

## THERAPEUTIC JUSTICE AND THE PROBLEM OF PENAL WELFARE

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*For decades, scholars and activists have decried the punitive turn in U.S. criminal policy and the rise of mass incarceration. Unsurprisingly, then, much ink has been spilled exploring alternative frameworks for responding to risk creation and interpersonal harm. And many commentators have embraced proposals that would repurpose existing criminal legal institutions—replacing a punitive orientation with one grounded in rehabilitation or restorative justice. In this Essay, I turn a critical eye on the project of reimagining criminal courts as therapeutic institutions. Drawing from the literature on penal welfare, I argue that these well-intentioned proposals risk reinforcing a troubling feature of post-Great Society U.S. political economy: viewing the criminal system as a primary site of governance and the right place to solve social problems. Instead, I argue that a turn to therapeutic justice should invite a turn away from criminal legal institutions and a shift to alternative frameworks for redressing harm and managing risk.*

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### INTRODUCTION

The footprint of U.S. criminal law is massive. Almost 2 million people are currently incarcerated.<sup>1</sup> Another 3.7 million adults are under some form of community supervision (probation, parole, etc.).<sup>2</sup> Roughly one-

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<sup>1</sup> See Wendy Sawyer, Brian Nam-Sonenstein & Peter Wagner, Mass Incarceration: The Whole Pie 2026, Prison Pol’y Initiative (Mar. 11, 2026), <https://www.prisonpolicy.org/reports/pie2026.html> [<https://perma.cc/E9Y4-XH8T>].

<sup>2</sup> See *id.*

third of all adults have a criminal record.<sup>3</sup> No one has been able to compile a definitive, comprehensive list of all substantive criminal laws on the books, but recent estimates suggest that there are at least 5,100 federal criminal laws.<sup>4</sup> And that figure does not include the massive bodies of state and local criminal law, which serve as the basis for the vast majority of arrests and convictions.<sup>5</sup> Nor do those figures track the number of ostensibly civil regulations that restrict the liberty of people based on their criminal record.<sup>6</sup> In short, criminal law plays a massive role in U.S. society—and an even larger role in race-class marginalized communities where enforcement tends to be concentrated.<sup>7</sup>

Nevertheless, the study of U.S. criminal law—at least in U.S. law schools—has historically adopted a relatively narrow focus.<sup>8</sup> Conventional criminal legal scholarship and constitutional criminal procedure insist on strict lines between civil and criminal.<sup>9</sup> And conventional criminal legal theory focuses on individual culpability or social interests in crime prevention, while giving short shrift to the

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<sup>3</sup> See Criminal Records and Reentry Toolkit, Nat'l Conf. of State Legislatures, <https://www.ncsl.org/civil-and-criminal-justice/criminal-records-and-reentry-toolkit> [<https://perma.cc/5GEG-LDPA>] (last updated Mar. 18, 2025).

<sup>4</sup> GianCarlo Canaparo, Patrick A. McLaughlin, Jonathan Nelson & Liya Palagashvili, Heritage Found., Special Rep. No. 251, Count the Code: Quantifying Federalization of Criminal Statutes 1 (2022), <https://www.heritage.org/sites/default/files/2024-05/SR251.pdf> [<https://perma.cc/3ECY-GA2G>].

<sup>5</sup> On state and local numbers dramatically outweighing federal numbers, see Sawyer et al., *supra* note 1.

<sup>6</sup> The closest we have to a comprehensive list of these restrictions can be found in the National Inventory of Collateral Consequences of Conviction. See Welcome to the NICCC, Nat'l Inventory of Collateral Consequences of Conviction, <https://niccc.nationalreentryresourcecenter.org/> [<https://perma.cc/YK6B-GA3J>] (last visited Nov. 15, 2025).

<sup>7</sup> On criminal law's role in exacerbating inequality across lines of race and class, see generally Bruce Western, *Punishment and Inequality in America* (2006).

<sup>8</sup> See, e.g., Jeffrie G. Murphy, "In the Penal Colony" and Why I Am Now Reluctant to Teach Criminal Law, 33 *Crim. Just. Ethics* 72, 75–76 (2014) (emphasizing the disconnect between the Model Penal Code and the realities of mass incarceration); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 *Harv. L. Rev. F.* 200, 211 (2021) (critiquing the uncritical posture of U.S. criminal legal education); Alice Ristroph, *The Curriculum of the Carceral State*, 120 *Colum. L. Rev.* 1631, 1640 (2020) (critiquing criminal law classes as constructing a coherent, morals-based understanding of the criminal system).

<sup>9</sup> For an extensive discussion of this distinction in both constitutional doctrine and legal thought, see generally Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 *Geo. L.J.* 775 (1997).

structural forces that shape defendants' behaviors—and the state's decisions to police and punish.<sup>10</sup>

Recent scholarship and advocacy have pushed back on “criminal law exceptionalism” and sought to reverse the siloing impulse that has led to a cramped understanding of the legal institutions and social structures relevant to criminal legal policy.<sup>11</sup> From a focus on the nexus between criminal law and employment policy,<sup>12</sup> to an explosion in work on “crimmigration”<sup>13</sup> and the so-called “family regulation system,”<sup>14</sup> this capacious understanding of what it means to study and reform criminal law is both welcome and necessary.<sup>15</sup> Taking the “criminal system”

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<sup>10</sup> See, e.g., Michael T. Cahill, Criminal Law's “Mediating Rules”: Balancing, Harmonization, or Accident?, 93 Va. L. Rev. In Brief 199, 199 (2007) (critiquing the “tendency of theoretical work in criminal law . . . to focus on . . . questions about the proper justification, scope, and amount of punishment in the abstract, while giving significantly less consideration to the various institutional and procedural aspects of any concrete system of imposing such punishment”); Ahmed A. White, Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society, 37 Ariz. St. L.J. 759, 786 (2005) (“Conventional accounts of the criminal justice system tend to obscure its social control agenda behind the idea that its origins and functions lie with the prevention and punishment of crime or even the humanitarian reform of offenders.”).

<sup>11</sup> On criminal law exceptionalism, see Alice Ristroph, Exceptionalism Everywhere: A (Legal) Field Guide to Structural Inequality, 65 Ariz. L. Rev. 921, 952 (2023); Alice Ristroph, An Intellectual History of Mass Incarceration, 60 B.C. L. Rev. 1949, 1953–55 (2019); Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1390 (2022). For critiques of this anti-exceptionalist turn, see R.A. Duff, Defending the Realm of Criminal Law, 14 Crim. L. & Phil. 465, 498 (2020); Sandra G. Mayson, The Concept of Criminal Law, 14 Crim. L. & Phil. 447, 449–50 (2020).

<sup>12</sup> On the nexus between criminal law and employment policy, see Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 28–40 (2007); Erin Hatton, Coerced: Work Under Threat of Punishment 2–5 (2020); Noah D. Zatz, Better Than Jail: Social Policy in the Shadow of Racialized Mass Incarceration, 1 J.L. & Pol. Econ. 212, 212 (2021); Benjamin Levin, Criminal Employment Law, 39 Cardozo L. Rev. 2265, 2268–71 (2018); J.J. Prescott & Sonja B. Starr, Expungement of Criminal Convictions: An Empirical Study, 133 Harv. L. Rev. 2460, 2461 (2020).

<sup>13</sup> On “crimmigration” and the nexus between criminal and immigration enforcement systems, see César Cuauhtémoc García Hernández, Migrating to Prison: America's Obsession with Locking Up Immigrants 61–68 (2019); Tanya Maria Golash-Boza, Deported: Immigrant Policing, Disposable Labor and Global Capitalism 9–11, 20–21 (2015); Eisha Jain, Policing the Polity, 131 Yale L.J. 1794, 1799–1800 (2022).

<sup>14</sup> On criminal law and the “family regulation system,” see Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World 25–26 (2022); S. Lisa Washington, Survived & Coerced: Epistemic Injustice in the Family Regulation System, 122 Colum. L. Rev. 1097, 1103 (2022).

<sup>15</sup> Indeed, a significant amount of my own scholarship focuses on describing and critiquing a criminal system that extends well beyond the formal institutions of criminal law and punishment. See Benjamin Levin, The Limits of “Punishment,” 114 Calif. L. Rev.

seriously requires both inter- and intradisciplinary engagement with a host of U.S. socio-legal institutions.<sup>16</sup>

Viewed against this backdrop, the rise of “therapeutic jurisprudence” or “therapeutic justice” (“TJ”) as a lens for criminal justice policy initially seems appealing.<sup>17</sup> According to Bruce Winick, one of the movement’s founders,

*Therapeutic jurisprudence* is the study of the role of the law as a therapeutic agent. . . . Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law. . . . Therapeutic jurisprudence calls for the study of [the law’s] consequences with the tools of the social sciences to identify them and to ascertain whether the law’s antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values.<sup>18</sup>

Such a “multidisciplinary perspective” might be helpful for those of us concerned about the narrow gaze of conventional criminal legal thought and policy<sup>19</sup>—perhaps serving as a way of emphasizing that “structural factors and experiences influence behavior.”<sup>20</sup>

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(forthcoming 2026) (manuscript at 2–6), <https://ssrn.com/abstract=5171917>; Benjamin Levin, *After the Criminal Justice System*, 98 Wash. L. Rev. 899, 900–07 (2023); Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 Ohio St. J. Crim. L. 619, 635–36 (2018) (book review).

<sup>16</sup> For a helpful articulation of this project, see Sharon Dolovich & Alexandra Natapoff, Introduction: Mapping the New Criminal Justice Thinking *to* The New Criminal Justice Thinking 1, 1 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (“If we are to fix the current criminal system[,] . . . we need a complete and nuanced understanding of what exactly this system *is*: What social and political institutions, what laws and policies, does it encompass?”); Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 Theoretical Criminology 221, 233 (2012).

<sup>17</sup> In this Essay, I use TJ as a shorthand for both “therapeutic jurisprudence” and “therapeutic justice” because I see the two phrases used interchangeably in the literature.

<sup>18</sup> Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 Psych. Pub. Pol’y & L. 184, 185 (1997).

<sup>19</sup> David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 U. Mia. L. Rev. 660, 679 (2021).

<sup>20</sup> Erin R. Collins, *Status Courts*, 105 Geo. L.J. 1481, 1485 (2017).

For example, in an explicit effort to reject a narrow conception of how criminal legal institutions operate, socio-legal scholars Hadar Dancig-Rosenberg and Tali Gal have drawn from TJ literatures to

coin[] the term “multi-door criminal justice” to reflect contemporary criminal law and criminal justice systems in post-industrial societies. This metaphor of multi-door criminal justice seeks to evoke the multiplicity of processes, mechanisms, values, and goals that coexist in modern criminal justice systems worldwide. This variety of punitive and non-punitive criminal justice mechanisms includes, for example, arraignment hearings, problem-solving courts, restorative justice processes, diversion programs, and more, each representing a “door” in a multi-door system. Although the various doors differ in their characteristics, prevalence, and outcomes, each may be suitable in different circumstances for different cases—they are all, at the same time, part of a rich, complex system that provides social responses to crime.<sup>21</sup>

Consistent with Dancig-Rosenberg and Gal’s vision, TJ has played a significant role in the development of problem-solving courts—criminal legal institutions that depart from conventional adversarial models and purport to function less as sites of punishment than as sites of general governance.<sup>22</sup>

In this respect, TJ interventions tend to reflect an orientation toward “penal welfare”—“welfare administration through criminal law.”<sup>23</sup> Penal

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<sup>21</sup> Hadar Dancig-Rosenberg & Tali Gal, Guest Editors’ Introduction: Multi-Door Criminal Justice, 22 *New Crim. L. Rev.* 347, 351 (2019).

<sup>22</sup> Scholars consistently trace the logic of problem-solving courts to TJ. See Jessica M. Eaglin, Networked Information Technology in Criminal Law 49 n.208 (Oct. 29, 2025) (unpublished manuscript) (on file with author) (“[D]rug courts and mental health courts, in particular are often discussed as examples of therapeutic jurisprudence in action. As a method, therapeutic jurisprudence adherents often use ‘social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.’” (quoting Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 *Psych. Pub. Pol’y & L.* 193, 196 (1995))); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 *Ohio St. L.J.* 1479, 1514 (2004); Michael D. Sousa, *Therapeutic Discipline: Drug Courts, Foucault, and the Power of the Normalizing Gaze*, 2021 *Mich. St. L. Rev.* 143, 158–59; Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 *Am. Crim. L. Rev.* 1513, 1513 (2003).

<sup>23</sup> Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 *Fla. L. Rev.* 1333, 1337 n.15, 1393 (2016); see also Miller,

welfarism, an approach associated with earlier rehabilitationist approaches to criminal law, is defined by “its unquestioning commitment to social engineering; its confidence in the capacities of the state and the possibilities of science; and its unswerving belief that social conditions and individual offenders could be reformed by the interventions of government agencies.”<sup>24</sup>

For critics of a siloed criminal law and the brutality of the status quo, this new conception of criminal legal institutions might offer some promise. These interventions appear to focus on humanizing criminal defendants—emphasizing social context and people’s needs, not just reflecting punitive impulses.<sup>25</sup> Much TJ-inflected work recognizes the broader constellation of state functions and services that an individual criminal case might implicate. And many reform efforts informed by TJ pragmatically deploy a preexisting criminal legal infrastructure to engage in social welfare policy.<sup>26</sup>

In this Essay, though, I critique the project of reimagining criminal courts as therapeutic institutions. Drawing from the literature on penal welfare, I argue that these well-intentioned proposals risk reinforcing a troubling feature of post-Great Society U.S. political economy: viewing the criminal system as a primary site of governance and the right place to solve social problems. Instead, I argue that recognizing the insights of TJ should invite a turn away from criminal legal institutions and a shift to alternative frameworks for redressing harm and managing risk. If many features of contemporary penal administration are properly understood as “antitherapeutic,”<sup>27</sup> then any project for reform, transformation, or

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supra note 22, at 1483 (arguing that “‘penal welfarism’ . . . has its modern correlate in ‘therapeutic jurisprudence’” (citation omitted)).

<sup>24</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 40 (2001).

<sup>25</sup> See Collins, supra note 20, at 1485 (arguing that a “contextualized conceptualization of criminality” should guide criminal justice reform).

<sup>26</sup> See Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 Fed. Sent’g Rep. 127, 128 (2007) (“[C]ollateral authority enables judges to engage in the managerial side of the therapeutic regime, mustering the local resources of the state to match the offender to those institutions that are able to provide support or treatment or that are necessary to mediate and remediate between offender and society . . . .”); Note, *Welfarist Prosecution*, 135 Harv. L. Rev. 2151, 2152 (2022) (“[E]ven if the current system of welfarist prosecution is inherently conflicted, it is nonetheless a mitigatory step in the right direction—and certainly preferred to the criminal justice-involved receiving *no* services, from the penal or welfare states alike.”).

<sup>27</sup> On the importance of the therapeutic/antitherapeutic distinction in TJ, see Bruce J. Winick & David B. Wexler, *Introduction to Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* 3, 7 (Bruce J. Winick & David B. Wexler eds., 2003).

abolition should involve seeking out noncriminal sites for addressing social problems—finding actors and institutions better equipped to tackle challenges and provide needed services.

To be clear, I am hardly the first person to level critiques at or raise questions about TJ and its relationship to penal welfare. Scholars have noted the indeterminacy of “therapeutic” and “antitherapeutic” as categories,<sup>28</sup> and commentators have raised concerns about a shift away from adversarialism and its attendant procedural protections.<sup>29</sup> Further, critical commentators have raised concerns about net-widening,<sup>30</sup> the individualization of social problems,<sup>31</sup> the continued use of threats and

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<sup>28</sup> See E. Lea Johnston, *Theorizing Mental Health Courts*, 89 Wash. U. L. Rev. 519, 531 (2012) (“One challenging aspect of therapeutic jurisprudence is its creators’ steadfast refusal to define ‘therapeutic’ with precision.”); Slobogin, *supra* note 22, at 203–04, 206–07.

<sup>29</sup> See Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 Fordham Urb. L.J. 2063, 2068–69 (2002); Mae C. Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. Rev. 539, 591 (2007) (“[D]espite its claims to the contrary, TJ runs the risk of gutting worthwhile core values of our current criminal justice system.”).

<sup>30</sup> See, e.g., Jessica M. Eaglin, *The Drug Court Paradigm*, 53 Am. Crim. L. Rev. 595, 631 (2016) (“Recent reforms adopted within the [drug court movement] provide rehabilitative treatment, but they often increase surveillance as well. Increased community supervision extends state control over individuals and exposes low-level offenders to the potential for harsher punishment in the future.”).

<sup>31</sup> See, e.g., Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 Stan. L. & Pol’y Rev. 417, 435–36 (2009) (“The behavioral emphasis of drug court treatment is a feature of the manner in which therapeutic justice conceives of its ‘client’ population (rather than society) as the primary entity in need of transformation. . . . Therapy, in other words, ignores the bureaucratic and political morass that structures the offender’s situation, in favor of a personalized, exhortative model of individualized suasion.” (citation omitted)).

coercion,<sup>32</sup> the reliance on questionable claims to expertise,<sup>33</sup> and the failure to address distributive justice.<sup>34</sup>

My analysis builds on and contributes to this critical literature. In this Essay, I focus on three related critiques of TJ and the logic of penal welfare. The Parts that follow sketch out these critiques in turn. In Part I, I raise questions about institutional capacity: Why should we think that criminal courts and criminal justice actors are particularly well suited to doing large-scale social welfare policy (or even smaller-scale therapeutic treatment)? In Part II, I express concern about institutional growth. I argue that efforts to address the institutional shortcomings described in Part I necessitate massive investments that will in turn grow and entrench criminal legal institutions—a result that should worry penal minimalists, abolitionists, and many critics of the carceral state. Finally, in Part III, I argue that TJ-informed penal welfare interventions risk crowding out *noncriminal* models for providing services. This approach, I worry, doubles down on decades of “governing through crime”—of turning over

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<sup>32</sup> See Josh Bowers, *Contraindicated Drug Courts*, 55 *UCLA L. Rev.* 783, 788 (2008) (“[D]rug courts meet addicts’ inability to exercise self-control and reason not only with therapeutic opportunities to address these deficiencies, but also with concurrent external threats to respond to reason—or else.”); Miller, *supra* note 22, at 1537 (“[G]enerally, the choice is not between coercion and non-coercion but between differently coercive therapeutic regimes.” (citing Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 *Wis. L. Rev.* 283, 328–33)); M. Eve Hanan, *Talking Back in Court*, 96 *Wash. L. Rev.* 493, 546–47 (2021) (noting “the danger that the therapeutic courtroom suddenly will turn punitive because of the defendant’s failure to comply with court orders”); Evelyn Malavé, *Criminal Courteaucracy*, 61 *Am. Crim. L. Rev.* 1205, 1218 (2024) (“Scholars have scrutinized how judges and prosecutors arguably employ the penal technique of performance when they require defendants to complete drug treatment programs or face steep sentences.”); Jessica M. Eaglin, *Neorehabilitation and Indiana’s Sentencing Reform Dilemma*, 47 *Valparaiso U. L. Rev.* 867, 881–82 (2013) (“Neorehabilitation permits rhetoric more acceptable to the public while obscuring the reality of offender management rather than criminal justice.”).

<sup>33</sup> See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *Geo. L.J.* 1587, 1623 (2012) (“[P]roblems arise when judges [in specialized judicial monitoring courts] believe they possess special expertise about a single best approach to monitoring an issue when in fact there is profound uncertainty as to how best to handle such matters.”); see also Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 *BYU L. Rev.* 403, 425 (2022) (“[I]n the rush to replace a system guided by discretion and intuition with one based in data, we have overlooked important perspectives and key insights about the source and structure of systemic dysfunction. In short, the [evidence-based] paradigm is an overcorrection.”).

<sup>34</sup> See, e.g., M. Eve Hanan, *Terror and Tenderness in Criminal Law*, 45 *Cardozo L. Rev.* 581, 644–45 (2023) (“[E]mpathy without structural change collapses into patterns of discrimination and abuse.”); Miller, *supra* note 31, at 427 (“Whether intentionally or not, then, the politics of therapy competes with and replaces a politics of race and class.”).

critical social functions to institutions of policing, prosecution, and violent social control.<sup>35</sup>

### I. INSTITUTIONAL CAPACITY

On a basic level, it is not clear to me why we should think that criminal legal institutions would be particularly good at serving therapeutic ends—whether that means providing treatment or addressing larger structural problems.<sup>36</sup> Policymakers routinely turn to criminal law as a “catchall solution[] to social problems.”<sup>37</sup> And criminal legal institutions serve—and are expected to serve—a host of functions beyond conventional policing and punishment.<sup>38</sup> That is, a turn to penal welfare is hardly unprecedented or surprising.

Nevertheless, criminal law is a blunt instrument, and the tools of criminal law are limited. Prosecutors have a lot of power, but that power is largely concentrated in specific areas: prosecutors can charge, they can ask for particular sentences, or they can exercise mercy and decline to charge.<sup>39</sup> They also can influence policing priorities and lobby legislators.<sup>40</sup> Similarly, criminal court judges can tell criminal defendants what to do and threaten sanctions if defendants (or arrestees)<sup>41</sup> fail to

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<sup>35</sup> On “governing through crime,” see Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 1–2 (2007).

<sup>36</sup> For an extended version of this argument as it pertains to prosecutors, see Benjamin Levin, *Prosecuting the Crisis*, 50 *Fordham Urb. L.J.* 989, 1010 (2023).

<sup>37</sup> Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* 2 (2007).

<sup>38</sup> On the many functions of criminal law, see generally Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 *New Crim. L. Rev.* 27 (2020). For a skeptical take on using the same institution to serve so many different functions, see generally Benjamin Levin, *Disentangling Safety and Accountability in Criminal Justice Policy*, 111 *Iowa L. Rev.* 1009 (2026).

<sup>39</sup> On prosecutorial power and its limits, see generally Jeffrey Bellin, *The Power of Prosecutors*, 94 *N.Y.U. L. Rev.* 171 (2019) (arguing that prosecutors are very powerful, but that commentators tend to overstate their power in shaping penal administration).

<sup>40</sup> See Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* 53–54 (2019); Lisa L. Miller, *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control* 10, 14, 64–65, 168–69 (2008); John F. Pfaff, *Locked In: The True Causes of Mass Incarceration—And How to Achieve Real Reform* 93, 132, 158 (2017); Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 *Wash. & Lee L. Rev.* 143, 146–47 (2023).

<sup>41</sup> Anna Roberts has helpfully noted the way that legal policies—and legal scholars—tend to elide the distinction between people *arrested* for crimes and people *convicted* of crimes. See Anna Roberts, *Arrests as Guilt*, 70 *Ala. L. Rev.* 987, 989 (2019) (describing “linguistic and statistical ‘slips’ that confuse ‘offenders’ with arrestees and ‘crimes’ with alleged

comply.<sup>42</sup> They also can influence police and prosecutorial behavior. But neither prosecutors nor criminal court judges can create jobs,<sup>43</sup> fund public housing, or levy taxes to fund new social programs. They can compel defendants or arrestees to seek treatment, but they cannot do the essential work of funding and overseeing that treatment. Put simply, even a sophisticated or well-meaning vision of penal welfare can only provide so much welfare because the underlying institutional tools are limited—they are penal.<sup>44</sup>

To be clear, I do not mean to embrace a cruel or harsh criminal system that prioritizes punishment above all else or to argue that it would be good if police, prosecutors, and criminal court judges operated as brutality maximizers. Nor do I mean to reject the possibility that incorporating therapeutic approaches might do important or necessary harm reduction work in certain cases.<sup>45</sup> Rather, my claim is that criminal legal institutions lack many of the tools to do the work that would be necessary to address major social problems. To the extent that TJ focuses on expertise and providing defendants with the right services, there is little reason to think that criminal court judges, probation officers, and so forth possess some sort of diagnostic expertise. And if we are focused on larger structural problems that might have led to arrest or lawbreaking, similar concerns persist—expecting judges, prosecutors, and police (no matter how well-

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crimes”). That distinction appears quite significant in the problem-solving court context, where guilt often seems to be presumed. Cf. Anna Roberts, LEAD Us Not Into Temptation: A Response to Barbara Fedders’s “Opioid Policing,” 94 *Ind. L.J. Supp.* 91, 98 (2019) (making a similar point in the context of “law enforcement assisted diversion”).

<sup>42</sup> Whatever other actors might be involved in a TJ model of penal welfare or problem solving, “[o]nce in the courtroom, it is the judge that controls the therapeutic interaction.” Miller, *supra* note 22, at 1543.

<sup>43</sup> Outside of employing people in their own offices, that is.

<sup>44</sup> Cf. Benjamin Levin, Victims’ Rights Revisited, 13 *Calif. L. Rev. Online* 30, 33 (2022) (arguing that reform-driven models of private prosecution would still rely on state penal or enforcement institutions).

<sup>45</sup> For thoughtful treatments of the relationship between short-term harm reduction and long-term radicalism, see, e.g., Daniel S. Harawa, In the Shadows of Suffering, 101 *Wash. U. L. Rev.* 1847, 1881 (2024) (“[I]n the end, hopefully, when the different positions are considered alongside one another and with their powers combined, there is a *real* chance to alleviate at least some of the suffering, both now and in the future.” (footnote omitted)); Jamelia Morgan, Abolition in the Interstices, *Law & Pol. Econ. Project* (Dec. 14, 2023), <https://lpeproject.org/blog/abolition-in-the-interstices/> [<https://perma.cc/T8NG-VPDU>] (describing “abolition in the interstices” as “the work of abolitionists dedicated to dismantling while building, protecting vulnerable groups now while pushing toward futures where protection from harm is unnecessary, providing for material needs now while working towards a new world where all material needs are met”).

meaning) to do comprehensive governance work is a big mistake. Not only would it invite disappointment, but it would also risk reproducing the same results as conventional approaches to criminal law—people in cages or under state supervision.<sup>46</sup> At the end of the day, those are the tools that the criminal law has, and those are the institutional vocabularies in which criminal legal actors can speak.<sup>47</sup> As a result, there is good reason to think that a therapeutic framework will be deployed in predictable ways—ways that pathologize, individualize wrongdoing and blame, and ultimately punish, segregate, or surveil.<sup>48</sup>

## II. INSTITUTIONAL GROWTH

But couldn't criminal legal institutions change? Couldn't these institutions be reformed so that they had access to different tools and so that they did not exclusively speak in the registers of punishment and violent social control? Couldn't criminal courts and criminal justice actors be equipped with the skills, expertise, and capacity to advance therapeutic ends and resolve major social problems? I am skeptical. But even if they could, that would require massive investments in the same institutions that many of us see as brutal, unjust, and drivers of social inequality.<sup>49</sup> It would require transforming criminal justice institutions into complex sites of governance and social welfare policy. And such a move to transform would raise an important follow-up question: Why transform at all rather than simply fund alternative institutions? Why rely on the same actors and institutions that got us into this mess in the first place?<sup>50</sup>

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<sup>46</sup> See *supra* note 32 and accompanying text.

<sup>47</sup> Cf. Simon, *supra* note 35, at 2 (“[T]he technologies, discourses, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions, where they can easily gravitate into new opportunities for governance.”).

<sup>48</sup> Cf. Miller, *supra* note 22, at 1483 (“Although their advocates often suggest they are therapeutic institutions, drug courts can and should be understood as advancing some of the traditional goals of the criminal justice system.” (footnote omitted)).

<sup>49</sup> See Eaglin, *supra* note 30, at 631 (“The drug court paradigm encourages reforms that expand the justice system’s reach. Recent reforms adopted within the frame provide rehabilitative treatment, but they often increase surveillance as well.”).

<sup>50</sup> I see this as an objection to most proposals that involve relying on existing criminal legal institutions and institutional insiders to fix problems associated with the status quo. See, e.g., Benjamin Levin, Values and Assumptions in Criminal Adjudication, 129 *Harv. L. Rev. F.* 379, 386 (2016) (arguing that criminal “courts have already proven inadequate when faced with the task of reigning in a system run amok”); Benjamin Levin, Criminal Justice Expertise, 90 *Fordham L. Rev.* 2777, 2817 (2022) (“When it comes to the construction of the

Penal abolitionist literature tends to distinguish between “reformist” and “non-reformist” reforms.<sup>51</sup> Reformist reforms prop up, legitimate, and perhaps even expand objectionable practices or institutions. Non-reformist reforms, in contrast, might offer incremental change or immediate harm reduction without entrenching objectionable practices or institutions.<sup>52</sup> Replacing an old jail with a new, larger jail to address overcrowding would be characterized as a reformist reform.<sup>53</sup> Making more incarcerated people eligible for early release would be characterized as a non-reformist reform.<sup>54</sup> According to abolitionists, reformist reforms should be avoided—they directly contradict abolitionist goals and commitments. Non-reformist reforms, on the other hand, offer practical steps—shy of (or on the way to) full-on penal abolition—that abolitionists might take to reduce harm and suffering.<sup>55</sup>

Such a binary framing has its limitations. The clarity of the distinction can get fuzzy at the margins and depend on how a policy is characterized

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contemporary criminal system, the ostensibly rational and restrained experts who are offered in opposition to the emotional and irrational political actors hardly have clean hands. Punitive impulses and the tendency to use criminal law as a tool of social control might be framed differently in different classes or communities, but they have been features of U.S. politics. It is not at all clear that highly educated actors and elite spaces have been immune to these cultural pathologies.” (footnote omitted)); Benjamin Levin, *De-Democratizing Criminal Law*, 39 *Crim. Just. Ethics* 74, 80–81 (2020) (reviewing Barkow, *supra* note 40).

<sup>51</sup> See, e.g., Thomas Mathiesen, *The Politics of Abolition Revisited* 231 (2015) (“[T]he short-term reforms which you work for . . . as a road to the long-term goal of abolition . . . must also consistently be of an abolishing kind.”); Ruth Wilson Gilmore & Craig Gilmore, *Restating the Obvious*, in *Indefensible Space: The Architecture of the National Insecurity State* 141, 145 (Michael Sorkin ed., 2008) (describing non-reformist reforms as “systemic changes that do not extend the life or breadth of deadly forces such as prisons”); André Gorz, *Strategy for Labor: A Radical Proposal* 7–8 (Martin A. Nicolaus & Victoria Ortiz trans., Beacon Press 1967) (1964) (outlining the distinction between reformist reforms and non-reformist reforms).

<sup>52</sup> See Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *Yale L.J.* 2497, 2527 (2023) (“[A] non-reformist reform aims to undermine the political, economic, and social system or set of relations as it gestures at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of world-building.”).

<sup>53</sup> See Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 *Calif. L. Rev.* 1597, 1654 n.380 (2022) (“Harm reduction and improving people’s daily conditions are in line with abolitionist principles, but funding better jails should not be pursued without considering whether it will amplify the carceral deportation state.”).

<sup>54</sup> That is, it would not expand prison populations or entrench the continued use and expansion of carceral punishment.

<sup>55</sup> See Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 *Mich. L. Rev.* 1199, 1208 (2022) (book review).

as much as its content.<sup>56</sup> And it is not clear how much the distinction depends on the reforms themselves or on the political movements in which they are embedded (i.e., perhaps funding additional prison education might look a lot more “non-reformist” when supported by a radical group and a lot more “reformist” when supported by a moderate group).<sup>57</sup>

But the reformist/non-reformist distinction or something like it might be helpful in thinking about penal welfare. (And that is true not only for abolitionists—who of course would oppose penal welfare—but also for minimalists or others concerned about the criminal system’s footprint.<sup>58</sup>) Constructing multi-door criminal courts and restructuring criminal legal institutions to advance therapeutic ends are big and costly projects. And such a project of reform or institutional transformation would require doubling down on the dominant model of “governing through crime”—relying on criminal law and criminal legal institutions to address social problems. For example, if it is important that more money is spent on addressing unmet mental health needs, why is the right approach to do that spending in the criminal justice context? If there is not a preexisting expertise or institutional competence, then why not look elsewhere—why not treat that absence as an opportunity to disaggregate one of the criminal system’s many functions?<sup>59</sup> Rather than opening (or expanding) one of the criminal courthouse’s doors, why not shut the door and build a different building—one without a jail attached to it?

### III. CROWDING OUT

Those questions bring us to the final problem with a therapeutic framework: the risk that penal welfare will crowd out other frameworks

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<sup>56</sup> Indeed, I raise questions about this dynamic elsewhere. See Benjamin Levin, *Abolitionisms*, 10 *UCLA Crim. Just. L. Rev.* (forthcoming 2026) (manuscript at 16 n.73), <http://ssrn.com/abstract=5189491>.

<sup>57</sup> Cf. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 *Harv. L. Rev. F.* 90, 102 (2020) (“[W]hether something is non-reformist or reformist is about more than the nature of the demand and its particulars: it is also a question of how the campaign is waged.”).

<sup>58</sup> On such a commitment to *less* when it comes to institutions of penal administration, see Trevor George Gardner, *Auditing Criminal Justice Minimalism*, 78 *Wash. U. J.L. & Pol’y* 147, 149–53 (2025); Benjamin Levin, *Decarceration and Default Mental States*, 53 *Ariz. St. L.J.* 747, 765–66 (2021).

<sup>59</sup> On disaggregating social functions currently performed by or assigned to the criminal system, see Barry Friedman, *Disaggregating the Policing Function*, 169 *U. Pa. L. Rev.* 925, 929–30 (2021); Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 *U.C. Irvine L. Rev.* 1291, 1300 (2021).

for social welfare—that this reformist approach will only continue the decades-long growth of the carceral state at the expense of a welfare state.<sup>60</sup>

For penal abolitionists and minimalists, institutional growth is an evil in and of itself.<sup>61</sup> Growing the reach and resources associated with penal administration would be concerning even if the expansion reflected a nonpunitive purpose or a therapeutic emphasis on provision of social services. That is, expanding the size and capacity of criminal legal institutions cannot possibly be a good result for anyone whose first-order commitment involves shrinking criminal legal institutions or doing away with them altogether. But even for those who are not minimalists or abolitionists,<sup>62</sup> expanding the scale and scope of penal welfare should be cause for concern.

Embracing penal institutions as a site for providing social services and empowering criminal justice actors as therapeutic agents risk crowding out noncriminal alternatives. Put differently, a penal welfare state might come at the expense of a *non*-penal welfare state. As Aya Gruber, Amy Cohen, and Kate Mogulescu argue in their study of New York City problem-solving courts,

There are . . . practical reasons why penal welfare can easily eclipse service programs not directly tied to criminal court. Law-reform projects are resource heavy. . . . [P]roblem-solving courts are products of significant investments in publicity, personnel, training, and the like. Once such investments are made, it can become difficult for the state and individuals to divest and put their monetary, political, and expert capital elsewhere. The risk is that law- and policy-makers, facing scarcity of resources, then dismiss proposals that address problems outside of the criminal system as wasteful or duplicative, or worse, reject them because of “turf” concerns. The reformed criminal court then becomes its own cottage industry with permanent players, internal reports, cultural norms, and specialized knowledge production. The

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<sup>60</sup> That said, it is worth recognizing that the boundaries between the carceral state and the welfare (or non-carceral) state are not entirely clear.

<sup>61</sup> See *supra* notes 57–59 and accompanying text.

<sup>62</sup> Elsewhere, I have argued that the vast majority of U.S. legal academics actually are minimalists—the question is just what the minimally acceptable amount of criminal law or punishment is. See Benjamin Levin, *Criminal Law Minimalisms*, 101 *Wash. U. L. Rev.* 1771, 1777–79 (2024). For the borderline abolitionist, the answer is almost none. For the more mainstream commentator, the answer might be quite a lot.

service providers become entangled in this penal welfare system and, in turn, have difficulty operating outside of it. Funding and other resources become increasingly tied exclusively to the criminal program, such that the penal welfare system becomes all-encompassing, crowding out noncriminal avenues of change.<sup>63</sup>

Just as traditionally punitive forms of criminalization, prosecution, and policing might crowd out other forms of state intervention,<sup>64</sup> penal welfare institutions might crowd out alternate social welfare models. The state would continue to govern through crime and criminal legal institutions; it is just that the theories animating crime and criminal legal institutions *might* look different.

Of course, this concern is speculative. Maybe institutions of penal welfare and an embrace of TJ in the criminal context might coexist with greater state investments in noncriminal institutions and models of care. Maybe building comprehensive and sophisticated multi-door criminal courthouses might not preclude building better schools, addressing economic inequality, or providing accessible and effective healthcare.<sup>65</sup> Maybe, but I am quite skeptical.

James Forman's Pulitzer Prize-winning study of criminal policy in Washington, D.C., strikes me as an important cautionary tale.<sup>66</sup> In examining progressive Black advocacy in D.C. in the 1960s and 1970s, Forman argues that many advocates called for more criminal enforcement *and* more spending on jobs, schools, housing, and social services.<sup>67</sup> That is, advocates called for a sort of "Marshall Plan for urban America" that would involve state investment across many different dimensions.<sup>68</sup> Advocates saw police and punishment as necessary responses to violent crime and disorder associated with widespread poverty and drug addiction.<sup>69</sup> But they also viewed spending on jobs, schools, and social

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<sup>63</sup> Gruber et al., *supra* note 23, at 1394–95 (footnote omitted).

<sup>64</sup> Cf. Georg Rusche & Otto Kirchheimer, *Punishment and Social Structure* 207 (1939) ("The futility of severe punishment and cruel treatment may be proven a thousand times, but so long as society is unable to solve its social problems, repression, the easy way out, will always be accepted. It provides the illusion of security by covering the symptoms of social disease with a system of legal and moral value judgments.").

<sup>65</sup> See *supra* note 26 and accompanying text.

<sup>66</sup> See James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* 12–13 (2017).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *id.* at 12.

services as required components of a comprehensive response.<sup>70</sup> Such a comprehensive urban investment was not to be, though.<sup>71</sup> Instead, Black communities in D.C. and cities across the country saw governmental spending focused almost exclusively on policing, prosecuting, and punishing.<sup>72</sup> The War on Poverty became a War on Crime—and, importantly, the War on Crime did not involve spending on root causes or structural antecedents of crime; it involved straightforward exercises of state violence.<sup>73</sup>

There are many explanations for why criminal legal solutions get political traction and legislative buy-in when spending on social welfare and other approaches to solving social problems fall by the wayside. A discussion of the relevant criminological and political science literatures that seek to answer the “why?” question falls largely outside of the scope of this Essay.<sup>74</sup> For our purposes, though, what matters is that criminal legal institutions have a preexisting political advantage over noncriminal legal institutions.<sup>75</sup> Policing, prosecuting, and imprisoning have been funded even as other social services have withered away in the face of austerity.<sup>76</sup> So doubling down on that advantage seems to endanger further the prospect of meaningful investment in noncriminal alternatives. Police, prosecutors, and prisons enjoy wide-ranging bipartisan support. If the public and policymakers (even those more sympathetic to less

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<sup>70</sup> See *id.*

<sup>71</sup> Cf. Elizabeth Hinton, Julilly Kohler-Hausmann & Vesla M. Weaver, *Did Blacks Really Endorse the 1994 Crime Bill?*, N.Y. Times (Apr. 13, 2016), <https://www.nytimes.com/2016/04/13/opinion/did-blacks-really-endorse-the-1994-crime-bill.html> (“Policy makers pointed to black support for greater punishment and surveillance, without recognizing accompanying demands to redirect power and economic resources to low-income minority communities.”).

<sup>72</sup> See *id.*

<sup>73</sup> On the shift from a War on Poverty to a War on Crime, see Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* 1–2 (2016); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* 41 (2009) (describing the replacement of a “(semi-) welfare state by a police and penal state”); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 *Dædalus* 74, 74 (2010) (tracing the “concomitant downsizing of the welfare wing and up-sizing of the criminal justice wing of the American state”).

<sup>74</sup> For helpful explanations, though, see Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* 2–8 (2006); Lisa L. Miller, *The Myth of Mob Rule: Violent Crime and Democratic Politics* 1–10 (2016); Darryl K. Brown, *Criminal Law’s Unfortunate Triumph Over Administrative Law*, 7 *J.L. Econ. & Pol’y* 657, 661–62 (2011); Miriam H. Baer, *Choosing Punishment*, 92 *B.U. L. Rev.* 577, 579–81 (2012).

<sup>75</sup> See Simon, *supra* note 35, at 12, 15.

<sup>76</sup> See Jessica M. Eaglin, *To “Defund” the Police*, 73 *Stan. L. Rev. Online* 120, 127–28 (2021).

punitive approaches) perceive that those institutions already are providing needed social services, there is no real incentive to look outside of the criminal system.

As Jessica Eaglin argues, “Whether social ills should be addressed through the criminal justice system may be overlooked when evidence demonstrates that social ills *can* be addressed through the criminal justice system.”<sup>77</sup> Similarly, Erin Collins critiques the increasingly ubiquitous “belief that problem-solving courts are the most effective reform strategy” as “problematic not only because it is inaccurate, but also because it can create active resistance to alternative reforms.”<sup>78</sup> Penal welfare, then, naturalizes a set of political decisions about the proper site for and sorts of social policy interventions:

[T]he deep judicial investment in this institutional response helps perpetuate the notion that the criminal legal system—and particularly the courts—are the best and most appropriate mechanism for responding to complicated social and structural issues. The creation of a new court for every newly discovered (or newly acknowledged) issue that overlaps with the criminal legal system has been normalized as a natural and effective response. With each iteration of this story of court creation and success, it becomes easier to forget that the decision to respond through the criminal legal system (as opposed to, for example, the public health system) to issues such as substance abuse and mental illness, is in fact a choice. And it is a choice that ultimately strengthens, rather than reduces or dismantles, the tie between these social issues and the criminal legal system.<sup>79</sup>

By housing the alternatives to conventional prosecution and punishment within the criminal system, this approach to penal welfare not only further entrenches criminal legal institutions. It also reinforces a dominant sociopolitical narrative that those institutions are the proper site for addressing social problems.<sup>80</sup>

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<sup>77</sup> Eaglin, *supra* note 30, at 633.

<sup>78</sup> Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. Davis L. Rev. 1573, 1621 (2021) (footnote omitted).

<sup>79</sup> *Id.* at 1625 (footnote omitted).

<sup>80</sup> Cf. Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* 41 (2011) (“Neoliberal penalty facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics.”); *id.* at 40–44.

## IV. CONCLUSION

Ultimately, it is not clear to me that all the arguments for greater incorporation of TJ into the criminal system actually necessitate using the criminal system at all. Of course, for proponents of problem-solving courts who embrace the “stick” of incarceration or the “accountability” of a guilty plea, criminal law clearly remains attractive and necessary.<sup>81</sup> Yet, I read a certain amount of scholarship and advocacy in this area as making a strong case for looking beyond conventional approaches to crime, punishment, legalism, and adversarialism in addressing risk, harm, and social problems. So why does that “looking beyond” need to stay within the framework or confines of criminal legal institutions? If the goal of TJ interventions is not punishment, stigma, or public condemnation, then why rely on institutions justified and designed in terms of such goals?

I find Dancig-Rosenberg and Gal’s call for a multi-door approach to problem solving to be illuminating and helpful,<sup>82</sup> but I am less convinced that *criminal courts* are the proper sites for multi-door problem solving. Indeed, the more multifaceted such an approach becomes, the more it starts to sound like all functions of governance are being consolidated into the criminal system. As a descriptive matter, that is troublingly close to how things currently work—particularly in underserved and race-class marginalized communities, criminal justice actors (police, prosecutors, judges, and probation officers) are “The State.”<sup>83</sup> As a normative matter, though, I am hard-pressed to understand why the criminal system is the right place for the state to carry out a wide range of governance functions.

Elsewhere, I have argued that it is certainly possible that shifting away from penal welfare and seeking noncriminal governance solutions would not address many concerns about the criminal system—the objectionable features of criminal social control would migrate to or exist in the context of a *non-carceral* state.<sup>84</sup> The hyper-surveillance of marginalized populations, the tendency toward punitive impulses, and so forth might simply be features of our political economy, such that ostensibly noncriminal, therapeutic institutions would be objectionable in similar

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<sup>81</sup> See *supra* notes 28–34 and accompanying text.

<sup>82</sup> See *supra* notes 21–22 and accompanying text.

<sup>83</sup> See Simon, *supra* note 35, at 11–12.

<sup>84</sup> See Levin, *supra* note 11, at 1385 (“[W]hat if the problem with the criminal system is not exclusively its *criminal-ness*, but rather is the way in which it is embedded in and reflective of a set of problematic beliefs about how society should be structured and how people should be governed?”).

ways as their criminal counterparts.<sup>85</sup> But perhaps that observation tells us less about the limitations of decriminalization than it does about the limitations of therapeutic solutions to larger structural social problems. Either way, though, we have a lot of evidence of the harms caused by using criminal legal institutions as the default place to do social policy. At the very least, then, it is worth trying something else.

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<sup>85</sup> See *id.* at 1408–09.