntz dubbed “the pathological politics of

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mechanism for increasing overall well-being by efficiently reducing harmful behavior. . . . [T]hey reflect our demons, past and present.”)

<sup>86</sup> Feeley, *supra* note 34, at 23–25 (“Decisions made under a strict application of rules often lead to outcomes that few find palatable.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 519 (2001) (“Broad criminal law . . . means that the law as enforced will differ from the law on the books.”).

<sup>87</sup> William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2563 (2004); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1531 (1981) (discussing prevalence of discretion “when dealing with minor offenses”); Wayne A. Logan, *Florence v. Board of Chosen Freeholders: Police Power Takes a More Intrusive Turn*, 46 Akron L. Rev. 413, 431 (2013) (“*Florence*, when combined with other Supreme Court decisions[,] afford[s] executive actors expansive discretionary power in their handling of low-level offenders.”).

<sup>88</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (Douglas, J.) (observing that, under open-ended vagrancy laws, “poor people, nonconformists, dissenters, [and] idlers . . . may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts”); Kohler-Hausmann, *supra* note 5, at 260 (“People are no longer arrested for status offenses such as being a vagrant, drunk, prostitute, drug addict, or unemployed. But for some people, the iterative logic of the [contemporary misdemeanor] model has functional similarities to the way vagrancy statutes were enforced in prior eras.”). See generally Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, at 1–4 (2016) (discussing how vagrancy laws “represented an approach to policing, [and] a vision of society”).

<sup>89</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 932–33 (2006) (“[C]riminal laws do not create binding obligations but rather a menu of options for [law-enforcement] insiders.”); see also Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* 3 (1981) (noting that legal officials “choose[] from a mass of overlapping and redundant criminal statutes”).

criminal law”—an incentive structure that leads lawmakers to delegate policymaking authority to perceived experts on the ground.<sup>90</sup> The relevant design of state-decreed impermissible disorder reveals itself only over time and in the streets, as a product of practice.

Take New York City, for example. From the start, the city pursued an aggressive version of broken windows, cracking down on “panhandling, squeegee cleaners, street prostitution, . . . public drunkenness, reckless bicyclists, and graffiti,” in an expressed effort “to undercut the ground on which more serious crimes seem possible and even permissible.”<sup>91</sup> The architect was William J. Bratton, a devotee of broken windows theory, whom Mayor David Dinkins appointed head of the transit police in 1990. Bratton’s officers swept subway platforms, arresting “ten or twenty [turnstile] jumpers at a time.”<sup>92</sup> Impressed with the results, the city’s subsequent mayor, Rudy Giuliani, promoted Bratton to Police Commissioner.<sup>93</sup> Bratton soon replicated his hardline campaign aboveground, adopting policies that encouraged arrests over summons and launching enforcement offensives in public parks and public-housing units.<sup>94</sup> Arrest rates skyrocketed. Sub-felony marijuana arrests, for

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<sup>90</sup> Stuntz, *supra* note 86, at 519 (“Because criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators. Broad criminal law thus means that the law as enforced will differ from the law on the books.”); see also Kenneth Culp Davis, *Discretionary Justice* 87 (1969) (“[L]egislation has long been written in reliance on the expectation that law enforcement officers will correct its excesses through administration.”).

<sup>91</sup> New York Police Department, *Police Strategy No. 5: Reclaiming the Public Spaces of New York 4–5* (1994); see also New York City Police Department, *Tackling Crime, Disorder, and Fear: A New Policing Model 2* (2015) (defining quality-of-life policing as “enforcing a variety of laws against street drug dealing, public drinking, public marijuana smoking, open-air prostitution, and other minor offenses”); Harcourt, *supra* note 83, at 47–49; Kohler-Hausmann, *supra* note 5, at 25. In addition to these offenses, the Inspector General of the New York Police Department has included the following: drug offenses, tobacco and alcohol offenses, offenses involving property damage, trespass, lewdness, disorderly conduct, unlicensed vending, jaywalking, loitering, urinating in public, spitting, resisting arrest, and petty theft, including turnstile hopping. Mark G. Peters & Philip K. Eure, *New York City Department of Investigation, Office of the Inspector General for the NYPD, An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010–2015*, at 13–14, 81–82 (June 22, 2016). But, as I indicate, the relevant category of quality-of-life offenses consists of just whichever plausible examples of such offenses the department chooses to enforce.

<sup>92</sup> Harcourt, *supra* note 83, at 48, 252 (describing “an aggressive policy of misdemeanor arrests in the subways,” relying upon a “Bust Bus . . . retrofitted . . . into an arrest-processing center” (quoting William Bratton, *Turnaround 155* (1998))).

<sup>93</sup> Alison Mitchell, *Giuliani Appoints Bostonian to Run New York’s Police*, *N.Y. Times*, Dec. 3, 1993, at A1, B4.

<sup>94</sup> New York Police Department, *Police Strategy No. 5*, *supra* note 91, at 7.

instance, climbed from fewer than 5,000 in 1980 to a high of over 60,000 in 2000—a rise in rate from 7.5% to 27.3% of *all* misdemeanor arrests.<sup>95</sup> Even more astonishing, turnstile hops (and other forms of theft of service) rose from 1.9% in 1980 to 23.8% of arrests in 1994.<sup>96</sup> And the rate of trespass arrests more than doubled from 3.6% of all arrests in 1980 to a high of 8.3% in 2008.<sup>97</sup> Overall, misdemeanor arrests jumped almost fourfold from 1980 to a peak in 2010—a year in which law enforcement effected roughly a quarter million misdemeanor arrests across the city.<sup>98</sup>

Critics have dubbed the city’s approach “zero tolerance,”<sup>99</sup> a characterization Bratton has long resisted, insisting instead that his

<sup>95</sup> Peters & Eure, *supra* note 91, at 47–49; Meredith Patten et al., *Misdemeanor Just. Project, Trends in Misdemeanor Arrests in New York, 1980 to 2017*, at 15 (2018).

<sup>96</sup> Patten et al., *supra* note 95, at 46.

<sup>97</sup> *Id.* at 49; William J. Bratton, N.Y. Police Dep’t, *Broken Windows and Quality-of-Life Policing in New York City* 18 (2015) (noting that, by 2009, “officers were making more than 20,000 arrests per year for criminal trespass”). The city’s trespass policies and practices demand special attention as a particularly noxious form of social control of underprivileged people. Under a policy titled, alternatively, the “Clean Halls Program” or the “Trespass Affidavit Program,” officers would stake out public housing and some predominantly low-income private buildings, relying on often obsolete tenant rosters to round up the “usual suspects” who could not persuasively offer lawful reasons for their presence. See NYCLU *Posts Notice of Ligon Settlement, N.Y.C. Liberties Union*, <https://www.nyclu.org/en/cleanhalls> [<https://perma.cc/U5NF-H6KR>] (last visited Feb. 14, 2021) (describing the *Ligon v. City of New York* settlement agreement, which changed NYPD policies related to the Trespass Affidavit Program); see also Bowers, *supra* note 34, at 1124–32 (discussing biases in arrest, charge, and trial that lead police and prosecutors to focus inordinately on the “usual suspects”); Josh Bowers, *Response, The Unusual Man in the Usual Place*, 157 U. Pa. L. Rev. PENNumbra 260, 262 (2009) (discussing “usual suspects” policing); Bratton, *supra* note 97, at 18 (“A significant element of quality-of-life policing . . . entailed confronting unauthorized people . . . The Department increased its presence in the buildings through what is known as vertical patrols, or top-to-bottom walkthroughs of the structures.”). In my experience, I represented dozens of legally innocent defendants arrested pursuant to this policy. *Infra* notes 172–81 and accompanying text (discussing innocence in petty cases, including trespass).

<sup>98</sup> The figures vary a bit but all fall roughly in this range. Patten et al., *supra* note 95, at 20 (“In New York City, there were 64,745 misdemeanor arrests in 1980. This number increased to 247,496 in 2010, followed by a decrease to 155,798 in 2017.”); Bratton, *supra* note 97, at 12 (providing a figure of 292,219); see also Kohler-Hausmann, *supra* note 5, at 45 fig.1.5 (tracking misdemeanor arrests over twenty-five-year period from 1990–2015, and showing peak in 2010).

<sup>99</sup> See, e.g., Harcourt, *supra* note 83, at 50, 252 n.3 (“This is not an exercise in police discretion . . . It was about sweeps.”); Tim Newburn & Trevor Jones, *Symbolizing Crime Control: Reflections on Zero Tolerance*, 11 *Theoretical Criminology* 221, 226 (2007) (“Although . . . the main players in the New York policing story distanced themselves from the term Zero Tolerance, it became inextricably associated with the policing approaches developed under [Police Commissioner] Bill Bratton.”).

policies were “synonymous with discretion.”<sup>100</sup> In a literal sense, Bratton was right. Even though the NYPD rarely opted for less-intrusive tactics and creative strategies, the department empowered its officers to choose between offenses, offenders, and neighborhoods.<sup>101</sup> It is telling that Bratton provided his force with “a catalog of ‘enforcement options’”<sup>102</sup> but never articulated a concrete definition of impermissible disorder, beyond empty refrains about “quality of life crimes . . . [that] victimiz[e] . . . the city psyche.”<sup>103</sup> Flexibility was precisely the point—the flexibility to define the shape of impermissible disorder, to decide whom to arrest for what.

This amounts to a type of discretion that feels a lot like zero tolerance to those caught in the crosshairs. And the target populations were predictable.<sup>104</sup> Between 1990 and 2010, the city’s misdemeanor arrest rate

<sup>100</sup> Bratton, *supra* note 97, at 3.

<sup>101</sup> To be sure, the NYPD still found ways to be creative, but principally in finding novel means to arrest. Thus, in *Betancourt v. Bloomberg*, the NYPD innovated by arresting a homeless man using a penal ordinance intended to prohibit people from abandoning property on city streets. 448 F.3d 547, 549 (2d Cir. 2006) (rejecting vagueness challenge to ordinance); see also *id.* at 559 (Calabresi, J., dissenting) (“The fact that a law against leaving . . . [inter alia] ‘movable property’ in a public place . . . was listed, by the police department, as an ‘enforcement option’ to target seemingly unrelated crimes . . . is evidence of that very unfettered discretion that causes vague texts to give rise to constitutional problems.”).

<sup>102</sup> *Id.* at 559 (Calabresi, J., dissenting) (“[T]he NYPD issued a catalog of ‘enforcement options’ to effectuate then-Mayor Rudolph Giuliani’s ‘Quality of Life’ initiatives. This type of ‘guidance’ is anything but comforting.”).

<sup>103</sup> Kohler-Hausmann, *supra* note 5, at 26–27 (quoting Interview by Issa Kohler-Hausmann with William J. Bratton, New York City Police Commissioner (July 21, 2013)); see also Peters & Eure, *supra* note 91, at 9 n.19 (“Based on interviews with NYPD officials, NYPD does not have a single official definition for what it considers a ‘quality of life offense.’”).

<sup>104</sup> Jeffrey Rosen, *Excessive Force*, *New Republic* (Apr. 10, 2000), <https://newrepublic.com/article/74124/excessive-force> [<https://perma.cc/RF8H-F5NS>] (“[P]olice stop, frisk, and arrest vast numbers of young black and Hispanic men for minor offenses, in the hope that turnstile jumpers and pot smokers may also be guilty of more serious offenses.”); Jeffrey Fagan, *Race, Legitimacy, and Criminal Law*, 4 *Souls* 69, 70 (2002) (“Under the recent policies of the New York City Police Department, aggressive stops and searches have been disproportionately aimed at nonwhite citizens, far outpacing their actual involvement in crime.”); Jeffrey A. Fagan, Amanda Geller, Garth Davies & Valerie West, *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in *Race, Ethnicity, and Policing: New and Essential Readings* 309, 311, 323–25, 331–32 (Stephen K. Rice & Michael D. White eds., 2010) (finding that broken windows enforcement is concentrated in majority-minority neighborhoods); Reed Collins, Note, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 *Geo. J. on Poverty L. & Pol’y* 419, 426 (2007) (“When police departments do adopt aggressive arrest policies to combat disorder, . . . the group[s] most affected by those strategies . . . [are] ‘both African Americans and the poor.’”); Devon

rose for Black<sup>105</sup> men from 4,539 to 9,517 individuals per 100,000—a rate of rise seven times that for white men.<sup>106</sup> For *young* Black men, the rate of arrest was even higher—in some years, approaching 30% of those aged sixteen to twenty-four.<sup>107</sup> And, even after controlling for crime rate, minority neighborhoods witnessed higher levels of quality-of-life enforcement than most other neighborhoods.<sup>108</sup> One slight exception is the fact that the NYPD also ramped up stops, frisks, and arrests in a collection of heavily trafficked affluent neighborhoods, like Midtown Manhattan.<sup>109</sup> A plausible explanation is that, in these areas, the department was pursuing two objectives at once: controlling people “out of place” and securing privileged classes.<sup>110</sup>

At a minimum, this seemed to be the citizenry’s understanding. As social scientists have found repeatedly, minority groups perceived bias

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W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479, 1486 (2016) (“[O]ur perception of disorder is racialized . . . [A] police officer is more likely to view three black teenagers on a street corner as a sign of disorder than he is to so view three white teenagers.”).

<sup>105</sup> Mike Laws, *Why We Capitalize ‘Black’ (and Not ‘white’)*, *Colum. Journalism Rev.* (June 16, 2020), <https://www.cjr.org/analysis/capital-b-black-styleguide.php> [<https://perma.cc/5Z7H-CQT8>] (“For many people, *Black* reflects a shared sense of identity and community. White carries a different set of meanings; capitalizing the word in this context risks following the lead of white supremacists.”).

<sup>106</sup> Patten et al., *supra* note 95, at 14, 76; Kohler-Hausmann, *supra* note 5, at 51 fig.1.10 (tracking misdemeanor arrests by race and ethnicity from 1990–2015); cf. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (detailing more than 4.4 million stops over an eight-year period, overwhelmingly of people of color, with figures approaching 90% certain years). This is consistent with racial disparities in quality-of-life policing nationally. Harcourt, *supra* note 83, at 173 tbl.6.4 (finding that, across large American cities, police arrested Black people disproportionately to white people for every category of public-order misdemeanor).

<sup>107</sup> Patten et al., *supra* note 95, at 14–15.

<sup>108</sup> Peters & Eure, *supra* note 91, at 41, 43.

<sup>109</sup> *Id.* at 16.

<sup>110</sup> On the intersection between gentrification and racialized order-maintenance policing, see Harold Stolper, *New Neighbors and the Over-Policing of Communities of Color*, *Cmty. Serv. Soc’y* (Jan. 6, 2019), <https://www.cssny.org/news/entry/New-Neighbors> [<https://perma.cc/89PJ-B89Y>] (“The largest increases in NYPD-referred complaints occurred in communities of color with large influxes of white residents accompanied by new housing development.”); cf. Goluboff, *supra* note 88, at 234–35 (discussing use of vagrancy laws to control people “out of place”); Carbado, *supra* note 104, at 1492 (describing people of color who are “presumptively ‘out of place’ and therefore presumptively suspicious because of the racial geography”). See generally Robert J. Sampson, *Great American City: Chicago and the Enduring Neighborhood Effect*, at ix (2012) (discussing the “powerful effects of ecologically concentrated disadvantage on individual outcomes as well as rates of behavior across neighborhoods”).



and illegitimacy in New York City’s quality-of-life policing patterns and practices.<sup>111</sup> By comparison, many whites were left unmolested and felt unaffected. Consider, in this vein, the viral video in 2020 of a white woman calling police on a Black birdwatcher who had objected to her failure to comply with Central Park’s dog-leash laws. She plausibly concluded that the NYPD was, in her words, a personal “protection agency” to be summoned against Black men who disturbed her quality of life—even as she was the one who had broken the written rules.<sup>112</sup> She *appreciated* (in two senses of the word) her relative immunity from offenses that police had applied principally against others. To her thinking, the Black birdwatcher’s perceived impertinence was the genuine threat to social order.

Of course, there is nothing new to racially skewed and repressive policing practices. Just as Michelle Alexander has linked mass incarceration to Jim Crow oppression, the lineage of order-maintenance policing traces back to efforts to socially control freed former slaves during and after Reconstruction.<sup>113</sup> Indeed, some commentators have identified the origins of modern policing in antebellum slave patrols and, before that, the English “Watchmen” who sought to preserve structures of caste and class during the breakup of feudal states in the late medieval age.<sup>114</sup> Nor is it novel for entitled white elites to weaponize state force

<sup>111</sup> Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk As a Program, Not an Incident*, 82 U. Chi. L. Rev. 159, 175 (2015) (“The fact that racial minorities in cities disproportionately encounter police in both constitutional and unconstitutional contexts fuels [their] perceptions of the illegitimacy of the police.”); Bowers & Robinson, *supra* note 10, at 246–52 (examining popular perceptions of order-maintenance policing); Rod K. Brunson, “Police Don’t Like Black People”: African-American Young Men’s Accumulated Police Experiences, 6 Criminology & Pub. Pol’y 71, 85 (2007) (finding that minority members of “distressed neighborhood[s]” harbor expectations of disrespectful treatment by police officers). Black musicians have described their experiences firsthand. See, e.g., Brand Nubian, *Probable Cause*, on Foundation (Arista Records 1998) (“Couldn’t believe it when he took me in/Threw me and my man up in the van, a seven-hour stand/ . . . Now Giuliani wanna talk about the ‘quality of life’/Think he got the right to follow me at night/ . . . Up in central booking . . . people looking.”).

<sup>112</sup> Aya Gruber, *Why Amy Cooper Felt the Police Were Her Personal “Protection Agency,”* Slate (May 27, 2020), <https://slate.com/news-and-politics/2020/05/amy-cooper-white-women-policing.html> [<https://perma.cc/9595-KDCJ>].

<sup>113</sup> Skogan, *supra* note 57, at 6 (“After the Civil War, police focused their attention on minor offenses against public order. This led to skyrocketing arrests for public drinking, vagrancy, suspicion, and loitering.”); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 13 (2010).

<sup>114</sup> *City of Chicago v. Morales*, 527 U.S. 41, 54 n.20 (1999) (“[M]any American vagrancy laws were patterned on these ‘Elizabethan poor laws.’ . . . In addition, vagrancy laws were

against people of color and economic underclasses. The murder of Emmett Till, the Tulsa Race Massacre, and the wrongful arrests and subsequent convictions of the “Scottsboro Boys” were all triggered by false claims of imagined inappropriate interactions between Black teens and white women.<sup>115</sup> Before social media began naming and shaming “Karen” and “Ken”—pseudonyms for whites who keep tabs on people of color—there were other prototypes, like “Miss Ann” and “Mister Charlie,” who also saw fit to mind Black bodies for signs of supposed slip up.<sup>116</sup>

Against this backdrop, the Central Park dogwalker’s condescension and disdain were overdetermined. Nevertheless, contemporary order-maintenance enforcement has done its part to contribute to the problem. It has reinforced the prevailing, pernicious message that only certain kinds of potentially harmful conduct count as prohibited disorder and punishable threats to the quality of life—and, even then, only when the actors have certain faces in certain spaces.<sup>117</sup>

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used after the Civil War to keep former slaves in a state of quasi slavery.”); Goldman v. Knecht, 295 F. Supp. 897, 902 (D. Colo. 1969) (“Vagrancy control dates back to the fourteenth century . . . as an economic measure which sought to shore up the crumbling structure of feudal society by prohibiting mobility among the laboring class . . . [and] in post-feudal society as a means of protecting a local community from . . . undesirable strangers.”); Goluboff, *supra* note 88, at 253; Roberts, *supra* note 37, at 7–8 (noting that the “carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained”); Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, Conversation (June 2, 2020), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816> [<https://perma.cc/4YZ4-RCJB>]; Skogan, *supra* note 57, at 6 (discussing policing efforts to bring “immigrants into conformity with the labor discipline of industrial society”); Smith, *supra* note 71 (“[L]ocal governments can criminalize sleeping outside, or criminalize panhandling, which begins to look a lot like the criminalization of vagrancy as part of the Black Codes in the era that ended Reconstruction.”). See generally Karakatsanis, *supra* note 34, at 16 (“If the function of the modern punishment system is to preserve racial and economic hierarchy through brutality and control, then its bureaucracy is performing well.”); Butler, *supra* note 81, at 1442–43 (arguing that the system is designed for racial and economic oppression); Kohler-Hausmann, *supra* note 5, at 7 (“[A] Marxian approach understands punishment as social control by being an instrument of class control. . . . [T]he forms of punishment in our society are determined by the needs of the ruling class to control the laboring classes.”).

<sup>115</sup> Clay Cane, *The Original Karens: From Emmett Till’s Accuser to the White Woman Who Sparked the Tulsa Massacre*, BET (June 19, 2020), <https://www.bet.com/news/national/2020/06/19/original-karens-emmett-till-accuser-tulsa-massacre.html> [<https://perma.cc/USC5-WT2B>].

<sup>116</sup> Decoder Ring: The Karen, Slate (July 13, 2020), <https://slate.com/podcasts/decoder-ring/2020/07/decoder-ring-the-karen> [<https://perma.cc/T7YL-37DQ>].

<sup>117</sup> Harcourt, *supra* note 83, at 172 (“Law enforcement policies that target minor disorderly conduct only aggravate the black face of crime.”).

## II. CRIME-CONTROL GOVERNANCE

Theorists have offered several explanations for treating repeat players more harshly than first-time offenders.<sup>118</sup> There is the obvious prevention-based justification—that resources are better spent incapacitating those whose behavior evidences a greater risk of future criminality or danger to the community.<sup>119</sup> But most rationales sound in retributivism—that, according to the Federal Sentencing Guidelines, “[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”<sup>120</sup> The idea is that recidivists are especially blameworthy because their ongoing criminality manifests “attitudes of defiance.”<sup>121</sup> By entering into “a relationship with the state,” repeat players are put on notice of what is proscribed and are obligated, thereafter, to exercise “fortitude” to resist criminal temptation.<sup>122</sup> In this

<sup>118</sup> See, e.g., Julian V. Roberts, Punishing Persistent Offenders: Exploring Community and Offender Perspectives 7–8 (2008); Youngjae Lee, Recidivism as Omission: A Relational Account, 87 *Tex. L. Rev.* 571, 610 (2009); Andrew von Hirsch, Proportionality and Progressive Loss of Mitigation: Further Reflections, *in* *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* 1, 1–16 (Julian V. Roberts & Andrew von Hirsch eds., 2010); Julian V. Roberts, First-Offender Sentencing Discounts: Exploring the Justifications, *in* *Previous Convictions at Sentencing*, *supra*, at 17–35; Youngjae Lee, Repeat Offenders and the Question of Desert, *in* *Previous Convictions at Sentencing*, *supra*, at 49–71; Christopher Bennett, “More to Apologize For”: Can a Basis for the Recidivist Premium Be Found Within a Communicative Theory of Punishment?, *in* *Previous Convictions at Sentencing*, *supra*, at 73–89; Richard Dagger, Playing Fair with Recidivists, *in* *Recidivist Punishments: The Philosopher’s View* 41, 41–59 (Claudio Tamburrini & Jesper Ryberg eds., 2012); Julian V. Roberts, Past and Present Crimes: The Role of Previous Convictions at Sentencing, *in* *Recidivist Punishments: The Philosopher’s View*, *supra*, at 115–33; Christopher Bennett, Do Multiple and Repeat Offenders Pose a Problem for Retributive Sentencing Theory?, *in* *Recidivist Punishments: The Philosopher’s View*, *supra*, at 137–56; Andrew von Hirsch, Desert and Previous Convictions in Sentencing, 65 *Minn. L. Rev.* 591, 594–95 (1981); Andrew von Hirsch, Criminal Record Rides Again, 10 *Crim. Just. Ethics* 2, 55 (1991); Andrew von Hirsch & Andrew Ashworth, Proportionate Sentencing: Exploring the Principles 131–32 (2005); David A. Dana, Rethinking the Puzzle of Escalating Penalties for Repeat Offenders, 110 *Yale L.J.* 733, 738–39 (2001).

<sup>119</sup> Lewis, *supra* note 9, at 3–6; *infra* notes 189–90 and accompanying text (responding to prevention-based justification).

<sup>120</sup> U.S. Sent’g Guidelines Manual, ch. 4, pt. A, introductory cmt. (U.S. Sent’g Comm’n 2016); Lewis, *supra* note 9, at 5 (“Some argue that in cases of repeat offending, we have more evidence of malice, ill will, or bad character than we do when someone is convicted of an otherwise similar first offense.”).

<sup>121</sup> Ewing, *supra* note 28, at 300–01.

<sup>122</sup> Lee, *supra* note 118, at 581, 585, 599–600, 609–10, 613–14 (2009) (noting that “the fact that one did not do what one was told to do is precisely at the heart of this type of criminality”); von Hirsch, Proportionality and Progressive Loss of Mitigation: Further Reflections, *supra* note 118, at 9 (“The offender’s original conviction and punishment should put him on notice

and other ways, a long history of crime is considered a mark of poor character or flawed temperament, whereas a single offense may more readily represent an extraordinary “lapse” from an otherwise unblemished record of compliance with legal rules and social norms.<sup>123</sup>

### A. *Doing Something*

The foregoing is a quick synthesis of a rich and varied literature on the *recidivist premium*. I survey the landscape only to situate prevailing retributive theories within a particular criminal-legal orientation—the tendency to believe that most social problems are products of wrongdoing to be rooted out and replaced with a “zero-risk environment.”<sup>124</sup> Joe Kennedy has called this mentality our “civic religion,” our “secular sacred.”<sup>125</sup> Its demons are racialized “monsters”—mythical juvenile “superpredators” and “Uzi-toting, gold-chain wearing” gang members.<sup>126</sup>

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that under certain circumstances he may be tempted to offend again.”); see also Jeffrey W. Howard, Punishment as Moral Fortification, 36 Law & Phil. 45, 49 (2017).

<sup>123</sup> Lewis, *supra* note 9, at 17–18; see also von Hirsch, Proportionality and Progressive Loss of Mitigation: Further Reflections, *supra* note 118, at 2; Roberts, First-Offender Sentencing Discounts: Exploring the Justifications, *supra* note 118, at 20–22; Roberts, Punishing Persistent Offenders, *supra* note 118, at 82; Dana, *supra* note 118, at 779 (“The ‘break’ given first-time violators can be understood . . . as morally appropriate because the violator may have simply made a mistake or acted foolishly out of impulse, rather than having determinedly flouted the moral authority of the laws.”).

<sup>124</sup> Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 16 (2007) (discussing the sentiment that a “zero-risk environment is . . . a reasonable expectation, even a right”); *infra* notes 217–24 and accompanying text (discussing crime control and risk aversion).

<sup>125</sup> Joseph E. Kennedy, Monstrous Offenders and the Search for Solidarity Through Modern Punishment, 51 Hastings L.J. 829, 831–33 (2000) (examining the contemporary cultural depiction of the criminal as “monster,” and describing the criminal-legal system as a “civic religion” of us versus “them”); see also Karakatsanis, *supra* note 34, at 67 (“The ‘law enforcement’ religion is hostile to the view that a society that is more equal would have less crime, not because that idea is untrue, but because the very *goal* of the criminal legal system is to preserve certain elements of an unequal social order.”); cf. Kohler-Hausmann, *supra* note 5, at 6 (citing Émile Durkheim for the proposition that “punishment is a social enterprise that expresses a group’s foundational, shared moral order and sustains it by enacting rituals”).

<sup>126</sup> Kennedy, *supra* note 125, at 829; Lara Abigail Bazelon, Exploding the Superpredator Myth: Why Infancy Is the Preadolescent’s Best Defense in Juvenile Court, 75 N.Y.U. L. Rev. 159, 165–67 (2000); Tamar R. Birckhead, The Racialization of Juvenile Justice and the Role of the Defense Attorney, 58 B.C. L. Rev. 379, 408–11 (2017). See generally James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* 13 (2003) (discussing the powerful contemporary American “drive to hit every offender . . . hard”).

Its “idealized political subject” is the crime victim.<sup>127</sup> It is a philosophy that “may lead citizens to tolerate higher levels of expenditure for crime control” than any other form of governance.<sup>128</sup> The concept is that “*everything works*” in the context of *punitive prohibition*—that we must “*do something*” by condemning someone.<sup>129</sup> It is what led New York City to rely upon *criminal legalism* to command a quality of life.<sup>130</sup> And it is what leads law enforcement to continue to single out recidivists for the harshest punishments. The inclination is less to *problem-solve* than to ascribe blame—even to hate.<sup>131</sup> According to James Q. Wilson, the co-creator of broken windows theory: “Wicked people exist. Nothing avails except to set them apart from innocent people.”<sup>132</sup>

The assumption, here, is that people are responsible for their own circumstances. Of course, sophisticated theorists—even proponents of the *recidivist premium*—understand that human will is not entirely unconstrained, and some frankly acknowledge that existing barriers to choice “are inconsistent with the system’s demand that offenders set their lives straight after going through the process of conviction and punishment.”<sup>133</sup> Still, our punishment practices reflect a general expectation that recidivists are obliged to steel themselves against

<sup>127</sup> Simon, *supra* note 124, at 108; Harcourt, *supra* note 83, at 26 (“Though [the convicted offender] may continue to live in the projects, he is no longer a ‘project resident,’ no longer a ‘citizen,’ and no longer has a legitimate voice.”).

<sup>128</sup> Zimring, *supra* note 3, at 192–93; Kohler-Hausmann, *supra* note 5, at 268 (“[T]he instrumentalities of criminal law [are] the primary social control mechanisms in urban spaces of concentrated poverty and insecurity.”); Simon, *supra* note 124, at 10, 14 (describing crime control as a “first response” and urging “a movement to restore crime to its rightful place as one ‘social’ problem among many”).

<sup>129</sup> Zimring, *supra* note 3, at 192–93 (discussing the “everything works” crime-control mentality); Skogan, *supra* note 57, at 3 (observing that “disorder[] often lead[s] to complaints that the authorities ‘do something’”); *United States v. Clary*, 846 F. Supp. 768, 793 (E.D. Mo. 1994) (noting “the demands of [political] constituenc[ies] to ‘do something’ about the most pressing problem in America today—crime”).

<sup>130</sup> Simon, *supra* note 124, at 273 (noting that the logic behind broken windows is that “dangerous acts arise from dangerous people whom you know by their character, to be read in their minor conduct”).

<sup>131</sup> Jeffrie G. Murphy & Jean Hampton, Introduction, *in* *Forgiveness and Mercy* 1, 2 (1988) (“[L]egal doctrines are rooted in specific *passions* (feelings, emotions) . . . . [T]he criminal law . . . institutionalizes certain feelings of anger, resentment, and even hatred.”). See generally William Ian Miller, *The Anatomy of Disgust* 34–35 (1997) (discussing the manner by which disgust and hatred produce a preference for punishment and ostracism).

<sup>132</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 131 (2001) (quoting James Q. Wilson).

<sup>133</sup> Lee, *supra* note 118, at 618, 620.

volitional limitations and cognitive shortfalls.<sup>134</sup> And it is on them when they fail.

### *B. Doing Something Slightly Different*

Let's return to New York City. In recent years, we have witnessed a potential sea change. In 2013, activists mounted successful class-action suits, challenging the constitutionality of the NYPD's trespass policies and practices and its selective use of stop and frisk.<sup>135</sup> That same year, Bill de Blasio was elected mayor on a reform-minded platform. But reform efforts have served largely to just reinforce preexisting skews—at least with respect to habitual offenders. Consider, by way of example, the specifics of a 2016 reform ordinance, which shifted some of the city's regulatory efforts from criminal to civil regimes—*except* “*in limited circumstances.*”<sup>136</sup> The ordinance excluded certain types of recidivists from applicable reforms, including individuals with open warrants, unanswered summons, or recent arrests.<sup>137</sup> Likewise, in just the last few years, the NYPD adopted a policy of mandatorily arresting for transit offenses, so-called “transit recidivists”—defined, *inter alia*, as individuals previously arrested for at least one crime committed in transit over the preceding twenty-four months.<sup>138</sup> And, more recently, the city doubled down on this policy by proposing literal banishment of transit recidivists

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<sup>134</sup> *Id.* at 609–10, 613–14; Karakatsanis, *supra* note 34, at 21 (“The standard narrative portrays ‘criminals’ as a vast collection of individuals who have each made a choice to ‘break the law.’ Convictions and punishments are consequences that flow naturally from that bad choice.”); *infra* notes 222–27 and accompanying text (discussing luck, freewill, and the “American Dream”).

<sup>135</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (2013) (holding that NYPD's practice of stop and frisk systematically violated the equal protection and Fourth Amendment rights of class-action litigants); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 540–41 (2013) (holding the same as to the practice of stop and frisk as part of trespass enforcement).

<sup>136</sup> Peters & Eure, *supra* note 91, at 7 (emphasis added).

<sup>137</sup> Misdemeanor Justice Project, *The Criminal Justice Reform Act Evaluation: Post Implementation Changes in Summons Issuance and Outcomes* 7 (2018).

<sup>138</sup> Bratton, *supra* note 97, at 15 (“A person stopped for a violation of transit rules [even a non-criminal violation] who is identified as a transit recidivist is ineligible for a civil notice and must be arrested for the offense.”); see also Class Action Complaint at 12–13, *R.C. v. City of New York*, 100 N.Y.S.3d 824 (N.Y. Sup. Ct. 2019) (No. 153739/2018) (detailing NYPD mandatory arrest policy for transit recidivists); Harold Stolper & Jeff Jones, *Community Service Society of New York, The Crime of Being Short \$2.75: Policing Communities of Color at the Turnstile* 24 (2017).

from the subway system.<sup>139</sup> Finally, Mayor de Blasio has employed conventional law-and-order rhetoric to describe the problem and his administration's criminal-legal response: "We are not going to allow constant recidivism and fare evasion."<sup>140</sup> Thus, with respect to habitual quality-of-life offenders, the system remains committed to *punitive prohibition* and the *recidivist premium*—to "gradually ratcheting up the punitive response with each successive encounter or failure to live up to the court's demands."<sup>141</sup> The sharp edges may have softened slightly from previous enforcement and adjudication approaches, but escalation remains the rule.

For context, we can look back to one particularly harsh prior policy—"Operation Spotlight." The intent behind the program was to "cast a spotlight" on the "persistent misdemeanants," who according to then-Mayor Michael Bloomberg, "deal drugs, deface storefronts, . . . drive away tourists[,] . . . discourage shoppers[, and] . . . devalue our neighborhoods."<sup>142</sup> Prosecutors refused to bargain with spotlight

<sup>139</sup> Alexa St. John, MTA Board Considers Banning Repeat Transit Criminals from Subway, Wall St. J. (June 24, 2019), <https://www.wsj.com/articles/mta-board-considers-banning-repeat-transit-criminals-from-subway-11561414572> [<https://perma.cc/N23W-TNN5>]; cf. supra, infra notes 63, 131–134, 222–27 and accompanying text (discussing culture of blame and shame and "governing through crime").

<sup>140</sup> Rocco Parascandola, Shayna Jacobs, Jillian Jorgensen, Thomas Tracy & Graham Rayman, NYPD Top Cop Slams DA Cy Vance for Not Prosecuting Some Fare-Beaters, N.Y. Daily News (Feb. 6, 2018), <https://www.nydailynews.com/new-york/nypd-top-slams-davance-not-prosecuting-fare-beaters-article-1.3803058>; Alison Fox & Vincent Barone, Turnstile Jumpers With Open Summonses Will No Longer Be Arrested, AMNY (Aug. 1, 2018), <https://www.amny.com/news/fare-evasion-arrests-nyc-1-20238070/> [<https://perma.cc/T68Y-5YDR>]; Alexander C. Kaufman, As New York Cracks Down on Fare Evasion, Another City Weighs Free Transit, Huffington Post (Nov. 18, 2019), [https://www.huffpost.com/entry/mbta-free-transit\\_n\\_5dd2e1d6e4b01f982f06b00c](https://www.huffpost.com/entry/mbta-free-transit_n_5dd2e1d6e4b01f982f06b00c) [<https://perma.cc/7SH2-7M5H>].

<sup>141</sup> Kohler-Hausmann, supra note 5, at 5, 108, 132, 165, 252 (describing the process by which penalties escalate for recidivist misdemeanants and indicating that "the defendant's record largely dictates . . . the sentence"); id. at 97 (quoting public defender: "[A] person can be stopped and searched fifteen times before they're arrested. . . . And then they get an ACD. . . . And then once your fingerprint even reflects contact with the system, you're in a different posture. . . . [Next time, y]ou get a [violation] and then you get a misdemeanor, and then you get jail time").

<sup>142</sup> Kohler-Hausmann, supra note 5, at 115, 293 n.37 (indicating that "operation spotlight" lasted over a decade but is "now largely defunct in some boroughs"); Julia Vitullo-Martin, Operation Spotlight, Etc., Gotham Gazette (June 1, 2002), <https://www.gothamgazette.com/criminal-justice/1657-operation-spotlight-etc> [<https://perma.cc/788H-99QC>]; Freda F. Solomon, Operation Spotlight: Year Four Program Report 1–4 (2007).

defendants and demanded, instead, the maximum punishment on the top misdemeanor charge. Judges retained sentencing discretion, but, even after pleas, tended to impose jail for much longer terms and much more often—well over 80% of the time.<sup>143</sup> Likewise, conviction rates were substantially higher; over 90% were convicted of some offense as compared to 50% for misdemeanor defendants overall.<sup>144</sup> And, once again, enforcement was skewed racially. Over half of spotlight arrestees were Black and less than a tenth were white.<sup>145</sup> For these offenders, who were thought to have demonstrated “a persistent disregard for social rules,” the “managerial model” of “misdemeanorland” came to resemble something closer to a conventionally draconian felony punishment structure, with all the attendant injustice and inefficiencies.<sup>146</sup>

From this starting point, there are persuasive reasons to be wary of “reformist” reforms initiated by the very same “punishment bureaucrats” who put such policies into place in the first instance.<sup>147</sup> These are systemic insiders who tend to “portray the problems of the criminal system as existing in a silo,” independent of “deeper problems like white supremacy, lack of access to health care, economic deprivation, educational divestment, neighborhood segregation, gender inequality, banking, lack of access to the arts, unaffordable housing, and

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<sup>143</sup> Solomon, *supra* note 142, at 1–4, 12, 37 (detailing Operation Spotlight in practice); Kohler-Hausmann, *supra* note 5, at 293 n.37 (same). It is not obvious which spotlight cases involved quality-of-life offenses. But it stands to reason that these charges were the overwhelming majority because—depending on the borough—only 3–8% of Operation Spotlight cases involved “harm to persons.” Solomon, *supra* note 142, at 11, 16. Comparatively, in every borough, more than one-half to more than two-thirds of spotlight cases involved drugs, trespass, or turnstile hops. Solomon, *supra* note 142, at 16.

<sup>144</sup> Solomon, *supra* note 142, at 10; John Feinblatt, Office of the Criminal Justice Coordinator, Criminal Justice Indicator Report 15 (2013).

<sup>145</sup> Solomon, *supra* note 142, at 6.

<sup>146</sup> Kohler-Hausmann, *supra* note 5, at 132, 264, 266 (coining the term “misdemeanorland” and explaining that the “moral meaning” of misdemeanors is distinct from felonies, but suggesting that longtime recidivists may “have the same cultural status” as felons); Garland, *supra* note 132, at 191–92 (discussing the manner by which “a record of prior offending affects the individual’s perceived moral status,” displacing “careful calculations of cost and effect” in favor of “a very different way of thinking which presses the imperatives of punishing criminals and protecting the public, ‘whatever the cost’”).

<sup>147</sup> McLeod, *supra* note 49, at 1616; Angela Y. Davis, *Freedom Is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement* 7, 90 (2016) (arguing that prison reform, as opposed to abolition, grants the current institution undue legitimacy); Karakatsanis, *supra* note 34, at 93; see also Note, *The Paradox of “Progressive Prosecution”*, 132 *Harv. L. Rev.* 748, 759–68 (2018) (highlighting the manner by which structural barriers undermine systemic reforms to the criminal-legal system).



environmental destruction.”<sup>148</sup> There is, for them, just too much of a temptation to settle for “superficial and deceptive . . . tweaks” that serve only to check the most “grotesque flourishes,” especially when it comes to the recidivists who are conventionally perceived to be most deviant.<sup>149</sup>

Elsewhere, I offered a version of this objection to the drug court movement—to wit, that judicially mandated treatment had failed to provide genuine alternatives to the prevailing paradigm of *punitive prohibition*.<sup>150</sup> To be sure, some drug-court defendants managed to avoid incarceration (and sometimes even charge and conviction), but, critically, only those participants who were able to complete abstinence programs.<sup>151</sup> Ultimately, the enterprise depends upon a logical and normative flaw: the most typical drug-court graduate is the least compulsive user; the genuinely addicted individual, by comparison, is likelier to fail out and face a long termination sentence—a jail or prison term that may outstrip even traditional drug penalties.<sup>152</sup> For this longtime drug offender—for this recidivist—therapeutic intervention can be expected to provide a mere waystation in an otherwise uninterrupted cycle of capture and incarceration. Simply put, the problem with drug courts—and, for that matter, most existing problem-solving criminal courts—is that they continue to operate as *criminal* courts. At all times, the preoccupation remains coerced clean living, with punishment as a backstop.<sup>153</sup> This should not come as a surprise. The judges who

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<sup>148</sup> Karakatsanis, *supra* note 34, at 93; cf. Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911, 921–23, 930–31 (2006) (comparing the incentives of criminal-legal insiders and outsiders).

<sup>149</sup> Karakatsanis, *supra* note 34, at 16, 73, 85 (cautioning against “advocates of some of the harshest punishments in the world pushing minor changes . . . for purposes that they do not acknowledge”); see also Butler, *supra* note 81, at 1466–68 (2016) (noting how incremental steps can distract from more meaningful systemic change).

<sup>150</sup> Josh Bowers, Contraindicated Drug Courts, 55 UCLA L. Rev. 783, 830, 834–35 (2008); see also Daniel Abrahamson, Drug Courts Are Not the Answer: Guest Commentary, L.A. Daily News (May 12, 2015), <https://www.dailynews.com/2015/05/12/drug-courts-are-not-the-answer-guest-commentary/> [<https://perma.cc/M5CM-4U7G>] (highlighting the practical shortcomings of California’s drug courts).

<sup>151</sup> Bowers, *supra* note 150, at 795–97.

<sup>152</sup> *Id.* at 786, 789 (“[D]rug courts . . . provide the worst results to their target populations . . . . Conversely, drug offenders who are noncompulsive or less compulsive ultimately do much better. . . . As such, the expected failure of addicts to respond to external stimuli seems an odd basis from which to subject them to alternative sentences that outstrip standard pleas.”); *infra* notes 228–37 and accompanying text (discussing recidivism as evidence of need).

<sup>153</sup> Bowers, *supra* note 150, at 807 (discussing “coerced treatment that uses conventional justice as a backstop”); see, e.g., Kohler-Hausmann, *supra* note 5, at 253 (quoting a drug-court

spearheaded drug courts are commendable professionals striving admirably to do good work.<sup>154</sup> But their incentive structures pushed them to pretend—even to themselves—that “little tweaks” were “big changes.”<sup>155</sup> Their inventiveness was hamstrung by what Roberto Unger called an “institutional fetishism”—a “false semblance” that the established model was the right basic model.<sup>156</sup>

For Unger, this “institutional fetishism” describes the shortcomings of classical “American pragmatism.”<sup>157</sup> It is a mode of social change that tends to keep us captive to “our own unrecognized creations, to which we [thereafter] bow down as if they were natural and even sacred.”<sup>158</sup> Unsurprisingly, then, Michael Dorf and Charles Sabel situated drug courts squarely within this classical tradition: “Treatment courts, like many other experimentalist institutions, emerged through a combination of . . . local innovation and . . . central information-pooling and discipline that blurs the distinction between accident and design.”<sup>159</sup> They highlighted drug courts’ admirable capacity to adjust to the circumstances—a “picture . . . constantly reconceptualized in the painting.”<sup>160</sup> But, unfortunately, the picture is repeatedly painted within

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prosecutor: “[W]e have to take a stance and offer a jail alternative. We are a DA’s office in the end.”); cf. Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. Davis L. Rev. 1573, 1573 (2021) (noting that the problem with “the problem-solving court model . . . [is that] its entrenchment creates resistance to alternatives that might truly reform [or transform] the system”).

<sup>154</sup> See generally Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 Vand. L. Rev. 831, 843 (2000) (describing the first drug court in Miami-Dade County, Florida); *The Early Drug Courts: Case Studies in Judicial Innovation 7* (W. Clinton Terry III ed., 1999) (describing efforts by drug court judges to address social harms that may contribute to drug dependency and criminal conduct).

<sup>155</sup> Karakatsanis, *supra* note 34, at 82 (“[A] movement to dismantle the punishment bureaucracy must learn how to distinguish little tweaks from big changes.”).

<sup>156</sup> Unger, *supra* note 42, at 29–32, 49–50.

<sup>157</sup> *Id.* at 30, 49.

<sup>158</sup> *Id.* at 49.

<sup>159</sup> Dorf & Sabel, *supra* note 154, at 841; see also Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 Md. L. Rev. 1120, 1130–31 (2014) (examining the pragmatic principles underlying problem-solving courts); Bowers, *supra* note 150, at 796 (“Drug courts . . . are experimentalist institutions born of incremental compromise. They developed from the ground up in ad hoc and undertheorized fashions.”).

<sup>160</sup> Dorf & Sabel, *supra* note 40, at 283–86.

the same frame—with recidivist drug users left largely on the outside, looking in.<sup>161</sup>

This is a defensibly modest approach if there is or ought to be “nationwide agreement as to [the] general goals” of a particular regulatory system.<sup>162</sup> In such circumstances, classical pragmatism can “improve efficiency,” build consensus, and promote democratic deliberation in the pursuit of shared objectives.<sup>163</sup> However, when the ultimate goals are debated or debatable, we need to ask additional questions. What does it mean to “improve efficiency”? What objectives are we more efficiently pursuing? The drug-free society? Social control? Deterrence? Public safety? Retribution? A state-ordained quality of life? Something else? If so, what? If we do not identify and pursue the right ends, we risk continuing to develop only criminal-legal reforms to perceived criminal-legal problems, without ever considering whether these problems and the solutions could be reimagined in a radically different way.<sup>164</sup>

### C. *What Works?*

Even according to conventionally defined ends—like crime reduction and safe streets—it is at least debatable whether the *recidivist premium* has done much, instrumentally, to improve quality of life.<sup>165</sup> Supporters of the New York City model point to a two-decade drop in crime rate.<sup>166</sup>

<sup>161</sup> Bowers, *supra* note 150, at 807 (noting that drug court punishments “are informed by the same social, economic, and institutional pressure points that historically have led to disparate punishment under the conventional . . . war on drugs”).

<sup>162</sup> Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 Cal. L. Rev. 1541, 1542 (2002).

<sup>163</sup> *Id.*; see Charles Sabel, *Dewey, Democracy, and Democratic Experimentalism*, 9 *Contemp. Pragmatism* 35, 36 (2012) (“Dewey was nothing if not a fallibilist. He held that inquiry in its exemplary form—in the laboratory—was a process of continuous self-correction, of learning from mistakes . . . [of pursuing] the ideal of democracy.”); Unger, *supra* note 42, at 23 (“[T]he promises of democracy can be kept only by the ceaseless experimental renewal of their institutional vehicles.”).

<sup>164</sup> See Karakatsanis, *supra* note 34, at 68–69 (arguing that the “‘law enforcement’ myth . . . lulls people into abandoning scrutiny of their assumptions”); Butler, *supra* note 81, at 1466–69.

<sup>165</sup> Peters & Eure, *supra* note 91, at 3, 8 (“What caused or contributed to the City’s decline in crime has been a continuing debate.”). Significantly, however, I endorse a radically different objective and metric for measuring success. *Infra* Section III.B. (discussing harm reduction and the “capabilities approach”).

<sup>166</sup> William Bratton & George L. Kelling, *The Assault on ‘Broken Windows’ Policing*, *Wall St. J.* (Dec. 18, 2014), <https://www.wsj.com/articles/william-bratton-and-george-kelling-the-assault-on-broken-windows-policing-1418946183> [<https://perma.cc/P3YS-T6YT>]; George L.

But “[t]he great American crime decline” is a national trend.<sup>167</sup> And the city’s crime rate continued to fall even after law enforcement softened its approach.<sup>168</sup> The verdict among criminologists is, therefore, mixed.<sup>169</sup> Franklin Zimring concluded that heavy-handed order-maintenance enforcement has had, at most, a limited impact, whereas Bernard Harcourt remained wholly unconvinced, devoting an entire book—entitled, *Illusion of Order: The False Promise of Broken Windows Policing*—to dismantling the empirical claims of broken windows proponents.<sup>170</sup>

One complication is that we lack genuine control groups. Criminologists tend only to measure success by stacking criminal-legal strategies side-by-side. To adequately test a given approach, we should stack it up against its opposite. Indeed, a principal purpose of my proposal for crime licenses is to develop just such a comparison group. Another complication is that we cannot even know whether so-called “persistent misdemeanants” actually commit a wildly disproportionate percentage of quality-of-life offenses. Returning to our discussion of discretion, when “some groups are much more heavily monitored and policed than others,”

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Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, *City J.* (Winter 2015). See generally Wesley G. Skogan, *Broken Windows: Why—and How—we Should Take Them Seriously*, 7 *Crim. & Pub. Pol’y* 195 (2008) (describing broken windows policing’s effect on social order).

<sup>167</sup> See Franklin E. Zimring, *supra* note 3; see also Michael Tonry, *Why Crime Rates Are Falling Throughout the Western World*, 43 *Crime & Just.* 1, 17–18 (2014) (describing national decline in American crime nationwide).

<sup>168</sup> Peters & Eure, *supra* note 91, at 4 (“Between 2010 and 2015 there was a dramatic decline in quality-of-life enforcement with no increase in felony crime. In fact, felony crime, with a few exceptions, declined along with quality-of-life enforcement . . . [We] find[] no empirical evidence to suggest that crime control can be directly attributed to quality-of-life summonses and misdemeanor arrests.”); see also William Wan, *Does New York City’s ‘Broken Windows’ Policing Work? New Report Says No*, *Wash. Post* (June 22, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/06/22/does-nypds-broken-windows-policing-work-new-report-says-no/> [<https://perma.cc/FNU8-MCS7>] (refuting that quality-of-life policing was responsible for fewer felony crimes in New York City).

<sup>169</sup> Carbado, *supra* note 104, at 1486 n.14 (“The empirical evidence on this theory is mixed, at best.”).

<sup>170</sup> Zimring, *supra* note 3, at 80; Harcourt, *supra* note 83; see also Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 *U. Chi. L. Rev.* 271 (2006) (detailing the lack of positive evidence in favor of broken windows policing); Agan, Doleac & Harvey, *supra* note 71, at 37 (finding that, under some circumstances, not prosecuting individuals for nonviolent misdemeanors reduces recidivism).

the data track the subset of rulebreakers upon whom law enforcement focuses.<sup>171</sup>

Likewise, there are significant reasons to worry about the *accuracy* of broken windows enforcement and adjudication. As I have argued elsewhere, the most likely innocent accused is the indigent longtime recidivist, facing a trivial charge.<sup>172</sup> In these “disposable” cases, institutional and cognitive biases lead frontline enforcers to arrest and charge repeat players reflexively.<sup>173</sup> Police read lawlessness into the *usual suspect’s* ambiguous conduct, and prosecutors thereafter presume guilt.<sup>174</sup> Even for trivial charges, judges are inclined to set “nuisance” bail for defendants with long records, warrant histories, and unstable social ties.<sup>175</sup> For many of these individuals, even the smallest bond requirements are tantamount to remand. Thereafter, they take “process pleas” (guilty or not) to exit the system as quickly as possible.<sup>176</sup> At every procedural stage, the emphasis is speed, not error correction or, for that matter, any meaningful form of litigation.<sup>177</sup> As Kohler-Hausmann explained:

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<sup>171</sup> Lewis, *supra* note 9, at 8–9 n.21; see Carbado, *supra* note 104, at 1488–89 (observing that selective order-maintenance policing creates recidivists in some places but not others, depending upon where police exercise discretion to focus enforcement efforts); see also Simon, *supra* note 124, at 274; Harcourt, *supra* note 83, at 172 (explaining that because of the “disparate impact” of broken windows policing, it is “practically impossible to gauge [the rate of] misdemeanors reliably by race”).

<sup>172</sup> See Bowers, *supra* note 34, at 1124–32 (describing the incentives of police and prosecutors in public-order cases).

<sup>173</sup> See Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 *Wake Forest L. Rev.* 319 (2012) (describing “disposable” cases); see also Bowers, *supra* note 34, at 1124–27; Bowers, *supra* note 10, at 1698–99.

<sup>174</sup> Bowers, *supra* note 34, at 1124–27; Bowers, *supra* note 36, at 210 (describing “the propensity of the law enforcer to exercise dominion reflexively over the usual suspect”); Lewis, *supra* note 9, at 16 (“Having a prior criminal record itself makes people easier to monitor, and thus more likely to get caught . . . easier to detect.”).

<sup>175</sup> Josh Bowers, *Upside-Down Juries*, 111 *Nw. U. L. Rev.* 1655, 1674 (2017) (describing the practice).

<sup>176</sup> Bowers, *supra* note 34, at 1132–38 (describing “process pleas” to avoid “process costs”); see Kohler-Hausmann, *supra* note 5, at 124 fig.3.5, 132 (indicating that “the defendant’s record largely dictates . . . the incentive to take the plea at arraignment,” and finding a range of between approximately 50% and 70% of New York City sub-felony cases disposed of at arraignments between the years 1992 and 2014).

<sup>177</sup> See Kohler-Hausmann, *supra* note 5, at 97 (quoting a public defender: “[T]hat’s how a criminal record builds . . . Good pleas, bad pleas. They were guilty, they weren’t. The main thing is to get out of jail.”); *id.* at 266 (“The probability of conviction . . . increases substantially with each subsequent criminal conviction.”); Jeffries, *supra* note 58, at 197, 215 (describing “street-cleaning” statutes as laws that “invite manipulation . . . for which the

[C]ourt actors operating under the managerial model produce *both* false positives and false negatives . . . . It seems reasonable to conclude . . . that the error types are distributed unevenly among different sorts of defendants according to the marks they bear from prior encounters . . . . False negative errors are most likely among defendants with no criminal record . . . . False positive errors are more likely higher among defendants with prior misdemeanor convictions.<sup>178</sup>

Personally, I represented hundreds of clients caught up in cycles of capture and (sometimes inaccurate) conviction. At liberty from past convictions, they would respond to economic pressures by illegally selling “loosies,” hopping turnstiles, or driving “dollar cabs.”<sup>179</sup> Or they would simply find themselves in the wrong place at the wrong time. Lacking stable housing, an itinerant recidivist might couch-surf permissibly in a housing project unit and then linger too long in the building lobby, provoking unwarranted police suspicion.<sup>180</sup> At every turn, “the machinery of criminal justice” would continue to churn, and the recidivist would collect more “marks.”<sup>181</sup>

Finally, the instrumental case for the recidivist premium is compromised by a well-examined phenomenon, called “aging out” whereby individuals become less risk-taking, typically in early middle

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individualized adjudication of guilt is an unusually inadequate check on police and prosecutorial action”); Bowers, *supra* note 34, at 1124–31; Bowers, *supra* note 10, at 1705–12. See generally Stephanos Bibas, *The Machinery of Criminal Justice* (2012) (describing the justice system’s emphasis on speedy convictions).

<sup>178</sup> Kohler-Hausmann, *supra* note 5, at 264–65.

<sup>179</sup> See Wikipedia, Loosie, <https://en.wikipedia.org/wiki/Loosie> [<https://perma.cc/NC8T-DVMW>] (defining a “loosie” as a “single cigarette . . . purchased or sold . . . illegal[ly] and commonly . . . in low-income areas,” and noting that Eric Garner died after a confrontation with police while allegedly selling loosies) (last visited Mar. 12, 2021); Urban Dictionary, Dollar Cab, <https://www.urbandictionary.com/define.php?term=dollar%20cab> [<https://perma.cc/A3H2-UY26>] (defining dollar cabs as “unmarked, unlicensed cabs, (usually vans) common in . . . ‘bad’ areas”) (last visited Mar. 12, 2021).

<sup>180</sup> *Supra* notes 97 & 174 and accompanying text (describing the likelihood of wrongful arrest of legally innocent “usual suspects” in quality-of-life trespass sweeps).

<sup>181</sup> See Bibas, *supra* note 177; Kohler-Hausmann, *supra* note 5, at 263.

age.<sup>182</sup> Simply put, crime rates and drug abuse decline with age.<sup>183</sup> As one study found, the older the offender, the less strongly recidivism correlates with future criminality.<sup>184</sup> New York City data bear out that finding. For defendants arraigned in 2009, those aged sixteen to nineteen were one-third more likely to be rearrested within one year than those over age thirty, and that is without controlling for the fact that the older cohort includes substantially more longtime recidivists.<sup>185</sup> This complicates the conclusion that, all else equal, “repeat offenders are more likely to re-offend” than first-time offenders, because all else is not equal: recidivists are older and, therefore, closer to the traditional period of “aging out.”<sup>186</sup>

Consider the data on the city’s “persistent-misdemeanant” program, “Operation Spotlight.” In every year studied, the largest proportion of spotlight defendants were aged thirty-five through thirty-nine or forty through forty-four, with these two age categories accounting for approximately 40% of all spotlight defendants.<sup>187</sup> By comparison, the

<sup>182</sup> See Michael Massoglia & Christopher Uggen, *Settling Down and Aging Out: Toward an Interactionist Theory of Desistance and the Transition to Adulthood*, 116 *Am. J. Soc.* 543, 544–45 (2010). See generally John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70*, at 4 (2003) (looking at patterns of criminal behavior over the life course of high-risk children); Darrell J. Steffensmeier, Emilie Andersen Allan, Miles D. Harer & Cathy Streifel, *Age and the Distribution of Crime*, 94 *Am. J. Soc.* 803, 803 (1989); Alex R. Piquero, David P. Farrington & Alfred Blumstein, *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development* 207 (2007) (acknowledging that most offenders cease offending by age 40); Michael E. Ezell & Lawrence E. Cohen, *Desisting from Crime: Continuity and Change in Long-Term Crime Patterns of Serious Chronic Offenders* 269 (2005) (describing the phenomenon of “aging out” and its implications for society).

<sup>183</sup> See Johann Hari, *Chasing the Scream: The First and Last Days of the War on Drugs* 212 (2015) (“Most addicts will simply stop, whether they are given treatment or not, provided prohibition doesn’t kill them first.”); Richard Lawrence Miller, *The Case for Legalizing Drugs* 53 (1991) (“Researchers have found chronological age to be a prevalent reason for drug abuse. Abuse is typically a young person’s habit, given up as the individual matures. Most opiate addicts relinquish their drug within [ten] years.”); The Sentencing Project, *People Serving Life Exceeds Entire Prison Population of 1970*, at 3 (2020) (“Even so-called ‘chronic-offenders,’ people who have committed repeated crimes, gradually desist from criminal conduct so that their public safety risk is substantially reduced by their late 30s or 40s.”).

<sup>184</sup> Shawn D. Bushway, Paul Nieuwebeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 *Criminology* 27, 49–50 (2011).

<sup>185</sup> John Feinblatt, Office of the Criminal Justice Coordinator, *Criminal Justice Indicator Report 5* (2013).

<sup>186</sup> Lewis, *supra* note 9, at 8; see also Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *Criminology* 575, 588 (1996) (finding that “criminal history” correlates with recidivism).

<sup>187</sup> Solomon, *supra* note 142, at 5–6.

largest cohort for *all* misdemeanor defendants was under age twenty-five.<sup>188</sup> Once we factor in the substantially older age of habitual offenders, criminal record becomes a less salient predictor of future criminality. All of this calls into question the prevention-based logic of harshly sentencing, as one judge put it, “someone who is fifty and has eighty-seven prior misdemeanor convictions.”<sup>189</sup> This unforgiving punishment practice may have intuitive appeal, but it is potentially as irrational as baseball clubs giving lucrative contracts to aging sluggers well past their primes.<sup>190</sup>

The lesson from the literature on “aging out” is not only that we should perhaps avoid punishing “persistent misdemeanants” harshly, but also that any kind of punishment may prove counterproductive. We may analogize, here, to the emerging research on the “environmental theory of addiction,” which posits that drug dependence is primarily a product of trauma and social setting.<sup>191</sup> The current line is that “the opposite of addiction is connection,” and the same may be said of order-maintenance offending.<sup>192</sup> Incapacitation and othering compound trauma, and trauma is criminogenic.<sup>193</sup> According to Gabor Mate, a doctor specializing in trauma and addiction:

<sup>188</sup> Patten et al., *supra* note 95, at 27.

<sup>189</sup> Kohler-Hausmann, *supra* note 5, at 108; cf. Todd R. Clear & James Austin, Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations, 3 *Harv. L. & Pol’y Rev.* 307, 319 (2009) (“[W]ith little exception, the outer years of [long prison] terms have no public safety value.”).

<sup>190</sup> Compare Joseph Kahn, Are Long Baseball Contracts Worth It?, *Bos. Globe* (Apr. 15, 2015), <https://www.bostonglobe.com/magazine/2015/04/01/are-long-baseball-contracts-worth/IJNSnCd8VjSvO9YQLb0zH/story.html> [<https://perma.cc/2PFK-5DNW>] (“Megadeals for players that stretch well into their 30s are perilous. So why do teams keep doing it?”), with The Sentencing Project, *supra* note 183, at 3 (“Most people serving life, including for murder, will not forever present a risk to public safety. . . . Therefore, from a public safety perspective, life imprisonment is an unwise investment.”).

<sup>191</sup> Hari, *supra* note 183, at 172–75.

<sup>192</sup> See, e.g., Robert Weiss, The Opposite of Addiction Is Connection: New Addiction Research Brings Surprising Discoveries, *Psych. Today* (Sept. 30, 2015), <https://www.psychologytoday.com/us/blog/love-and-sex-in-the-digital-age/201509/the-opposite-addiction-is-connection> [<https://perma.cc/5K5V-GES7>]; Bowers & Abrahamson, *supra* note 14, at 802 (“The environmental theory of addiction insists that pharmacology is only secondarily related to dependence. Chemicals have physiological effects to be sure, but plenty of drug users . . . maintain relative free will to ingest (or not) without becoming dependent.”); see also Hari, *supra* note 183, at 173 (describing how 95% of American addicts returning from the Vietnam War stopped using).

<sup>193</sup> See *infra* notes 384–90 and accompanying text (discussing link between incarceration, social isolation, and “lost time”).



If I had to design a system that was intended to keep people addicted, I'd design exactly the system that we have right now . . . [T]o create a system where you ostracize and marginalize and criminalize people, and force them to live in poverty with disease, you are basically guaranteeing they will stay at it.<sup>194</sup>

Likewise, if we had to design a system that was intended to keep “persistent misdemeanants” recidivating, we would design something like New York City’s “Operation Spotlight.”<sup>195</sup>

### III. HARM-REDUCTION GOVERNANCE

But what is the alternative? For Roberto Unger, it is less important to answer the question *ex ante* than to adopt the right approach to develop and achieve an appropriate line of attack over time. This orientation, which he called “radical pragmatism,” consists of a “radicalization of experimentalism,” whereby we aim to achieve “denaturalization of society and culture . . . [and] the emancipation of individuals from stultified social hierarchies . . . and stereotyped social roles.”<sup>196</sup> If classical pragmatism is an exercise in “looking into a mirror,” radical pragmatism entails “peering into the dark.”<sup>197</sup> Whereas the classical pragmatist keeps to the mirror’s reflection, the radical pragmatist more willingly ventures into mysterious unknowns where she may discover something genuinely new.

The strategy of radical pragmatism, therefore, poses a particular challenge for academics, who prize descriptive rigor, and for activists, who must incrementally advance and also sell a vision before it is even fully formed.<sup>198</sup> Still, we may rely upon a rudimentary roadmap, featuring the basic principles that inform our radically different conception of governance and social life. According to Unger, “nothing is more important than structural change,” but such ambitious goals are

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<sup>194</sup> Hari, *supra* note 183, at 166.

<sup>195</sup> *Supra* notes 142–46 and accompanying text (discussing “Operation Spotlight”).

<sup>196</sup> Unger, *supra* note 42, at 7–8.

<sup>197</sup> *Id.* at 29, 31–32.

<sup>198</sup> See Dorf & Sabel, *supra* note 40, at 284 (observing that “we do not aim to provide conclusive answers to particular controversies” because “[a] method founded on the generalization of experimental corrigibility would belie itself in proceeding otherwise”); *supra* notes 37–45 and accompanying text (discussing radical pragmatism as a social-movement strategy for political persuasion).

achievable only by a “piecemeal . . . endless series of next steps . . . *guided by ideas*”:<sup>199</sup>

[A]lthough we may fancy ourselves philosophers enjoying the view from the stars, we are in fact lawyers contending with irreducible ambiguity and foreclosing alternative solutions out of practical need . . . . [E]xperimentalism is . . . a way of moving within the established context that allows us to anticipate within the context the opportunities that it does not yet realize and may not even allow.<sup>200</sup>

An instructive, though unsettling, recent example of a radical-pragmatic agenda is Adrian Vermeule’s proposal for “integration from within.”<sup>201</sup> Vermeule is “guided by the idea” that America needs an illiberal, theocratic takeover, which he sees as achievable if pursued methodically, one step at a time.<sup>202</sup> He might resist my characterization of his ultimate objective, but his words speak for themselves and, more to the point, reflect the radicalism of his plan and the incremental nature of his tactics:

[A]gents with administrative control . . . may nudge whole populations in desirable directions . . . . [I]t is a matter of finding a strategic position from which to sear the liberal faith with hot irons, to defeat and capture the hearts and minds of liberal agents, to take over the institutions of the old order that liberalism has itself prepared[.]<sup>203</sup>

Vermeule “peered into the dark” and conjured up something genuinely horrifying. I am not alone in this harsh assessment, but I leave it to other

<sup>199</sup> Unger, *supra* note 42, at 37–38 (emphasis added); RSA, *supra* note 46.

<sup>200</sup> Unger, *supra* note 42, at 37–38, 43 (emphasis added). This is something John Dewey understood, as well: “Ideals express possibilities . . . . Imagination can set them free from their encumbrances . . . . But, save as they are related to actualities, they are pictures in a dream.” John Dewey, *Individualism Old and New* 72 (1999).

<sup>201</sup> Adrian Vermeule, *Integration from Within*, 2 *Am. Affs.* 202 (Spring 2018).

<sup>202</sup> Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 *San Diego L. Rev.* 1039, 1041–43 (2019) (“Integralists argue that liberalism is a relentless and destructive ideology. . . . These are radical views . . . . Catholic integralism . . . conflict[s] with a conception of reasonableness that requires cooperating on fair terms, including by respecting the freedom and equality of citizens . . . .”).

<sup>203</sup> Vermeule, *supra* note 201; Matt Ford, *The Emerging Right-Wing Vision of Constitutional Authoritarianism*, *New Republic* (Apr. 2, 2020), <https://newrepublic.com/article/157132/emerging-right-wing-vision-constitutional-authoritarianism> [<https://perma.cc/XUR3-CB5W>] (“[Vermeule] imagines a small coterie of integralists infiltrating elite institutions and the machinery of the liberal state so they can subtly co-opt them in favor of their ultimate goals.”).

critics to articulate the dangers of his radical-pragmatic plan.<sup>204</sup> The point, for now, is only that radical pragmatism is a strategy, not an unalloyed good. The radical pragmatist must defend the project and its goals.

#### *A. A Radically Different Frame*

What are the ideas and ideals that guide me? What are the basic principles that ground a viable alternative to *punitive prohibition*? In Jonathan Simon's book, *Governing Through Crime*, he juxtaposed the "war on crime" with the "war on cancer."<sup>205</sup> The comparison was meant to highlight that there are aspects of social life that we do not reflexively filter through a crime-control lens. For instance, though we may disapprove of individuals who smoke tobacco, sunbathe without protection, or binge on fatty foods, when these same people develop cancer or Type II diabetes, we abandon scapegoating as a policy position and turn, instead, to the medical establishment for cure or care.

In the same vein, consider COVID-19. As infection rates spiked, localities planned to ration resources. Medical ethicists offered different criteria for how this should be done—by age; baseline health; prognosis for recovery; or first-come, first-served.<sup>206</sup> But, critically, no serious voice proposed withholding care from patients who did not responsibly quarantine, socially distance, or wear masks. Medical professionals committed themselves to treating all infected individuals as patients—and, thus, to *treat them*, independent of whether they could be faulted for their illnesses. This is not to say that our pandemic response is a model of either optimal public health or good governance.<sup>207</sup> Nor is American health care a paragon of equity and humanity. From the standpoint of

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<sup>204</sup> Vermeule finds critics on the right and the left. See, e.g., Randy E. Barnett, Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution: This Wolf Comes as a Wolf, *Atlantic* (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> [<https://perma.cc/29WF-CVVC>]; Garrett Epps, Common-Good Constitutionalism Is an Idea as Dangerous as They Come: It's an Argument for Authoritarian Extremism, *Atlantic* (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/> [<https://perma.cc/C6UC-XL74>].

<sup>205</sup> Simon, *supra* note 124, at 259–83.

<sup>206</sup> See generally Ezekiel J. Emanuel, et al., Fair Allocation of Scarce Medical Resources in the Time of Covid-19, 382 *N.E. J. Med.* 2049, 2051–52 (May 21, 2020) (proposing "six specific recommendations for allocating medical resources in the Covid-19 pandemic").

<sup>207</sup> See *infra* Conclusion (examining the ways in which our pandemic response could do more to embrace harm reduction).

distributive justice, it is an abject failure.<sup>208</sup> We are the only western country without universal coverage, a fact some observers attribute to race and class bias.<sup>209</sup> Still, our health care system is, at bottom, a therapeutic model, not a punishment model.

In criminal-legal reform circles, the common term for this alternative governance frame is *harm reduction*—a philosophy that focuses on minimizing the negative social, economic, and physical externalities that flow from human behavior. Proponents of harm-reduction strategies may still hope to reduce instances of antisocial, disorderly, dangerous, or otherwise detrimental behavior, but so-called “prevalence reduction” or prohibition is not the goal.<sup>210</sup> To the contrary, harm reduction readily tolerates higher rates of incidence if they come at lower levels of individual and societal costs.<sup>211</sup> Consider two methods for promoting sexual health—providing free condoms or criminalizing contraceptives. *Harm reduction* describes the first approach; *prevalence reduction* or

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<sup>208</sup> See generally Dayna Bowen Matthew, *Just Medicine: A Cure for Racial Inequality in American Health Care* (2015) (illustrating racial and ethnic disparities in America’s health care system and discussing changes to correct them).

<sup>209</sup> See, e.g., Jeneen Interlandi, *Why Doesn’t the United States Have Universal Health Care? The Answer Has Everything to Do with Race*, N.Y. Times (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html> [<https://perma.cc/A7E7-FBDN>].

<sup>210</sup> Jason Tan de Bibiana, et al., *Changing Course in the Overdose Crisis: Moving from Punishment to Harm Reduction and Health 2* (2020) (defining “the principles of harm reduction,” as applied to addiction, as “a set of practical strategies and ideas aimed at reducing the negative consequences of drug use without insisting on cessation of use” and by treating drug abuse as “a public health problem rather than a criminal justice issue”).

<sup>211</sup> See generally Robert J. MacCoun & Peter Reuter, *Drug War Heresies: Learning from Other Vices, Times, and Places 2* (2001) (assessing “the likely effects of legalization” and “review[ing] a wide variety of experiences and theories that have been used in the debates”); see also Robert J. MacCoun, *Moral Outrage and Opposition to Harm Reduction*, 7 *Crim. L. & Phil.* 83, 85 (2013) (examining “the tension between . . . prevalence reduction and harm reduction” and demonstrating that “many citizens are willing to blend” their different responses to risk); Robert J. MacCoun & Peter Reuter, *Assessing Drug Prohibition and Its Alternatives: A Guide for Agnostics*, 7 *Ann. Rev. L. & Soc. Sci.* 61, 73 (2011) (surveying the challenges and merits of ending drug prohibition, along with various alternatives to full prohibition); Robert J. MacCoun, *Harm Reduction is a Good Label for a Criterion All Drug Programs Should Meet*, 104 *Addiction* 341, 342 (2009) (arguing that “we should recognize explicitly three criteria—prevalence reduction, quantity reduction and average harm reduction—for any drug program, no matter how it might be labeled”); Don C. Des Jarlais, *Harm Reduction in the USA: The Research Perspective and an Archive to David Purchase*, 14 *Harm Reduction J.* 51 (2017) (recounting the history of harm reduction and the current challenges that it faces in the United States).

prohibition, the second. The former policy may lead to more sex, but the sex is intended to be safer. Health—not abstinence—is the policy goal.<sup>212</sup>

On this score, compare American crime control with European approaches to sex work. In Switzerland, for instance, sex work has long been legal and zoned into “red-light” districts. In recent years, however, Zurich residents began to complain about noise and traffic associated with the trade.<sup>213</sup> But, rather than abandon legalization and shift to *punitive prohibition*, the city simply doubled down on harm reduction. In 2012, voters approved a plan to earmark two million dollars to construct drive-in “sex boxes.”<sup>214</sup> Moreover, the government committed eight hundred thousand dollars to on-site social services, health screens, security personnel, and alarm systems.<sup>215</sup> The effect has been a downtick in violence and an uptick in safety and well-being, consistent with the city’s stated purpose not only to enhance neighborhood conditions but also to “improve the working conditions of sex workers—their health, physical and mental integrity.”<sup>216</sup>

To adopt comparable domestic harm-reduction approaches to this and other forms of purported disorder, we must let go of two deeply held and distinctive commitments—our outsized aversion to external risk and our misguided intuition that people are wholly responsible for their own behavior. The same impulses that have led America to cage 25% of the world’s prisoners<sup>217</sup> compel us also to pen our children in padded

<sup>212</sup> It is not even obvious that widely available contraceptives do increase incidence of sex. Melissa Healy, *Does No-Cost Contraception Promote Promiscuity? No, Says Study*, L.A. Times (Mar. 6, 2014), <https://www.latimes.com/science/sciencenow/la-sci-sn-contraceptives-sex-promiscuity-20140306-story.html> [<https://perma.cc/TL5L-YPKY>]; Julia Marcus, *Americans Aren’t Getting the Advice They Need*, Atlantic (May 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/no-one-telling-americans-how-reopen-their-lives/612172/> [<https://perma.cc/YW6V-4FTY>] (“People have argued against providing the HPV vaccine to teens out of concern that it will lead them to have sex earlier or with more people, even though no evidence shows this to be the case.”).

<sup>213</sup> Helena Bachmann, *Sex in the City: Zurich’s Prostitution ‘Sex Boxes’ Deemed Success in Switzerland*, USA Today (Aug. 24, 2018), <https://www.usatoday.com/story/news/world/2018/08/24/sex-boxes-make-legal-prostitution-safe-zurich-switzerland-europe/1083444002/> [<https://perma.cc/XKC8-BETL>].

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (quoting city’s website); see also *id.* (“The Swiss have taken this pragmatic approach to prevent exploitation, sexually transmitted diseases, links with criminal networks and other problems common in countries where sex commerce is banned.”).

<sup>217</sup> Glenn C. Loury & Bruce Western, *Introduction: The Challenge of Mass Incarceration in America*, 139 *Daedalus* 5, 6 (2010).

playgrounds, with warnings about so-called “stranger danger.”<sup>218</sup> This “gated community” mindset is imprinted on the American psyche.<sup>219</sup> Harm-reduction, by contrast, demands a pragmatic assessment of threats to public welfare to determine what is tolerable and even inevitable, without reflexively entertaining the blind impulse to deal with risks punitively, whatever the costs.<sup>220</sup> The epidemiologist, Julia Marcus, raised this precise point in the context of coronavirus response:

This country has always been slow to embrace harm reduction, a resistance that dates back to our Puritan roots. . . . [A] concern about the promotion of risky behavior masquerades as a concern about health. But in reality, resistance to harm reduction is typically a cloak for moral judgments about what constitutes responsible behavior. . . . Instead of moralizing, harm reduction comes from a place of pragmatism and compassion. It accepts that compromises will happen—usually for perfectly understandable reasons—and aims to reduce any associated harms as much as possible. . . . Harm reduction is public health with a dose of empathy.<sup>221</sup>

This propensity—to translate actuarial risk into moral blame—informs not only conventional retribution but also the myth of the “American Dream.” The pervasive and fictive narrative is that you are what you make of yourself.<sup>222</sup> The irony here is that this form of so-called self-made

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<sup>218</sup> How Stranger Danger Changed the Way Children Play, BBC News Mag. (Dec. 8, 2009); see also *supra* Section II.A (discussing crime-control governance and the irrationally costly and inequitable pursuit of a “zero-risk environment”).

<sup>219</sup> Simon, *supra* note 124, at 6–7, 14 (describing a culture of “fear and control” and noting that “[w]hat is visibly different about the way we govern since the 1960s is the degree to which crime is a first response”).

<sup>220</sup> Julia Marcus, Quarantine Fatigue Is Real, Atlantic (May 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/quarantine-fatigue-real-and-shaming-people-wont-help/611482/> [<https://perma.cc/3VCP-AT2N>] (“Public-health campaigns that promote the total elimination of risk, such as abstinence-only sex education, are a missed opportunity to support lower-risk behaviors that are more sustainable in the long term.”); *supra* notes 24–41 and accompanying text (discussing the costs of crime control and the failure to rationally assess them).

<sup>221</sup> Marcus, *supra* note 212. Notably, when we talk about “flattening the curve” of pandemic infection, we are speaking the language of harm reduction. We very much want case counts to drop, but that is not necessarily the primary goal. Our alternative aim is to reduce harm by spreading out the impact of infections across time and place to avoid overtaxing the medical personnel and resources.

<sup>222</sup> See, e.g., Horatio Alger, Jr., *Ragged Dick: Or, Street Life in New York with the Boot Blacks* (Hildegard Hoeller ed., 1868).

“rugged individualism” is, itself, premised on a notion of taking risks.<sup>223</sup> But not really. The narrative pays insufficient attention to the “role of luck and grace in human life: having or not having lucky breaks, receiving or not acts of recognition and love from other people.”<sup>224</sup> Moreover, it disregards the degree to which institutions create the preconditions for people to be lucky in the first instance. E.B. White wrote: “No one should come to New York to live unless he is willing to be lucky.”<sup>225</sup> But *willingness* to be lucky—a willingness to take risks—is only one piece of the puzzle; *access to low-risk luck* is more critical, and, of course, access to low-risk luck depends upon luck itself, including, most importantly, the luck of being born into a favored caste or class. This is what Louis Michael Seidman had in mind when he wrote of “crime-resistance capital” and the moral luck of the biological or socio-economic draw:

Imagine that there is a good called crime resistance capital that is unequally allocated at or shortly after birth. This capital might consist of early training in impulse control, plausible noncriminal paths toward wealth and happiness, inculcation in mainstream values, and so forth. It is easy to see that, through no fault of his own, a person with little crime resistance capital is differently situated than a person with a great deal of this capital with respect to ability to obey the law.<sup>226</sup>

<sup>223</sup> Samuel Bazzi, Martin Fiszbein & Mesay Gebresilasie, *Frontier Culture: The Roots and Persistence of “Rugged Individualism” in the United States* (Nat’l Bureau of Econ. Rsch., Working Paper No. 23997, 2017); cf. *infra* notes 463–66 and accompanying text (discussing “rugged individualism” and resistance to COVID-epidemic mask-wearing orders).

<sup>224</sup> Unger, *infra* note 42, at 40 (“The blind fortune that presides over our birth—out of the consequences of the accidental coupling of our parents—pursues us in the big things as well as in the little ones.”). Of course, the idea of “lucky breaks” is related to “luck egalitarianism” and John Rawls’ discussion of the “natural lottery.” John Rawls, *A Theory of Justice* 63–64 (1921) (discussing the “natural lottery”). See generally Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 *Phil. Stud.* 77 (1989) (arguing that “the idea of equal opportunity for welfare is the best interpretation of the ideal of distributive equality”); G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 *Ethics* 906 (1989) (examining “[w]hat aspect(s) of a person’s condition should count in a *fundamental* way for egalitarians, and not merely as cause of or evidence of or proxy for what they regard as fundamental”); Carl Knight, *Luck Egalitarianism: Equality, Responsibility, and Justice* 4 (2009).

<sup>225</sup> E.B. White, *Here Is New York* 19 (1949).

<sup>226</sup> Seidman, *supra* note 31, at 13; see also Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *Criminology* 441 (1998) (arguing that “an overreliance on incarceration as a formal control may hinder the ability of some communities to foster other forms of control because they weaken family and community structures”); Unger, *infra* note 42, at 18 (“What individuals can do with their lives

Once we perceive the centrality of the prevailing social order—and our lucky or unlucky ability or inability to access lucky breaks within it—we may come to terms more readily with the notion of *generously giving breaks*, even (or especially) to those who would do us harm, to help them break free from the criminogenic structural and other pressures that produce crime in the first instance. That is to say, we may reconceptualize petty offenses “not as a threat to social order but as [a] lingering relic of previous deprivations”—what Richard Delgado called a “rotten social background.”<sup>227</sup>

This understanding gives lie to the conclusion that recidivism invariably signals a “progressive loss of mitigation.”<sup>228</sup> Just as marks on the body are symptoms of disease, criminal-legal “marks” may be symptoms of an overwhelming influence.<sup>229</sup> On this reading, purported deviance may actually evidence privation. Self-help is primarily a response to the real offense of endemic poverty.<sup>230</sup> And the genuine need of the “modern Jean Valjean” is revealed, in part, by his desperate illegal act.<sup>231</sup> The connection, here, is clear between the immediate project and conventional affirmative defenses. Indeed, the crime license may be thought of as a species of the duress or necessity defense, where the

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depends on the way society is organized and on their place within the social order, as well as on achievement and luck.”).

<sup>227</sup> Garland, *supra* note 132, at 48; Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation, 3 *L. & Inequality* 9, 64 (1985).

<sup>228</sup> von Hirsch, *Proportionality and Progressive Loss of Mitigation: Further Reflections, in Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, *supra* note 118, at 9; Julian V. Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* 2–7, 137–84 (2008) (observing that punishing recidivists more harshly is a persistent practice worldwide); cf. Lewis, *supra* note 9, at 29, 55–56 (offering reasons to do “the opposite of what human societies have done for millennia” with the recidivist premium).

<sup>229</sup> Kohler-Hausman, *supra* note 5, at 144–82 (discussing criminal-legal “marks”).

<sup>230</sup> Donald Black, *Crime as Social Control*, 48 *Am. Socio. Rev.* 34 (1983) (“There is a sense in which conduct regarded as criminal is often quite the opposite. Far from being an intentional violation of a prohibition, . . . it is self-help.”). On this score, I am reminded of the observation of my old boss, Robin Steinberg, former executive director of the Bronx Defenders. She claimed that—because the organization’s holistic-defense model served also the civil-legal and social-service needs of criminal-defense clients—it was a crime-fighting outfit; cf. Experts: Robin Steinberg, at <http://gideonat50.org/experts/robin-steinberg/> [<https://perma.cc/UX4C-TPL2>] (describing holistic defense as a “model of representation to fight both the causes and consequences of involvement in the criminal justice system”). We eliminate crime by meeting people’s needs in the first instance.

<sup>231</sup> David L. Bazelon, *The Morality of the Criminal Law*, 49 *S. Cal. L. Rev.* 385, 389 (1976) (asking “whether a free choice to do wrong can be found . . . in the act of a ‘modern Jean Valjean’”); Victor Hugo, *Les Misérables* (1862) (telling the story of Jean Valjean).



justification or excuse is recognized at the policy level *ex ante* and categorically—and where the principal proof for irrationality, compulsion, or need are repeated prior acts of criminality.

There is, after all, nothing new to the normative claim that “social injustice” might “create individual license.”<sup>232</sup> The maxim, “to each according to his needs,” is as old as Marx.<sup>233</sup> Even some scholars who have accepted conceptually the morality of the *recidivist premium* have questioned whether the state has met preconditions for its imposition.<sup>234</sup> But there is more to crushing pressure than socio-economic duress or other forms of grave distributive injustice. There are also persuasive *internal* explanations for criminal conduct—what Harry Frankfurt called a “volitional necessity”—like an undesirable and unsought overwhelming flaw of reasoning or *akrasia* (absence of willpower) that may drive an individual to act in a particular manner.<sup>235</sup> Here, it is instructive to look to emerging attitudes toward addiction. Therapeutic experts understand that relapse is typically no moral failing or mark of poor character or choice, but rather corroboration of the strength of the underlying craving or

<sup>232</sup> Aditi Bagchi, *Lying and Cheating, or Self-Help and Civil-Disobedience?*, 85 *Brook. L. Rev.* 1, 20–21 (2020).

<sup>233</sup> Karl Marx, *Critique of the Gotha Program* (1875), *reprinted in* *The Marx-Engels Reader* 382, 388 (Robert C. Tucker ed., 1972).

<sup>234</sup> Ewing, *supra* note 28, at 283, 330 (observing that the recidivist premium “is problematic in practice because ex-offenders’ opportunities to avoid reoffending are arguably worsened by criminogenic prison conditions and collateral consequences of conviction to a greater extent than they are improved by . . . punishment”); see also Lee, *supra* note 118, at 618–20 (arguing that the state shares at least partial blame for an offender’s recidivism because it has “made it difficult for ex-offenders to pursue normal lives by denying them housing, welfare, education, certain jobs, and the ability to drive to work”); cf. Christopher Lewis, *Incentives, Inequality, Criminality, and Blame*, 22 *Legal Theory* 153 (2016) (arguing social conditions create incentives to commit crime, and, in such circumstances, blame is inappropriate). Ewing identified a number of moral and prudential objections to “*large* recidivist premiums,” including the criminogenic effect of long-term incarceration, the elasticity of criminal conduct, and corresponding concerns about the value of incapacitation. Ewing, *supra* note 28, at 292. But, to my thinking, Ewing did not go far enough. As I argue here, there are good reasons, in some circumstances, to doubt not only large recidivist premiums but any recidivist premium—and, in fact, any punishment at all for the longtime recidivist offender.

<sup>235</sup> Bowers, *supra* note 150, at 809 (describing *akrasia* in the context of addiction); Harry G. Frankfurt, *Duty and Love*, 1 *Phil. Explorations* 4, 5 (1998); see also Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 *Legal Theory* 215, 234 (2009); Ole-Jørgen Skog, *The Strength of Weak Will*, 9 *Rationality & Soc’y* 245 (1997); Donald Davidson, *How Is Weakness of the Will Possible?*, in *Essays on Actions and Events* 21 (2d ed. 2001) (1969); *infra* notes 356–61 and accompanying text (discussing “volitional necessity”).

environmental pull or strain.<sup>236</sup> The compulsion comes both from the inside and the outside.<sup>237</sup>

Just as drug-dependent individuals may struggle to “get with the program,” so-called “persistent misdemeanants” may fail to respond rationally or volitionally to punishment, even when compliance would seem to be in their manifest best interests.<sup>238</sup> Decades ago, behavioral economists, like Daniel Kahneman and Amos Tversky, persuasively exploded the myth of the rational actor.<sup>239</sup> But, even in a world chockfull of unsound thinking, the young, criminally involved, and drug dependent stand out as particularly prone to discount steeply or hyperbolically the prospect of future jail sentences.<sup>240</sup> For these individuals, the

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<sup>236</sup> Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 *Notre Dame L. Rev.* 439, 463, 523 (1999) (describing addiction as a “chronic, progressive, relapsing disorder”); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 *Ohio St. L.J.* 1479, 1485 (2004) (discussing the “inevitability of relapse”).

<sup>237</sup> *Infra* notes 255–61 and accompanying text (discussing environmental theories of addiction).

<sup>238</sup> Bowers, *supra* note 150, at 788 (“Ultimately, when drug courts imprison failing participants, they punish them not for their underlying crimes, but for their inability to get with the program.”); *id.* at 828 (“Drug courts . . . view the addict as only partially responsible (and, rhetorically, perhaps not even that) when valuing the retributive worth of his crime, but wholly rational and responsible when it comes to his success or failure at responding to the carrots and sticks of treatment.”).

<sup>239</sup> See generally Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263 (1979) (arguing that “people underweight outcomes that are merely probable in comparison with outcomes that are obtained with certainty”); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 *J. Risk & Uncertainty* 297 (1992) (“develop[ing] a new version of prospect theory” that “allows different weighting functions for gains and for losses” and “confirm[s] a distinctive fourfold pattern of risk attitudes”).

<sup>240</sup> Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1539 (1998) (defining hyperbolic discounting as an irrational “impatience . . . for near rewards . . . and aversion . . . for near punishments”); George Ainslie, *A Research-Based Theory of Addictive Motivation*, 19 *L. & Phil.* 77, 91 (2000) (describing the hyperbolic discounter as one who “fails to develop a faculty for ‘utility constancy’”). On irrationality and addiction, see Michael Louis Corrado, *Addiction and Responsibility: An Introduction*, 18 *L. & Phil.* 579, 583–585 (1999); Michael Louis Corrado, *Behavioral Economics, Neurophysiology, Addiction and the Law* 1, 27 (Univ. of N.C. at Chapel Hill, UNC Legal Studies Research Paper No. 892007, 2006) (discussing the argument that addicts may discount hyperbolically because of “distorted reasoning[,] . . . a flaw in our way of approaching future costs and benefits . . . that . . . lands the addict . . . in hot water”); Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 *Utah L. Rev.* 205, 246 n.132 (1999) (“[W]e can see that criminals appear to be more risk seeking than the general population in both the decision to engage in prohibited behavior and in the decision to

consequences of the recidivist premium often do not register in a meaningful way.<sup>241</sup> And, in such circumstances—where offenders ignore such seemingly clear signals—the offenses, themselves, begin to screen better for low reserves of *crime-resistance capital* than high levels of personal fault.<sup>242</sup>

I recall one client, from my time as a Bronx County public defender, who racked up so many convictions for unlicensed driving—his only crime of conviction—that prosecutors ultimately charged him with multiple felony offenses, carrying a mandatory prison sentence.<sup>243</sup> In a city renowned for its public transportation and lack of available parking, his behavior was nonsensical. The criminal-legal system had provided him with escalating reasons to course correct. No actor of sound mind and freewill would have kept driving in the face of felony time.<sup>244</sup> But still he drove. He seemed psychologically driven to drive—just as a kleptomaniac is compelled to steal.<sup>245</sup> Of course, I am unequipped to offer a definitive diagnosis, but, for present purposes, I need not pinpoint

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exacerbate penalties by hiding or running from detection.”); Lewis, *supra* note 9, at 15 (“[T]hose who commit crime tend to be impulsive and risk-seeking in general[.]”). On risk seeking and youth, see Laura Duberstein Lindberg, Scott Boggess, Laura Porter & Sean Williams, *Teen Risk-Taking: A Statistical Portrait* 22 (2000) (discussing statistics on risk-taking behaviors in adolescent males); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Dev. Rev.* 78 (2008) (citing sources); *supra* notes 182–95 and accompanying text (examining the “aging out” process whereby offenders and drug users temper risk-seeking behavior with age).

<sup>241</sup> Ewing, *supra* note 28, at 293 (explaining that deterrence theory does not support recidivist premiums where the recidivist has “problems rationally assessing his options, exercising self-control, or protecting his future interests when they come into conflict with immediate desires”).

<sup>242</sup> *Infra* notes 374–90 and accompanying text (discussing optimal screening); cf. Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr. & Peter W. Low, *Criminal Law* 9 (4th ed. 2015) (introducing the argument that, to account for “society’s own conduct in relation to the actor,” the criminal law should allow for more capacious excuse defenses based upon “physiological, psychological, environmental, cultural, educational, economic, and hereditary factors”) (quoting David Bazelon).

<sup>243</sup> N.Y. Veh. & Traf. L. § 511(3)(a)(ii), (b) (McKinney 2013) (defining felony aggravated unlicensed operation of a motor vehicle as, *inter alia*, “operating a motor vehicle while . . . ha[ving] in effect ten or more suspensions,” and mandating prison sentence for predicate felons).

<sup>244</sup> *Id.* (providing mandatory prison or probation for felony “unlicensed operation”).

<sup>245</sup> Links have been drawn between obsessive compulsive disorder and kleptomania. Jon E. Grant, *Understanding and Treating Kleptomania: New Models and New Treatments*, 43 *Isr. J. Psych. & Related Sci.* 81 (2006) (“Evidence suggests that there may be subtypes of kleptomania that are more like OCD, whereas others have more similarities to addictive and mood disorders.”).

precisely what was wrong with him, only that *something* was—and the proof was his ongoing criminal conduct.<sup>246</sup>

### *B. Harm Reduction and Human Capabilities*

There is a powerful objection to the preceding. Retributivists have argued that we dehumanize people when we treat their conduct as determined and perceive them, in turn, as patients to be conditioned.<sup>247</sup> According to Stephen Morse, criminal-law doctrine limits excuse defenses, like insanity, because there is “no bright line between free and unfree choices” and, without a line, the law is right to presume that people are “autonomous and capable of that most human capacity, the power to choose.”<sup>248</sup> This is an admirable sentiment. But we do no favors to the unlucky few (or many) who lack sufficient *crime-resistance capital*, by reassuring them that they are authors of their own fates when prevailing conditions raise serious doubts about the claim.<sup>249</sup> This kind of faith in humanity risks making the individual into a “plaything of impersonal forces that are indifferent to his concerns and destructive of them.”<sup>250</sup> By contrast, once we appreciate the destructive influence of impersonal forces, we may come to understand that it is the conventional criminal-legal “machine” with its mandatory punishments and formal features that more often treats the offender—especially the recidivist—as something other than an individual, as “a thing with no insides.”<sup>251</sup>

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<sup>246</sup> It is also possible that the problem was situational necessity, but that seems less likely given widely available public transportation in New York City. In another part of the country, however—where car travel is more central to everyday living—my client’s criminal history might have pointed to the manner by which unlicensed driving is a crime of poverty. *Infra* notes 353–55 and accompanying text (discussing circumstances where unlicensed driving may be a crime of situational necessity).

<sup>247</sup> Herbert Morris, *Rehabilitation and Dignity*, in *Principled Sentencing* 20 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

<sup>248</sup> Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 *S. Cal. L. Rev.* 1247, 1253–54, 1268 (1976) (explaining that it is “respectful to the actor to hold the actor responsible”).

<sup>249</sup> *Supra* notes 222–27 and accompanying text (discussing luck, freewill, and the “American Dream”).

<sup>250</sup> Unger, *supra* note 42, at 35.

<sup>251</sup> Martha C. Nussbaum, *Equity and Mercy*, 22 *Phil. & Pub. Aff.* 83, 111 (1993); Bibas, *supra* note 177, at xvi; Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 *Stan. L. Rev.* 987, 1021–24 (criticizing the dominant role of formalism in criminal procedure); *supra* notes 172–81 and accompanying text (discussing criminal-legal “machinery” and the need for individualized justice).

For Unger, the trick is to keep vigilant against the forces that may transform “the toolmaker” into a “tool.”<sup>252</sup> This is the promise and purpose of radical pragmatism, appropriately applied. It is not a matter of treating the disadvantaged person as an object to be pitied and coddled. To the contrary, Unger placed “the human agent” at the center of his analysis and sought to “marry science and democracy, experimentalism and emancipation” as a means to poke and prod existing institutional and cultural forms to uncover relevant constraints and replace them with alternative “forms of social life that recognize and nourish the godlike powers of ordinary humanity.”<sup>253</sup> The metric, per Unger, is whether the particular radical-pragmatic project promotes human “liberation” by maximizing human “capabilities.”<sup>254</sup>

With this reference to human “capabilities,” Unger gestured at a rich and established literature on the “capabilities approach” that Martha Nussbaum and Amartya Sen formulated as an alternative to welfare economics.<sup>255</sup> They criticized the conventional utilitarian logic that links a “quality of life” to a nation’s aggregate economic wellbeing—most notably, its gross domestic product.<sup>256</sup> A more capacious understanding takes into account also an individual’s lack of access to goods and rights and any corresponding negative impacts on health, education, housing, food security, and opportunity.<sup>257</sup> A *capabilities* metric entails a qualitative evaluation as much as a quantitative calculation. It blurs lines between instrumental and deontic conceptions of *the good life*, as well as internal and external threats to it.<sup>258</sup> In other words, it is concerned not only with social inequality but also the manner by which the outside world and our internal brain chemistries and physiological abilities combine to

<sup>252</sup> Unger, *supra* note 42, at 35 (“A philosophy that takes sides with the agent . . . [endeavors to] reveal how we can redirect thought and reorganize society so that the vision of the agent able to use contingency against constraint becomes more real, and the picture of the toolmaker made into a tool . . . becomes less real.”).

<sup>253</sup> *Id.* at 26, 28, 35 (explaining that “[a] radicalized pragmatism” uses as its touchstone “the agent and his ambitions”).

<sup>254</sup> RSA, *supra* note 46, at 5:59 and 2:50.

<sup>255</sup> Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* 46–56 (2013); see also Amartya Sen, *The Idea of Justice* 225–91 (2009); Amartya Sen, *Capability and Well-Being*, in *Quality of Life* 30, 30 (Martha Nussbaum & Amartya Sen eds., 1993).

<sup>256</sup> Nussbaum, *supra* note 255, at ix.

<sup>257</sup> *Id.* at 33–34, 49.

<sup>258</sup> Lewis, *supra* note 9, at 38–39 (discussing “conceptions of the good”); *supra* notes 78–80 and accompanying text.

impact our capacity for practical reasoning and self-actualization.<sup>259</sup> Like pragmatism, this can be messy. Indeed, proponents of the *capabilities approach* have debated even the operative principle. Is it dignity, human flourishing, choice, autonomy, or some other related concept at play?<sup>260</sup> But, ultimately, it makes little difference which term we use. All ideas collapse into the same core inquiry: “What is each person able to do and to be?”<sup>261</sup> It is a matter of helping the *free-willed, dignified, flourishing, agent* help herself.

Still, the *capabilities approach* is more than a mere means to self-satisfaction. There is, as Unger recognized, a “relation between self-help and solidarity.”<sup>262</sup> We achieve social solidarity when we have the opportunity to act according to our own selfish interests, *but we use our capabilities also to care for each other*—to experiment on behalf of each another, to attend to another’s particular challenges and barriers, to *reduce harms* upon individuals and the collective.<sup>263</sup> The *capabilities approach* is, therefore, an approach that stands in sharp contrast with conventional rights-based frameworks, which, according to Robin West rely upon the “separation thesis”—the idea that each of us is “not essentially connected with one another” and that “what separates us is in some important sense prior to what connects us.”<sup>264</sup> The recognition, here, is that agency and community may be symbiotic concepts; they may travel in tandem and reinforce each other. This, then, is the opposite of a dehumanizing and self-centered model of social order and existence. This is what it means

<sup>259</sup> Nussbaum, *supra* note 255, at 33–34; see also Kony Kim, *Restoring Human Capabilities After Punishment: Our Political Responsibilities Toward Incarcerated Americans* 39–40 (2016) (Ph.D. dissertation, University of California, Berkeley) (ProQuest); *supra* notes 191–95 and accompanying text (discussing the “environmental theory” of addiction).

<sup>260</sup> Nussbaum, *supra* note 255, at 20, 29–33 (emphasizing dignity and human flourishing); Amartya Sen, *Capabilities, Lists, and Public Reason: Continuing the Conversation*, 10 *Feminist Econ.* 77, 77–80 (2004) (emphasizing a more generalized capabilities approach).

<sup>261</sup> Nussbaum, *supra* note 255, at 18–20; see also Kim, *supra* note 259, at 39 (“Among the most essential human capacities, in Nussbaum’s view, is the ability to make reasoned choices: in a word, agency . . . . When people are exercising agency reasonably, they’re living in a manner most worthy of their dignity. Thus, agency is vital to human flourishing, and respect for people’s dignity requires preserving and protecting their exercise of agency.”).

<sup>262</sup> Unger, *supra* note 42, at 51; cf. Robin West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1, 2 (1988) (describing Unger as the “premiere spokesperson for the communitarian left”).

<sup>263</sup> See Rebecca Solnit, *A Paradise Built in Hell: The Extraordinary Communities that Arise in Disaster* 3 (2009) (“The very concept of society rests on the idea of networks of affinity and affection, and . . . the keeping of one’s brothers and sisters.”).

<sup>264</sup> West, *supra* note 262, at 1–2.

to pursue the common good and appreciate concurrently that “[e]ach individual is different from every other individual who has ever lived or who will ever live,” with her own distinct needs, wants, limits, and possibilities.<sup>265</sup> In turn, radical-pragmatic harm reduction depends upon experimentation to identify and lift constraints on the twinned concepts of self-help and solidarity, attending to what is practical (with an eye toward making the immediately impractical more practical, going forward).<sup>266</sup>

### C. *Letting Go*

There is something almost ethereal to radical-pragmatism’s aspiration to “unchain” our “shackled vision.”<sup>267</sup> Unger even adopted a mystical tone when arguing that, when we “lift ordinary people up to a higher plain of intensity, scope, and capability,” we “cannot become God . . . [but] we can become more godlike.”<sup>268</sup> Indeed, we find strands of our radical harm-reduction frame in religious texts.<sup>269</sup> For instance, the Parable of the Prodigal Son (also known as the Parable of the Lost Son) presents us with the story of a wayward child who eventually returns home. His father showers favor upon him, provoking the ire of a second, obedient son. When the obedient son demands to know why his father would reward a child who “devoured thy living with harlots,” his father responds: “Son, thou art ever with me, and all that I have is thine . . . [But] be glad: for . . . thy brother was dead, and is alive again; [he] was lost, and is found.”<sup>270</sup> For the obedient son, goodness is a form of striving. He thinks in conventional American terms of “law, merit, and reward,” not “love

<sup>265</sup> Unger, *supra* note 42, at 18. In a related vein, Ta-Nehesi Coates wrote: “Slavery is not an indefinable mass of flesh. It is a particular, specific enslaved woman, whose mind is active as your own, whose range of feeling is as vast as your own . . . , who loves her mother in her own complicated way.” Ta-Nehesi Coates, *Between the World and Me* 69 (2015).

<sup>266</sup> See Kim, *supra* note 259, at 39 (“[E]fforts to protect agency must account for human *vulnerability*: by nature, people have inherent needs and weaknesses . . . . [P]eople need to inhabit societies that afford them freedom to flourish by meeting welfare needs, protecting against exploitation, and supporting the growth and exercise of essential human capacities.”).

<sup>267</sup> Unger, *supra* note 42, at 44.

<sup>268</sup> RSA, *supra* note 46, at 2:43; Unger, *supra* note 42, at 256.

<sup>269</sup> The concepts of mercy and forgiveness are, of course, familiar to many religious traditions. Murphy & Hampton, *supra* note 131, at 5.

<sup>270</sup> Luke 15:29–32 (King James) (“Lo, these many years do I serve thee, neither transgressed I at any time thy commandment: and yet thou never gavest me a kid, that I might make merry with my friends: but as soon as this thy son was come, which hath devoured thy living with harlots, thou hast killed for him the fatted calf.”).

and graciousness.”<sup>271</sup> But the father thinks in terms of *letting go* and *giving breaks*. The father is willing to forgive and hopes the Prodigal Son takes the following message from that forgiveness: “If he can see enough in me to welcome me back, then maybe I am not such a hideous person after all.”<sup>272</sup>

An even more dramatic (and comparatively obscure) literary example is the delightful and underappreciated stop-motion film, *Kubo and the Two Strings*.<sup>273</sup> Throughout the movie, a supernatural villain terrorizes a town. In the final confrontation, he is laid low and transformed back into the mortal form of an old man, suffering from amnesia: “I’m sorry . . . I seemed to have forgotten my story. Can you help me?”<sup>274</sup> Remarkably, the villagers do not take vengeance against their longstanding tormentor. They do not even contemplate retributive notions of proportional punishment or exile. Instead, they welcome him with a generous and fabricated tale of his own past:

“We’ll tell him everything he needs to know.” . . . “You . . . are the kindest, sweetest man to ever live in this village.” . . . “Every day, you walk around smiling and handing out coins to children . . . like me!” . . . “You . . . taught my kids to swim!” . . . “[Y]ou give blankets to the poor.” . . . “You fed the hungry.” . . . “You always lend a helping hand!” . . . “You’re a good man.” . . . “That’s why we love you!”<sup>275</sup>

The villagers deceive him. But it is a good and kind lie—a “nudge” to bring him back into the fold.<sup>276</sup> In modern parlance, the film—like the *Parable of the Prodigal Son*—is a story of “offender reentry.”<sup>277</sup> The villagers are primarily concerned with reintegration, not payback. As Jean Hampton observed: “[F]orgiveness involves seeing the wrongdoer as, despite it all, a person who still possesses decency and one whom we ought to be *for* rather than against.”<sup>278</sup> The objective is “to focus on

<sup>271</sup> Arland J. Hultgren, *The Parables of Jesus: A Commentary* 80 (2002).

<sup>272</sup> Jean Hampton, *Forgiveness, Resentment and Hatred*, in *Forgiveness and Mercy*, supra note 131, at 87 (“This might be the first step towards coming to like himself again.”).

<sup>273</sup> *Kubo and the Two Strings* (Laika Films 2016).

<sup>274</sup> *Id.* at 1:29:02.

<sup>275</sup> *Id.* at 1:29:19.

<sup>276</sup> *Id.* infra notes 299–301 and accompanying text (discussing libertarian-paternal “nudges”).

<sup>277</sup> Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 15 (2003); NYU Center on the Administration of Criminal Law, *Disrupting the Cycle: Reimagining the Prosecutor’s Role in Reentry: A Guide to Best Practices* 44 (2017).

<sup>278</sup> Jean Hampton, *The Retributive Idea*, in *Forgiveness and Mercy*, supra note 131, at 111, 151.



building a better future,” and the notion of *letting go* is a path to get there.<sup>279</sup>

This notion does, however, raise a set of immediate objections—specifically, that mercy and forgiveness are inconsistent with justice, equal treatment, the rule of law, or some combination of the three.<sup>280</sup> Elsewhere, I have responded to these concerns in considerable detail.<sup>281</sup> For now, it is enough to recognize that the answer depends upon the context.<sup>282</sup> The most astonishing aspect of *Kubo and the Two Strings* is that the villagers do not even make contrition part of the price of redemption. They just move on. From a harm-reduction perspective, this may be defensible—even laudable—but it could be too much to expect of people who, in that specific context, were victimized violently for decades by a *literal* demon. In this vein, even theorists who champion forgiveness have expressed worries about “cheap grace.”<sup>283</sup> But, when it comes to the kinds of trivial wrongs (if they *are* wrong) that populate quality-of-life codes, it is not obvious why contrition ought to be a prerequisite.<sup>284</sup> Nor is it apparent that justice commands anything at all. (Query, in the first instance, whether a “managerial model” of social control could even be

<sup>279</sup> Martha Minow, *When Should Law Forgive?* 153 (2019).

<sup>280</sup> See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176, 1179 (1989) (“It is this dichotomy between ‘general rule of law’ and ‘personal discretion to do justice’ that I wish to explore . . . There are times when even a bad rule is better than no rule at all.”); David Dolinko, *Some Naive Thoughts About Justice and Mercy*, 4 Ohio St. J. Crim. L. 349, 349–51 (describing mercy as infliction of less punishment than deserved and recognizing the argument that “a deliberate departure from the requirements of justice [may be] an injustice”); Jeffrie G. Murphy, *Mercy and Legal Justice*, in *Forgiveness and Mercy*, supra note 131, at 167–70 (“If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice.”); Minow, supra note 279, at 129 (“Forgiveness judgments must always consider the jeopardy to the rule of law and to the fair treatment of others who obey the rules.”).

<sup>281</sup> Bowers, supra note 10, at 1673, 1680–81 (discussing mercy’s relationship to justice and treating “like cases alike”); Bowers, supra note 36, at 135–37 (responding to rule-of-law objections to leniency).

<sup>282</sup> Jeffrie G. Murphy, *Mercy and Legal Justice*, in *Forgiveness and Mercy*, supra note 131, at 172 & n.7 (arguing that a “sophisticated theory” of justice is not “overrestricted and simplistic,” but rather remains flexible enough to account for “morally relevant differences”); infra notes 287–98 and accompanying text (discussing “normative guilt and innocence”).

<sup>283</sup> Bibas, supra note 177, at 97; see also Minow, supra note 279, at 142 (“The legal tools of forgiveness can themselves be abused, but that should not be a reason for less forgiveness in the law. Instead, it should be a reason for developing rigorous, reasoned analysis about when forgiveness is and is not warranted.”); infra notes 393–411 and accompanying text (discussing the objection of “undeserved windfall”).

<sup>284</sup> Supra notes 78–85 and accompanying text (discussing contested concepts of disorder and quality of life).

termed a *justice* system.<sup>285</sup>) For the so-called “persistent misdemeanor”—struggling perhaps against cognitive, psychological, or socio-economic deprivation—there may be nothing, simply put, for which to apologize.<sup>286</sup>

In any event, there is a strong claim that justice and mercy are not intrinsically incompatible, even though tensions may arise in distinct cases. In fact, Martha Nussbaum has argued persuasively that *complete justice* sometimes demands thoroughgoing attention to what I have termed *normative guilt and innocence*.<sup>287</sup> Even retributivists, like Jeffrie Murphy, have recognized that, although justice may *allow* punishment in a given situation, it may not require it when, all things considered, the individual “has suffered enough.”<sup>288</sup> According to Murphy:

[S]uffering tends to bring people low, to reduce them, to humble them. . . . They may not have severed themselves from their own evil acts, but there is perhaps a sense in which they have been severed. Given the hurt and sadness that may come to be present in a person’s life, it may be difficult and improper to retain, as one’s *primary* view of that person, the sense that he is essentially “the one who has wronged

<sup>285</sup> Supra note 146 and accompanying text.

<sup>286</sup> Infra notes 381–90 and accompanying text; cf. Minow, supra note 279, at 146, 153 (noting that forgiveness may be a means to use “a wider lens” and “acknowledge larger social failures to prevent misery [and] restrain power”).

<sup>287</sup> Nussbaum, supra note 251, at 85–86 (arguing complete justice requires legal justice tempered by equity, and recognizing the “close connection between equitable judgment—judgment that attends to the particulars—and mercy”); Bowers, supra note 10, at 1672, 1678–79 (“Complete justice demands both the simple justice that arises from fair and virtuous treatment and the legal justice that arises from the application of legal rules . . . Roughly, normative innocence is equivalent to a lack of blameworthiness, . . . [which] relies upon particularized exercise of practical intuition and intelligence, not on formal legal designations . . . [I]t demands a separate (and contextualized) evaluation.”); see also Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 Seton Hall L. Rev. 288, 343 (1993) (“[M]ercy is neither a redundancy of justice nor an indefensible deviation from justice. Instead, . . . mercy is a guarantor of justice.”); C.S. Lewis, *God in the Dock: Essays on Theology and Ethics* 294 (Walter Hooper ed., 1970) (“Mercy, detached from Justice, grows unmerciful. That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice.”).

<sup>288</sup> Jeffrie G. Murphy, *Forgiveness and Resentment*, in *Forgiveness and Mercy*, supra note 131, at 26.; see also Jeffrie G. Murphy, *Mercy and Legal Justice*, in *Forgiveness and Mercy*, supra note 131, at 162, 171, 180–81 (endorsing “individuation” as “a basic demand of justice,” and describing mercy as a “free gift” whether “acted on or not”); see also Ewing, supra note 28, at 316; cf. John Tasioulas, *Mercy*, 103 Proc. Aristotelian Soc. 101, 117–18, 122 (2003) (observing that not “taking . . . extenuating circumstances into account is unduly harsh”).

me.” Perhaps he does and should become in one’s mind simply “that poor bastard.”<sup>289</sup>

Turning next to the objection that mercy violates the principle of “treating like cases alike,” we must first ask what it even means for two cases to be alike. *Criminal legalism* answers this question with reference to formal statutory definitions only.<sup>290</sup> The contrary claim, which I endorse, is to compare the equities of respective cases.<sup>291</sup> But this idea, in turn, implicates the final objection—that attention to the equities may offend certain aspirations of the rule of law, for instance, “regularity and evenhandedness.”<sup>292</sup> Elsewhere, I have argued for a thicker conception of the rule of law that promises more than fidelity to prospective and precise rules, accommodating also moral considerations, like autonomy and dignity.<sup>293</sup> But, for now, it is enough to stack up the anticipated vagaries of merciful systems against the experienced vagaries of our prevailing system—a system chock-a-block with arbitrary disparity.<sup>294</sup> Even a formalist, like Justice Scalia, has acknowledged that our criminal-legal system does not, in application, adhere to the “admirable belief that the law is the law, and those who break it should pay the penalty.”<sup>295</sup> And, of course, these practice-based disparities are particularly pronounced in the context of quality-of-life enforcement, where the law as written is quite

<sup>289</sup> Jeffrie G. Murphy, *Forgiveness and Resentment*, in *Forgiveness and Mercy*, supra note 131, at 27–28; see also Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 *Ohio State J. Crim. L.* 329, 333 n.14 (defending exercises of “humane compassion” in criminal justice).

<sup>290</sup> Bowers, supra note 36, at 157–60 (critiquing the special role played by formalism in criminal justice).

<sup>291</sup> Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 *Harv. L. Rev.* 1214, 1242–43 (2010) (defending the notion of “treating like cases differently . . . because we . . . have differing opinions . . . of what constitutes right treatment”); David A. Strauss, *Must Like Cases Be Treated Alike?* 12 (*U. Chi. Law Sch. Pub. L. & Legal Theory Working Paper*, Paper No. 24, 2002) (arguing that, rather than measuring whether like cases are treated alike according to application of legal rules, the justice system could measure according to “morally relevant differences” of cases); Bowers, supra note 10, at 1674 (“[A] contextualized approach to criminal justice necessarily demands more than just a rigid application of legal rules pursuant to formal designations. It demands an evaluation of relative blameworthiness to ensure that equitably distinct cases are recognized as such, even if those cases happen to be legally identical under insufficiently discriminating statutes.”).

<sup>292</sup> Jeffries, supra note 58, at 201, 212; see also Bowers, supra note 36, at 193; Minow, supra note 279, at 146 (“Promoting legal forgiveness . . . may jeopardize the predictability, reliability, and equal treatment sought by the rule of law.”).

<sup>293</sup> Bowers, supra note 36, at 144–45; Bowers, supra note 251, at 988–89.

<sup>294</sup> Supra Section I.B.

<sup>295</sup> *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting).

different from the law as applied.<sup>296</sup> In such circumstances, it is naïve—if not laughable—to claim that a radical-pragmatic experiment in leniency somehow sullies entrenched commitments either to notions of “treating like cases alike” or “the rule of law as a law of rules.”<sup>297</sup> Once we recognize that petty crime was built for selective enforcement, we may more readily and defensibly *let go* of it and *do nothing* more with it.<sup>298</sup>

#### D. Doing Something Radically Different

The process of *letting go* does not, however, mean *doing absolutely nothing* with *anything*. It is just a matter of *doing nothing* with a *particular something*—the *criminal-legal system*. Indeed, we may even keep doing certain things within the criminal-legal system, provided they are sufficiently different types of things. Restorative justice may be one such example. Behavioral economists have long endorsed using incentives and other less coercive policies and practices as “libertarian-paternal” means to “nudge” people in the right direction.<sup>299</sup> The logic of

<sup>296</sup> Supra notes 86–112 and accompanying text (discussing large role played by discretion in quality-of-life enforcement and adjudication).

<sup>297</sup> Scalia, supra note 280, at 1175.

<sup>298</sup> In any event, leniency is a special case. Certain rule-of-law concerns—for instance, the concept of notice—are simply not as pressing when it comes to mercy, as compared to punishment. According to Meir Dan-Cohen: “[T]he rule of law allegedly promotes liberty or autonomy by increasing predictability. But the need for security of individual expectations is not a great obstacle . . . when decision rules are more lenient than conduct rules would lead people to expect. In such cases no one is likely to complain of frustrated expectations.” Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, in *Criminal Law Conversations*, supra note 31, at 3, 10–11 (2011); see also Anne M. Coughlin, *Of Decision Rules and Conduct Rules, or Doing the Police in Different Voices*, in *Criminal Law Conversations*, supra note 31, at 15, 16 (2011) (“What does the lawbreaker have to whine about? The fact that she thought she was going to be punished . . . ? That would be goofy, to say the very least.”). In other words, the rule of law tolerates pleasant surprises. Bowers, supra note 36, at 136, 147–48, 160 (“[P]ositive legality is not offended by pleasant surprises, and an exception that tends toward leniency produces only a *pleasant* surprise. . . . In other words, the rule of law abides pleasant surprises because such surprises do not affect the individual’s opportunities to plan conduct in the shadow of law.”).

<sup>299</sup> Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 *Am. Econ. Rev.* 175–76 (2003) (“If no coercion is involved, we think that some types of paternalism should be acceptable to even the most ardent libertarian. . . . [I]n some cases individuals make inferior choices, choices that they would change if they had complete information, unlimited cognitive abilities, and no lack of willpower. . . . [P]lanners are forced to make some design choices.”); Michael Louis Corrado, *Behavioral Economics, Neurophysiology, Addiction and the Law* 35 (UNC Legal Stud., Research Paper No. 892,007, 2010) (“[I]f the behavioral economist is right we might arrange choices so that people can get what they want for the long run without our making the choice for them.”); cf. Bowers, supra note 150, at 790, 830–33 (describing a way

restorative justice is premised on the same basic idea—that we may nudge offenders to take steps to reintegrate and repair damage, without foregrounding penalties.<sup>300</sup> It does not always operate that way, to be sure. Because restorative justice is typically grafted onto a criminal-legal system, it risks reverting to traditional structural forms and norms. Ultimately, it comes down to the people whom we aim to restore. The more we concentrate only on making “individual survivors whole,” the likelier we are to slip back into old grooves; the more we strive comprehensively to make “whole the many survivors of systemic government atrocities” (whether so-called offenders, crime victims, or other stakeholders), the likelier we are to break free of *punitive prohibition*.<sup>301</sup>

Even within the core of conventional *criminal legalism*, we may adopt policies or take actions that embody this fresh perspective by prioritizing carrots over sticks. Consider, for instance, a program crafted recently by the police department in Richmond, California, to pay recidivist offenders who meet benchmarks toward law-abiding lives.<sup>302</sup> Likewise, New York City has implemented an initiative to provide economic incentives to criminal defendants who appear for court dates.<sup>303</sup> And, of course, drug

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to restructure drug courts around carrots, rather than sticks, as a means to “provide something akin to a ‘libertarian-paternal’ nudge in the right direction for the addicted ex-convict who found himself ready for treatment but who still required some help to get and to keep clean”).

<sup>300</sup> Minow, *supra* note 279, at 160 (quoting Katie J.M. Baker: “In restorative justice, . . . [the] emphasis is on repairing and preventing harm, not indefinite, often ineffective punishment”); see, e.g., Kony Kim, *From Adversarial Legalism to Collaborative Problem-Solving: A Pragmatic Turn in American Criminal Justice 20–25* (examining the Red Hook Community Justice Center in Brooklyn, New York).

<sup>301</sup> Karakatsanis, *supra* note 34, at 95 (“[M]aking whole the many survivors of systemic government atrocities is entirely absent from broader ‘criminal justice reform’ discourse.”); cf. *supra* notes 147–64 and accompanying text (critiquing the scope of internal criminal-legal “reformist” reforms, like drug courts).

<sup>302</sup> Richard Gonzales, *To Reduce Gun Violence, Potential Offenders Offered Support and Cash*, NPR (Mar. 28, 2016), <https://www.npr.org/2016/03/28/472138377/to-reduce-gun-violence-potential-offenders-offered-support-and-cash> [<https://perma.cc/J2WM-AA2T>].

<sup>303</sup> Stephanie Pagonis, *New York City Gifting Alleged Criminals Baseball Tickets, Gift Cards as Part of \$12M Perk Program*, Fox Bus. (Nov. 8, 2019), <https://www.foxbusiness.com/money/new-york-city-gifting-alleged-criminals-baseball-tickets-gift-cards-as-part-of-12m-perk-program> [<https://perma.cc/8B7N-SATG>]. I was a Reporter for the Uniform Law Commission’s recently adopted “Pretrial Release and Detention Act.” We included, in our proposed statute, a similar set of provisions that would require courts to consider whether “practical assistance” or “supportive service” could effectively manage release risks. Uniform Law Commission, *Pretrial Release and Detention Act*, § 305 (adopted July 15, 2020).

courts—for all their shortcomings—have long depended upon positive motivation.<sup>304</sup>

More creatively, consider a grassroots example from the early days of Hip-Hop culture. By the middle of the 1970s, Bronx County, New York had come to resemble a war zone. Gangs populated otherwise abandoned buildings. Governmental services were few and far between. Crime ran rampant.<sup>305</sup> To quell the violence, some activists (primarily, former gang members) organized block parties, but they invited only those willing to come in peace.<sup>306</sup> The parties—featuring a new musical style, called rap—were a huge hit. In short order, other gang members put down weapons and rebranded themselves as dance, music, and art “crews.”<sup>307</sup> Of course, poverty and crime continued to plague these communities. But a system of social motivation had successfully reduced harm—and, in the process, helped create new cultural traditions. The carrot was celebration, and the price for reintegration was only a commitment to peace, not punishment.<sup>308</sup>

Or, more recently, the municipal government in Oakland, California, developed a radical-pragmatic set of incentives designed to correct for the criminal-legal excesses of the past.<sup>309</sup> Specifically, the city adopted a “Cannabis Equity Program” to offer over three million dollars in interest-

<sup>304</sup> Douglas B. Marlowe, *Behavior Modification 101 for Drug Courts: Making the Most of Incentives and Sanctions* 3 (2012); see also *supra* notes 150–64 and accompanying text (discussing drug courts).

<sup>305</sup> Vivian Vásquez Irizarry, Gretchen Hildebran & Julia Steele Allen, *Decade of Fire*, PBS (Nov. 4, 2019), <https://www.pbs.org/independentlens/documentaries/decade-of-fire/> [<https://perma.cc/S5K9-NV4R>].

<sup>306</sup> Soraya Nadia McDonald, *Out of the Chaos, a Beat: ‘Rubble Kings’ Explains How Gang Violence Gave Way to the Creation of Hip-Hop*, *Wash. Post* (June 25, 2015), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/25/out-of-the-chaos-a-beat-rubble-kings-explains-how-gang-violence-gave-way-to-the-creation-of-hip-hop/> [<https://perma.cc/Q5GE-RSAZ>]; Jeff Chang, *Can’t Stop, Won’t Stop: A History of the Hip-Hop Generation* 60 (2005).

<sup>307</sup> Chang, *supra* note 306, at 80.

<sup>308</sup> Cf. Karakatsanis, *supra* note 34, at 32 (“[A] variety of other alternatives to human caging exist . . . education, employment, companionship, after-school art and theater programs, medical and mental health care, addiction treatment, and stable housing, to name a few.”).

<sup>309</sup> Maki Becker, *The War on Drugs Hit Them Hard, So Oakland Is Saving Them a Spot in the Pot Trade*, *Buff. News* (May 5, 2019), [https://buffalonews.com/news/local/the-war-on-drugs-hit-them-hard-so-oakland-is-saving-them-a-spot-in/article\\_d0e501f1-b2bb-550c-a5dd-fb4fb25ed92a.html](https://buffalonews.com/news/local/the-war-on-drugs-hit-them-hard-so-oakland-is-saving-them-a-spot-in/article_d0e501f1-b2bb-550c-a5dd-fb4fb25ed92a.html) [<https://perma.cc/5FBE-T9JF>] (drawing an analogy to reparations); Max Blau, *Legal Pot Is Notoriously White. Oakland Is Changing That.*, *Politico* (Mar. 27, 2018), <https://www.politico.com/magazine/story/2018/03/27/oakland-legal-cannabis-hood-incubator-217657/> [<https://perma.cc/4ATX-E48W>].

free loans and to award permits to sell recreational marijuana to would-be entrepreneurs “who have been the most victimized by the war on drugs.”<sup>310</sup> At least half of all permits must go to “equity applicants,” a category that includes the poor, longtime residents of disproportionately policed neighborhoods and, most importantly for our purposes, individuals with *prior convictions for marijuana crimes*.<sup>311</sup> In a city where police had arrested Blacks for marijuana crimes at twenty times the rate of whites (and where, to date, Blacks own or have founded less than 5% of licit marijuana businesses), the equity measures have had the effect of promoting Black enterprise, reintegrating former offenders, and providing restitution.<sup>312</sup> Likewise, Oakland’s equity initiative is notable for its collaborative nature. It is a public-private partnership, whereby equity participants have access to a nonprofit business accelerator, called the “Hood Incubator,” which provides training in business fundamentals and relevant municipal ordinances and bureaucracy.<sup>313</sup> Oakland is flipping the script on *punitive prohibition*, turning formerly “lost sons” into legitimate businessmen.<sup>314</sup>

But to find the most obviously analogous state-sponsored, harm-reduction prototypes for a recidivist crime license, we must turn to drug policies of the domestic past and international present. In the late nineteenth century, there was no *criminal* drug war. To the contrary, recreational drug use was considered principally a public-health problem.<sup>315</sup> For profoundly dependent users, the medical profession

<sup>310</sup> Becker, *supra* note 309. In addition to \$3 million in interest-free loans, the city is looking to provide commercial kitchen space for edible-cannabis processing. *Id.*

<sup>311</sup> Blau, *supra* note 309 (noting that, under the program, Oakland set aside at least half the permits “for residents who had been targets of the war on drugs”).

<sup>312</sup> Becker, *supra* note 309 (“It came down to this: White people were being allowed to sell and smoke marijuana—even getting rich off it—while African Americans were getting arrested.”); Blau, *supra* note 309 (describing one equity participant for whom “cannabis suppressed her life” but “now, cannabis will uplift her family’s life”); Karakatsanis, *supra* note 34, at 96–97 (describing “[p]olicies to reserve profitable marijuana business licenses to people with prior marijuana convictions” as meaningful radical reform and a “reinvestment” effort designed to promote “community-based wellness”).

<sup>313</sup> Blau, *supra* note 309 (quoting a founder of the Hood Incubator that “[i]t’s there to help those most impacted by the war on drugs”).

<sup>314</sup> *Supra* notes 269–79 and accompanying text (discussing the Parable of the Lost Son as a tale of harm-reduction and restorative justice).

<sup>315</sup> Ellen M. Weber, *Failure of Physicians To Prescribe Pharmacotherapies for Addiction: Regulatory Restrictions and Physician Resistance*, 13 *J. Health Care L. & Pol’y* 49, 56 (2010) (“[T]he medical community viewed addiction as a medical problem, and physicians prescribed opioid medications for the care of addicted patients without legal restrictions.”); David T.

provided *addiction maintenance* as a form of palliative care. That is to say, doctors distributed drugs to satiate overwhelming cravings.<sup>316</sup> But, as the twentieth century dawned, the push for prohibition began as a means to control minority communities. The new war on drugs became, like almost every war on crime since, a fight against Black, Brown, and poor people, as political leaders and the press whipped up public passions with racist lies, linking drug abuse to Black violence and the exploitation of white women (and providing additional cover, more generally, for ongoing Jim Crow oppression and persecution).<sup>317</sup>

But for white drug users, including “southern whites,” whose addiction rate was “perhaps one of the highest in the world,” drug dependency remained (at least for a time) a matter of public health.<sup>318</sup> Doctors continued to treat these recidivist drug users with prescriptions—that is, *licenses*—for recreational narcotics.<sup>319</sup> In fact, several cities established publicly funded addiction-maintenance clinics, including opioid clinics in New York City, Los Angeles, New Orleans, Shreveport, Atlanta, New

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Courtwright, *The Hidden Epidemic: Opiate Addiction and Cocaine Use in the South, 1860–1920*, 49 *J.S. Hist.* 57, 71–72 (1983) (noting that as early as 1870, medical professionals began to conceive of addiction as a disease as opposed to a moral failing, and they responded to the epidemic by treating and ultimately tracking addicts).

<sup>316</sup> Hari, *supra* note 183, at 33–34 (quoting a contemporary physician that “the doctor knows just what should be done . . . that he has but to write a few words on the prescription blank that lies at his elbow, and the patient . . . will receive the remedy that would restore him miraculously to a semblance of normality”); *id.* at 37 (“[D]octors, vets, and dentists . . . [gave] out these drugs as they saw fit . . . addicts [were] dealt with compassionately in this way.”). See generally Henry Smith Williams, *Drug Addicts Are Human Beings* 14 (1938) (recounting the rise to prominence of the prohibitive approach towards drug-use).

<sup>317</sup> See, e.g., Edward Huntington Williams, *Negro Cocaine ‘Fiends’ Are New Southern Menace*, *N.Y. Times*, Feb. 8, 1914, at 12 (warning in racist terms of the purported dangers presented by “cocaine-crazed negroes”); Hamilton Wright, *Report on the International Opium Commission and on the Opium Problem as Seen Within the United States and Its Possessions*, S. Doc. No. 61-377, at 49–50 (2d Sess. 1910); *Cocaine Sniffers*, *N.Y. Daily Trib.*, June 21, 1903, at 11 (describing in racist terms the threats presented by a rise in “cocaine sniffing”); see also David F. Musto, *The American Disease: Origins of Narcotic Control* 7 (3d ed. 1999), (explaining that “fantasies” about super-human strength resulting from cocaine use “characterized white fear, not the reality of cocaine’s effects”); Courtwright, *supra* note 315, at 70–71 (describing the “supercharged racial atmosphere” and “exaggerated reactions” of the white southern power structure); *How Did We Get Here?*, *Economist*, July 28, 2001 (A Survey of Illegal Drugs), at 4 (describing racist early-twentieth century perception of “drug-crazed, sex-mad negroes”).

<sup>318</sup> Courtwright, *supra* note 315, at 57; Hari, *supra* note 183, at 36.

<sup>319</sup> Hari, *supra* note 183, at 37.



Haven, Albany, and Jacksonville.<sup>320</sup> These government-run dispensaries alleviated users' overwhelming cravings by providing free narcotics of known purity, strength, and quality, in sterile and medically supervised settings.<sup>321</sup> Although existing data are limited, the efforts were apparently quite successful and politically popular.<sup>322</sup> The Mayor of Los Angeles, for instance, observed that the city's clinic did "more good . . . in one day than all the prosecutions in one month."<sup>323</sup>

But the legal landscape continued to shift. The federal government began to crack down on the so-called "script doctor[s]" who unethically prescribed opioids to patients to generate profit.<sup>324</sup> And, though the Supreme Court toyed with the idea that drug-dependent individuals "are diseased and proper subjects for such treatment,"<sup>325</sup> it typically upheld prosecutions of prescribing medical professionals, pursuant to the Harrison Act.<sup>326</sup> Federal law enforcement "stigmatized medication-assisted treatment as well as the patients who received such care."<sup>327</sup> In

<sup>320</sup> Musto, *supra* note 317, at 151; Hari, *supra* note 183, at 37; Courtwright, *supra* note 315, at 57–62; Weber, *supra* note 315, at 59 ("[F]ederal and state health officials and local law enforcement, beginning around 1912, created maintenance clinics in a dozen states that would prescribe medication in an effort to prevent suffering related to addiction and wean individuals from their drug use through the gradual reduction of dosage.").

<sup>321</sup> Courtwright, *supra* note 315, at 60–62 (analyzing the data and observing that the clinics were "designed to supply narcotics to, as well as to keep track of, addicts").

<sup>322</sup> Musto, *supra* note 317, at 151, 156–78.

<sup>323</sup> Hari, *supra* note 183, at 37.

<sup>324</sup> Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 *Cath. U. L. Rev.* 586, 594–95 (1973) ("[L]aw enforcement officials soon began to move to curtail the medical profession's freedom to prescribe narcotics in the treatment of addicts.").

<sup>325</sup> *Linder v. United States*, 268 U.S. 5, 18 (1925).

<sup>326</sup> Harrison Act of 1914, Pub. L. No. 63-223, ch. 1, 38 Stat. 785, 785 (1914) (repealed 1970). Compare *Linder*, 268 U.S. at 18 ("[W]e cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed . . . in the ordinary court and in good faith . . . morphine or cocaine for relief of conditions incident to addiction."), with *United States v. Behrman*, 258 U.S. 280, 288–89 (1922) (holding that prescribing drugs for an addict was a crime regardless of the physician's intent in the matter), and *Jin Fuey Moy v. United States*, 254 U.S. 189, 194 (1920) (holding that a physician's lawful prescribing authority did not include "a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug"), and *Webb v. United States*, 249 U.S. 96, 99–100 (1919) ("[T]o call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required.").

<sup>327</sup> Weber, *supra* note 315, at 56.

turn, the clinics began to close.<sup>328</sup> “The addict-patient vanished; the addict-criminal emerged in his place.”<sup>329</sup>

However, beyond our borders, addiction maintenance has returned. In Vancouver, Canada, a grassroots campaign by drug users and their supporters led to the establishment of an underground supervised injection facility in the 1990s.<sup>330</sup> Eventually, this subterranean radical-pragmatic experiment became public and won the favor of political leaders, leading, thereafter, to the opening of Insite, the first legally authorized supervised injection facility in North America.<sup>331</sup> Almost immediately, deaths from drug overdose plummeted. And sterile equipment likewise has largely eliminated the injection-based transmission of communicable diseases, like HIV and hepatitis.<sup>332</sup> In the process, a number of drug-dependent users have managed to secure stable employment and housing, and, by even conventional measures, quality of life has improved dramatically in surrounding neighborhoods.<sup>333</sup> More recently, Vancouver took an even bolder step, opening a genuine addiction-maintenance clinic, which provides doctors with the authority

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<sup>328</sup> *Id.* at 60.

<sup>329</sup> Quinn & McLaughlin, *supra* note 324, at 596–97 (“[T]he addict could no longer turn to the medical profession for help: he was forced to turn to a new source of supply—the growing illicit drug market.” (quoting Rufus King, *The Drug Hang-Up* 43 (1972))); see also *id.* at 595 (“The unfortunate consequence of this policy was to drive from the field of drug treatment not only the unethical ‘script doctor’ but the legitimate doctor as well.”).

<sup>330</sup> Hari, *supra* note 183, at 200–02; Matthew Power, *The Alleys of Vancouver*, *Slate* (Feb. 3, 2010), <https://slate.com/news-and-politics/2010/02/the-alleys-of-vancouver.html> [<https://perma.cc/3PYW-7ZTF>].

<sup>331</sup> See Matthew Power, *Welcome to Insite*, *Slate* (Feb. 1, 2010), <https://slate.com/news-and-politics/2010/02/welcome-to-insite.html> [<https://perma.cc/7A2S-QU9R>]. See generally Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 *S.C. L. Rev.* 261, 348 (2010) (describing supervised injection facilities as potentially “a pragmatic call for balance and for evidence-based decisionmaking”).

<sup>332</sup> JoNel Aleccia, *As Seattle Eyes Supervised Drug-Injection Sites, Is Vancouver a Good Model?*, *Seattle Times* (Nov. 30, 2016), <https://www.seattletimes.com/seattle-news/health/is-vancouvers-safe-drug-use-site-a-good-model-for-seattle/> [<https://perma.cc/58S9-KB24>]; see also Hari, *supra* note 183, at 203 (noting sharp drop in drug-related fatalities in British Columbia as a whole); Robert Matas, *B.C. Drug Deaths Hit a Low Not Seen in Years*, *Globe & Mail* (Dec. 9, 2008), <https://www.theglobeandmail.com/news/national/bc-drug-deaths-hit-a-low-not-seen-in-years/article1067082/> [<https://perma.cc/7VU9-YZMQ>] (same). See generally *Att’y Gen. of Can. v. PHS Cmty. Servs. Soc’y*, [2011] 3 *S.C.R.* 134, 151 (Can.) (describing the impacts of Vancouver activism and reform).

<sup>333</sup> Evan Wood, et al., *Changes in Public Order After the Opening of a Medically Supervised Safer Injecting Facility for Illicit Injection Drug Users*, 171 *CMAJ* 731, 733 (2004). Between 1996 and 2006, life expectancy in the Downtown Eastside rose by several years. Sam Cooper, *Life-Expectancy Jump Astounds, Province (Vancouver)*, *Sept. 7, 2012*, at A3.

also to prescribe medical-grade heroin for on-site consumption, paid for by the national health service.<sup>334</sup>

Before Vancouver, a number of European countries and municipalities experimented with similar harm-reduction, prescription-based interventions, dating back to the 1980s when the city of Liverpool, England implemented a program to prescribe “heroin reefers” (cigarettes soaked in the drug) to opioid-dependent individuals.<sup>335</sup> Although officials kept little data, a contemporaneous government study showed that drug convictions dropped dramatically.<sup>336</sup> Then, in the 1990s, Switzerland opened addiction-maintenance clinics.<sup>337</sup> Today, the country subsidizes twenty-three such clinics, servicing over 2,000 participants.<sup>338</sup> Addiction maintenance proved so popular that, in 2008, 68% of Swiss voters voted to incorporate the practice into the country’s official health policy.<sup>339</sup>

Finally, in the early 2000s, Portugal adopted even more ambitious and comprehensive harm-reduction measures, with perhaps even greater success. The nation had been ravaged by hard drugs, with an astounding 1% of the entire population dependent on heroin.<sup>340</sup> The government responded by decriminalizing personal use and investing heavily in addiction maintenance, other forms of therapeutics, and social services.<sup>341</sup> The results were transformative: drug-related HIV infections plummeted over 99%, and overdose deaths fell 85%—to the lowest death rate in Western Europe and *one-fiftieth* the rate in the United States.<sup>342</sup> As

<sup>334</sup> German Lopez, *The Case for Prescription Heroin: Vancouver Gives Heroin to People Suffering from Addiction—and It Works*, Vox (June 12, 2017), <https://www.vox.com/policy-and-politics/2017/6/12/15301458/canada-prescription-heroin-opioid-addiction> [<https://perma.cc/L7RQ-T9X9>].

<sup>335</sup> Hari, *supra* note 183, at 206, 209–10.

<sup>336</sup> Linnet Myers, *Europe Finds U.S Drug War Lacking in Results*, Chi. Trib., Nov. 2, 1995, at SW1.

<sup>337</sup> Hari, *supra* note 183, at 218–19. See generally John Strang, Teodora Gorshkova & Nicola Metrebian, *EMCDDA Insights: New Heroin-Assisted Treatment* 11, 13 (2012) (observing that, in various European countries, supervised injectable heroin treatment, though more expensive than optimized oral methadone treatment, led to significant societal savings).

<sup>338</sup> Gaëlle Faure, *Why Doctors Are Giving Heroin to Heroin Addicts*, Time (Sept. 28, 2009), <http://content.time.com/time/health/article/0,8599,1926160,00.html> [<https://perma.cc/G2U3-WH8H>].

<sup>339</sup> Alex Kreit, *Controlled Substances: Crime, Regulation, and Policy* 740 (2013).

<sup>340</sup> Lauren Frayer, *In Portugal, Drug Use Is Treated as a Medical Issue, Not a Crime*, NPR (Apr. 18, 2017), <https://www.npr.org/sections/parallels/2017/04/18/524380027/in-portugal-drug-use-is-treated-as-a-medical-issue-not-a-crime> [<https://perma.cc/B7S8-AW2X>].

<sup>341</sup> *Id.*

<sup>342</sup> Nicholas Kristof, *How to Win a War on Drugs*, N.Y. Times, Sept. 24, 2017 (Sunday Review), at 1; see also Hari, *supra* note 183, at 249–50, 268 (noting that the number of addicts,

Nicholas Kristof remarked: “Portugal may be winning the war on drugs—by ending it.”<sup>343</sup>

Addiction maintenance is, in essence, a *recidivist crime license*. Clinics treat the very users that criminal-legal systems formerly punished as habitual offenders. Repeated instances of what was formerly considered drug crime are transformed from “marks” of blameworthiness into evidence that *punitive prohibition* has not worked, and that it is time to do something radically different.<sup>344</sup> Addiction-maintenance clinics have successfully reduced harm in three meaningful ways: first, they provide users with sterile syringes and narcotics of predictable quality, unadulterated by impurities or other toxic substances, like fentanyl; second, they supervise users, with medical professionals on staff to administer oxygen and naloxone to reverse overdoses; and, third, they insulate users not only from deadly criminal drug markets but also from the damaging and draconian consequences of the conventional war on drugs.<sup>345</sup> There may be little hope that a particular drug-dependent

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incidents of overdose, and the proportion of people contracting HIV from drug use have fallen in Portugal after the decriminalization); Caitlin Elizabeth Hughes & Alex Stevens, What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?, 50 *Brit. J. Criminology* 999, 1014–15 (2010) (finding that after decriminalization, the number of drug-related deaths, young people becoming dependent on illicit drugs, and drug users diagnosed with HIV and AIDS in Portugal has decreased); Christopher Ingraham, Why Hardly Anyone Dies from a Drug Overdose in Portugal, *Wash. Post* (June 5, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/05/why-hardly-anyone-dies-from-a-drug-overdose-in-portugal/> [<https://perma.cc/8VEQ-LPYQ>] (same); Frayer, *supra* note 340 (same).

<sup>343</sup> Kristof, *supra* note 342. Other countries, like Uruguay and the Netherlands, have undertaken similar decriminalization reforms with promising results. Hari, *supra* note 183, at 264–73; Shirley Haasnoot, Opinion, Dutch Drug Policy, Pragmatic as Ever, *Guardian* (Jan. 3, 2013), <https://www.theguardian.com/commentisfree/2013/jan/03/dutch-drug-policy-pragmatic>.

<sup>344</sup> Lopez, *supra* note 334; Bowers & Abrahamson, *supra* note 14, at 788–89; cf. Kohler-Hausmann, *supra* note 5, at 144–82 (discussing criminal-legal “marks”).

<sup>345</sup> Bowers & Abrahamson, *supra* note 14, at 801; *infra* notes 99–109 and accompanying text (discussing “downstream consequences” of arrest, charge, conviction, and punishment); Denis Ribeaud, Long Term Impacts of the Swiss Heroin Prescription Trials on Crime of Treated Heroin Users, 34 *J. Drug Issues* 163, 173 (noting 55% and 75% reduction in vehicle thefts among participants in the first and fourth years of treatment, respectively); Hari, *supra* note 183, at 221 (noting drop in HIV infections caused by injection drug use from 68% to 5%); Joanne Csete & Peter J. Grob, Switzerland, HIV and the Power of Pragmatism: Lessons for Drug Policy Development, 23 *Int’l J. Drug Pol’y* 82, 84 (2012) (noting drop in hepatitis infections caused by injection drug use from 51% to 10%); cf. Karakatsanis, *supra* note 34, at 66 (“The drug war cost more than a trillion dollars, tens of millions of arrests, hundreds of millions of police stops, tens of millions of years in prison, tens of millions of lost jobs and educations and homes . . .”).

individual will taper from addiction maintenance, but cessation is not the plan. The objective is to turn the habitual user into a functioning and socially engaged community member with the economic and social resources to focus on activities more productive than finding the next fix. And, notably, there is even some indication that—particularly when clinics couple licenses with reintegrative social services, like job training and counseling—addiction maintenance may lead to prevalence reduction, as drug users construct lives of meaning beyond their habits.<sup>346</sup> But even if the drug-free life remains elusive, addiction maintenance promises palliative care. And the alleviation of pain is practically the definition of harm reduction.

#### IV. CRIME LICENSES

I have an early memory of wandering through my neighborhood with a local boy who set about yanking up flowers from an elderly woman's garden. The woman appeared and scolded my friend. He cried, and she softened. She brought him into her home, as I hung back, steering clear of trouble. When my friend emerged minutes later, his tears had dried, and he was contentedly munching on a giant cookie that the old woman had provided to soothe him. I was livid. I had done nothing wrong, yet I had no treat. At even that tender age, I had internalized the American philosophy of *punitive prohibition*. In its retributive formulation, the notion is that my friend was blameworthy and deserved no cookie.<sup>347</sup> In its consequentialist formulation, the notion is that the old woman had

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<sup>346</sup> For instance, a study published in *The Lancet* found that the majority of participants in Switzerland's addiction-maintenance clinics were able to pivot eventually to methadone or abstinence programs. Wim Weber, Heroin Prescription for Addicts in Switzerland Improves Quality of Life, 356 *Lancet* 1177, 1177 (2000); Hari, *supra* note 183, at 222 (citing studies showing that in Switzerland "[t]he number of addicts dying every year fell dramatically"); cf. Lopez, *supra* note 334 (describing clinics that provide social services); Karakatsanis, *supra* note 34, at 32 ("[A] mountain of evidence suggests that the punishment approach to drugs has actually *increased* drug use and the harms associated with it . . ."); Agan, Doleac & Harvey, *supra* note 71, at 5–6, 37 (finding that not prosecuting marginal nonviolent misdemeanor defendants "reduces the likelihood of a new misdemeanor complaint by 24 percentage points . . . [and] a new felony complaint by 8 percentage points," and speculating that the economic, social, and stigmatic consequences of criminal justice involvement explain the differences in recidivism rates); *supra* notes 212–16 and accompanying text (discussing manner by which social services may counteract the criminogenic aspects of conventional criminal legalism, and citing sources for the proposition that harm-reduction, safe-sex measures have not increased instances of sex).

<sup>347</sup> *Supra* notes 118–23, 222–28, 247–48 and accompanying text.

taught the Holmesian “bad boy” the wrong lesson (that the crimes of trespass and mischief, in fact, *could* pay).<sup>348</sup>

Looking back, I am convinced that my anger was misguided.<sup>349</sup> But I am a product of my culture, and my bitterness was genuinely felt. The anecdote demands attention. It implicates distinct pitfalls that a well-designed radical-pragmatic experiment must navigate—*to wit, underserved windfall, moral hazard, resentment, and confusion*. That is to say, a plausible recidivist crime license must be normatively defensible, at least potentially instrumentally effective, and politically viable.

### A. Which Offenses?

To address each of these concerns, we must first draw limits around the offenses to which recidivist crime licenses could realistically apply. It is morally fantastic and politically impractical to confer upon recidivists the immunity to commit more serious *mala in se* crimes, like assault, burglary, robbery, rape, kidnapping, human trafficking, or homicide. The objective is harm reduction, not anarchy (much less, the fictional dystopia of *The Purge*).<sup>350</sup> To repeat, I am concerned only with certain quality-of-life offenses.<sup>351</sup> But which ones? Generally speaking, the category is broad enough to include forms of trespass, petty theft, criminal mischief, graffiti, drug offenses, vagrancy, unlicensed vending, public urination, public intoxication, unlicensed or drunk driving, possession of a weapon, and much, much more.<sup>352</sup>

Still, we may craft some limits. One boundary is an intolerable level of risk to the safety of others. Although I favor harm-reduction interventions

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<sup>348</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . . .”); see, e.g., N.Y. Penal Law § 145.00 (McKinney 2021) (defining “criminal mischief,” *inter alia*, as “[i]ntentionally damag[ing] property of another”); N.Y. Penal Law § 140.10 (McKinney 2021) (defining “criminal trespass,” *inter alia*, as “enter[ing] . . . real property . . . which is fenced or otherwise enclosed in a manner designed to exclude intruders”).

<sup>349</sup> See *supra* Part III.

<sup>350</sup> See *supra* Part III (describing and championing harm reduction); see also *The Purge* (Universal Pictures 2013) (telling narrative of alternate America in which day-to-day crime is minimized by making all crimes legal for twelve hours annually); cf. *infra* note 442 and accompanying text (discussing willingness of even prison abolitionists to incapacitate the “dangerous few”).

<sup>351</sup> *Supra* Part I.

<sup>352</sup> *Supra* Section I.A. (discussing undefined nature of the concept of disorder and corresponding quality-of-life offenses).

to address, for instance, the dangers and consequences of drunk driving and illegal possession of firearms, I would not (without much more) endorse experiments to immunize recidivists who engaged in these behaviors, if otherwise criminal.<sup>353</sup> Even if I were inclined to feel otherwise, radical pragmatism depends upon persuasion of the unpersuaded, and a crime license for an inherently dangerous offense would likely prove a bridge too far. By contrast, an especially strong case could be made to license offenses that most obviously implicate concerns about situational necessity and distributive justice—most notably, recognized crimes of poverty, like panhandling, window washing, turnstile hopping, prostitution, unlicensed vending, or unlicensed driving.<sup>354</sup> Take unlicensed driving, for example. Authorities often revoke licenses for failure to pay court fees or traffic fines. Thereafter, indigent motorists get trapped in impossible cycles—struggling to get from place to place; to go to work or find work; in order to make money to pay off fines, fees, and other debts; in order to get licenses reinstated.<sup>355</sup> We may craft an experimental crime license to correct for the criminalization of poverty—to reach those recidivists who lost their driver’s licenses for

<sup>353</sup> With respect to possession of firearms, I could be convinced otherwise, particularly because enforcement of weapons offenses potentially produces distributive and racial inequities. Benjamin Levin, *Guns and Drugs*, 84 *Fordham L. Rev.* 2173, 2173 (2016) (“[R]ace- and class-based critiques . . . concerns about police and prosecutorial power . . . worries about the social and economic costs of mass incarceration . . . the same issues persist in an area—possessory gun crime—that receives much less criticism.”).

<sup>354</sup> *Supra* notes 83, 110–11, 113, 170–71, 192, 402 and accompanying text (discussing intersection between order-maintenance enforcement and poverty); see, e.g., Stolper & Jones, *supra* note 138, at 24 (describing turnstile hopping as “an essential crime of poverty”); Parascandola, et al., *supra* note 140 (“Most people who jump the turnstiles are doing it because it’s a [sic] economic hardship.”); Vincent Barone, *Brooklyn Turnstile Jumping Arrests Target Poor African-Americans: Report* (Oct. 16, 2017) (“This is basically a crime of poverty.”), <https://www.amny.com/transit/brooklyn-turnstile-jumping-arrests-target-poor-african-americans-report-1-14490216/> [<https://perma.cc/5X7M-JFS6>]; cf. Eduardo M. Penalver & Sonia Katyal, *Property Outlaws*, 155 *U. Pa. L. Rev.* 1095, 1172 (2007) (endorsing situational excuse for economic necessity).

<sup>355</sup> Lawyers and activists have opposed driver’s license revocation laws on precisely these grounds. See, e.g., Richard A. Oppel, Jr., *Being Poor Can Mean Losing a Driver’s License. Not Anymore in Tennessee.*, *N.Y. Times* (July 4, 2018), <https://www.nytimes.com/2018/07/04/us/drivers-license-tennessee.html> [<https://perma.cc/S3CB-YR24>] (describing litigation as “a major victory for advocates of the poor who have targeted license revocation laws as some of the worst examples of statutes that effectively criminalize poverty”); Vivian Wang, *Ticket to Nowhere: The Hidden Cost of Driver’s License Suspensions*, *Milwaukee J. Sentinel* (Aug. 15, 2015), <http://archive.jsonline.com/news/milwaukee/ticket-to-nowhere-the-hidden-cost-of-drivers-license-suspensions-b99547649z1-321972931.html> [<https://perma.cc/RPX3-38Z9>].

unpaid fines (as opposed to, say, those who lost licenses for serially speeding at great risk to the safety of others).

There is even a way in which a form of human flourishing could provide support for a recidivist street artist's crime license.<sup>356</sup> Like the offender who lacks "crime-resistance capital" for more-obvious reasons of cognitive impairment, the street artist may be compelled by a "volitional necessity" to paint.<sup>357</sup> Or perhaps the better analogy is the religious adherent. Indeed, Christopher Eisgruber and Larry Sager drew the link directly—not only between the zealot and "the deeply devoted artist" but also, tellingly, "the parent with a hungry child . . . driven to disobey the law."<sup>358</sup> The significance of the comparison is that we recognize already some religious exemptions from generally applicable law.<sup>359</sup> These exemptions are premised on the legal principle that devotion may be "motivationally more powerful" than other internal or external influences.<sup>360</sup> According to Andrew Koppelman: "Someone in the grip of volitional necessity cares about something so wholeheartedly that he cannot form an intention to act in a way that is inconsistent with that care. Such a person must say, in the words attributed to Martin Luther, 'Here I stand; I can do no other.'"<sup>361</sup>

But, of course, religious fervor is not the only potentially persuasive human drive. The fanatical artist may likewise be unable "to refrain from performing . . . [an illegal] action."<sup>362</sup> Thus, Eisgruber and Sager concluded: "As against the artist for whom art is the highest command of life, . . . the deeply religious . . . have no reason to offer, from within their own beliefs, for the privileging of their commitments that the rest of us lack with regard to our deep commitments."<sup>363</sup> Eisgruber and Sager

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<sup>356</sup> Cf. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269, 349–50 (1996) (describing the offender who "behaved virtuously, albeit lawlessly").

<sup>357</sup> Frankfurt, *supra* note 235, at 5; see also Koppelman, *supra* note 235, at 216; *supra* note 235 and accompanying text (discussing "volitional necessity").

<sup>358</sup> Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1263 (1994).

<sup>359</sup> See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267, slip op. at 2, 21 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171, 187–88 (2012); *Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993).

<sup>360</sup> Eisgruber & Sager, *supra* note 358, at 1263.

<sup>361</sup> Koppelman, *supra* note 235, at 216, 234.

<sup>362</sup> *Id.* at 234 (internal quotation marks omitted).

<sup>363</sup> Eisgruber & Sager, *supra* note 358, at 1255, 1262, 1286 (urging "parity for religious belief, not privilege"); Micah Schwartzman, *What If Religion Is Not Special*, 79 *U. Chi. L.*



offered the analogy to demonstrate that religion is not special and, for that reason, should not receive special treatment.<sup>364</sup> But, as Amy Gutmann concluded, religion may be just one special thing among many—any of which may merit a deviation from law and social norms.<sup>365</sup> To put a finer point on it, consider a final analogy. John Garvey reasoned that devotion may be sufficiently all-consuming to justify exemptions akin to well-recognized insanity defenses.<sup>366</sup> Like insanity, religious belief has the power to scramble practical reason and overtake volition, such that the person lacks capacity to make “a meaningful choice to comply with the law,” should law run counter to the dictates of faith.<sup>367</sup> By the transitive property, if art is like religion, and religion is like insanity, then art is like insanity.<sup>368</sup> In all three contexts, the law may defensibly excuse the actor who is sufficiently moved.

And, even if a *mad devotion* to make art does not constitute a particular artist’s overriding motivation for action, it still may be so meaningfully constitutive of identity that it is appropriate to accommodate it.<sup>369</sup> As one street artist explained:

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Rev. 1351, 1353, 1426 (2012) (“The problem . . . is that religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment. . . . As a normative matter, religion is *not* special. . . . [R]eligious views, at least as traditionally conceived, cannot easily be distinguished from comprehensive secular doctrines on epistemic or psychological grounds.”).

<sup>364</sup> Eisgruber & Sager, *supra* note 358, at 1286.

<sup>365</sup> Amy Gutmann, *Identity in Democracy* 151–91 (2003) (arguing against singling out religion for special treatment and defending legal exemptions for a wider range of claims of conscience).

<sup>366</sup> John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 *Conn. L. Rev.* 779 (1986).

<sup>367</sup> *Id.* at 798, 800 (“I think religion is a lot like insanity. There are two aspects to the parallel, just as there are two aspects to the most commonly used test for insanity. The first is a cognitive aspect, which concerns defects in practical reasoning; the second is a volitional aspect, which concerns the ability to conform one’s conduct to legal norms one knows to be binding.”); see, e.g., Model Penal Code § 4.01 (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of law.”).

<sup>368</sup> See, e.g., Julia Cameron, *The Artist’s Way: A Spiritual Path to Higher Creativity*, at xi–xiii (1992).

<sup>369</sup> William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 *U. Chi. L. Rev.* 308, 320–21 & n.21 (1991) (arguing that “bonds of ethnicity, interpersonal relationships, and social and political relationships, as well as religion may be, and are, integral to an individual’s self-identity”); see also Camille Lannert, *The Perpetuation of Graffiti Art Subculture*, 1 *Butler J. Undergraduate Res.* 47, 51 (2015) (“On the most primitive level, graffiti art is an individual’s outlet for self-expression, an outlet perceived as suppressed or blocked

I was out, depressed, lonely, hungry, and this was the only thing that kept my spirits up. Letting that trauma out, doing graffiti. It's a human need to express yourself. Unfortunately, the lower classes and the impoverished don't have the spaces and the walls to just be creative. They don't own nothing. . . . They don't have a house to do it in the backyard, so where are they going to do it at? The streets are their canvas.<sup>370</sup>

In such circumstances, the painter exercises a kind of artistic self-help. Here, I am reminded of a perhaps apocryphal story from the evolution of Hip-Hop. Grandmaster Caz, one of the progenitors of rap, claimed that a flowering of musical creativity followed the New York City blackout of 1977, when poverty-stricken teens helped themselves to prohibitively expensive records, turntables, amplifiers, and other equipment.<sup>371</sup> The looters had committed grand theft as a means to pursue radical artistic experimentation. To be sure, I am not endorsing providing crime licenses to allow recidivists to commit grand theft. Still, the anecdote serves as a reminder that broken rules may feed creative culture—sometimes beautifully.

Of course, not all street art or music is beautiful. Much of it is dreck. But even ugly self-expression has some intrinsic value—particularly anti-establishment political expression, which describes a fair proportion of urban murals (especially as the Movement for Black Lives gains influence).<sup>372</sup> But my final point is somewhat different: if we take

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by society at large. For the graffiti artist, self-expression is central to the construction and maintenance of his or her identity.”).

<sup>370</sup> California Love Scared Straight, 99% Invisible, at 16:02 (Aug. 4, 2020), <https://99percentinvisible.org/episode/california-love-scared-straight/> [<https://perma.cc/2VJ8-NLVN>].

<sup>371</sup> Michael A. Gonzales, The Holy House of Hip-Hop, *N.Y. Mag.* (Sept. 22, 2008), <https://nymag.com/anniversary/40th/50665/> (“[T]he blackout that year spawned a whole new generation. . . . ‘During the looting, everybody stole turntables and stuff. Every electronics store imaginable got hit. Every record store. That sprung a whole new set of D.J.’s.” (quoting Grandmaster Caz)).

<sup>372</sup> Julia Jacobs, The ‘Black Lives Matter’ Street Art That Contains Multitudes, *N.Y. Times* (July 16, 2020), <https://www.nytimes.com/2020/07/16/arts/design/black-lives-matter-murals-new-york.html> [<https://perma.cc/5BYL-4D6B>]. On street art and political expression, see generally Lindsay Bates, *Bombing, Tagging, Writing: An Analysis of the Significance of Graffiti and Street Art* (2014) (Master’s Thesis, University of Pennsylvania) (on file with the University of Pennsylvania libraries); Joe Austin, *Taking the Train: How Graffiti Art Became an Urban Crisis in New York City* 6 (2001) (arguing that graffiti “writers” are underappreciated for their cultural and political contributions). Hip-Hop has long embraced street art. And Hip-Hop, in all its facets, is a powerful medium for political expression. See,

seriously the adage that “practice makes perfect,” it stands to reason that the most committed and experienced street artists will be the best.<sup>373</sup> The longtime recidivist has honed his artistic skills. And his desire to make art (even in the face of state coercion and with limited economic incentive) is evidence not only of his talent but also his compulsion. Habitual graffiti is, therefore, a type of recidivism that screens quite well for licenses on both fronts. First, the longtime street artist is likelier to deserve the crime license, because he is driven inescapably to paint. Second, he is likelier to be a master of his craft, because he has literally put the *time in*—that is to say, time in practice and time in the system.

### B. Screening

This last point about screening is critical to the crime-license project. For systematic leniency to plausibly work—morally and prudentially—we must be systematic about screening. We must focus on maximizing the probability that we are reaching the right offenders, at the right time, in the right ways. This is a concept familiar to tax scholars who have developed a rich literature on “optimal tax screening,” whereby instances of illegality are means to “identify groups of people who are, on average, needy.”<sup>374</sup> Tax theory turns the assumptions of *punitive prohibition* inside-out. What *criminal legalism* calls an “offense” translates, here, to a “tag” for need—a site for the provision of “targeted benefits” and “poverty relief” rather than penalties.<sup>375</sup> According to Wojciech Kopczuk:

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e.g., Public Enemy, *Night of the Living Baseheads*, on *It Takes a Nation of Millions to Hold Us Back* (Columbia Records 1988) (“Have you forgotten that once we were brought here, we were robbed of our name, robbed of our language? We lost our religion, our culture, our god . . . and many of us, by the way we act, we even lost our minds.” (quoting Khalid Abdul Muhammad)).

<sup>373</sup> Malcolm Gladwell, *Complexity and the Ten-Thousand-Hour Rule*, *New Yorker* (Aug. 21, 2013) (claiming that genius is principally a product of practice).

<sup>374</sup> Leigh Osofsky, *Who’s Naughty and Who’s Nice?—Frictions, Screening, and Tax Law Design*, 61 *Buff. L. Rev.* 1057, 1075–77, 1076 n.63 (2013) (noting that tax compliance and noncompliance may evidence “relative ability, well-being, or need” and thereby help identify the offenders who may be more deserving of exceptions); Wojciech Kopczuk, *Redistribution When Avoidance Behavior Is Heterogeneous*, 81 *J. Pub. Econ.* 51, 53 (2000); see also George A. Akerlof, *The Economics of ‘Tagging’ as Applied to the Optimal Income Tax, Welfare Programs, and Manpower Planning*, 68 *Am. Econ. Rev.* 8, 8 (1978).

<sup>375</sup> Osofsky, *supra* note 374, at 1075–77 & n.63 (“[T]hese tags should identify groups of people who are, on average, needy. Individuals with these tags could then receive targeted benefits.”); Kopczuk, *supra* note 374, at 52–53.

[I]t may be optimal for tax avoidance to persist, even if administrative costs of eliminating it are negligible. If a particular activity (even a seemingly wasteful one) is used by those who are “more deserving” from the social point of view, it may be more efficient than redistribution via income tax. In the first-best optimum, the government would determine tax liabilities based on all characteristics of individuals, including . . . avoidance characteristics.<sup>376</sup>

The idea is to pay attention to exercises of self-help and reconceptualize some amount of deviance as “welfare improving”—as a “cheap instrument of . . . redistribution taking place through illegal activity.”<sup>377</sup>

But what do appropriate “tags” look like? According to tax scholar, Leigh Osofsky: “Ideally, tags are observable, immutable, and well correlated with the relevant measure of neediness or well-being at issue.”<sup>378</sup> It is possible, for our purposes, that technology may come to play a role in determining sufficiently predictive “tags” of privation or cognitive limitation. I am wary, for the time being, based on the uneven and sometimes-regressive performance of algorithmic risk assessment in the context of pretrial release.<sup>379</sup> But we can leave that matter to one side since a rigorous actuarial determination is beyond the sophistication and scope of this Article. In any event, it is in the nature of an experimentalist agenda not to commit wholeheartedly to any one shape *ex ante*, but rather to leave aspects of design to evolution over time. In this vein, the roboticist, Rodney Brooks, famously insisted that to explore efficiently the mysteries of space, it would be better to disaggregate experimentation and adopt multiple means that are “fast, cheap and out of control” rather than to put all our eggs in one basket.<sup>380</sup>

<sup>376</sup> Kopczyk, *supra* note 374, at 53, 69 (“[I]mperfect enforcement of existing rules[] may be welfare improving[] and need not always reflect economic inefficiency of the underlying political system.”).

<sup>377</sup> *Id.* at 69 (“[O]bserve that black market activities are highly concentrated among low-income people. Their existence can be a cheap instrument of redistribution.”).

<sup>378</sup> Osofsky, *supra* note 374, at 1077.

<sup>379</sup> Sandra G. Mayson, *Bias In, Bias Out*, 128 *Yale L.J.* 2218, 2221–22 (2019); Minow, *supra* note 279, at 157 (“Feeding the algorithms data that reflect disparate (or biased) law enforcement practices will repeat or amplify problematic practices. Rather than replacing human judgment, machine learning can push human beings to be more explicit and self-reflective about their judgments, predictions, biases, and use of discretion.”).

<sup>380</sup> Rodney A. Brooks & Anita M. Flynn, *Fast, Cheap and Out of Control: A Robot Invasion of the Solar System*, 42 *J. Brit. Interplanetary Soc.* 478 (1989); see also *Fast, Cheap & Out of Control* (American Playhouse & Errol Morris Films 1997) (documentary about Brooks).

All the same, I can speculate as to the optimal design of a recidivism screen and the best criteria to reduce harm and to evidence genuine situational and volitional necessity. First, the individual should have a long record of increasingly harsh penalties for a particular quality-of-life offense or set of related offenses, with few, if any, felony or other convictions that do not fit squarely within a fairly obvious narrative of external duress or internal compulsion or irrationality. I recognize that a habitual felon may be just as compulsive, irrational, or needy as a “persistent misdemeanor,” but, at least at the outset, crime licenses for the perceived worst offenders would likely prove politically impractical. Moreover, there is something to the notion that, if a person generally manages to live a life free from crime except for one relatively discrete context, we can more readily reduce harm by responding only to that particular context.

One concern is that this subset of habitual offenders may be a fairly small group, and, admittedly, I imagine it is only a fraction of the recidivist whole. But, in the age of order-maintenance enforcement, that fraction likely still consists of tens of thousands of offenders nationwide, if not more. Some data back this speculation. Among those recidivists who were designated “persistent misdemeanants” under New York City’s “Operation Spotlight” program, over one third had *no* felony convictions.<sup>381</sup> That cohort amounted to over six thousand defendants per year of the program’s operation.<sup>382</sup> And this figure held for even those *longtime* “persistent misdemeanants” who were designated “spotlight” *all four years* of the relevant study period; one third of them, likewise, had no felony convictions.<sup>383</sup>

Second, the target recidivist should be somewhat older than the average misdemeanor defendant, which, as it happens, describes most persistent misdemeanants.<sup>384</sup> As discussed, drug use and crime are a young man’s game.<sup>385</sup> As individuals approach middle age, they tend to slow down. More to the point, they develop perspective; previously engrained predilections toward foolhardy risk diminish, replaced by greater

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<sup>381</sup> Solomon, *supra* note 142, at 6.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 28 (listing a figure of 32%).

<sup>384</sup> *Supra* notes 187–90 and accompanying text (discussing ages of different cohorts of misdemeanants in New York City).

<sup>385</sup> *Supra* notes 191–93 and accompanying text (discussing phenomenon of “aging out”).

capacities to rationally reflect and consider long-term consequences.<sup>386</sup> Self-destructive habits, which might have seemed unalterable mere years before, may begin to slip away. These developments strike different offenders at different ages—and some not at all. But, on the average, it is a real phenomenon. Deviation dissipates with age. Of course, people do not have the luxury to “age out” of poverty. But they may, over time, develop capabilities to better contend with the trauma of it.<sup>387</sup> On the other hand, incarceration slows down maturation. By severing social ties, jail and imprisonment contribute to a kind of “lost time”—an emotional and psychological suspended animation.<sup>388</sup> But harm-reduction measures may speed along the aging-out process by minimizing the destructive aspects of both harmful conduct and criminal-legal responses to it.<sup>389</sup> Just as drug prescriptions for dependent individuals keep them relatively healthy and socially integrated, crime licenses for “persistent misdemeanants” have potential to eliminate barriers to offender reentry. In this way, the crime license promises to *do by not doing*—to “nudge” without nudging.<sup>390</sup> It is a problem-solving approach premised partially on patience, allowing the purported “lost cause” an opportunity to navigate his way through, at his own pace, to the other side of the age divide.

### *C. Prepaid Licenses*

Screening is only ever a matter of playing the odds.<sup>391</sup> An ideal tag is not a perfect tag. Errors occur and games are played, as the undeserving mimic the signals of the genuinely compulsive or needy.<sup>392</sup> But we might

<sup>386</sup> Supra note 240 and accompanying text (discussing higher levels of risk-seeking and steep and hyperbolic discounting among offenders and drug-dependent individuals).

<sup>387</sup> Christopher Allen Mallett, Miyuki Fukushima Tedor & Linda M. Quinn, Race/Ethnicity, Citizenship Status, and Crime Examined Through Trauma Experiences Among Young Adults in the United States, 17 *J. Ethnicity Crim. Just.* 110, 110–11 (2019).

<sup>388</sup> Massoglia & Uggen, supra note 182, at 570–71.

<sup>389</sup> Supra notes 315–46 and accompanying text (discussing addiction-maintenance clinics).

<sup>390</sup> Supra notes 299–300 and accompanying text (discussing libertarian-paternal “nudge[s]”).

<sup>391</sup> Osofsky, supra note 374, 1079–80 (“Good screening mechanisms separate between a group of individuals who should be screened in for a certain benefit . . . and those who should be screened out . . . [but] what matters for a screening mechanism . . . is determining what groups systematically bear the costs . . . not . . . [the] cost in a particular case.”).

<sup>392</sup> Robert E. Scott & William J. Stuntz, A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants, 101 *Yale L.J.* 2011, 2012 (1992) (“Prosecutors, like insurers, are charged with finding the occasional deserving claim in a sea of frauds.”). In the context of optimal tax screening, Leigh Osofsky explained: “[I]f high ability taxpayers are taxed at a higher rate when they earn high income, they can masquerade as low ability taxpayers by

mitigate concerns about *moral hazard* and *undeserved windfall* by imposing barriers—which Leigh Osofsky called “ordeals”—to keep out the individuals who ought to be screened out.<sup>393</sup> For our purposes, these “ordeals” would be the *recidivist premium*’s conventional penalties. In other words, a habitual offender’s already-served sentences would be the price—the cumulative lifetime penalty—paid down for his crime license. And, if this upfront punishment price were set high enough and made obvious enough—a version of what Bert Huang termed “complete disclosures”—then the population of prospective undeserving cheats would be unwilling to prepay the penalty *precisely because they would be undeserving*.<sup>394</sup> That is to say, as rational people of freewill, these individuals would have the capacity to comprehend the gauntlet that would need to be run and, thus, would choose volitionally not to run it. Simply put, one prospective design would be to set the entry price such that the benefit of the license is manifestly outweighed by the pain of *ex-ante* “ordeals.” For example, almost no one would be enticed by a transit-theft crime license that the offender could only procure in exchange for multiple months-long jail sentences. At that price, there would be no subway “free riders” for the simple reason that the ride would not be free.

But we must address also a related objection—the risk of *confusion*. Specifically, a layperson might observe a recidivist’s (licensed) crimes and come to believe erroneously that his permission is universal—that the conduct in question is categorically lawful. This, according to Huang, is the problem of “shallow signals”:

We may be quicker to jaywalk . . . or to drink in the park . . . when we see others doing it. . . . [T]he signal of noncompliant behavior by peers is often taken as a cheap source of information . . . about the degree of a law’s enforcement. But sometimes we get it wrong. We may think others are flouting the law when in fact they are complying—using a license or an exemption. . . . The signals of others’ actions may thus be shallow—a critical dimension is hidden from our view. We see the behavior itself, but we miss the metadata. And what we fail to notice is the crucial fact distinguishing them from us, a special status they have but we do not. Unaware of the distinction, we follow their lead half

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earning less income, which they can do by substituting leisure for work. . . . The fundamental dilemma of optimal tax theory, then, is how to meet its redistributive goal while minimizing the efficiency costs . . . .” Osofsky, *supra* note 374, at 1075.

<sup>393</sup> Osofsky, *supra* note 374, at 1078 (“Ordeals are costs attached to a desirable benefit.”).

<sup>394</sup> Bert I. Huang, *Shallow Signals*, 126 *Harv. L. Rev.* 2227, 2285 (2013).

blind. . . [W]hat the observer needs to know is not the law's prohibition, but rather the fact of another actor's permitted status.<sup>395</sup>

The insight behind “shallow signals” is, in part, a restatement of broken windows theory: that unchecked antisocial conduct might lead others to conclude (mistakenly or otherwise) that such conduct is tolerated. I am tempted, then, to respond simply that the expressive import of these information shortfalls is just as unproven as the expressive import of shattered glass.<sup>396</sup> All the same, Huang is almost-certainly right that, absent relevant information, an individual must be *somewhat* likelier to incorrectly indulge her “impulse to emulate” a crime licensee. Even so, the remedy is plain; it is, once again, “total disclosure”—providing the layperson *all* the relevant information. On this reading, the design for a *prepaid crime license* should include, first, a requirement for recidivists to display their permits in some transparent fashion; and, second, a public-education campaign detailing the “ordeals” repeat offenders had to endure to qualify for their licenses. In this way, otherwise law-abiding individuals not only could avoid inadvertently committing “copycat wrongs” but also would harbor less *resentment* toward a recidivist for a “special status” that was earned only through obvious pain.<sup>397</sup>

By way of example, imagine an alternative version of the Parable of Prodigal Son, in which the wayward son was punished repeatedly before receiving forgiveness. In such circumstances, we could be more confident that his obedient brother would neither copy his misdeeds nor resent his father's grace.<sup>398</sup> Or, recall my young friend, who was rewarded with a cookie after yanking up our elderly neighbor's flower bed. I doubt I would have begrudged him his treat or been tempted to pluck roses myself had my friend been forced first to spend hours with a trowel replanting the garden in the hot sun for all to see.<sup>399</sup> To be sure, my resentment was misguided in the first instance—the product of a destructive crime-control impulse.<sup>400</sup> Still, that sentiment is deeply rooted and must be appreciated by any pragmatic political program that hopes eventually to dislodge it.

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<sup>395</sup> Id. at 2231–32, 2234.

<sup>396</sup> Supra notes 169–70 and accompanying text (addressing the debate over whether broken windows policing works).

<sup>397</sup> Huang, supra note 394, at 2230, 2232.

<sup>398</sup> Supra notes 270–72 and accompanying text (discussing the “Parable of the Prodigal Son”).

<sup>399</sup> Supra notes 347–48 and accompanying text (discussing anecdote).

<sup>400</sup> Supra Part II.



A high-set and transparent cumulative penalty effectively accommodates the entrenched retributive norm while also providing for leniency on the backend. Indeed, I could imagine that even my vengeful childhood self would have ultimately reached the conclusion—had my friend descended into a chaos of compulsive flower pulling, followed by repeated episodes of enforced gardening—that *the old woman should just give him the cookie and be done with it*. Or, better still, she should carve him his own plot to plant (and destroy) as he desired, in order to channel his so-called antisocial deviance. By contrast, I was doing just fine without garden or cookie. More to the point, no matter how delicious a cookie would taste, the promise of a treat would not have motivated me to endure those “ordeals” to get one.

In any event, we should be prepared to tolerate some residual amount of *underserved windfall*, *moral hazard*, or *resentment*, as fair tradeoffs for crime licenses’ anticipated benefits.<sup>401</sup> We should remember, after all, that distressed communities of color resent already the unequal and often-undeserved punishments that selective order-maintenance enforcement produces.<sup>402</sup> It is far from obvious, then, that a deliberately designed crime license would undercut perceptions of systemic legitimacy more deeply. Indeed, this points up a principal purpose of a radical-pragmatic experiment—to develop evidence for viable alternative social frameworks.<sup>403</sup> If it were to come to pass that such an experiment inevitably failed—that, say, a crime-license pilot program fared demonstrably worse (according to some defensible metric) than conventional criminal legalism, then we should modify or abandon the project.<sup>404</sup> My hope, however, is that our immediate efforts might prove more promising—that we might learn that a less orderly world is not always a worse world; that our underlying notions of purported disorder are misguided in the first instance; and that criminalization is the wrong tool to address *malum prohibitum* conduct.<sup>405</sup>

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<sup>401</sup> Cf. Huang, *supra* note 394, at 2237 (discussing optimal design of licensing regimes and concluding that “[t]he desirability of any strategy will turn on costs and benefits . . . the tradeoffs for any given policy”).

<sup>402</sup> *Supra* note 111 and accompanying text (detailing studies examining perceptions of illegitimacy of order-maintenance enforcement).

<sup>403</sup> *Supra* notes 42–46 and accompanying text (describing the aims of radical pragmatism).

<sup>404</sup> Cf. *supra* notes 260–65 and accompanying text (describing the “capabilities approach” as a metric for evaluating crime licenses).

<sup>405</sup> *Supra* Part I (discussing contested notions of disorder).

Thus, my aspirations are more fundamental than a simple measure of whether a crime license better achieves some conventional criminal-legal goal, like maximizing the deterrence of statutorily defined disorderly conduct. My basic objective is to test the very foundations upon which we order ourselves through state coercion. This is a radical and somewhat abstract aim, but it is sometimes appreciated even by conventional economists. For instance, Bert Huang recognized that the problem of “shallow signals” implicates bigger questions than the simple matter of how to cultivate legal compliance most efficiently. He understood, instead, the possibility that confusion (and, more to the point, people’s reaction to it) could lead us, appropriately, to second-guess our bottom-line prohibitions: “When might it make sense to allow new norms arising from shallow signals to ‘feed back’ into the law itself, *reshaping enforcement policy or even the lines of legality?*”<sup>406</sup> In other words, we may use the information we draw from even the pitfalls of a crime-license design—like the potential for *confusion*—to learn lessons and develop new radical-pragmatic experiments going forward.

A final note about one such pitfall—*undeserved windfall*: we should be prepared to abide this risk for no other reason than that inappropriate harshness is far inferior to inappropriate leniency, as “Blackstone’s Ratio” instructs.<sup>407</sup> For all the pathologies of our criminal-legal system, this is a healthy institutional commitment, which is embodied by multiple existing rules and standards, from the burden of proof beyond a reasonable doubt, to the rule of lenity, to the exclusionary rule.<sup>408</sup> All of these doctrines are premised on the proposition that *legally* wrongful conviction is far worse than wrongful acquittal. Elsewhere, I have argued that this commitment does and ought to extend likewise to *equitably* wrongful punishment.<sup>409</sup>

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<sup>406</sup> Huang, *supra* note 394, at 2288 (emphasis added).

<sup>407</sup> 4 William Blackstone, Commentaries \*352 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

<sup>408</sup> Bowers, *supra* note 36, at 202 (“The rule of lenity, the presumption of innocence, the Double Jeopardy clause—these and many other procedural protections—are all liberal devices designed to correct (and even overcorrect) for potentially arbitrary errors that could harm the individual.”); see also Peter Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1018 (1980) (discussing the liberal principle that “it is ultimately better to err in favor of nullification than against it”); Akhil Reed Amar, America’s Unwritten Constitution: The Precedents and Principles We Live By 445–46 (2012) (“Cruel and unusual punishments are expressly prohibited by the Constitution; *merciful* and unusual punishments are not.”).

<sup>409</sup> Bowers, *supra* note 36, at 202–03 (“[T]he costs of error extend . . . to moral arbitrariness. . . . Look no further than Blackstone’s maxim.”); Bowers, *supra* note 251, at

For present purposes, the takeaway is that some measure of morally or prudentially *undeserved windfall* is a fair tradeoff against the even greater threat of *undeserved punishment* posed by prevailing quality-of-life enforcement and adjudication.<sup>410</sup>

In fact, it is precisely because I am so troubled by inequitable punishment that I would ultimately resist this first design for crime licenses—the *prepaid license*. It would be just too costly for the licensee. And the logic of it would be just too contradictory. If crime-control governance is so misguided, it seems backward to so thoroughly commit to that enterprise as the entry price for a license. All the same, as a pragmatist I might be willing to stomach these threshold “ordeals,” if this model of crime license were the only one politically feasible. That is to say, even this *compromised* design holds the pragmatic promise of generating data and support from which we might thereafter expand the radical project.<sup>411</sup>

#### D. Hidden Licenses

To minimize risks of *moral hazard*, *undeserved windfall*, *resentment*, and *confusion*, I favor a second (and, perhaps, more provocative) design—the *hidden* crime license. Just as the most innovative drug-policy reforms began as underground operations,<sup>412</sup> a crime license could be structured, initially, so that even the recipient was left unaware of its existence. Meir Dan-Cohen famously and controversially endorsed the

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1041 (“[T]he state ought to criminalize no more conduct than necessary to promote crime control, public safety, and retributive goals . . . as Blackstone’s maxim prescribes . . . .”); see also Matt Matravers, *Unreliability, Innocence, and Preventive Detention*, in *Criminal Law Conversations*, supra note 31, at 81, 82 (“[A] situation in which someone is overburdened is worse from the point of view of justice than one in which someone carries a burden that is too light. It is worse, still, for someone for whom no burden is appropriate and yet a burden is applied.”); supra notes 287–98 and accompanying text (discussing normative guilt and innocence). Megan Stevenson and Sandy Mayson have likewise extended “Blackstone’s Ratio” beyond the context of legal guilt. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* 46 (Feb. 16, 2021) (unpublished manuscript) (on file with author) (engaging in a “translation of the Blackstone ratio to the preventive detention context”).

<sup>410</sup> Supra Parts I–II.

<sup>411</sup> Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 *Stan. L. Rev.* 1, 13 (1973) (arguing for “a blueprint for experimentation . . . at modest cost . . . designed to move from existing knowledge, empirically derived, to a scheme of larger, more coordinated experiments, and then ultimately, to a higher level of implementation”); supra notes 198–200, 380 (detailing this methodology).

<sup>412</sup> Infra notes 429–31 and accompanying text.

notion that a criminal-legal system could maximize its objectives with a minimum of punishment by cultivating what he called “acoustic separation” between the pronounced “conduct rules” and the practiced “decision rules.”<sup>413</sup> The logic is that if laypeople credibly believe the statutory law is also the law applied (even though it is not), they still might be deterred by it. In fact, Dan-Cohen intuited a version of the central insight of this paper. That is, he picked up on the fact that crime sometimes reflects genuine need or constitutes self-help (but that these evidentiary or beneficial qualities of illegal conduct may be compromised if would-be cheats recognize that they can feign the characteristics that should trigger immunity to otherwise applicable law). Thus, for example, Dan-Cohen argued that the defense of duress is appropriate precisely because people typically do not know *how* it applies (or even that it exists):

The typical situation that gives rise to a defense of duress or necessity involves an actor of no special legal sophistication caught in circumstances of emergency, high pressure, and emotion. The likelihood that the actor is aware of the defense or able to act on such awareness is in these circumstances at its lowest.<sup>414</sup>

In other words, *acoustic separation* prevents games-playing as long as prospective pretenders do not realize exceptions exist. Conversely, the genuinely needy, compulsive, or irrational offenders still act against conduct rules—even without knowing about the relevant decision-rule exceptions—for the simple reason that, practically speaking, they are incompetent to act in any other way. As Alon Harel observed: “Necessity knows no law.”<sup>415</sup>

But how do we promote *acoustic separation* such that even the holder of the crime license is unaware of his privilege? It cannot be done perfectly.<sup>416</sup> But, here, quality-of-life policing holds particular promise precisely because existing enforcement depends so heavily on expansive discretion.<sup>417</sup> That is to say, the public knows already that, with respect to

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<sup>413</sup> Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 625–26 (1984).

<sup>414</sup> Id. at 641.

<sup>415</sup> Alon Harel, Why Law Matters 107 (2014).

<sup>416</sup> Dan-Cohen, *supra* note 413, at 634–35 (indicating that only “partial acoustic separation” is possible).

<sup>417</sup> *Supra* notes 89–90 and accompanying text (discussing discretionary enforcement of quality-of-life offenses).

these low-level offenses, the *decision rules* allow for ample police-determined exceptions—that warnings are frequently given (even, occasionally, to longtime recidivists). Put differently, because “misdemeanorland” is characterized by opacity and selectivity, police may more readily maintain and act upon a *secret* “do-not-arrest” list. To be sure, a recidivist might begin to suspect something was afoot after a few lucky breaks. But the ruse could be maintained for a time. And, from the outside looking in, little would appear amiss. Passersby would see only a police officer stop and question a given recidivist for some act of legally defined disorder; they would not intuit the existence of the license or even the fact the individual was a recidivist who was ultimately released. As such, they would be less likely to copy the recidivist’s conduct or be confused as to its legal status, and they would not resent the recidivist for his enjoyment of a license that they could not perceive.

The strategy here is to play upon a preexisting confusion. Observers would see only discretion, not its source. In this way, a *hidden* license, done right, would disappear into the fabric of conventional order-maintenance policing. This is what Bert Huang had in mind when he suggested that regulators may hide licenses by aiming to “unsettle the observers’ perceptions—to give them pause—by creating uncertainty.”<sup>418</sup>

But, of course, such secrecy seems troubling. The state should not cultivate illusions. After all, theorists prize pragmatism as a means to experiment democratically, and “democratic experimentalism” depends upon transparency.<sup>419</sup> Still, we may commit ourselves to the democratic principle that the people get the final say without initially revealing *all* of our plans and actions to *all* of the people *all* of the time, particularly when some of those people—the politically powerful—hold outsized institutional sway (even as they remain largely unaffected by the most oppressive systemic features). That is to say, democratic experimental

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<sup>418</sup> Huang, *supra* note 394, at 2236 (“I introduce a distinct class of solutions aimed at ‘prompting’ observers to take account of the possibility of permission, yet without disclosure of the status of individual actors.” (emphasis omitted)).

<sup>419</sup> Erik Luna, *Transparent Policing*, 85 *Iowa L. Rev.* 1107, 1108 (2000) (“Decent conceptions of democratic rule and individual liberty require, at a minimum, that discretionary judgments and actions be open to the electorate.”). On the connection between pragmatism and “democratic experimentalism,” see Dorf & Sabel, *supra* note 40, at 314 (arguing that pragmatism, in the form of “democratic experimentalism,” promises “to create a form of collective problem solving suited to the local diversity and volatility of problems that confound modern democracies”); Sabel, *supra* note 163, at 35; *supra* notes 40–50 and accompanying text (discussing relationship between pragmatism and democratic engagement).

governance—especially *radical* democratic experimental governance—depends upon local control, since that is the likeliest site where discrete minorities have sufficient influence to implement meaningful innovation.<sup>420</sup> On this reading, keeping the powerful in the dark, temporarily, is just a means to promote popular democratic values, by “disaggregating power” away from traditional centers.<sup>421</sup> It is because traditional politics have done such a poor job representing the will of disadvantaged majority-minority neighborhoods that we need a “new local politics” to give expression and meaningful influence to the most affected stakeholders.<sup>422</sup> This is what Charles Sanders Peirce called a “laboratory philosophy”—an idea familiar to legal theorists who have praised the “virtues of federalism.”<sup>423</sup> Only after thorough testing is complete should it be necessary to submit these “novel forms of local participation” to “the electorate as a whole.”<sup>424</sup> And, at that point, it would be harder, in turn, for entrenched and influential majorities to dismiss obvious successes and insist upon preserving the *status quo*.

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<sup>420</sup> Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745, 1748 (2005); Danzig, *supra* note 411, at 4 (describing a “particular type of innovation” that is “conceptually and emotionally closely tied to . . . decentralization”); cf. Sabel, *supra* note 163, at 40 (discussing Dewey’s “attraction to the local”); Dorf & Sabel, *supra* note 40, at 315 (“[E]ffective government is first and foremost local government.”). See generally Klein, *supra* note 162, at 1541–42 (endorsing a federalism that “seeks to preserve local control of the criminal-justice system”); Richard C. Schragger, *City Power: Urban Governance in a Global Age* 5 (2016); Richard C. Schragger, *The Limits of Localism*, 100 *Mich. L. Rev.* 371, 372 (2001).

<sup>421</sup> Heather K. Gerken, *Second-Order Diversity*, 118 *Harv. L. Rev.* 1099, 1126–27 (2005) (“The way that second-order diversity diffuses power in practice will depend on the institution in question. For some disaggregated institutions, second-order diversity frustrates the majority faction simply by disaggregating power. For others, it allows electoral minorities to ‘edit’ the law they lack the power to ‘authorize.’”).

<sup>422</sup> Dorf & Sabel, *supra* note 40, at 288, 314; see also Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 *U. Chi. Legal F.* 197, 210 (1998) (arguing that the criminal-legal system must be more responsive to affected communities where offenders and victims are “linked to [each other and to the local] majority by strong social and familial ties”); Tracey L. Meares, *It’s a Question of Connections*, 31 *Val. U. L. Rev.* 579, 588–89 (1997).

<sup>423</sup> T.L. Short, *Peirce on Science and Philosophy*, 36 *Phil. Topics* 259, 271 (2008); see also Sabel, *supra* note 163, at 43 (“[A] persistent increase in uncertainty favors the emergence of a world congenial to Dewey—a world in which mutual learning and joint problem solving give rise to a democratic community.”). On the “virtues of federalism,” see, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments.”).

<sup>424</sup> Dorf & Sabel, *supra* note 40, at 288.

One final point: at a hyper-local level, we probably have a version of the hidden crime license already. It has existed as long as there have been rural sheriffs. Consider the comedic narrative trope of the town drunk, whose hijinks and escapades are largely tolerated by officers who (in the case of this particular recidivist) resort to warnings and shrugged shoulders instead of rigorous enforcement. “*That’s just Otis being Otis; Barney’s gonna Barney.*”<sup>425</sup> When we encounter the town drunk in popular culture, we intuit the propriety of the crime license as applied to certain recidivists.<sup>426</sup> The issue is that the circumstances that tend to justify official tolerance of the town drunk in the popular imagination are not the kinds of circumstances that most need to be addressed. In communities that are larger and more racially diverse, law enforcement is much less likely to *go along to get along*.<sup>427</sup>

But I raise the narrative of the town drunk for another reason. It highlights a perhaps fatal contradiction implicit to both of the crime-license designs that I have proposed thus far. Specifically, they require law enforcement’s buy-in on the frontend. Sheriff Taylor tolerates Otis precisely because that is the kind of tolerance he can tolerate. But more radical experiments—particularly those that redound to the benefit of disfavored political and racial minorities—are unlikely to find traction because an institutional actor is not inclined to implement an anti-establishment measure that puts the official’s own institution in the crosshairs.<sup>428</sup> Once a radical project proves successful, we may be able to cultivate institutional support, but it is much more difficult to enlist official participation at the outset. There is, however, a third way.

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<sup>425</sup> The Andy Griffith Show (CBS television broadcast 1960–1968) (depicting town drunk, Otis Campbell); The Simpsons (Fox television broadcast 1989–2020) (depicting town drunk, Barney Gumble).

<sup>426</sup> Cf. Brantly Keiek, Sobering Center for People Deemed “Publicly Intoxicated” Open Near New Orleans’ French Quarter, WXXV 25 (Nov. 12, 2019), <https://www.wxxv25.com/sobering-center-people-deemed-publicly-intoxicated-open-near-new-orleans-french-quarter/> [<https://perma.cc/3JZ2-H848>] (“The Sobering Center is a more appropriate destination than jails . . . as clients will . . . have a ‘warm handoff’ into medically supported detox or additional services if appropriate.”).

<sup>427</sup> Cf. Skogan, *supra* note 57, at 91 (“Community Policing relies upon organizational decentralization.” (emphasis omitted)).

<sup>428</sup> *Supra* notes 153–58 and accompanying text (discussing “institutional fetishism”).

*E. Grassroots Licenses*

It is no accident that many of the most successful radical-pragmatic drug-policy reforms began as *illicit* operations by nongovernmental groups. In Vancouver, Canada, it was the heroin users working underground—with the help of friends, family, and medical personnel—who *illegally* built Canada’s first supervised injection facility. This *criminal enterprise* achieved such irrefutably positive results that it won over not only the broader public but also the city’s conservative mayor, leading ultimately to the opening of a *licit* addiction-maintenance clinic.<sup>429</sup> Likewise, it was grassroots activists who, at first, *illegally* distributed medical marijuana, clean syringes, and lifesaving naloxone, long before cities and states agreed to authorize these practices.<sup>430</sup> Practically every widely available crime license in existence today *began as crime*. The lesson is clear—*crime itself may serve as the most effective radical-pragmatic design and a particularly persuasive form of democratic experimentalism*. According to Martha Minow: “Perhaps more controversially, another possible benefit is allowing room for a certain amount of disobedience. In a democracy, disobedience can be a way to express substantive disagreement with particular laws . . . . Acts of disobedience can gain attention and generate legal responses by courts, legislatures, and the public.”<sup>431</sup>

Of course, a law journal is not the right venue for me to advocate for acts of criminality. Instead, I will sketch a discrete idea for how activists

<sup>429</sup> Bowers & Abrahamson, *supra* note 14, at 797–98.

<sup>430</sup> See, e.g., Scott Burris, Evan D. Anderson, Leo Beletsky & Corey S. Davis, *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 *St. Louis L.J.* 1089, 1099 (2009) (discussing establishment of syringe exchanges as product of efforts by those who “bear the brunt of the human and financial costs associated with injection drug use and its collateral consequences”); Bowers & Abrahamson, *supra* note 14, at 817 (“Public health innovations typically start underground. For years . . . sterile syringes were exchanged, medical marijuana was ingested, and naloxone was distributed and injected.”).

<sup>431</sup> Minow, *supra* note 279, at 134; see also Shiffrin, *supra* note 291, at 1225 (“[H]ow law is understood on the street by everyday citizens may actually, and rightly, have an important influence on its ultimate judicial interpretation.”). This point obviously intersects with an extensive literature on civil disobedience. That literature is largely beyond the scope of this article, but it is, of course, an important topic that is relevant to many of the same themes that inform this project—particularly, social action and social justice. See generally Lewis Perry, *Civil Disobedience: An American Tradition* (2013) (tracing the origins of the notion of civil disobedience); Martin Luther King, Jr., *Why We Can’t Wait* (1964) (describing the manner by which civil disobedience may contribute to the nonviolent movement against racial discrimination in the United States).



*legally* may launch a *grassroots* crime-license project. In fact, there is an informal effort underway already. Let's return to New York. The city's transit system remains a particular focus of heavy-handed, quality-of-life policing, even as law enforcement has moved modestly toward reform in other ways.<sup>432</sup> A group of activists has responded to recent crackdowns on turnstile hoppers by initiating the "Swipe It Forward" campaign—a project that does just that.<sup>433</sup> Transit rules allow a person to use an unlimited subway pass to swipe another person into the subway system as a courtesy, provided only one person enters on each pass at a given time (and provided no one solicits or sells a swipe). The activists behind the effort have encouraged riders exiting the system to use their cards to admit others who want to enter. Ideally, the swipes go to those most in need; in fact, that message is one of the many slogans that pepper the program's Twitter feed and website: "If you see someone, help someone. . . . Poverty is not a crime. . . . Transportation is a right. . . . End broken windows policing. . . . Support the resistance. . . . It is totally legal to swipe someone into the subway."<sup>434</sup> The bold ambition of these activists "isn't just to challenge the NYPD to reconsider its aggressive stance on fare-beating, but to *provoke a cultural shift* among New Yorkers."<sup>435</sup> This is almost definitional radical pragmatism. Josmar Trujillo, of the Coalition to End Broken Windows, put it this way:

We're trying to bring back an older tradition, which is New Yorkers seeing each other and *helping each other*. If someone needs a ride and you've got a card, you swipe them through. It's a lot cheaper than

<sup>432</sup> *Supra* notes 138–41 and accompanying text (describing recent farebeat crackdown).

<sup>433</sup> Nick Pinto, "Swipe It Forward" Activists Protest NYPD Subway Arrests by Giving Out Free Rides, *Village Voice* (Nov. 3, 2016), <https://www.villagevoice.com/2016/11/03/swipe-it-forward-activists-protest-nypd-subway-arrests-by-giving-out-free-rides/> [<https://perma.cc/2WG8-VZTB>]; James Ramsay, "Can I Get a Swipe?" Can We Get in Trouble?, *WNYC News* (Feb. 12, 2018), <https://www.wnyc.org/story/can-i-get-swipe-can-we-get-trouble/> [<https://perma.cc/F9VX-M7Z2>].

<sup>434</sup> Swipe It Forward (@swipeitforward), Twitter (May 11, 2018, 10:25 PM), <https://twitter.com/swipeitforward/status/995127801324896257> [<https://perma.cc/UAT2-LSGJ>]; Swipe It Forward (@swipeitforward), Twitter (Apr. 2, 2018, 3:51 PM), <https://twitter.com/swipeitforward/status/980895528371277826>.

<sup>435</sup> Pinto, *supra* note 433 (emphasis added).

spending all the money on police and jail and courts, and it's also just *a better way to live together*.<sup>436</sup>

These activists understand that their incremental campaign is not going to radically shift the city's governance and culture overnight away from crime control and toward philosophies of harm reduction and social solidarity. But the effort already has had some arguable impact on public policy. In 2019, the city implemented a modest program to provide half-priced subway cards to poor residents.<sup>437</sup> (Other cities and towns have adopted wholly free transit systems, but one incremental step at a time.)<sup>438</sup>

The efforts of the “Swipe It Forward” campaign reflect the reality that, within any system, there are grassroots moves we can make—legally and perhaps even illegally—to loosen constraints right now, without first seeking permission from the very institutions we intend to disrupt.<sup>439</sup> A

<sup>436</sup> Id. (quoting Trujillo) (emphasis added) (describing goal to “highlight the role that fare-beating arrests have played in the application of the aggressive ‘Broken Windows’ police enforcement against minor ‘quality of life’ violations”).

<sup>437</sup> J. David Goodman & Jeffery C. Mays, Of 800,000 Poor New Yorkers, Only 30,000 Can Get the New Half-Priced MetroCards, N.Y. Times (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/nyregion/fair-fares-metrocard-discount-nyc.html> [<https://perma.cc/98JJ-3JCC>] (describing the program).

<sup>438</sup> Alexander C. Kaufman, As New York Cracks Down on Fare Evasion, Another City Weighs Free Transit, Huffington Post (Nov. 18, 2019), [https://www.huffpost.com/entry/mbta-free-transit\\_n\\_5dd2e1d6e4b01f982f06b00c](https://www.huffpost.com/entry/mbta-free-transit_n_5dd2e1d6e4b01f982f06b00c) [<https://perma.cc/PDT3-RLAL>]; Beth Musgrave, Can a Bus Pass Help End Homelessness? Lexington Is About To Find Out, Lexington Herald Leader (Aug. 12, 2018), <https://www.kentucky.com/latest-news/article216452400.html>. An advantage of universal free transit is that it might minimize the stigma and resentment that sometimes attach to subsidies for the poor. Recently, some school districts have experimented with universal free lunch to counteract precisely these pernicious perspectives. Amy Brown & Janna Bilski, Fighting the Stigma of Free Lunch: Why Universal Free School Lunch Is Good For Students, Schools, and Families, Ford Foundation (Sept. 29, 2017), <https://www.fordfoundation.org/just-matters/just-matters/posts/fighting-the-stigma-of-free-lunch-why-universal-free-school-lunch-is-good-for-students-schools-and-families/> [<https://perma.cc/D58R-FSNC>].

<sup>439</sup> Here, I am reminded of and inspired by the many ordinary people, including some of my own students (who were inspired, in turn, by the Movement for Black Lives) to start community bail funds in an effort to take tangible radical-pragmatic steps today. See, e.g., Fundraiser by Elizabeth Fosburgh: Blue Ridge Community, <https://www.gofundme.com/f/blue-ridge-bail-fund> [<https://perma.cc/29YY-P8BR>]; Jia Tolentino, Where Bail Funds Go from Here, New Yorker (June 23, 2020), <https://www.newyorker.com/news/annals-of-activism/where-bail-funds-go-from-here> [<https://perma.cc/4JYR-KSH6>]; Hannah Giorgis, Why It Matters That So Many People Are Donating to Bail Funds, Atlantic (June 6, 2020), <https://www.theatlantic.com/culture/archive/2020/06/why-sudden-popularity-bail-funds-matters/612733/> [<https://perma.cc/TW23-WGGZ>] (“The popularity of these donations signals a quietly radical shift in many people’s attitudes toward American policing.”). Nonprofit

viable next move for activists committed to minimizing turnstile-hop arrests would be to enlist deep pockets for seed money to put unlimited subway cards in the hands of New Yorkers in the most need. For my part, I would start with the longtime recidivists who have suffered most under *punitive prohibition* and would work diligently from there to track success and build enthusiasm for additional radical-pragmatic reforms.<sup>440</sup>

#### CONCLUSION

William Blake wrote: “I must create a system, or be enslav[e]d by another [m]an’s.”<sup>441</sup> But radical pragmatism does not demand the wholesale abandonment of existing institutions—even coercive

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organizations, like The Bail Project, pursue two tracks simultaneously—first, pushing to change pretrial law to eliminate money bail and, second, paying for defendants’ release in the interim. The Bail Project, at <https://bailproject.org/> [<https://perma.cc/5T9P-JBVX>]. Both tracks describe radical-pragmatic projects—with the latter representing a means by which activists may shift to a philosophy of assistance and support without having to convince anyone to upend the prevailing legal regime. See generally Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *Yale L.J.* 2740, 2757–60 (2014) (“Social movements tend to emerge initially as a local source of power and moral authority . . . that draw on local resources (networks, information, relationships, and cultural symbols) . . . linking lived experience to an imagined alternative.”).

<sup>440</sup> As with any valid experiment, we would want a control group, which might mean that some recidivists would get licenses while other similarly situated individuals would not. Alternatively, we could provide licenses categorically to all similarly situated individuals and then compare results chronologically with past practices. But that kind of longitudinal study entails a greater number of confounding variables. In any event, we should not be too troubled about treating like cases unlike, not only for the reasons discussed *supra* Section III.B, but also because a genuinely random process is particularly fair, even if it produces disparate results. Bowers, *supra* note 10, at 1677 (“[T]here is no persuasive reason why equal treatment must be measured according to substantive outcomes only. A justice system could honor the equality principle just as well by adopting procedures that provide roughly equivalent probabilities of receiving some favorable result.”); Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 *New Crim. L. Rev.* 277, 306 (2012) (arguing that “roughly equalizing chances is the principle of fair treatment underlying our capital jurisprudence”); Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtue of Randomization*, in *Criminal Law Conversations*, *supra* note 31, at 163, 167–70 (arguing that within reasonable ranges the criminal-legal system should “turn to the lottery” in making punishment and enforcement decisions); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *Colum. L. Rev.* 1193, 1213 (1985) (“[T]he criminal justice system . . . and the lottery are fair so long as the ex ante costs and benefits are equalized among the participants.”). Indeed, Rawls identified a fair gamble as a paradigmatic example of “pure procedural justice.” John Rawls, *A Theory of Justice* 74–75 (1971) (“If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution is.”).

<sup>441</sup> William Blake, *Jerusalem: The Emanation of the Giant Albion* 8 (1804).

institutions. Within coercive institutions, there are those that control for justifiable and unjustifiable reasons. Even many prison abolitionists have acknowledged that there are a genuine “dangerous few” who must be incapacitated—albeit as humanely as possible—for the protection of the rest of us.<sup>442</sup> The right orientation, then, is *institutional skepticism*. It is a matter of constantly testing which institution is what, all the while adopting a distant gaze—a gaze unclouded by our personal stakes, rank, or cultural biases.<sup>443</sup> Applying that gaze to *criminal legalism*, the pathologies become clear: ours is a system that counterproductively and immorally churns through people; that reduces humans to docket numbers even while pretending they are unencumbered moral agents.<sup>444</sup>

The degrading nature of this system was the theme of the first law review article I ever wrote.<sup>445</sup> There, I tackled the issue of what to do about recidivist offenders who are inaccurately arrested and charged in quality-of-life cases. I argued in favor of letting these *legally innocent* recidivists plead guilty falsely in order to exit the criminal-legal assembly line on the best terms available. It was, in essence, a pragmatic harm-reduction proposal to tolerate wrongful *conviction* as a fair tradeoff for ending a dehumanizing and painful process.<sup>446</sup> Here, I come full circle to offer a pragmatic harm-reduction proposal to *license* a set of otherwise *legally guilty* recidivists to engage in criminal conduct to avoid reentering the same dehumanizing and painful process. Both counterintuitive claims are animated by the depressing reality that, in “misdemeanorland,” legal guilt has come to signify relatively little *normatively*.<sup>447</sup> The fact is that what we are doing is not working—at least, not for appropriate ends.<sup>448</sup> It

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<sup>442</sup> Butler, *supra* note 37, at 19; Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics* (unpublished manuscript) (on file with author).

<sup>443</sup> At a minimum, we must frankly acknowledge our stakes, rank, and corresponding cultural biases. Consider, for instance, the refreshingly honest way Duncan Kennedy concluded his own critique of legal education by recognizing his own privileged place in the paradigm: “Maybe I’m just wrong about what it’s like out there. Maybe my preoccupation with the horrors of hierarchy is just a way to wring the last ironic drop of pleasure from my own hierarchical superiority.” Kennedy, *supra* note 81, at 76.

<sup>444</sup> *Supra* notes 180–81 and accompanying text (discussing the “machinery” of the criminal-legal system).

<sup>445</sup> Bowers, *supra* note 34, at 1118.

<sup>446</sup> *Id.* See generally Feeley, *supra* note 34, at 199–241 (famously arguing that “the process is the punishment” in lower criminal courts).

<sup>447</sup> *Supra* note 146 and accompanying text (discussing “misdemeanorland”). On the distinction between legal and normative guilt, see Bowers, *supra* note 10, at 1678–80.

<sup>448</sup> *Supra* notes 441–44 and accompanying text (arguing that criminal legalism is working quite effectively as a system of subordination).

is, therefore, incumbent upon us to look hard for what could work. But to look hard is not to *be hard*.

On this score, I am reminded of an exchange between Alice Ristroph and Bernard Harcourt. Debating what to do, in the face of uncertainty, about “social engineering” through criminal law, Ristroph observed: “Some choose not to stone anyone. For some of us, the moment when reason runs out is . . . the time to stop punishing.”<sup>449</sup> Harcourt offered a quote from Nietzsche in support of Ristroph’s position:

It is not unthinkable that a society one day might attain such a consciousness of power that it could allow itself the noblest luxury possible to it—letting those who harm it go unpunished. “What are my parasites to me?” it might say. “May they live and prosper: I am strong enough for that!”<sup>450</sup>

I do not mean to suggest that quality-of-life offenders are parasites—just the opposite. But this is how they are perceived by conventional law and society.<sup>451</sup> The prevailing wisdom is that punishment is a sign of strength, and wrongdoers must be punished. But, of all people, Nietzsche understood that forbearance—*the decision to do nothing*—is no necessary sign of weakness. Rather, it may be a sign of the health of a system. More importantly, it may be a sign that the system has committed itself *to* health, not destruction.

Even once we come to see the hard-luck, quality-of-life offender as someone other than a parasite, the temptation remains to draw a comparison between him and the great many others, who may be products of the same desperate circumstances but nevertheless have managed to avoid engaging in criminal self-help. But that kind of thinking disregards the manner by which each of us is uniquely challenged, even as we face similar social conditions. Our brain chemistry, biology, psychology, and environment all play off each other in different ways. In turn, some people have what it takes to manage their burdens well enough, but it does not follow that another who cannot is deserving of punishment. I am reminded of the time I worked, before law school, as a fifth-grade teacher

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<sup>449</sup> Alice Ristroph, *Games Punishers Play*, in *Criminal Law Conversations*, supra note 31, at 173, 174.

<sup>450</sup> Bernard E. Harcourt, Reply, in *Criminal Law Conversations*, supra note 31, at 181, 183 (quoting Friedrich Nietzsche, *On the Genealogy of Morals* 72 (Walter Kaufmann & R.J. Hollingdale trans., 1989)).

<sup>451</sup> See supra Parts I–II.

at an at-risk elementary school in Houston, Texas. I had plenty of students who struggled and plenty who excelled despite hurdles. Admittedly, I probably commended the excellent students more. But, surely, it would have been monstrous of me to orient my teaching around our criminal-legal system's operative philosophy—to single out the failures for condemnation and tell them that they deserved no assistance because their peers had done well enough without extra help in the same setting. Instead, I did what I could with the limited resources available. And if a social scientist had come to me and told me that, even without supportive intervention, there was some hope that the strugglers might also excel within a matter of years, I would have at least done what I could to stand aside and let them try to find a way to flourish.<sup>452</sup>

This kind of forbearance is no easy feat for a culture so committed to *crime-control governance*. But there are times when we may achieve less or more. As Unger observed: “extraordinary moments of national crisis” lay bare “the mutable nature of [our] social life.”<sup>453</sup> Unger wrote these words in less volatile times. He was not banking on catastrophe. But perhaps we are in such an historical moment now. At the time of this Article's publication, the world continues to confront a global pandemic and high levels of civil and political unrest. For its part, the United States has been wrestling (however insubstantially) with its own uniquely ugly past and present of racial subordination and discriminatory state violence. A silver lining to these challenges is the hope that we may transform our culture and politics, opening wide the “Overton Window” to policy discussions about previously radical topics—not only defunding the police and abolishing prisons but also paying reparations and providing universal health care and a basic income.<sup>454</sup>

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<sup>452</sup> Cf. *supra* notes 182–95, 385–90 and accompanying text (discussing the phenomenon by which many offenders “age out” from crime in early middle age).

<sup>453</sup> Unger, *supra* note 42 at 7, 49 (“To the extent we move in this direction, the facts of society and culture cease to present themselves to our consciousness as an inescapable fate.”); cf. Thomas Piketty, *Capital in the Twenty-First Century 1* (2014) (explaining that it took the fallout from two World Wars and a depression to modify—albeit for only half a century—capitalist structures of wealth concentration).

<sup>454</sup> See, e.g., Michael Hiltzik, COVID-19 May Make Universal Basic Income More Palatable. That's a Good Thing, *L.A. Times* (May 22, 2020), <https://www.latimes.com/business/story/2020-05-22/covid-19-universal-basic-income>. See generally The Mackinac Center, The Overton Window, <https://www.mackinac.org/OvertonWindow> [<https://perma.cc/8899-URBR>] (“The core concept is that politicians are limited in what policy ideas they can support—they generally

From the earliest days of the coronavirus pandemic, academics and artists sensed such a dramatic societal shift. The psychologist, Jamil Zaki, wrote: “[T]he sustained struggle ahead presents an opportunity to reboot our culture and turn this interconnected moment into a habit . . . a shift in our values, towards empathy and fellowship.”<sup>455</sup> Zaki’s work is at the center of a literature on “kindness,” which teaches that “[w]hen all the ordinary divides and patterns are shattered, people step up—not all, but the great preponderance—to become their brothers’ keepers.”<sup>456</sup> According to Rebecca Solnit:

Disasters provide an extraordinary window into social desire and possibility, and what manifests there matters elsewhere, in ordinary times and in other extraordinary times. . . . If paradise now arises in hell, it’s because in the suspension of the usual order and the failure of most systems, we are free to live and act in another way. . . . [L]ong-term social and political transformations, both good and bad, arise from the wreckage.<sup>457</sup>

More colorfully still, there are the words of the Capuchin Franciscan, Richard Hendrick, who, in the first days of quarantine, penned the poem, *Lockdown*, which reads in part:

All over the world people are slowing down and reflecting  
 All over the world people are looking at their neighbours in a new way  
 All over the world people are waking up to a new reality

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only pursue policies that are widely accepted throughout society as legitimate policy options. These policies lie inside the Overton Window.”)

<sup>455</sup> Jamil Zaki, *Habits of Kindness That Will Endure*, *Wall St. J.* (Mar. 28, 2020), <https://www.wsj.com/articles/habits-of-kindness-that-will-endure-11585368061> [<https://perma.cc/5U3Q-QU66>]. This was a theme of Barack Obama’s 2020 commencement speech to all graduating high school seniors. Barack Obama, *Graduate Together* (May 16, 2020), <https://www.obama.org/updates/president-obamas-graduation-message-class-2020/> [<https://perma.cc/68SN-AQLJ>] (“This pandemic has shaken up the status quo and laid bare a lot of our country’s deep-seated problems—from massive economic inequality to ongoing racial disparities to a lack of basic health care for people who need it . . . that our society and our democracy only work when we think not just about ourselves, but about each other.”).

<sup>456</sup> Rebecca Solnit, *A Paradise Built in Hell: The Extraordinary Communities that Arise in Disaster* 3 (2010). See generally Jamil Zaki, *The War for Kindness: Building Empathy in a Fractured World* 6 (2019) (describing how humanity’s “darkest times expose our noblest capacities”).

<sup>457</sup> Solnit, *supra* note 456, at 6, 9.

To how big we really are.

To how little control we really have.

To what really matters.

To Love.<sup>458</sup>

We are not naturally cruel, even if our culture and institutions make us so.<sup>459</sup> Perhaps, then, we can use current cataclysms to rise from our ruts and “unfreeze” our “frozen” and sometimes destructive order.<sup>460</sup> But I am skeptical. Yes, there is currently an emerging white consciousness of social injustice and systemic racism. But these challenges are centuries old, and, even now, only half of white America perceives them (while the other half is egged on to make the old order “great again” by a race-baiting, reactionary, and fact-allergic ex-president).<sup>461</sup> Yes, there are proposals for groundbreaking legislation, but Congress slow-walked ambitious pandemic relief, and the Senate stalled the “George Floyd Justice in Policing Act.”<sup>462</sup> And, yes, there may be a fresh spirit of mutual sacrifice in the face of a common cause, but it is continually undercut by the “ruthless individualism” of those who consider mask orders and vaccine drives totalitarian—and also, somewhat ironically, by those who

<sup>458</sup> Lee Moran, *Irish Priest Pens Stirring Poem About the Coronavirus Lockdown*, *Huffington Post* (Mar. 20, 2020), [https://www.huffpost.com/entry/ireland-priest-coronavirus-lockdown-poem\\_n\\_5e748a0cc5b6f5b7c541e875](https://www.huffpost.com/entry/ireland-priest-coronavirus-lockdown-poem_n_5e748a0cc5b6f5b7c541e875) [<https://perma.cc/8V3L-8A36>].

<sup>459</sup> Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L.J.* 1, 54 (1984) (“But people do not want just to be beastly to each other. To suppose so is to ignore facts. People want freedom to pursue happiness. But they also want not to harm others or be harmed themselves. The evidence is all around us that people are often caring, supportive, loving, and altruistic, both in their family lives and in their relations with strangers.”).

<sup>460</sup> Unger, *supra* note 42, at 7–8.

<sup>461</sup> See Anna North, *White Americans Are Finally Talking About Racism. Will It Translate Into Action?*, *Vox* (June 11, 2020), <https://www.vox.com/2020/6/11/21286642/george-floyd-protests-white-people-police-racism> (discussing polls finding that the proportion of white Americans who said that police were likelier to use force against Black people had risen from 25% in 2016 to 49% in 2020); see, e.g., Stephen Collinson, *Trump Turns Clock Back 155 Years with Confederacy-Inspired Election Strategy*, *CNN* (July 7, 2020), <https://www.cnn.com/2020/07/07/politics/donald-trump-politics-race-election-2020/index.html> [<https://perma.cc/7HSN-9D7R>].

<sup>462</sup> See, e.g., Philip Elliott, *With the Eviction Moratorium Over and Unemployment Checks Next to Exit, Congress Is Nowhere Near a Deal*, *Time* (July 27, 2020), <https://time.com/5872273/congress-new-coronavirus-relief-package/> [<https://perma.cc/UTE7-QEZU>]; Niv Elis, *House Democrats Include \$597 Million for Police Reform in Spending Bill*, *Hill* (July 7, 2020), <https://thehill.com/policy/finance/506152-house-democrats-propose-597-million-toward-police-reform> [<https://perma.cc/L2NW-SYK7>].



blame and shame those others who may be slower to adapt to public-health measures.<sup>463</sup>

On social media, almost everyone—left and right—is scapegoating everyone else for our shared troubles. Some on the left have embraced “cancel culture,” which is a contemporary form of banishment, whether deserved or not.<sup>464</sup> Some on the right consider the virus a hoax, against the weight of all credible science. Thus, the green shoots of a newfound communitarian ethic have wilted. Instead of building friendship and fellowship, we get battle cries: “Wear a damn mask!” or “Liberate Michigan!”<sup>465</sup> To be sure, I have picked my side in this battle. Given the choice between the public-health zealots and the mask-less unvaccinated hordes, I am whole-heartedly with the zealots. But that choice, itself, is the crux of the problem. We resort to picking allies and enemies in a fight against a virus that perceives no ideology. We are divided when we most need to unite in common cause. I cannot ignore the loathing I feel toward COVID-deniers. And I genuinely hate the self-proclaimed “American patriots” (and their political appeasers) who commit (and foment)

<sup>463</sup> Zaki, *supra* note 455 (discussing possibility that the pandemic may lead us to turn away from “ruthless individualism”); see, e.g., Quint Forgey, ‘Everyone is Lying’: Trump Undercuts Public Health Officials in Fresh Attacks, *Politico* (July 13, 2020), <https://www.politico.com/news/2020/07/13/trump-questions-public-health-experts-twitter-359388> [<https://perma.cc/8FQZ-FCVR>]; Jonathan J. Cooper, Arizona’s Rugged Individualism Poses Barrier to Mask Rules, *Associated Press* (July 19, 2020), <https://apnews.com/article/virus-outbreak-us-news-ap-top-news-az-state-wire-phoenix-27afcc9ba34281ab425293a98c0726a3>; Jake Sherman, Louie Gohmert, Who Refused to Wear a Mask, Tests Positive for Coronavirus, *Politico* (July 29, 2020), <https://www.politico.com/news/2020/07/29/louis-gohmert-who-refused-to-wear-a-mask-tests-positive-for-coronavirus-386076> [<https://perma.cc/2Q7Y-US6B>].

<sup>464</sup> Eric Zorn, ‘Cancel Culture’ Is Just a New Name for an Old and Bipartisan Impulse, *Chi. Trib.* (July 31, 2020), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-cancel-culture-nba-charlie-kirk-zorn-20200731-nbohyowc3rbkzpvxsqgv3nljpu-story.html>.

<sup>465</sup> Rhiannon Evans, ‘Wear a Damn Mask,’ Karens and Desmond Swayne—How Face-Coverings Became Political, *Grazia* (July 15, 2020), <https://graziadaily.co.uk/life/in-the-news/face-masks-covid-karen-jennifer-aniston/>; see, e.g., Nicole Gallucci, 8 Karens and Kens Who Threw Huge Tantrums Instead of Putting on Masks, *Mashable* (June 29, 2020), <https://mashable.com/article/karen-no-mask-videos-tantrums-coronavirus> [<https://perma.cc/66A3-XL6P>]; Eric Bradner & Sarah Mucha, Biden Blames Trump’s “Liberate Michigan” Tweet for Plot to Kidnap Michigan Governor, *CNN* (Oct. 16, 2020), <https://www.cnn.com/2020/10/16/politics/joe-biden-trump-whitmer-kidnapping-plot/index.html> [<https://perma.cc/6M5X-TYQH>]; cf. Julia Marcus & Jessica Gold, Colleges Are Getting Ready to Blame Their Students, *Atlantic* (July 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/colleges-are-getting-ready-blame-their-students/614410/> [<https://perma.cc/RK52-J7UG>] (discussing the blame universities are, perhaps unfairly, placing on young people for virus spread).

insurrection in vile efforts to replace our (admittedly flawed) democratic order with a far-worse, ethno-authoritarian alternative.<sup>466</sup> But it remains a terrible sign of civic collapse that my primary emotion is genuine hatred.

There is even a disturbing and familiar echo of *prohibitionism* in the demand by some would-be communitarians for nothing short of the categorical elimination of coronavirus infection—whatever the social and economic costs.<sup>467</sup> Such absolutist approaches are just different species of the same punitive “zero-risk” perspective that underpinned past criminal-legal moral panics and that still fuels mass incarceration and mass misdemeanor arrest.<sup>468</sup> In this vein, the epidemiologist, Julia Marcus, used recognizable harm-reduction terms to describe our sometimes-overwrought pandemic attitudes:

[W]ithout a nuanced approach to risk, abstinence-only messaging can inadvertently stigmatize anything less than 100 percent risk reduction. . . . [T]he harm-reduction model . . . recognizes that some people are going to take risks, whether public-health experts want them to or not—and instead of condemnation, offers them strategies to reduce any potential harms. . . . [S]ome people will choose to engage in higher-risk activities—and instead of shaming them, we can provide them with tools to reduce any potential harms.<sup>469</sup>

Rather than embracing harm reduction holistically, we sometimes (re)turned to the police and state-sponsored violence to enforce our

<sup>466</sup> Cf. Peter Wehner, *Republicans Own This Insurrection*, Atlantic (Jan. 7, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/republicans-own-insurrection/617583/> [<https://perma.cc/P6V2-7W3T>] (arguing that many Republican officials bear some responsibility for the insurrection); cf. Elie Mystal, *The People Aren't Freedom Fighters—They're Virus-Spreading Sociopaths*, Nation (Apr. 21, 2020), <https://www.thenation.com/article/economy/liberate-america-covid/> [<https://perma.cc/739Z-J5NH>] (criticizing those who claim liberty and individualism entitles them not to wear masks).

<sup>467</sup> See *supra* Section II.C.

<sup>468</sup> Simon, *supra* note 124, at 6–7, 100–102; Garland, *supra* note 132, at 131–32; *supra* notes 217–23 and accompanying text (discussing risk aversion, fear, crime-control governance, mass incarceration, and mass misdemeanor arrest). Likewise, this same crime-control ethos led some politicians to demand draconian penalties for those who immunized out of formal order, rather than keeping focus on the more-important, harm-reduction aim of expeditiously putting vaccine shots in arms. See, e.g., Alexandra Kelley, *New York Weighs Whether to Outlaw Cutting the Line for COVID-19 Vaccine*, Hill (Jan. 4, 2021), <https://thehill.com/changing-america/well-being/prevention-cures/532565-new-york-to-outlaw-cutting-the-line-for-covid-19> [<https://perma.cc/ZL8M-PFD2>].

<sup>469</sup> Marcus, *supra* note 220.

public-health measures, with predictably regressive consequences. Per Marcus:

State and local officials across the country are unleashing a new weapon in America's war against the coronavirus: the cops. . . . Look no further than New York City to see how this will play out. When police were authorized to enforce social-distancing guidelines, nearly all the arrests were of Black and Latino residents, including several who were punched in the face or knocked unconscious by police officers.<sup>470</sup>

Marcus wanted a modicum of tolerance for harmful conduct by a pandemic-weary populace, just as I want a modicum of tolerance for harmful conduct by “persistent misdemeanants.” Neither of us believes that harmful conduct is good—only that pragmatic harm reduction “meets people where they are and acknowledges that individual-level decisions happen in a broader context . . . out of people's control.”<sup>471</sup> This “broader context” includes the manner by which harmful conduct is, itself, a product of distributive injustice: “[S]ome people can't comply with public-health guidance because of structural factors, including systemic racism, that render physical distancing a privilege. If we ignore this broader context, people of color will continue to bear the brunt of not only the pandemic itself, but also American society's response to it.”<sup>472</sup> Here, Marcus could have just as easily been talking about *criminal legalism* as opposed to epidemiology—and, indeed, she was.

There are important lessons to be learned from COVID-19 about the better path forward—whether we have managed to learn them or not. But, critically, we should not need to rely on devastation and chaos to teach us. According to Unger: “[I]t is part of the project of human empowerment and freedom to diminish the dependence of change on calamity.”<sup>473</sup> This, then, is the promise of a collective commitment to radical pragmatism and its continuous regimen of piecemeal reinvention. It offers a means to pursue *small-but-meaningful experiments* in an effort to cultivate *small-but-meaningful changes*. It serves as an opportunity to

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<sup>470</sup> Julia Marcus, *The Fun Police Should Stand Down*, Atlantic (Aug. 15, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/containing-the-pandemic-isnt-a-job-for-cops/615298/> [<https://perma.cc/C5JW-M26W>] (“In the meantime, not a single ticket was issued in Park Slope, a wealthy and predominantly white neighborhood, despite the crowds that gathered there in Prospect Park.”).

<sup>471</sup> Marcus, *supra* note 220.

<sup>472</sup> *Id.*

<sup>473</sup> Unger, *supra* note 42, at 49–50.

seek and discover what is possible.<sup>474</sup> And, most of all, it provides a hope that we may find ways to be more imaginative, collaborative, and incrementally ambitious in the quieter moments to come.

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<sup>474</sup> Id. at 49 (arguing that radical pragmatism enables us to “draw the line between the alterable features of social life and the enduring character of human existence”).