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## Criminal Justice Expertise

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## CRIMINAL JUSTICE EXPERTISE

*Benjamin Levin\**

*For decades, commentators have adopted a story of mass incarceration's rise as caused by "punitive populism." Growing prison populations, expanding criminal codes, and raced and classed disparities in enforcement result from "pathological politics": voters and politicians act in a vicious feedback loop, driving more criminal law and punishment. The criminal system's problems are political. But how should society solve these political problems? Scholars often identify two kinds of approaches: (1) the technocratic, which seeks to wrest power from irrational and punitive voters, replacing electoral politics with agencies and commissions, and (2) the democratic, which treats criminal policy as insufficiently responsive to community will and seeks to shift more power to "the people." Put differently, commentators often suggest that the critical prescriptive disagreement boils down to one about expertise and its role—should experts or nonexperts be the most powerful actors in criminal policymaking?*

*In this Article, though, I argue that the key fault line between visions of change is not the one between proponents and opponents of expertise; rather, competing camps are advancing different visions of expertise. In an effort to understand better the landscape and stakes of the expert turn(s), I map out three different conceptions of expertise: (1) expertise based on vocation (e.g., the police officer or the judge); (2) expertise based on education (e.g., the professor or the criminologist); and (3) expertise based on lived, day-to-day experience (e.g., the incarcerated person or the crime victim).*

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\* Associate Professor of Law, University of Colorado Law School. For helpful comments and conversations, many thanks to Aziza Ahmed, Rachel Barkow, Stephanos Bibas, Fred Bloom, Jenny Braun, Beth Colgan, Erin Collins, Dan Deacon, Justin Desautels-Stein, Dan Farbman, Malcolm Feeley, Mark Fondacaro, Thomas Frampton, Trevor Gardner, Cynthia Godsoe, Aya Gruber, Eve Hanan, Michael Herz, Carissa Byrne Hessick, Sharon Jacobs, Eisha Jain, David Jaros, Irene Joe, Margot Kaminski, Nancy King, Issa Kohler-Hausmann, Chenjerai Kumanyika, Kate Levine, Leah Litman, Sara Mayeux, Lisa Miller, Calvin Morrill, Ngozi Okidegbe, Will Ortman, Michael Pollack, Carolyn Ramsey, Alice Ristroph, Anna Roberts, Ed Rubin, Pierre Schlag, Joan Segal, Jon Simon, Jocelyn Simonson, Chris Slobogin, Susannah Barton Tobin, Rachel Wechsler, Ahmed White, Ekow Yankah, and the editors of the *Fordham Law Review*. This Article also benefitted from presentations at the Cardozo Criminal Law Virtual Summer Series, the University of Colorado Center for Critical Thought, the Criminal Justice Roundtable at Vanderbilt University Law School, and the Becoming a Law Professor reading group at Harvard Law School. For exceptional research assistance, thanks to Rami Jordan, Alyssa Ortiz, William Thomas Raley, Neil Sandhu, Daniel Sequeira, and Sara Yates.

*The third conception increasingly underpins many of the “democratic” responses.*

*I raise a series of questions implicated by the expert turn—whichever approach to expertise one adopts. I argue that any turn to expertise requires a set of shared first principles. Given widespread debate about the values that should govern the criminal system, how should experts go about addressing contested policy questions? Additionally, I argue that these conceptions of expertise are slipperier than they appear—who gets to decide what constitutes expertise, and who gets to be an expert? Rather than eliminating politics from the administration of criminal law, a turn to expertise shifts the location of political decisions to the stage of identifying experts. Unpacking and surfacing those decisions should be an important part of any way forward toward institutional change. By looking more closely at how society understands which voices to privilege and how those voices should shape policy, we can better appreciate first-principles disagreements about criminal law and governance.*

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## INTRODUCTION

It is a strange time to be writing about experts. This Article is the product of a moment when expertise occupies a fraught place in U.S. political culture. An impression of widespread impulsiveness defined many characterizations of the Trump administration and led to calls for “experts” to return to power—from progressives’ embrace of Robert Mueller and the intelligence community to the celebration of career prosecutors and highly credentialed doctors and scientists.<sup>1</sup> In spring 2017, Trump opponents rallied in large numbers for a “March for Science,” framing science alternatively as neutral and apolitical (and therefore superior to Trumpian visceral politics) or clearly supporting policy positions favored by progressives.<sup>2</sup> And, the administration’s response to the COVID-19 pandemic led to calls from the left (broadly conceived) for politicians to defer to doctors and scientists.<sup>3</sup>

At the same time, traditional sources of authority and expertise have sustained fire from corners of the political left. During the summer of 2020, protests to confront structural racism and state violence against Black people have called for a reckoning with the ways in which dominant social and political institutions have maintained racial hierarchy. As activists and riot squads squared off, demands to defund and dismantle police forces came to supplant requests for better training, more transparency, and greater accountability for officers.<sup>4</sup> And, calls to abolish police and prisons have entered the mainstream, appearing in the pages of popular press publications from *Rolling Stone* and *Teen Vogue* to *The New York Times*.<sup>5</sup> For a growing

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1. See, e.g., Spencer S. Hsu, *Hearing Sought in Justice Dept. Bid to Undo Flynn Guilty Plea, as Nearly 1,000 Ex-Prosecutors Prepare to Oppose Conviction Reversal*, WASH. POST (May 18, 2020), [https://www.washingtonpost.com/local/legal-issues/hearing-sought-in-justice-dept-bid-to-undo-flynn-guilty-plea-as-1000-ex-prosecutors-prepare-to-oppose-conviction-reversal/2020/05/18/5b762684-9872-11ea-a282-386f56d579e6\\_story.html](https://www.washingtonpost.com/local/legal-issues/hearing-sought-in-justice-dept-bid-to-undo-flynn-guilty-plea-as-1000-ex-prosecutors-prepare-to-oppose-conviction-reversal/2020/05/18/5b762684-9872-11ea-a282-386f56d579e6_story.html) [https://perma.cc/P82H-6AVE]; Niall Stange, *The Memo: Trump Era Flips Script on Views of Intelligence Agencies*, THE HILL (Dec. 18, 2019, 6:00 AM), <https://thehill.com/homenews/administration/475009-the-memo-trump-era-flips-script-on-views-of-intelligence-agencies> [https://perma.cc/CA9K-QR5L].

2. See Ed Yong, *What Exactly Are People Marching for When They March for Science?*, ATLANTIC (Mar. 7, 2017), <https://www.theatlantic.com/science/archive/2017/03/what-exactly-are-people-marching-for-when-they-march-for-science/518763/> [https://perma.cc/JP2U-D6ZM].

3. See, e.g., Linda Qiu, Bill Marsh & Jon Huang, *The President vs. the Experts: How Trump Played Down the Coronavirus*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/interactive/2020/03/18/us/trump-coronavirus-statements-timeline.html> [https://perma.cc/H4RA-VN65].

4. See, e.g., Ruairí Arrieta-Kenna, *The Deep Roots—and New Offshoots—of “Abolish the Police,”* POLITICO (June 12, 2020, 7:30 PM), <https://www.politico.com/news/magazine/2020/06/12/abolish-defund-police-explainer-316185> [https://perma.cc/D57M-MVJV]; Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/Z4GB-4ZLS].

5. See, e.g., Kim Kelly, Opinion, *What the Prison-Abolition Movement Wants*, TEEN VOGUE (Dec. 26, 2019), <https://www.teenvogue.com/story/what-is-prison-abolition-movement> [https://perma.cc/B558-3YNN]; Rachel Kushner, *Is Prison Necessary?: Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>

group of commentators, then, experts and their technocratic solutions have been woefully unprepared to address deep, systemic injustice.<sup>6</sup>

In this Article, I examine that tension and the fraught status of expertise in debates about criminal justice reform and transformation. Is criminal policy a realm (perhaps like public health) where greater deference to the right experts would yield better policy? Or is the turn to expertise part of what's wrong with the criminal system? Who is an expert? And what are the costs and benefits of using "expertise" as a frame through which to make and assess criminal policy?

For decades, criminal legal literature generally has adopted a story of mass incarceration's rise as caused by popular punitive impulses or "punitive populism."<sup>7</sup> Rising prison populations, expanding criminal codes, and the attendant raced and classed disparities in enforcement are the result of a set of "pathological politics": voters and politicians act in a vicious feedback loop, consistently driving *more* criminal law and punishment.<sup>8</sup> To be clear, that's an oversimplified account, and scholars disagree widely about the details.<sup>9</sup> But there is general agreement that something unique about U.S. electoral politics, political culture, and/or political economy has led to the uniquely American carceral state.<sup>10</sup>

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[<https://perma.cc/7L8Q-KTVZ>]; José Martín, *Six Ideas for a Cop-Free World*, ROLLING STONE (June 2, 2020, 2:48 AM), <https://www.rollingstone.com/politics/politics-news/police-brutality-cop-free-world-protest-199465/> [<https://perma.cc/U8CH-V7DN>].

6. See Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 475, 495 (2021) ("The 1960s are remembered as witnessing a crisis of expertise, as a series of elite failures, from the Vietnam War to the rise of malpractice litigation, alerted the public to the limits of professional judgment. We are broadly witnessing a similar crisis again today." (footnote omitted)).

7. See generally RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015) [hereinafter GOTTSCHALK, CAUGHT]; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006) [hereinafter GOTTSCHALK, THE PRISON AND THE GALLOWES]; JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

8. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

9. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that mass incarceration is a direct extension of Jim Crow); LISA L. MILLER, THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS (2016) (arguing that voters are not punitive in a vacuum and that they choose punitive policies when they are not offered nonpunitive options); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014) (tracing mass incarceration to liberal political commitments).

10. See, e.g., Stuntz, *supra* note 8, at 507–10; Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 760–63 (2012) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)).

The criminal system's problems are political.<sup>11</sup> But how should society solve those political problems? Scholars often identify two general classes of responses<sup>12</sup>: (1) technocratic approaches that seek to wrest power from irrational, emotional, and punitive voters and politicians, replacing criminal electoral politics with agencies, commissions, and evidence-based decision-making;<sup>13</sup> and (2) democratic approaches that treat U.S. criminal policy as insufficiently democratic and seek to shift more power to "the people."<sup>14</sup> Put differently, commentators often suggest that the critical prescriptive disagreement boils down to one about expertise and its role—should experts or nonexperts be the most powerful actors in criminal policymaking?

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11. I use "criminal system" or "criminal legal system" in the Article advisedly, given the growing body of work that stresses that the administration of criminal law in the United States implicates a range of local actors and institutions and hardly constitutes a single, unified system. *See, e.g.*, Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1475–76, 1476 n.7 (2020); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421 (2018); Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619, 619–20 (2018); Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 65 (2018); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013).

12. *See, e.g.*, Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L.J. 446, 450 (2019); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1399 (2017); Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 75–76 (2020) (reviewing RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019)); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 534–40 (2020); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 3–4 (2019); John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 714 (2020); David Alan Sklansky, *Populism, Pluralism, and Criminal Justice*, 107 CALIF. L. REV. 2009, 2011 (2019).

13. *See generally* DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW (2016); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 616 (2011); Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299, 1324 (2013); Rappaport, *supra* note 12.

14. *See generally* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 876 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016). *See also* GOTTSCHALK, CAUGHT, *supra* note 7, at 278 (arguing that a "technicist" approach to reform "is inattentive to the important political and symbolic dimensions of crime prevention and penal policy more generally").

While this two-type classification can help to understand a number of disagreements about how to bring about policy change, it paints too neat a picture. The classificatory scheme, which sets up the two approaches as competing, misses a point of increasing commonality: a shared appeal to the language of experts and expertise.

In this Article, I argue that the key fault line between visions of change is not the one between proponents and opponents of expertise. Rather, competing camps are advancing different versions or visions of expertise and different accounts of how those experts should exert influence in criminal policymaking. Activists, advocates, and scholars who reject the traditional metrics or markers of “expertise” (i.e., educational credentials, professional experience)<sup>15</sup> have begun to deconstruct the potential elitism and false neutrality of expert-based decision-making.<sup>16</sup> While some of these accounts appear to reject expertise altogether, others have sought to reconstruct and reimagine a new vision of expertise and a new set of experts—people from marginalized communities who have been harmed by violence and/or the criminal system.<sup>17</sup> In other words, I argue that we may be witnessing a turn to expertise that transcends other ideological, political, or methodological divides.<sup>18</sup>

In an effort to understand better the landscape and stakes of the expert turns, I map out three different conceptions of expertise that are reflected in contemporary debate: (1) expertise based on vocation or on-the-job experience (e.g., the police officer, the judge, or the criminal law practitioner); (2) expertise based on education or elite training (e.g., the criminologist, the law professor, or the data analyst); and (3) expertise based on lived, day-to-day experience (e.g., the incarcerated person, the person frequently stopped by police, or the crime victim).<sup>19</sup>

The first two conceptions have long-established positions in the study and architecture of the criminal system. Education-based expertise as the reformist gold standard has been a staple of good-government-style

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15. See MAX WEBER, *Politics as a Vocation*, in THE VOCATION LECTURES 32, 44–46 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

16. See, e.g., Priscilla Ocen, *Beyond Ferguson: Integrating Critical Race Theory and the “Social Psychology of Criminal Procedure,”* in THE NEW CRIMINAL JUSTICE THINKING 226 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Mariana Valverde, “Miserology”: *A New Look at the History of Criminology*, in THE NEW CRIMINAL JUSTICE THINKING, *supra*, at 325; Akbar, *supra* note 14, at 425 (arguing for a “vision to imagine expertise very differently than law scholarship”); Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.–C.L. L. REV. 703, 712 (2019); Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, CONN. L. REV. (forthcoming 2022); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021) [hereinafter Simonson, *Police Reform*]; Jocelyn Simonson, *Power over Policing*, BOS. REV. (June 8, 2020), <http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing> [<https://perma.cc/DM9X-3FUU>] [hereinafter Simonson, *Power over Policing*].

17. See *infra* Part IV.

18. Cf. Pierre Schlag, *Expertopia—The Rule of Expertise and the Rise of the New Technocrats* 10 (Feb. 27, 2022) (unpublished manuscript) (on file with author) (arguing that “the rule of expertise (at least in law) is ascendant”).

19. At times, these visions or understandings may overlap.

interventions from the left and the right.<sup>20</sup> And appeals to (and critiques of) vocation-based expertise not only are staples of the academic literature; they also undergird the doctrinal framework for criminal procedure, from Fourth Amendment jurisprudence to appellate courts' deference to sentencing judges and prison officials.<sup>21</sup>

While the third conception has historical antecedents, it generally hasn't been featured in discussions of criminal justice expertise. Often the product of abolitionist and radical approaches to the criminal system,<sup>22</sup> the conception, which has gained ground of late, deconstructs the expert/nonexpert distinction relied on in most technocratic accounts and common in the literature on criminal policy. Instead, this conception frames expertise as the product of the lived, day-to-day experiences of people affected by the criminal system: the resident of a heavily policed neighborhood, incarcerated people, the victim of state or interpersonal violence, and so forth.<sup>23</sup> This conception of expertise resonates with a set of moves developed in critical race theory, postcolonial theory, and other poststructural approaches to law and knowledge production.<sup>24</sup>

In this Article, I raise a series of questions implicated by the expert turn—whichever approach to expertise one adopts.<sup>25</sup> I argue that the “traditional” conceptions understate the inherent politicization of expertise. Further, the long-standing debate in academic, activist, and policy circles about what values the criminal system is *supposed* to advance makes it unclear how experts should go about addressing contested policy questions. Additionally, I argue that these conceptions of expertise are slipperier than they appear—who actually gets to decide what constitutes expertise and who gets to be an

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20. *See infra* Part II.B.

21. *See infra* Part II.A.

22. While this move may have a certain left, anti-carceral valence, its consequences remain indeterminate. *See infra* Part IV. For example, this model of expertise also resonates with a more punitive discourse on victims' rights that might elevate the voices of people harmed by crime who wish to see defendants treated more harshly. *See infra* note 303 and accompanying text.

23. *See infra* Part IV.

24. *See generally* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Michel Foucault, *On Popular Justice: A Discussion with Maoists*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 1, 8, 30 (Colin Gordon ed., Colin Gordon, Leo Marshall, John Mepham & Kate Soper trans., 1980); PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 44–45 (Myra Bergman Ramos trans., 2000); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 26–27 (2015); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 3–51 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953, 2956 (2015) (“[T]he social sciences’ implicit claims of ‘objectivity’ and embrace of ‘neutrality’ in knowledge production stand in contrast to CRT’s contention that these claims mask hierarchies of power that often cleave along racial lines.”).

25. To be clear, there certainly might be other ways to map or define “expertise” in the criminal context. *See* Lvovsky, *supra* note 6, at 481 (describing “the difference between seeing expertise as a *professional virtue* or as a *professional technology*” when it comes to judicial treatments of police).



expert? Rather than eliminating politics from the administration of criminal law, deferring to experts just shifts the location of political decisions to the stage of defining and qualifying expertise.<sup>26</sup>

The turn to lived experience—in some sense—responds to these concerns by highlighting the contingent, politicized, and contextual way in which society and legal institutions interpret truth claims.<sup>27</sup> By expanding the class of experiences and backgrounds that qualify a person to participate in policymaking or “official” discourse on criminal law, this deconstructive move highlights the politicized project of selecting experts in the first place and denaturalizes experts’ privileged status.

Therefore, in this Article, I highlight the potential of this deconstructive move as a vehicle for reimagining the structure and terms of criminal policymaking. A reconstructive move that might replace the existing structure of governance by experts with a system of governance by (new) experts, though, raises a new set of questions worth considering. A shift to a new model of expertise might begin to address some of the existing power imbalances and structures of elitism and exclusion, but might “expertise” as a frame risk reifying exclusion and imbalances of power? Put differently, I see the deconstructive move (i.e., breaking down the expert/nonexpert distinction) as fundamentally *inclusive*, as more voices, particularly voices from marginalized or less powerful communities, should be elevated in policymaking, and those voices should be heard and evaluated alongside the voices of traditional experts. In contrast, I see any reconstructive move as *exclusive*—some set of voices would be epistemically superior to others. How might reconstructed expertise avoid replicating the same dynamics that necessitated deconstruction in the first place? And, what is the continued utility of “expertise” as a frame for radical approaches to criminal legal transformation?

Two caveats are in order before I proceed. First, “expertise” is a familiar concept in many different areas of law and in many different corners of the criminal system. In this Article, I primarily focus on claims about the proper role of experts in setting criminal policy. While I draw at times from other disciplines or other areas of law, my primary focus here is on how expertise is conceived of in discussions of criminal legal policy. And, while I address in passing “expertise” as it arises doctrinally in the rules of evidence or *Daubert* hearings, I am less focused on such questions of technical qualification. Many of the observations, arguments, and critiques that I trace

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26. I have begun to trace these arguments in much briefer terms elsewhere. See generally Levin, *supra* note 12; Benjamin Levin, Response, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379 (2016).

27. Cf. Schlag, *supra* note 18, at 76 (“Perhaps the problem is not with expertise *qua* knowledge-form, but rather with the particular genre of expertise that currently dominates in law. . . . [T]he main problem with our experts . . . is that ours are simply way too taken with a quest for formalization, mastery, and authoritativeness. We could say, perhaps, that an expertise tempered with broader more general, more critical perspectives would be far more appealing.”).

certainly may bear on evidentiary debates.<sup>28</sup> But, the analysis that follows operates more on the wholesale level of policy and lawmaking across institutions than on the retail level of individual cases and individual evidentiary motions.

Second, in raising questions about expertise as a frame, I don't mean to reject out-of-hand the importance and value of "experts" of many different models. Any decisions about criminal policymaking rest on some universe of facts and assumptions about the nature of society (e.g., what risks are acceptable, what harms require state intervention, and what conduct is widespread). And, any such decision-making requires *someone* to supply those facts and assumptions. In this Article, I argue that choosing who those "someones" are and how much weight to give their input are not neutral or apolitical decisions. Unpacking and surfacing those decisions should be an important part of any path forward toward institutional change.<sup>29</sup> By looking more closely at how society understands which voices to privilege and the extent to which those voices should shape policy, I contend that we can better appreciate first-principles disagreements about criminal law and governance.<sup>30</sup>

My argument unfolds in four parts. In Part I, I set up the conventional distinction between "democratizers" and "bureaucratizers." I argue that this bifurcated characterization—ascendant in the literature—understates the overlap between both visions of institutional change.

In Part II, I describe the two dominant, or traditional, visions of expertise: (1) expertise rooted in education and (2) expertise rooted in vocational experience. I trace the ways in which these visions of expertise have shaped policy proposals and the existing landscape of criminal law and policy. Further, I tie the belief in neutral experts to a certain vision of Progressive-era and New Deal-era thought about the proper mode of governance.

In Part III, I offer a critical reading of these traditional conceptions of expertise. First, I argue that they often rest on the faulty premise that the criminal system has some generally agreed upon purpose, which would allow experts to reach optimal policy solutions. Second, I argue that the turn to

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28. This overlap may be particularly noteworthy in the policing context, where similar questions of what constitutes expertise regarding policing might be relevant to larger policy debates, as well as more discrete questions of an individual officer's behavior or qualifications. See generally Lvovsky, *supra* note 6 (tracing competing judicial approaches to police expertise).

29. Cf. BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY xi (2006) ("Rather than use the research to *draw* law and policy inferences, use the research to *expose* the assumptions about human behavior that . . . underlie the law and policy proposals."); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000) ("[U]se of empirical evidence will produce a *clearer* picture of the existing constitutional landscape and spotlight the normative judgments at the heart of criminal procedure cases.").

30. Cf. Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3214 (2015) ("[C]ritical scholars must be careful not to lionize data as objective or untouchable and to retain awareness that scientific knowledge is necessarily produced within the context of value-driven choices.").

expertise generally understates the ways in which expert analysis of data is always political. Despite attempts at insulation, elite actors will still be embedded in a certain set of values and assumptions about how the world should work. And, given the state of the criminal system, there's good reason to be skeptical that simply choosing the right experts will address deep-seated cultural attitudes about punishment and the proper scope of criminal law.

In Part IV, I pivot to the third and least-explored conception of expertise—expertise rooted in the lived experience of laypeople and those directly affected by the system. I examine the ways in which this alternative turn to expertise represents a deconstruction of the expert/nonexpert binary and therefore should provide some hope for those who share my concerns about expertise and its limitations, including commentators who wish to rethink the political economy of criminal law. Ultimately, though, I raise a series of questions implicated by this new conception of expertise—questions that I see as critical to any path forward that continues to rely on or deploy the language of expertise.

#### I. BEYOND THE BUREAUCRACY/DEMOCRACY DISTINCTION

In his *Manifesto of Democratic Criminal Justice*, Professor Joshua Kleinfeld articulates “one foundational, enormously important . . . line of disagreement” in conversations about criminal policy:

On one side are those who think the root of the present crisis is the outsized influence of the American public . . . and the solution is to place control over criminal justice in the hands of officials and experts. On the other side are those who think the root of the present crisis is a set of bureaucratic attitudes, structures, and incentives divorced from the American public's concerns and sense of justice, and the solution is to make criminal justice more community focused and responsive to lay influences.<sup>31</sup>

Kleinfeld's framing allows for some strange bedfellows and ideological tensions but suggests that core commitments might unite otherwise disparate actors into two general camps.<sup>32</sup>

For example, the democratizer camp might include abolitionists who seek to amplify the voices of anti-carceral activists alongside commentators who are critical of or agnostic about decarceration and instead hope to see criminal law tied more closely to public morality.<sup>33</sup> Similarly, the bureaucratizer camp might include commentators who would replace the current structures of the criminal system with a more explicitly managerial model alongside others who imagine that some sort of agency oversight would improve the functioning of prosecutors, police, etc. But, even if commentators in each

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31. Kleinfeld, *supra* note 12, at 1376.

32. *See id.*

33. Compare Akbar, *supra* note 14, at 460, and McLeod, *supra* note 14, at 1618, with Stephanos Bibas, *Improve, Dynamite, or Dissolve the Criminal Regulatory State?*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 16, at 61, 61–62 (“Instead of relying more on expertise and wonkish incremental reforms or repudiating the whole exercise, I advocate a return to criminal justice's populist moral roots as the system's guiding star.”).

camp diverge on whether they desire more or less punishment, the bureaucratizer/democratizer frame suggests that there are still shared commitments regarding process and distributions of power.

Scholars who have adopted this distinction certainly have hit on some core conceptual, rhetorical, and practical fault lines.<sup>34</sup> Nevertheless, I see the distinction as relying on an underlying problematic assumption: that a clean line exists between bureaucracy (or technocracy) and democracy<sup>35</sup>—or, even if such a line could be drawn theoretically, that such a line actually exists between the camps of activists, advocates, and academics.<sup>36</sup> It hardly should come as a surprise to see such a distinction obtaining widespread purchase—similar distinctions between the political and the rational or technical persist in many corners of legal thought.<sup>37</sup>

One of my core claims in this Article, though, is that the line between technocratic or bureaucratic arguments on the one hand and democratic ones on the other is much blurrier than it appears. By pitting technocracy and democracy against one another, as clear and incommensurable poles and goals, much writing about the U.S. criminal system understates both deep political divisions and points of potential commonality. As international law scholar Professor David Kennedy describes this relationship in the context of global governance, “the effort to ‘replace technocracy with democracy’ . . . leaves unexplored the assumption that they are essentially different while shielding from controversy the process by which earlier struggles had settled this as technical and this as political.”<sup>38</sup> That is, just as technocracy often assumes a class of elite actors insulated from politics, democracy (or discussions of it) often flattens out distributions of power and claims to

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34. See, e.g., Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 844 (2020); Simonson, *Police Reform*, *supra* note 16, at 799–803; Elizabeth G. Jánosky, Note, *Defining “Local” in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318, 1324–26 (2019).

35. Cf. David Owen & Tracy B. Strong, *Introduction: Max Weber’s Calling to Knowledge and Action*, in THE VOCATION LECTURES, *supra* note 15, at ix, xiv (describing the “positivistic conceptual separation of ‘facts’ from ‘values’”).

36. The distinction risks understating overlaps in approach. See, e.g., Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 459 (2017) (advocating a clemency board that incorporates “formerly incarcerated people who can speak to their experiences while incarcerated and during reentry”); Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 688 (2017) (expressing some optimism about “technicist” approaches).

37. See, e.g., CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 183 (1990) (describing administrative law as “entail[ing] a conception of politics as distinguishable from and in opposition to the required rationality of agency decision making”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2270 (2001) (explaining that courts “requir[e] that agency action bear the indicia of essentially apolitical, ‘expert’ process and judgment”); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 30 (2009) (describing the persistence of this politics/expertise distinction in administrative law).

38. DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 39 (2016).

relative authority that proliferate in even ostensibly less-hierarchical structures of governance and decision-making.<sup>39</sup>

In addition to reckoning with the theoretical slipperiness of this distinction, any attempt to distinguish on these grounds must consider the ways in which bureaucratizers rely on a democratic logic and democratizers appear to rely on a technocratic logic. Framed differently, “[c]riticism of the ‘technocratic’ nature of . . . decision making” may operate “simply [as] a way of arguing that the wrong interests and ideologies and technical arguments have won out.”<sup>40</sup> Technocratic scholarship and policy proposals frequently incorporate some acknowledgement of democratic needs and inputs. For example, maybe as some have suggested, administrative oversight of policing should be combined with a sort of “notice and comment” process to allow input from community members.<sup>41</sup> That is, some proponents of technocratic institutions appear to frame their arguments as advancing *democracy via administrative governance*.<sup>42</sup> Or, even if democratic inputs aren’t framed as desirable, many pro-technocracy commentators appear to embrace “expert decisionmaking” as a means of achieving *some* distance from electoral politics.<sup>43</sup> And, as I argue in Part III, even these more sophisticated calls for technocratic solutions may understate how much technocracy or bureaucracy remains embedded in politics. Moreover, proponents of greater democracy continue to argue for a conception of expertise that advances democratic ends or shifts power to previously subordinated groups.<sup>44</sup> And, many proponents of greater public involvement frame that involvement as complementary to—not a replacement for—governance by experts, insiders, or professionals.<sup>45</sup>

All of this is to say that the real question is less whether experts have a role to play and more who those experts are and what they are expected to do.<sup>46</sup> Therefore, in this Article, I ask who the imagined experts are for different ideological, political, and intellectual projects. When scholars or activists

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39. *See id.*

40. *Id.* at 3 (footnote omitted).

41. *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1834 (2015); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 137 (2016).

42. *See infra* notes 101–04 and accompanying text.

43. There may be good reason to worry whether such institutions actually can reflect the will of marginalized communities. *See* Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 209 (2019).

44. *See infra* Part IV.A.

45. *See, e.g.*, BIBAS, *supra* note 14, at xviii (“That does not mean that we should or even can abolish . . . lawyers’ leading role in criminal justice . . . . But . . . [we should] giv[e] outsiders more information, more voice, and more influence . . . . Instead of remaining outsiders, victims, defendants, and ordinary citizens should actively participate as stakeholders alongside insiders.”); Bell, *supra* note 16, at 712.

46. *Cf.* Lvovsky, *supra* note 6, at 540–41 (“In scholarly debates, expertise increasingly figures as a site of struggle, a deeply politicized and contested bid for power. But in ordinary parlance, it generally retains a less complicated association: it is, in effect, a compliment. Inside and outside the legal academy, designations of expertise often function as status markers, hallmarks of value and authority in a technocratic culture that prizes relative competency.” (footnotes omitted)).

call for “experts,” describe actors as “experts,” or critique “experts” and their qualifications, what do they mean? Who are the experts they imagine, and what qualifies them as such? Once experts are certified, qualified, or recognized, what power does the title of “expert” entitle them to?

Perhaps, I suggest, we might reframe the bureaucratizer/democratizer distinction by focusing on competing visions of expertise that reflect different visions of governance, distribution, and public participation. Maybe “bureaucratizer” operates as a shorthand for the turn to elite actors or actors whose qualifications are drawn from dominant institutions in the criminal system.<sup>47</sup> And perhaps “democratizer” operates as a shorthand for the turn to actors generally disempowered by the current hierarchies and logics of the criminal system.<sup>48</sup>

That method of characterizing the distinction or the competing frames may provide greater detail and clarity. But, it still has shortcomings. First, it assumes that there is a clear distinction between those two sets of actors. As I argue below, too much discussion of expertise in the context of criminal law and policy fails to state explicitly what makes an expert or how narrowly cabined (or capacious) concepts of expertise should be. Second, even once we identify what makes an expert an expert—a primary objective of this Article—we are left with follow-up questions: What does or should an expert get to do? Is the expert the decider or arbiter who should be handed the reins of the criminal system? Is the expert the privileged advisor whose opinion should be credited by the politician or final decider?<sup>49</sup> Or, is the expert someone who is deserving of a “seat at the table”—just another voice, but one that has been recognized as legitimate within the confines of official policy discourse and decision-making?<sup>50</sup>

These are difficult questions, and the literature on criminal justice reform and transformation hardly reflects consistent answers.<sup>51</sup> In this Article, I try to surface those questions and the ways in which the answers may point in dramatically different directions as we consider whether and how the face of the criminal system will change. Further, I hope to stress the ways in which any turn to expertise is embedded in a certain distribution of political and institutional power. Different visions of expertise might reflect different understandings or models of politics, knowledge, and their relationship to one another. But, any turn to expertise requires addressing the costs and benefits of shifting the locus of political debate and contestation to the space

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47. Cf. BIBAS, *supra* note 14, at 29–34 (distinguishing between criminal law “insiders” and “outsiders”).

48. Such a frame may resonate with calls to focus on power-shifting as the lens through which to view debates about institutional transformation. See generally K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020); Simonson, *Police Reform*, *supra* note 16.

49. See *infra* Part IV.B.3.

50. See generally Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798 (2021).

51. See *infra* Part IV.B.3.

of expert knowledge.<sup>52</sup> In the next part, I begin that examination by tracing out the traditional conceptions of expertise and how they operate—and are imagined as operating—to structure decision-making about criminal law and its administration.

## II. TRADITIONAL MODELS OF EXPERTISE

Law, or at least U.S. legal culture, stands as a space dominated by experts.<sup>53</sup> Legal argument, legal texts, legal practice, and legal scholarship are notoriously hostile to outsiders and interlopers.<sup>54</sup> Whether that “expertise” is understood in terms of mastery of doctrine, jargon, and formal thought, or (through more of a realist lens) as knowing how the law works on the ground, legal practice and the legal academy operate on the assumption that law requires a specialized understanding.<sup>55</sup> Indeed, even within the already-elite and inhospitable realms of legal practice and legal scholarship, siloing among various specialties allows for hyperspecialization.<sup>56</sup>

In the spaces of criminal law and its administration, expertise has played a special function—from police officers and detectives, to prosecutors and judges, to probation officers, prison officials, and parole boards, the criminal system is neck-deep in competing claims to expertise. In this part, I address the two traditional conceptions of expertise that recur in legal scholarship, lawmaking, and policy discussions. First, I identify the conception that has long held sway in courts: a belief in expertise accumulated through

52. See Schlag, *supra* note 18, at 71 (“[E]xpertise has but one move, or one tendency: to reduce everything to the order of expert knowledge.”).

53. See Lvovsky, *supra* note 6, at 542 (“[L]awyers and judges identify as members of their own highly skilled and credentialed expert group, a designation that many regard as central to their own effective performance and that (conveniently) entitles them to significant social and professional privilege. Enjoying what they see as the fruits of their own technocratic authority, they may simply be likelier to regard expertise as a distinction worth respecting.” (footnotes omitted)).

54. See generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) (describing law school and legal reasoning as designed to reproduce hierarchies and stifle radicalism); Akbar, *supra* note 14 (describing the limited imagination of formal law and legal discourse); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974).

55. To the extent that “legal expertise” is bounded, legal thinkers often suggest it is because experts in other fields retain some epistemic advantage when questions implicate their jurisdiction. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 77, 79 (1995).

56. On the siloing of legal scholarship and the legal academy, see, for example, Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 *BERKELEY J. EMP. & LAB. L.* 163, 165 (2007) (critiquing the distinction among labor law, employment law, and employment discrimination as a formalist mischaracterization of “work law”); Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 *YALE J.L. & HUMANS.* 1, 5 (2011) (critiquing the move to exceptionalize “family law”); Veronica Root Martinez, *Investigating Intersections of Corporate Governance & Compliance*, *U. CHI. L. REV. ONLINE* (Jan. 7, 2020), <https://lawreviewblog.uchicago.edu/2020/01/07/investigating-intersections-of-corporate-governance-compliance-by-veronica-root-martinez/> [] (describing the “intellectual silos that are so often found within legal scholarship”).

on-the-job training and experience.<sup>57</sup> Second, I identify the strand of expertise frequently identified as underpinning the turn to technocracy—a belief that educational training can allow for more effective administration of criminal law.<sup>58</sup>

### A. Vocational Expertise

Visit any criminal court room in the country, and you're sure to see the power of vocational expertise in action. The administration of criminal law rests on nested systems of deference to actors whose past experience is treated as expertise.<sup>59</sup> As Professor William Stuntz observed, "criminal law is . . . not law at all, but a veil that hides a system that allocates criminal punishment discretionarily."<sup>60</sup> And, in understanding the scope of vocational expertise, it is important to recognize that the "experts" might possess different degrees of training, might occupy different social statuses, or might fall in different places within the internal hierarchy of the criminal system.<sup>61</sup>

#### 1. Vocational Expertise in Action<sup>62</sup>

For example, consider the sentencing process. As I will discuss in the next section, educational expertise certainly has taken on a major role in the

57. Cf. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521–22 (1945) (describing "local" knowledge).

58. As I will discuss at much greater length in Part III, the question remains how we can, or should, go about assessing "effectiveness."

59. This model of expertise might find purchase with the Weberian concept of "traditional authority." See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215 (Guenther Roth & Claus Wittich eds., 1978) (arguing that such authority "rest[s] on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them").

60. Stuntz, *supra* note 8, at 599. While I agree with Stuntz's characterization of criminal law and its administration, I part ways on one key point: it is not clear to me that criminal law is unique; from a realist perspective, all legal institutions share the feature that Stuntz identifies. See, e.g., KARL N. LEWELLYN, *THE BRAMBLE BUSH* 5 (Oxford Univ. Press 2008) (1930) ("What these officials do about disputes is, to my mind, the law itself."); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 412 (2007); Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 16, at 246, 257 ("Laws don't apply themselves; someone somewhere must do things and make choices."). This observation falls well outside the scope of this Article, but it is worth noting as a means of appreciating just how high the stakes are for the debates about expertise described here. Deciding who counts as an expert and who is deserving of deference are not just questions for administrative law and criminal law; they are questions that are essential to any institutional analysis of law.

61. See LEWELLYN, *supra* note 60, at 5 ("[T]he people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law.").

62. Each of the examples in this section reflects a focus on courts and the ways in which expertise and deference play out in the judicial context. To be clear, though, these are simply examples. By focusing on judges, I do not mean to understate the ways in which criminal policymaking occurs in other places. My suggestion is that similar patterns of deference based on expertise play out in nonjudicial contexts. For example, scholars have shown that legislators regularly defer to prosecutors and law enforcement in drafting criminal statutes. See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY*



sentencing process. But, even in a world of sentencing commissions, predictive algorithms, and so forth, sentencing still involves a heavy reliance on the gut intuitions of actors based on their past experiences on the job.

The decision-making process rests on a hierarchy of deference or a set of nested deferrals to expert actors.<sup>63</sup> The appellate judge generally defers to the trial court judge on the assumption that the trial court judge has some expertise over matters of sentencing; presumably, the trial court judge has sentenced many defendants in the past and so is able to assess the “proper” punishment—perhaps being able to determine the defendant’s relative culpability as compared to past defendants and make judgments about how best to serve the purposes of punishment based on impressions of previous defendants.<sup>64</sup> As former U.S. District Judge Nancy Gertner describes the process, “The judge [is] seen as an ‘expert’ in individualizing the sentence to reflect the goals of punishment, including rehabilitation and deterrence.”<sup>65</sup> Additionally, after actually having sat through the sentencing hearing, seen the defendant firsthand, and heard from witnesses, perhaps the trial court judge is better positioned than the appellate court judge to make the sort of hyperpersonalized assessments of an individual that sentencing often entails.<sup>66</sup>

The sentencing judge, though, may similarly defer to the expertise of the vocational experts before her: probation department representatives who may make recommendations based on their department’s work with the individual defendant or past defendants, and the prosecutor who may base

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AMERICAN POLITICS 98–101 (1997); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 232 n.31 (2007). When prosecutors argue that they need broad criminal statutes to address certain problems or obtain convictions against certain defendants, legislators oblige. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2194 (2002); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 736 (2017). It’s a stretch to conclude that prosecutors are such effective lobbyists because they represent a massive voting bloc. Rather, at least some of this deference may be explained in terms of expertise: legislators lack knowledge about the mine run of cases and the inner workings of the criminal system. When prosecutors make a claim about what tools are necessary to reach a pressing problem, they can frame that argument in terms of their superior knowledge based on their on-the-job experience.

63. This description owes a debt to Michel Foucault’s characterization of “subsidiary authorities” and “[s]mall-scale legal systems” that predominate throughout “penal procedure.” See MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 21 (Alan Sheridan trans., 2d ed. 1995).

64. Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENT’G REP. 83, 84 (2002); see also Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 389 (2006); John F. Stanton, *Avoiding and Appealing Excessive Sentences*, 40 LITIG. 46, 50 (2014) (“[T]he sentencing judge has more expertise in administering sentences and has the opportunity to observe the defendant and other trial participants firsthand.”).

65. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005).

66. See, e.g., *Koon v. United States*, 518 U.S. 81, 98 (1996) (noting the trial court judge’s “day-to-day experience in criminal sentencing”); Paul J. Hofer, *Beyond the “Heartland”*: *Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 691 (2011) (“The sentencing judge . . . has the advantages of knowing the particular facts of the case and the individual characteristics of the defendant better than any rule-maker in Washington, D.C.”).

recommendations on similar encounters with other defendants.<sup>67</sup> In turn, the prosecutor might defer to the probation department (believing that the department possesses specific expertise about determining the right sort of punishment) or to senior prosecutors who have developed greater insight into sentencing based on their handling of large numbers of cases.

Sentencing provides only one such example. Judicial oversight of police operates along similar lines.<sup>68</sup> “Expertise” and appeals to expertise undergird the architecture of modern policing, justifying sweeping deference from judges and lawmakers.<sup>69</sup> For example, in *Terry v. Ohio*,<sup>70</sup> the seminal decision upholding the constitutionality of stop-and-frisks without probable cause, the U.S. Supreme Court explicitly based its analysis on a vocational model of expertise.<sup>71</sup> The Court concluded that Cleveland Police Detective Martin McFadden’s decision to stop and search the defendants was justified not by a “hunch” (which would have been unconstitutional), but by “specific reasonable inferences which he [was] entitled to draw from the facts *in light of his experience*.”<sup>72</sup> The Court also repeatedly framed McFadden’s experience as significant in providing his special understanding of an individual’s possible criminality.<sup>73</sup>

*Terry* was hardly an outlier.<sup>74</sup> The decades following *Terry* have seen judges and legislators frequently defer to an imagined police expertise, rooted perhaps less in specific training than in the instincts picked up on the job—instincts that might allow an officer to distinguish a guilty defendant from a random person on the street, or to determine when a civilian was a proper target of force.<sup>75</sup> Outside of the suppression context, the presence of

67. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 20–22 (1998); Anupam Chander, *Designating the Place of Confinement in Probation Sentences: A Judge’s Prerogative*, 8 FED. SENT’G REP. 173, 174 (1995).

68. As Professor Anna Lvovsky has described at length, expertise has played a critical role in both expanding and constraining police power. See generally Lvovsky, *supra* note 6.

69. See generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017); Josh Segal, Note, “All of the Mysticism of Police Expertise”: *Legalizing Stop-and-Frisk in New York, 1961–1968*, 47 HARV. C.R.-C.L. L. REV. 573 (2012). 70. 392 U.S. 1 (1968).

71. See *id.* at 8, 20–22, 24; see also Elizabeth E. Joh, *The Consequences of Automating and Deskillling the Police*, 67 UCLA L. REV. DISCOURSE 133, 150 (2019) (“[T]he Court grounded its decision in terms of police expertise.”).

72. *Terry*, 392 U.S. at 27 (emphasis added).

73. *Id.* at 30 (“[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search.”).

74. See Lvovsky, *supra* note 69, at 1998–99 (“[J]udges came to rely on the promise of police expertise—the notion that trained, experienced officers develop rarefied and reliable insight into crime—to expand police authority in multiple areas of the law.”).

75. See, e.g., Joh, *supra* note 71, at 150; Lvovsky, *supra* note 69, at 1998–99; Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 429 n.79 (2013) (“[P]olice officers receive an extremely high level of deference about their determinations . . . as long as they are prepared to invoke their ‘experience and expertise’ as the basis of their decision.” (quoting *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996))).

“police practices experts”—essentially, former officers who testify about proper police conduct—in use-of-force cases helps to suggest that the “mysticism of police expertise”<sup>76</sup> requires a sort of specialized knowledge that only other officers possess.<sup>77</sup> Or, as the Supreme Court put it in *Ornelas v. United States*,<sup>78</sup> judges’ deference to officers’ decision-making is justified because “a police officer views the facts through the lens of his police experience and expertise.”<sup>79</sup>

Like policing and sentencing, prison administration reveals the explanatory power of vocational expertise as a frame.<sup>80</sup> The architecture of prison law similarly relies largely on judges’ deference to the expertise of prison officials.<sup>81</sup> Efforts by incarcerated people to challenge the conditions of their confinement are rarely met with success.<sup>82</sup> These failures may be explained by a range of factors, from a lack of legal representation to general political hostility, but perhaps the greatest obstacle is the trust that elite legal actors have placed in the expertise of those who work in corrections.<sup>83</sup> The doctrinal framework of “prison law” is one rooted in discretion, deference, and a set of assumptions about the expertise of correctional officers and prison administrators.<sup>84</sup>

Guards, wardens, and others in the “corrections industry” have a great deal of power to shape the experience of incarceration for people inside, and lawmakers and judges are consistently loath to circumscribe that power.<sup>85</sup> In 1995, Congress passed the Prison Litigation Reform Act,<sup>86</sup> which nods to

76. See generally Segal, *supra* note 69.

77. See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 301 (“[T]he Court in effect declared that police officers should receive as much deference as trial judges.”). See generally Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847 (2014) (arguing that appellate courts tend to defer to officers but often base that deference on a misunderstanding of what policing looks like in practice).

78. 517 U.S. 690 (1996).

79. *Id.* at 699.

80. See generally Lisa Kerr, *Contesting Expertise in Prison Law*, 60 MCGILL L.J. 43 (2014).

81. See generally Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89 (2015). See also Keramet Reiter & Kelsie Chesnut, *Correctional Autonomy and Authority in the Rise of Mass Incarceration*, 14 ANN. REV. L. & SOC. SCI. 49, 58 (2018) (describing the discretion afforded to prison officials).

82. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1590–91 (2003).

83. See *Davis v. Ayala*, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring) (“[T]he public . . . assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.”).

84. See generally Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G REP. 245 (2012).

85. See *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979); *Pell v. Procunier*, 417 U.S. 817, 826–27 (1974); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 449 (2005).

86. Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

correctional officials' expertise and makes it harder for federal judges in civil rights suits to "micromanage" those officials.<sup>87</sup> The Supreme Court has acted as a willing partner in this shift of power, announcing that "[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face."<sup>88</sup>

## 2. Vocational Expertise as Reformist Model

Much academic commentary is less than enthusiastic about the value of vocational expertise and the structures of deference discussed above. A significant body of literature sharply criticizes appellate judges' and legislators' deference to the purported expertise of prison officials and police officers.<sup>89</sup> And, while technocratic reform projects often include space for the voices of actors with vocational expertise, the vocational experts are not framed as enjoying a major epistemic advantage in questions of criminal policy. Put differently, police, correctional officers, and other vocational experts are not necessarily treated as experts in many reformist or transformative takes on criminal policy.

To the extent that there are departures from this general theme, they tend to involve more elite forms of vocational expertise. That is, some commentators embrace the expertise of judges and attorneys in the criminal system.<sup>90</sup> For example, Professor Andrew Crespo has pushed back on calls for administrative agency–like approaches to criminal adjudication,<sup>91</sup> arguing instead that judges and other "criminal court" actors possess the requisite expertise to address institutional flaws: "[A] criminal court has the capacity as an institution to attain . . . the very informational breadth of knowledge and expertise that contemporary scholars crave in the administrative form—without sacrificing the unique institutional advantages of the judicial process."<sup>92</sup> That call, in some ways, resonates with the turn to "progressive prosecution" and the attendant faith that actors and institutions within the criminal system can repurpose their experiences and insider

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87. See 141 CONG. REC. 26,549 (1995) (statement of Sen. Bob Dole) (describing the need to "restrain liberal Federal judges who . . . micromanage State and local prison systems"); *id.* at 26,553 (1995) (statement of Sen. Orrin Hatch) ("I believe that the courts have gone too far in micromanaging our Nation's prisons.").

88. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 326 (2012).

89. See, e.g., David Jaros, *Criminal Doctrines of Faith*, 59 B.C. L. REV. 2203, 2206 (2018); Lvovsky, *supra* note 69, at 1997–98 ("[J]udicial deference to police judgment in criminal procedure has inspired a small library of criticism."); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 287–88 (2012). See generally Dolovich, *supra* note 84.

90. See generally Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016); Matthew Clair, *Getting Judges on the Side of Abolition*, BOS. REV. (July 1, 2020), <https://bostonreview.net/law-justice/matthew-clair-getting-judges-side-abolition> [<https://perma.cc/5YWX-GSSF>].

91. For a discussion of this approach, see *infra* Part II.B.

92. Crespo, *supra* note 90, at 2069 (emphasis omitted).

knowledge to reform the system and alter its priorities.<sup>93</sup> But Crespo is not alone in seeing trial-court judges as enjoying some expert advantage conferred by their time on the bench, rather than (or in addition to) their law degrees. Indeed, that view of trial court judges is a driver of much of the deference discussed above in the sentencing context and in other areas where appellate judges defer to trial judges for their expertise in “managing their courtrooms.”<sup>94</sup>

And the reliance on judicial expertise in the context of “problem-solving courts” might reflect—at least in part—a view that judicial experience might contribute to some expertise in assessing character or helping to design individualized responses to lawbreaking.<sup>95</sup> A cause embraced by advocates and academics across the political spectrum,<sup>96</sup> these specialty courts offer a shift away from the traditional adversarial model,<sup>97</sup> with judges taking on a much larger role.<sup>98</sup> As Professor Erin Collins describes the dynamic, “[T]he problem-solving court judge’s expertise and authority are central to creating and sustaining the jurisdictional space the courts occupy.”<sup>99</sup> That is, the problem-solving court adopts an expert frame, but does so by doubling down on the claims of institutional competence that undergird “traditional” criminal courts. Judges, in this account, are not just rulers of their own

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93. See generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021); David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017).

94. See, e.g., *supra* notes 64–67 and accompanying text; see also *Ornelas v. United States*, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) (describing “expertise of the district court” as a justification for “deferential review”); *United States v. Armstrong*, 517 U.S. 456, 480 (1996) (highlighting the trial court judge’s experience in the state and federal system as justifying deference); Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1160 (2005) (“Such discretion . . . is well informed by the special circumstances of each case and the available punishment options, which only the sentencing judge with her local knowledge and expertise is likely to fully understand.”).

95. Problem-solving court judges are “often deemed [experts] on the intricacies and best practices for that model and will regularly travel the country and even the world reflecting on their experiences and encouraging other jurisdictions to adopt their court model.” Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1600–01 (2021).

96. See, e.g., Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 208 (2013).

97. That said, commentators broadly agree that traditional criminal courts hardly represent an adversarial model. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 624 (2014) (“There is near consensus that felony courts, and in particular federal felony courts, do not operate according to ‘the idealized model of adversary justice described in the textbooks.’” (quoting Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998))). See generally Lynch, *supra*.

98. See, e.g., Eaglin, *supra* note 96, at 209 (“A traditionally nonadversarial model, drug courts require the prosecutor, defense attorney, and judge to agree that diversion will promote public safety and rehabilitation.”).

99. Collins, *supra* note 95, at 1616.

private fiefdoms because of politics; they now exercise control over defendants because of their acquired expertise in handling a specific type of case or dealing with a specific type of defendant.<sup>100</sup> Vocational expertise, then, can be seen as a way of explaining or legitimating the existing dynamics in criminal courtrooms and within the criminal system.

Relatedly, some scholars have advocated for administrative solutions to police oversight that sound in the language of vocational expertise. Dubbed “new administrativists,” these scholars have argued that police departments should be treated as agencies and should be governed and regulated according to administrative law principles.<sup>101</sup> As Professor Christopher Slobogin argues,

Police . . . possess expertise about the various ways the criminal law . . . can be enforced that legislatures (and courts) usually do not have. Police agencies are much better positioned to make decisions about resource allocation and the relative efficacy of enforcement methods than are other institutions.<sup>102</sup>

In this account, the problem isn’t that police have power or even that police receive significant judicial discretion. Rather, the worry is that deference is unconstrained and doesn’t reflect any checks or commitment to democratic process. Slobogin, for example, argues that the “exercise of . . . expertise should be mediated through administrative law.”<sup>103</sup> That is, police *are* experts, but they should be forced to make policies via a framework that provides checks on their expert opinions. To this end, scholars have proposed notice-and-comment review and a host of other processes that borrow from administrative law but still leave police as the relevant “experts” on policing.<sup>104</sup>

### *B. Educational Expertise*

At the outset, there may be a certain artificiality to the distinction between “vocational” and “educational” foundations of expertise. What is vocational training if not a form of education? The easy response sounds in a potentially elitist register—official markers of education reflect a superior level of understanding and expertise than on-the-job experience can afford.<sup>105</sup> This

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100. See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012). See generally Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004).

101. See, e.g., Crespo, *supra* note 90, at 2059.

102. Slobogin, *supra* note 41, at 121.

103. *Id.*

104. See, e.g., Friedman & Ponomarenko, *supra* note 41, at 1834.

105. See STEVEN BRINT, IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE 4 (1994) (framing relative expertise in terms of class and relative social privilege); BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS 4 (1989) (same); Clifford I. Nass, *Bureaucracy, Technical Expertise, and Professionals: A Weberian Approach*, 4 SOCIO. THEORY 61, 61 (1986) (“[A] professional is characterized by technical training and expertise, a service orientation based on a code of ethics, and institutionalized credentials. Therefore, professionals are basically

preference for one form of expertise over another might also reflect a certain managerial bias when it comes to distributions of labor—managers, not line-level workers, are seen (particularly by managerial class observers) as possessing superior knowledge and should be entrusted with greater policymaking authority.<sup>106</sup> These responses may explain the turn to educational expertise, but I don't think they capture the core set of arguments that drive technocratic thinking.

In many ways, the turn to educational expertise stands as the response to a system steeped in vocational expertise.<sup>107</sup> For commentators outraged by the “irrationality” of criminal policy, the prevalence of junk science and folk wisdom, and the popularity of counterproductive approaches, vocational expertise has been a resounding failure. A common response over the past couple of decades has been to stress the questionable nature of vocational expertise.<sup>108</sup> In this telling, mass incarceration and the excesses of the criminal system are not only the result of “punitive populism” on the part of voters and elected officials; they also result from the false claims to expertise mobilized by police, correctional officials, and other criminal justice actors.<sup>109</sup> Vocational expertise presumes that the accepted or dominant modes of policing, sentencing, and punishment are the right ones, further entrenching flawed, punitive practices that might be deeply infected with bias.<sup>110</sup>

Educational expertise, by contrast, might invite a critical approach.<sup>111</sup> An outsider's perspective grounded in an academic or scientific method might help to distinguish the “is” from the “ought” and allow for conversations about what the dominant modes of policing, sentencing, and punishment *should* look like.<sup>112</sup> Educational expertise and some form of professionalization, therefore, suggest “the ability to make authoritative judgments and to solve problems based on disciplinary training.”<sup>113</sup> Or, to

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different than bureaucrats, individuals who simply hold a bureaucratic office.” (internal citations omitted)).

106. See generally ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 43–44 (W.D. Halls trans., Free Press 2014) (1893). This argument is reflected in at least some of the critiques of police unions. See Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333 (2020) (describing this preference for management over labor).

107. This distinction also might resonate with distinctions in organizational sociology and elsewhere between “bureaucrats” and “professionals.” See Nass, *supra* note 105, at 64–65.

108. See, e.g., Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115, 119 (2007) (arguing that police “hunches,” even if based on experience, are unreliable and problematic); Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 396 (2019) (critiquing reliance by judges and prosecutors on the “misleading folk wisdom on repentance”).

109. See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1806 (2020); Levin, *supra* note 26, at 385–86.

110. Cf. AMITAI ETZIONI, *MODERN ORGANIZATIONS* 77 (1964) (discussing how professionals justify their actions).

111. See Nass, *supra* note 105, at 61.

112. Cf. DURKHEIM, *supra* note 106, at 43–44 (distinguishing “science proper” from “science” known by non-elite actors).

113. BRINT, *supra* note 105, at 40.

borrow from Max Weber's characterization, "The only difference between an amateur and an expert is . . . that the amateur lacks a tried and tested method of working. He is therefore mainly not in a position to judge or evaluate or pursue the implications of his inspiration."<sup>114</sup> And, the realm of educational expertise is almost definitionally bounded—the expert's status as expert relies upon a claim to specific knowledge in a *specific* realm that outsiders or non-experts cannot access or cannot have mastered.<sup>115</sup>

To proponents of educational expertise, the defect in the structures of deference in criminal law's administration is not the deference itself, but the basis for that deference. Mass incarceration and the punitive violence and inequities of the system reflect ingrained bad practices that have been replicated to the point of becoming conventional wisdom and standard operating procedure.<sup>116</sup> In a sense, this view reflects a recognition of the circularity described in the previous section: the performance of the job in the generally accepted way had been treated (by judges, legislators, and other powerful institutional actors) as a marker of expertise and the basis for deference and for claims of expert authority.<sup>117</sup>

While the turn to educational expertise isn't always couched in terms of an analogy to administrative law, it often is. To the extent that the criminal system operates as an administrative system (or is more managerial than adversarial),<sup>118</sup> commentators have argued that it makes sense to advance administrative best practices and to ensure that the "agency" is functioning as well as possible.<sup>119</sup> To advance these ends, they argue, it makes sense that the agency should be subject to expert oversight.

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114. MAX WEBER, *Science as a Vocation*, in THE VOCATION LECTURES, *supra* note 15, at 1, 8–9 (footnote omitted).

115. See Nass, *supra* note 105, at 63 ("Professional credentials . . . legitimately confirm the technical expertise and service orientation of the certified individual as well as specify implicitly a sphere of competence . . . . Thus, professional credentials can serve as a basis for legitimate domination (authority)."); Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 262 (2017) ("[T]he expertise of experts tends to be limited to their domain of detailed knowledge.").

116. See Rachel Herzing, Commentary, "Tweaking Armageddon": *The Potential and Limits of Conditions of Confinement Campaigns*, 41 SOC. JUST. 190, 194 (2014) ("Far from being broken . . . the prison-industrial complex is actually efficient at fulfilling its designed objectives—to control, cage, and disappear specific segments of the population."); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 851–52 (2019).

117. This understanding finds purchase in the judicial presumption of regularity. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996); Cynthia Barmore, *Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R.-C.L. L. REV. 273, 313 (2016).

118. See generally Kohler-Hausmann, *supra* note 97; Lynch, *supra* note 97.

119. See generally Rachel Barkow, *The Criminal Regulatory State*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 16, at 33. See also Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 707–26 (2018); cf. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 744 (2011) ("Certainly, our institutions ought to do their best to incorporate good science into decision making . . .").



This conception of expertise resonates with an understanding of agency functioning associated with the rise of the administrative state during the New Deal era:

The expertise model of the administrative state . . . attempted to eliminate political influence by characterizing the issues that came before agencies as non-political. To do so, the model assumed that seemingly value-laden decisions were not controversial if viewed from the perspective of the professionals on agency staffs who made these decisions. Essentially, the model viewed agencies as politically disinterested entities comprised of professionals whose decisions are driven by their professional knowledge and training. . . . [P]olitical influence in agency decision-making was seen as corrupting and biased when brought to bear on what were essentially professional questions about what needed to be done to cure the relevant ill that the agency was authorized to address.<sup>120</sup>

Viewed through this frame, “bureaucratic discretion” was hardly a thing to be feared; rather, it was desirable “because . . . the managers and employees who exercised it . . . [were] ‘experts’ whose professionalism simultaneously limited the scope of their power, prevented personal domination, and made possible the creativity and flexibility necessary to the effectiveness of the bureaucratic form.”<sup>121</sup>

Understood in this way, educational expertise operates as a response to the vocational model and to the electoral basis of much criminal policymaking. Commentators have advocated for the increased use of, and emphasis on, highly educated experts in a range of areas, from sentencing to police oversight.<sup>122</sup> In this section, I don’t purport to offer an exhaustive, or even vaguely comprehensive, account of each of these areas or of the wealth of proposals that call for the increased involvement of educated experts in policymaking. Instead, I offer a few examples as a means of demonstrating how educational expertise has been seen as responding to pathologies of the criminal system.

Sentencing operates as the area perhaps most dominated by the turn to educational expertise. Where traditional, indeterminate sentencing rested on the discretion of trial court judges and their (vocational) expertise in assessing the character and culpability of individual defendants,<sup>123</sup> the turn to sentencing guidelines and sentencing commissions reflects a belief that educated experts can move past hunches and instinct to craft rules, procedures, and directives that will lead to more just and appropriate sentences.<sup>124</sup> Put differently, many of the abuses of indeterminate sentencing

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120. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 151–52 (2012); see also Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 753 (1996).

121. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1283 (1984).

122. See, e.g., BARKOW, *supra* note 7, at 165–69.

123. See *supra* notes 63–67 and accompanying text.

124. See Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 529 (2007).

were associated with its irrationality: unconstrained by traditional rules of evidence or procedural checks associated with trial, the judge was allowed to make personal assessments of the defendant, the defendant's character, and the defendant's culpability.<sup>125</sup> Such an idiosyncratic and individualized assessment invited bias (e.g., perhaps the Black defendant seemed less remorseful than the white one),<sup>126</sup> or at least dramatic disparities from judge to judge or from defendant to defendant (e.g., defendants with fairly similar convictions might receive very different sentences depending on which judge they drew or even which day they drew the same judge).<sup>127</sup>

Guidelines sentencing, then, reflected an expert turn that rejected an earlier, vocational model of expertise. Rather than deferring to the sentencing judge as the wise elder—the arbiter of, or stand-in for, community values<sup>128</sup>—this new model suggested that rationality was the key.<sup>129</sup> By bringing in the educated experts and forming a commission, the state could rid itself of the abuses of indeterminacy.<sup>130</sup> Use of the guidelines could optimize punishment, ensuring that each defendant got the punishment that each deserved (if not in moral or retributive terms, then in the language of good-government liberalism).<sup>131</sup> To be clear, the rise of guidelines sentencing was not necessarily justified in terms of ensuring more or less punishment; instead, the goal was to ensure that the *right* punishment was meted out.<sup>132</sup> That is, the private fiefdoms of criminal court judges nationwide were brought to heel under the control of a Progressive governance regime.<sup>133</sup>

While guidelines sentencing has come under fire since its inception,<sup>134</sup> at least some commentators have argued that its shortcomings are not the result

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125. See Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1988 n.68 (2006).

126. See generally M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018) (describing the role of racial bias in judicial determinations of remorse at sentencing).

127. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 936 (2006).

128. See BIBAS, *supra* note 14, at 3 (describing a pre-professionalized historical moment in which judges were “laymen representing the community’s sense of justice and order”).

129. See Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 727–28 (2009) (“Sentencing may be science rather than art; it may require the analysis of empirical data, and the question of appropriate punishment may be one for which there are objectively ascertainable right and wrong answers.”).

130. See Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 159 (2019).

131. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1791 (2005) (describing the tension between technocratic and democratic rule in the context of sentencing guidelines).

132. See, e.g., Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 20 (2003).

133. See, e.g., Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 179–80 (2010).

134. See generally Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005); Frank O. Bowman, III, *The Failure*

of the model or the technocratic turn; rather, guidelines sentencing—at least according to some commentators—has been hamstrung by insufficient insulation.<sup>135</sup> As former U.S. Sentencing Commissioner Rachel Barkow argues, the “Commission has rarely been left alone to make policy and Congress has directed just about everything it has done over the years.”<sup>136</sup> That is, the problem is not the experts, their judgments, or the way in which their approaches to sentencing design failed to remedy the biases and views that led to long sentences in the first place; rather, it’s that prosecutorial and law enforcement lobbies and the elected officials defined by punitive populism continued to exercise too much sway over the process.

Finally, the Model Penal Code (MPC) stands as the apotheosis of educational expertise as a model for criminal policymaking. Drafted by academics, elite practitioners, and other members of the American Law Institute (ALI) during the 1950s and early 1960s, the MPC has been hailed as one of “the most successful academic law reform projects ever attempted.”<sup>137</sup> Interestingly, while the ALI frequently produced restatements—treatises that attempted to describe the state of the law—the MPC was different; “it was an explicit attempt to provide a model statute that would advance doctrine and practice rather than merely describe it.”<sup>138</sup> Grounded perhaps in a similar impulse that led Herbert Wechsler, the president of the ALI and one of the MPC’s primary drafters, to embrace “neutral principles” in constitutional law,<sup>139</sup> the MPC reflects an understanding of an aspirational criminal law that might exist outside of politics and the political process.<sup>140</sup>

### III. THE LIMITATIONS OF TRADITIONAL EXPERTISE

The preference for expert-based decision-making that I describe in the previous part clearly predates the current political moment and the fascination with expertise described at the outset of this Article.<sup>141</sup> But, it is

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*of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005). See also Charles J. Ogletree, Jr., *The Death of Discretion?: Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1958 (1988).

135. See, e.g., BARKOW, *supra* note 7, at 171.

136. *Id.*

137. Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297 (1998).

138. Christopher Slobogin, *Introduction to the Symposium on the Model Penal Code’s Sentencing Proposals*, 61 FLA. L. REV. 665, 665 (2009). But see Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367, 1368 n.1 (2001) (raising the possibility that the MPC was, in effect, a sort of restatement).

139. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

140. Even within the discourse on educational expertise, though, claims to neutrality, legitimacy, and expertise can be—and are—challenged on their own terms. See Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 83 (2000).

141. See *supra* notes 1–3 and accompanying text. And, indeed, “scientific” approaches to criminal law and criminology have a long history. See generally CESARE BECCARIA, ON

worth recognizing the ways in which the turn to expertise operates as a response to the threat of (prejudiced or reactionary) populism—real or imagined.<sup>142</sup> In other words, “the rule of expertise could be valorized . . . because it supplants and suppresses folk wisdom or traditional cultural tendencies—arguably incendiary knowledges to be feared in law and politics.”<sup>143</sup> The expert is understood as unburdened by the emotions, impulsiveness, and prejudices that define much of politics.<sup>144</sup>

But the turn to expertise should raise some concerns. Expertise, appeals to experts, and the language of neutrality are not neutral.<sup>145</sup> They are political.<sup>146</sup> Indeed, immediately after famously observing that “[t]he life of the law has not been logic: it has been experience,” Oliver Wendell Holmes went on to argue that “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do . . . [with] determining the rules by which men should be governed.”<sup>147</sup>

For those concerned about “intuitions” and “prejudices,” educational expertise might offer some improvements over a vocational model. And, it might—at least ostensibly—offer a check on the punitive impulses that have

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CRIMES AND PUNISHMENTS AND OTHER WRITINGS (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., 2008) (1764); GINA LOMBROSO-FERRERO, CRIMINAL MAN: ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO (1911).

142. See BIBAS, *supra* note 14, at 121–22.

143. Schlag, *supra* note 18, at 67.

144. Cf. KENNEDY, *supra* note 38, at 165 (“To challenge the expert work of people in sophisticated fields by linking it to political interests and ideologies can make you sound shrill, lacking nuance. It can violate the style rather than discredit the content of expert work and mark you as an outsider.”); Watts, *supra* note 37, at 30 (“[E]xpertise tends to be associated with positive attributes and politics with negative attributes . . .”).

145. See, e.g., Aziza Ahmed, *Trafficked?: AIDS, Criminal Law and the Politics of Measurement*, 70 U. MIAMI L. REV. 96, 151 (2015) (“While measurement and indicators are treated as an objective and neutral way to move away from ideological debates and towards documenting realities, this paper argues that measuring and data-gathering itself is a political process.”); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 699 (1985) (“By appearing to be neutral to ends, or by merely offering means to reach pre-selected ends, the ideology of technocracy actually buttresses the status quo.”); Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1831 (2020) (describing “purportedly neutral and technocratic visions for rationalizing governance” as “neither neutral nor, in practice, rationalizing”); Sheila Jasanoff, *A Field of Its Own: The Emergence of Science and Technology Studies*, in THE OXFORD HANDBOOK OF INTERDISCIPLINARITY 173, 177–78, 184–85 (Robert Frodeman et al. eds., 2d ed. 2017).

146. See, e.g., KENNEDY, *supra* note 38, at 121 (“Experts make arguments . . . for a reason: their assertions are motivated. Often, the motivation is their role in a distributive struggle.”); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 480 n.88 (2003) (collecting sources); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 618 (1984) (“For the Critical scholar, the pretense that social science methods lead to objective and value neutral knowledge hides an implicit and conservative political message behind a neutral and technocratic façade.”).

147. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3–4 (1881).

driven voters and elected officials to construct the carceral state.<sup>148</sup> Indeed, this concern about irrationality appears to motivate many of the contemporary calls for bureaucratization: by turning to experts who can analyze data and weigh costs and benefits, policy makers could pursue “rational” approaches designed to steer the country away from the prejudice and reactive vengefulness that have defined the era of mass incarceration.<sup>149</sup> Or, at the very least, by shifting more decision-making power to experts, politicians and voters could provide some insulation from the worst tendencies of punitive populism.<sup>150</sup>

In this part, though, I push back on those claims by surfacing some problematic assumptions that underpin this expert turn and by stressing the value-laden decisions that undergird the ostensible neutrality of traditional expertise. Specifically, I focus on two questions that traditional theories of expertise often raise or leave unanswered. First, I argue that the turn to expertise frequently rests on a faulty premise that a consensus (or at least a general agreement) on the fundamental purpose of the criminal system exists. For expertise to have a meaningful impact, for technocracy’s advantages to kick in, and for the analogies to agency experts to work, I contend that there would need to be an agreement on the first principles of criminal policy—an agreement that is lacking in academic and popular discourse about the criminal system. Second, I argue that the promise of expert decision-making—neutral and objective analysis divorced from political pressure and populist sentiments—remains unattainable. Instead, I argue that the interpretive and analytical tasks that experts or technocrats would undertake are inherently political; there is no way to do policy or interpret data that isn’t rooted in a deeper set of values and assumptions about how the world works and should work.

In leveling these critiques or raising these questions, I do not mean to reject technocratic critiques of democratic approaches whole hog—it would be a mistake to discount the role of electoral politics and “punitive populism” in driving mass incarceration. Nor do I mean to suggest that traditional experts haven’t played a role and don’t have a role to play in dismantling the carceral state. Indeed, as noted throughout, I see the technocracy/democracy distinction as potentially misleading.<sup>151</sup> And, it is inevitable (and probably a good thing) that actors with specialized knowledge and various epistemic advantages will take on different roles within any decision-making or policymaking process. Rather, I argue that a space of expertise divorced

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148. See generally BARKOW, *supra* note 7.

149. See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017) (calling for a broader engagement with data in addressing mass incarceration); Erin R. Collins, *Abolishing the Evidence-Based Paradigm* (Feb. 27, 2022) (unpublished manuscript) (on file with author).

150. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2379 (2006) (“Independence might also be sought through cultural means, such as the cultivation of Weberian, professionalized expertise in administration and public acceptance that this expertise provides a legitimate basis for administrators to resist the pressures of elected officials.”).

151. See *supra* Part I; *infra* Part III.B.1.

from politics and other social forces exists only in theory; in practice, expertise and its applications are and always have been products of their social, cultural, and political contexts.<sup>152</sup> They add value; but that value is bounded, and its relative worth rests on political decisions about the nature of policymaking, the way to interpret facts, and the way to mobilize truth claims.

### A. *First Principles*

#### 1. Purposes of Punishment?

In his seminal characterization of criminal procedure as an “administrative system,” U.S. Circuit Judge Gerard Lynch described that system as “serv[ing] the interests both of defendants seeking certainty of result and a public that sees the primary purpose of the system as the protection of the public and the reduction of crime.”<sup>153</sup> Whether institutional actors and the system actually do serve those interests is a fair question.<sup>154</sup> Indeed, one common justification for the bureaucratic turn is that the system and voter-supported policies have not effectively or efficiently advanced public safety.<sup>155</sup> And, assuming that there were a broader societal agreement that the purposes articulated by Judge Lynch were the “right” ones, we certainly might (and probably should) strive to determine whether the administration of the criminal system were serving those ends.<sup>156</sup>

But, when it comes to criminal law and its administration, there is hardly an agreement as to what the system is supposed to do. As a preliminary matter, much writing on the purposes of the criminal system is not entirely clear as to whether it is providing (1) an attempt to justify the current workings of the system, (2) an explanation for how institutional actors understand the justifications of their decisions, or (3) an argument for how the system ought to operate. Substantive criminal law classes and conventional accounts emphasize the “traditional” purposes or justifications of punishment: deterrence, incapacitation, rehabilitation, and retribution.<sup>157</sup>

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152. See KENNEDY, *supra* note 38, at 3 (“Although experts routinely imagine their work as a technical and pragmatic practice at least aspirationally removed from conflict and political contestation, the idea that ‘politics’ is somehow different is its own kind of expert fantasy.”).

153. Lynch, *supra* note 97, at 2142.

154. *Cf. generally* BARKOW, *supra* note 7 (critiquing criminal policy as irrational and failing to serve the interests of ensuring public safety).

155. Barkow’s work, in particular, tends to reflect this important insight—regardless of one’s view on whether the shift to an administrative model is socially desirable, there is something particularly troubling about a poorly structured administrative system that fails to achieve the stated or desired aims. See *generally id.* *Cf.* Jeffrie G. Murphy, *In the Penal Colony and Why I Am Now Reluctant to Teach Criminal Law*, 33 CRIM. JUST. ETHICS 72, 77 (2014) (“The stated purpose of our system is said . . . to achieve a reasonable degree of crime control while constrained by the justice requirement of punishing in accord with actual culpability. What we actually have, however, is neither an efficient mechanism of crime control nor a system that is just to offenders.”).

156. See *generally* Barkow, *supra* note 119.

157. See Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 454 (2013) (identifying “the four traditional purposes of punishment”).

However, there is not real agreement on which of those theories the system *should* advance, let alone which theory, or theories, it actually *does* advance. Other commentators have thrown additional theories into the mix, from expressivism,<sup>158</sup> to distribution or redistribution (either of pleasure and pain, resources, or social standing).<sup>159</sup> Academic and judicial treatments of constitutional criminal procedure similarly reflect common themes or statements of purpose: efficiency, fairness, accuracy, and some concern about curbing illegitimate state power.<sup>160</sup> And, more radical or critical treatments of the criminal system suggest other more explicitly nefarious purposes—perhaps social control, maintenance of societal hierarchies, or legitimation of inequality or the dominant social order.<sup>161</sup>

Further, these theories of punishment and procedural values don't even begin to describe, justify, or explain many features of the system that are less easily identified with the administration of criminal law. For example, police officers serve a range of social functions and deliver a range of social services that have little (if anything) to do with enforcing criminal law<sup>162</sup>—even if there were an agreed-upon reason why police should stop, search, or arrest someone, what is the overarching theory for why police officers should respond to nonemergency calls or respond to medical emergencies? In other words, in the context of a weak social welfare state, where much regulatory energy and many resources are directed toward the criminal system,<sup>163</sup> it

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158. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999).

159. See generally VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 5, 63 (2019); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 16 (2010) (discussing criminal law as distributing pain); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429 (2021) (discussing criminal law as redistributing resources).

160. See, e.g., Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 450 (2007); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338 (1988).

161. See DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 3–22 (1990); GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 108 (1939); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1478 (2016); 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) (“Behind the façade of justifications, the criminal justice system is an institution of social control oriented to the management of dysfunctions inherent in capitalist society—unemployment, poverty, and the like—that, if left unchecked, tend to produce untenable levels of social disorder and deviance.”). See generally Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109 (2013); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

162. See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 761 (2020); Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314, 335–38 (2016); Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 426 (2019).

163. See generally BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN

becomes even more difficult to tease out what exactly all the actors and institutions that comprise the criminal system are supposed to be doing in the first place.

To be clear, answering that first-principles question (i.e., what's the point of it all?) is critically important and probably should be a prerequisite to many discussions—both macro and micro—about how the system should be reformed, whether it needs to be reformed, or whether it should be scrapped altogether.<sup>164</sup> But, those first-principles questions are not questions for experts, and no one claims that they should be.<sup>165</sup> Even if we were prepared to accept that there were spaces where expert decision-making could be relatively neutral or at least could enjoy clear advantages over other models, “removing choices to neutral technocratic territory is unlikely when there is dispute over what values should govern the choice.”<sup>166</sup> Or, put differently, the turn to expertise and the suggestion that technocrats could provide solutions risk obscuring the live political debates and disagreements simmering below the surface of this high-level policy analysis. And, “by withdrawing political questions from the public sphere and giving them over to expert decisionmaking, technocratic rationality actually diminishes the possibility of democratic debate over ends, in the name of an improved analysis of means.”<sup>167</sup>

Continuing the analogy to administrative law discussed in the previous part, it's not clear what the purpose of the authorizing statute or statutes is. Certainly, that is not an uncommon situation—given the realities of the lawmaking process, some degree of uncertainty is hardly unusual.<sup>168</sup> But,

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AMERICA (2016); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

164. See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (arguing for the importance of clarifying first-principles commitments in discussions of criminal policy).

165. That is, scholars and advocates who turn to expert-based decision-making do so by claiming that such decision-making operates against a backdrop of a given value, purpose, or set of preferences that society (or a given community) seek to advance. See, e.g., Kagan, *supra* note 37, at 2353 (“[A]gency experts have neither democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most administrative policymaking.”); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1137 (2010) (“Nor can agency officials generally be seen as ‘experts’ on such value-laden (rather than solely scientific or technical) policy questions.”).

166. Kristen Underhill, *Broken Experimentation, Sham Evidence-Based Policy*, 38 YALE L. & POL’Y REV. 150, 187 (2019); cf. Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1431 (2018) (arguing that the problem with criminal policymaking may not be cost-benefit analysis as such, but the way in which costs and benefits are conceived and conceptualized).

167. Boyle, *supra* note 145, at 751; see also Jürgen Habermas, *The Scientization of Politics and Public Opinion*, in *TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS* 62 (Jeremy J. Shapiro trans., 1970).

168. See *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (“Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize.”); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 933–34 (2016) (“The legislative history of most federal statutes is extensive, and debate on the House and Senate floor often produces competing statements about a statute’s meaning.”).



the question of which purpose to favor or how to go about prioritizing the interests to be advanced is contested. Indeed, the specter of debate, struggle, or contestation should be a critical component of any discussion of expertise.<sup>169</sup> Even though “[institutional] insiders imagine themselves as agents of the general interest,” they often advance a specific set of debatable policy preferences or ideological goals.<sup>170</sup> This absence of neutrality may always pose problems,<sup>171</sup> but these concerns are magnified significantly when the experts have no clear directive.<sup>172</sup> With no clear values to prioritize, with no predetermined benefits to weigh against costs, and with no overriding directive, experts become policy makers. Maybe that is an acceptable or good result. But, accepting that result means accepting that those experts are making the threshold political decisions that usually precede their fine-tuning. And, accepting that result would require truly embracing technocracy and accepting that the contested values and political struggles traditionally associated with electoral politics have been sublimated into the role of experts.

## 2. Abolition (or Something Like It)

Relatedly, there remains an open question about how to discuss *optimizing* criminal law and punishment if commentators disagree about *whether* there should be criminal law and punishment.<sup>173</sup> Put differently, a debate about the purposes of punishment and how best to achieve them appears to presuppose an agreement that academics, activists, policy makers, and members of the polity want the criminal system to do a better job achieving those ends. Even if we set aside the first-principles disagreements discussed in the previous section, what should we make of serious and growing strands of legal thought and activism that reflect “criminal law skepticism?”<sup>174</sup> If, for example, one believes that the criminal system is designed as an engine of social control to advance racial subordination, to reify class hierarchies, or to preserve inequality,<sup>175</sup> it seems unlikely that the prospect of a better

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169. Cf. KENNEDY, *supra* note 38, at 108 (“Expertise is special knowledge made real as authority in struggle.”).

170. *Id.* at 104.

171. See *infra* Part III.B.1.

172. See BRINT, *supra* note 105, at 17 (“Without a strong sense of the public and social purposes served by professional knowledge, professionals tend to lose their distinctive voice in public debate.”).

173. As I see it, the turn to educational expertise reflects a belief that institutional actors need to do a *better* job. In other words, the claim or analysis relies on a belief that the system can and should be optimized.

174. See generally Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27 (2020).

175. Recent U.S. abolitionist accounts generally rely on such claims. See generally Butler, *supra* note 161; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1188 (2015); Roberts, *supra* note 161. Not all abolitionist arguments reflect this frame or U.S.-specific story of raced and classed subordination, but a general claim that the institutions of punishment are irredeemable remains a common feature. See, e.g., WILLEM DE HAAN, *THE POLITICS OF REDRESS: CRIME, PUNISHMENT, AND PENAL ABOLITION* (1990); THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* (2015); Máximo Langer,

functioning system steered by experts is particularly appealing or responsive. A system that does a *better* job delivering abuse, injustice, and violence may be even more objectionable than one that is slapdash and poorly run.<sup>176</sup>

By way of example, take the case of Eighth Amendment conditions-of-confinement challenges. Incarcerated people bring numerous lawsuits arguing that they are being deprived of their constitutional rights due to the inhumane state of the prisons in which they are held.<sup>177</sup> Via the Prison Litigation Reform Act of 1995, Congress dramatically limited the ability of incarcerated plaintiffs to bring such suits and empowered federal judges to dismiss them earlier and more easily.<sup>178</sup> The landscape of prison law, then, reflects strong norms of deference in which judges throw up their hands and decline to interfere with the expertise of prison officials.<sup>179</sup> Academics and advocates have bemoaned this approach and the deference to experts.<sup>180</sup> But why?

The answer may be that the Federal Bureau of Prisons (BOP) or state equivalents are not experts and therefore should not be entitled to set policy, make rules, and govern the day-to-day operations of carceral institutions. That is, deferring to the BOP is somehow worse than deferring to some other agency (e.g., the Environmental Protection Agency, the Food and Drug Administration, or other agencies presumed to base their decision-making authority on expertise) because the BOP lacks the expertise of those other agencies. If so, though, why?

I take it that the answer reflects the mix of two related impulses<sup>181</sup>: (1) there is no such thing as expertise in caging people—it is cruel and inhumane, and no amount of educational or vocational experience should constitute expertise such that an actor is worthy of deference; and (2) even if some correctional officials might be experts (by dint of education, on-the-job experience, or some mix of the two), they are unworthy of deference and

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*Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020); cf. FOUCAULT, *supra* note 63, at 277 (“For the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well in producing delinquency . . .”).

176. Certainly, this may not be true, and it may well depend on the specifics. But I do think it is an open question. Cf. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2196–98 (2013) (arguing that providing counsel to indigent criminal defendants might not actually lead to more substantive justice and might legitimate an unjust system); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–32 (1995) (making a similar argument regarding the death penalty).

177. See generally Schlanger, *supra* note 82.

178. See *supra* note 86.

179. See generally Dolovich, *supra* note 84.

180. See *supra* note 81 (collecting sources).

181. The different treatment of criminal law and other expert-dominated areas may also have less to do with theoretical distinctions, and more to do with the social salience and accessibility of the issues at hand in the criminal context. See BIBAS, *supra* note 14, at xvii (“In other areas of government, rational apathy and faith in expertise leads voters to defer to experts . . . . In contrast, many ordinary citizens do not defer to criminal justice experts but show passionate interest in how insiders handle criminal cases.”).

policymaking authority because of the cruelty of their enterprise.<sup>182</sup> Similar impulses may rear their heads elsewhere in discussions of criminal policy and help to explain why progressive and left commentators, who are otherwise enthusiastic about agency deference, remain hostile to delegations of power in the criminal realm.

In other words, if a significant strand of scholarship and activism relating to the criminal system contests the fundamental legitimacy or desirability of its institutions,<sup>183</sup> what role could experts possibly play? Perhaps, experts could produce better plans for scaling back and ultimately doing away with prisons, prosecutions, and policing. (And, indeed, maybe that's the understanding of expertise's potential that helps undergird some commentators' proposals.) Nevertheless, it is worth noting how that understanding of expertise differs from the model of expertise evoked by analogies to other corners of the administrative state. The turn to educational expertise presumes that—even if the criminal system shouldn't resemble an administrative or managerial process—the system can be improved by empowering skilled and knowledgeable actors to manage the system and make it run better.<sup>184</sup> If “running better” means not running at all, then this turn to educated experts appears to hold much less promise.

### B. Values and Assumptions

Even if there were an agreed-upon purpose of the criminal system, turning to experts to achieve that desired purpose still should raise some concerns. The primary justifications for expertise articulated in many corners of the literature sound in the language of neutrality and reliability.<sup>185</sup> Unlike lay voters, experts bring something special—their analysis and proposals are supported by a specific scientific (or quasi-scientific) method. Biases and imperfections might sneak into that analysis, but better data collection, more sophisticated regressions, greater methodological rigor, and better-trained experts could minimize those fears. In short, experts purport to offer indicia of neutrality, rationality, and reliability, while voters, community members, and others whose preferences, decision-making, and interpretive approaches may reflect emotion, prejudice, or irrationality.

To be clear, I share concerns about prejudice and moral panics in the drafting and enforcement of criminal law.<sup>186</sup> Any account of mass

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182. See Levin, *supra* note 12, at 80–81.

183. See *supra* note 175 (collecting sources).

184. See *supra* Part II.B.

185. See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 765 (2005) (“When the Supreme Court upheld the Sentencing Commission against separation of powers challenges in *Mistretta v. United States*, it characterized the agency as an ‘expert body’ engaged in an ‘essentially neutral endeavor.’ The image of the Sentencing Commission as an independent agency, divorced from politics, was a strong one.” (footnotes omitted)).

186. As discussed later, though, framing the problems with the criminal system as its irrationality or emotion-driven dimensions understates the ways in which rationality and what purports to be cold neutrality have actually operated as significant drivers of mass incarceration and the new penology. See *infra* Part III.B.2. See generally Malcolm M. Feeley

incarceration (whether framed as pro-technocracy/bureaucracy or not) needs to grapple with the role of electoral politics and public support for punitive policies.<sup>187</sup> But, this pro-expert frame often understates or sidesteps two interrelated issues: (1) the ways in which expertise, data, and ostensibly neutral methods are always embedded in politics and (2) the reality that experts (both vocational and educational), not just emotion-driven voters, have been key players in constructing the carceral state. In this section, I address each concern in turn.

### 1. Politics All the Way Down

To a certain extent, many reformist, pro-expertise arguments rest on an analogy to administrative law and a belief that social science and apolitical decision-making could lead more efficiently to objectively good policy. Importantly, though, even within the realm of administrative law, expertise—particularly when framed as apolitical—remains a fraught concept. As one commentator puts it, “By the end of the twentieth century, the New Deal view of the agency-as-expert—providing neutral, sociotechnical expertise to resolve society’s problems—was all but dead, and the agencies’ authoritative role was in a state of crisis.”<sup>188</sup> Part of that crisis stemmed from a recognition that “sociotechnical expertise” was much harder to divorce from policy questions and policymaking than it appeared.<sup>189</sup> While “[l]egal institutions and the citizenry at large” continue to “suffer from a science obsession, assuming that if only we had answers from science, we would know what regulatory decisions are ‘correct,’” that view runs headlong into the realities of policymaking.<sup>190</sup> “[T]he ultimate decisions that must be made are policy choices.”<sup>191</sup> Even when expertise is framed in scientific terms or is grounded in scientific methods, “policy informs everything from how an experiment is designed to how results are interpreted and communicated.”<sup>192</sup>

That observation certainly hasn’t led to the demise of the administrative state. But, these insights have helped fuel a broader set of critiques of expertise and expert-based decision-making. In describing the rise of

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& Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992).

187. See generally FORMAN, *supra* note 7; GOTTSCHALK, *THE PRISON AND THE GALLOWS*, *supra* note 7; NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); MILLER, *supra* note 9.

188. Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2025 (2015).

189. See *id.* (“[I]t became increasingly apparent—through a variety of sources—that the science-intensive problems faced by federal agencies were even more policy-laden than initially believed and that, consequently, the agencies enjoyed substantial policymaking power in selecting the best alternative from among a wide range of choices.”).

190. Meazell, *supra* note 119, at 744.

191. *Id.*

192. *Id.*; see also EDLEY, *supra* note 37, at 190 (calling for agencies to “frankly acknowledge the role of political, ideological, or subjective analyses in their reasons and findings rather than attempting to obscure those elements behind the filigree so readily generated by the scientific and adjudicatory fairness methods of decision making and explanation”).

“systems analysis” and cost-benefit analysis as the dominant approaches to policy questions during the mid-twentieth century, Professor Bernard Harcourt has stressed the ways in which social scientific or scientific language masks politics.<sup>193</sup> Despite the purported neutrality of the experts tasked with solving social problems, decisions about policy were

inevitably going to involve choices . . . that are invariably normative and political in nature. They are decisions that implicate political values. However, they are treated as a technical step in the [systems analysis] and most often delegated to the systems analysts, public policy professionals, or cost-benefit experts rather than to the democratic political process. And therein lies the problem: systems-analytic methods are portrayed as scientific, objective, and neutral tools, when in fact they necessarily entail normative choices about political values at every key step.<sup>194</sup>

Similarly, in her genealogical look at the “idea of ‘the criminal justice system,’” Professor Sara Mayeux argues that the use of both the system metaphor and the rhetoric of systems theory invites a specific vision of criminal law and institutional change.<sup>195</sup> The language connotes a set of actors and institutions as “self-regulating, through various governing mechanisms and feedback loops . . . and as always working towards some systemic function or goal. Once mapped and understood, systems can be modified—they can be made more efficient, or more accurate—but only within some outer set of limits or bounds.”<sup>196</sup>

In both accounts, the turn to a “system” as the metaphor for the messy, localized, and highly context-specific administration of criminal law invites a certain vision steeped in science, logic, inevitability, and perfectibility. Within the preestablished confines of the system, experts “have learned to see order and system in the world rather than struggle, and too often experience their expertise as clear and persuasive, underestimating the plasticity, ambivalence, and conflicted nature of what they know.”<sup>197</sup> The vision is tempting, not only because it may jibe with the worldview of managerial and professional class commentators who see in it a sort of clarity and familiarity (i.e., these are, after all, the sorts of problems that we have been trained to solve),<sup>198</sup> but also because it is so eminently *manageable*.<sup>199</sup> Thinking about a criminal system that could be assessed, calibrated, and then repaired invites proposals, policy analysis, and a shared sense that if only the

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193. See generally Harcourt, *supra* note 11.

194. *Id.* at 421.

195. Mayeux, *supra* note 11, at 58–60.

196. *Id.* at 60.

197. KENNEDY, *supra* note 38, at 277.

198. Indeed, this vision also resonates with a certain characterization of “legal science” or a formalist understanding of the practice of law. See SCHLEGEL, *supra* note 55, at 1.

199. See Wagner, *supra* note 188, at 2024 (“This important role of agency-as-expert coincided with the inherently optimistic belief that there were ‘objectively correct solution[s] to the country’s problems.’” (quoting Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 417 (2007))).

right people, resources, and metrics were deployed, society could get it right.<sup>200</sup>

And therein lies the appeal of educational expertise—the conception that goes hand in hand with the scientific approach critically described by Harcourt and Mayeux. Politics are messy. People are unpredictable and irrational. And, confronting the specific, localized pathologies of thousands of criminal systems is daunting. Turning to experts and their potential neutral principles and applications provides some optimism and promises to transform a Sisyphean task into something digestible, manageable, and improvable—if not actually fixable.<sup>201</sup>

The problem, of course, is that such an imagined system, administered by experts, is only that: imagined.<sup>202</sup> Politics, biases, value judgments, and assumptions about what the world should look like or what is an acceptable policy solution necessarily shape any interpretive exercise.<sup>203</sup> Once we move past some universe of generally agreed-upon facts about the world, what comes next necessarily implicates ideology, politics, and a set of contested assumptions about what to do with those facts.<sup>204</sup> Or, to return to the beginning of the Article, even if there are factual questions that could be resolved with some degree of certainty (as in the case of how a virus is transmitted), that does not tell us what to do with the answers to such questions. Just because we know that a virus is transmitted via aerosols, for example, does not and cannot answer the difficult policy questions of how to respond to that knowledge and how to contain that virus.<sup>205</sup>

Granted, a truly postmodern account might suggest that there are no such “generally agreed upon facts”—every truth claim is socially constructed and contingent.<sup>206</sup> But, one need not accept such a totalizing critique or relativist

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200. See Foucault, *supra* note 24, at 30 (“This re-inforces [sic] the idea that for judicial proceedings to be just they must be conducted by someone who can remain quite detached, by an intellectual, an expert in the realm of ideas.”).

201. This is not to say that more small-bore, fine-grained attention to the detailed operation of specific “criminal justice systems” might not be doable and might not bear fruit from both an academic perspective (i.e., allowing for greater precision in the object of study) and from a policy standpoint (i.e., allowing for greater precision in the institutional levers that require adjustment, improvement, or elimination).

202. See *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 359 (1938) (“The professed ideal of an independent commission of experts above politics and reaching scientific results by scientific means, has no correspondence with reality.”).

203. Cf. BIBAS, *supra* note 14, at 165 (“[T]oo often professionals are blind to their own shortcomings and how their own views and self-interest need checking too. Insiders need to check outsiders, but outsiders likewise need to check insiders.”); WEBER, *supra* note 114, at 28 (“No science is absolutely free of assumptions . . .”).

204. See KENNEDY, *supra* note 38, at 131 (“It is useful to distinguish knowledge that is widely shared or taken for granted from points about which people in the field disagree when they argue about what is legal, what policy to adopt, or who should do what. The line between them is not firm.”).

205. See WEBER, *supra* note 114, at 17 (quoting Tolstoy’s statement that “[s]cience . . . has no answer to the only questions that matter to us: ‘What should we do? How shall we live?’”).

206. See, e.g., James Clifford, *Introduction: Partial Truths*, in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* 1, 6 (James Clifford & George E. Marcus eds., 1986) (arguing that some postmodern critiques have resorted “to the banal claim that all truths

posture in order to conclude that there are only so many uncontested facts and that “data” can only ever get us so far in a debate about policy.<sup>207</sup> In other words, even if we all agreed on data about crime rates, the frequency of police stops for different racial groups, or the likelihood of recidivism, that wouldn’t tell us how to respond or what to do with that data.

Data, information, and facts (which may or may not be one in the same) are not self-interpreting or self-executing.<sup>208</sup> To have meaning and to translate to discrete policies, they require someone to do the interpreting and analyzing.<sup>209</sup> All of which is not to say that data about the criminal system and the administration of criminal law are not helpful; they are.<sup>210</sup> But we should be careful about identifying *how* and *why* they are helpful—not because they allow for incontrovertible best practices, but because they help to clarify what is actually happening on the ground and to lay bare the politics and heuristics that the “experts” are applying.<sup>211</sup>

Scholars of administrative law have identified a related set of practices and impulses as “the science charade.”<sup>212</sup> In the agency context, “scientists and bureaucrats fail to identify the gaps left by uncertain science or to reveal the policy choices made to fill those gaps. . . . These behaviors undercut transparency . . . [and] hinder participation and accountability because they drown policy choices in inaccessible science.”<sup>213</sup> That is, while judges often

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are constructed”); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 354 (1995) (“[P]ostmodernism signals a movement away from forms of legal modernism premised upon the belief in universal truths, core essences, or foundational theories.”). On the construction of “facts” and “truth,” see generally MARY POOVEY, *A HISTORY OF THE MODERN FACT PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY* (1998).

207. See KENNEDY, *supra* note 38, at 131. See generally HARCOURT, *supra* note 29; Meares & Harcourt, *supra* note 29.

208. See, e.g., Meazell, *supra* note 119, at 743 (“The bottom line is that where there is scientific uncertainty, policy must fill the gap.”).

209. See, e.g., Gruber, *supra* note 30, at 3214–15; WEBER, *supra* note 114, at 17–18.

210. See generally Crespo, *supra* note 90; see also Meares & Harcourt, *supra* note 29, at 735; Ocen, *supra* note 16, at 239.

211. See, e.g., Meares & Harcourt, *supra* note 29, at 735 (“Judicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decision-making.”); Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1287 (1999) (“[E]mpirical knowledge is most useful in unmasking the theoretical assumptions that undergird constitutional law . . . .”); Schlag, *supra* note 18, at 8 (“[A]ny responsible rejection of expertise as a knowledge-form must contend with the ‘the compared to what?’ question—a question which no doubt would reveal that some (many?) of the available options are arguably even less appealing.”).

212. See generally Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

213. Meazell, *supra* note 119, at 751–52.

base their deference on administrative expertise and appeals to science,<sup>214</sup> the veneer of scientific objectivity may be thinner than it initially appears.<sup>215</sup>

In fairness, thoughtful and reflective calls for expertise tend to concede and internalize some of these critical observations. Scholars of the administrative state and other expert-based structures have outlined the ways in which everything from outright capture to implicit bias may well interfere with an idealized technocratic model.<sup>216</sup> Indeed, a major question in many accounts is how best to go about insulating experts from external political forces,<sup>217</sup> or perhaps how to incorporate political inputs in ways that support democratic values without undermining expert authority.<sup>218</sup>

While those strike me as admirable goals, and while I appreciate the move to add nuance to the technocratic turn, I still think that these moves raise two unanswered questions: First, what is the vision of “politics” at play here? I read most of these accounts as focused on *electoral* politics. The claim is that there could be experts insulated (at least relatively) from electoral pressures. Given the way that elections drive punitive politics, perhaps that’s a worthy goal. But, what about politics in the sense of *ideology*?<sup>219</sup> That is, appointed judges may be insulated from the wrath of voters, but they are political actors in that they are embedded in a political culture and decide cases filtered through the lens of their political commitments.<sup>220</sup> I see that

214. See *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (“[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”); see also Meazell, *supra* note 119, at 734–35 (describing this process as “super deference”).

215. See Gruber, *supra* note 30, at 3215 (“Distributional analysis thus calls on critical empirical scholars to retain skepticism of objectivity, be aware that design choices and data labeling are value laden, and be mindful of critical race, feminist, and other anti-subordination concerns when collecting and presenting data.”).

216. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–24 (2010) (describing widespread scholarly concern about capture); Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 432–37 (2019) (describing approaches to dealing with capture); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766–71 (1997).

217. See, e.g., BARKOW, *supra* note 7, at 171 (attributing the failures of the U.S. Sentencing Commission, at least in part, to overinvolvement from Congress and arguing that other expert bodies require further insulation).

218. See, e.g., Friedman & Ponomarenko, *supra* note 41, at 1834 (“[P]olicing agencies may only act pursuant to sufficient democratic authorization. Such authorization can . . . be the product of administrative notice-and-comment rulemaking, in which public participation is welcomed. . . . But, in one form or another, democratic authorization is vital.”); Slobogin, *supra* note 41, at 139 (advocating for administrative-agency-style oversight of policing that incorporates aspects of “notice-and-comment”).

219. See Brian Z. Tamanaha, *The Several Meanings of “Politics” in Judicial Politics Studies: Why “Ideological Influence” Is Not “Partisanship,”* 61 EMORY L.J. 759, 770 (2012) (“‘Politics’ is also often used as synonymous with ‘ideology’—an opaque term that encompasses the totality of a judge’s views about politics, morality, economics, society, religion, and life.”).

220. See JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 1–4 (1983); GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY*



vision of politics as critically important but also inescapable. All the insulation in the world doesn't seem as though it could (or perhaps should) keep experts from being *political* actors in that sense.

Second, if these deeper political commitments or biases are inescapable, then what is the advantage of relying on these educated experts over other political actors? Once we concede that experts are susceptible to the same prejudices and vicissitudes as voters and politicians, don't they lose much of their epistemic advantage? If they cannot offer neutrality, don't they risk reinscribing a set of political preferences, but doing so with the patina of legitimacy, science, and neutrality?<sup>221</sup> Maybe they are still better than other deciders,<sup>222</sup> but I see that as a fundamentally political question and one that should be framed as such and situated within a conversation about the "commitments and constraints" of experts.<sup>223</sup> Further, any such discussion should involve considering the potential costs of expert legitimacy—should we be concerned about decision-makers' ability to wrap their decisions in the language of science or the potentially unassailable trappings of authority?

## 2. A Carceral Track Record

The construction of the carceral state certainly has relied on voters' punitive instincts and the mobilization of moral panics.<sup>224</sup> But, an account of mass incarceration that lays the blame entirely at the feet of nonexperts and political forces (in the sense of electoral politics) would be woefully incomplete. As Professor Alice Ristroph has argued, "measures of general public punitiveness cannot provide a full account of how or why experts, political officials, and legal professionals built a carceral state."<sup>225</sup> Indeed, a thorough reckoning with how we arrived at the current state of affairs and how we may take a different path going forward requires confronting the "models and expectations of criminal law held by the most influential actors in the criminal legal system," including elite policy makers and academics.<sup>226</sup>

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SHAPE THE LEGAL MIND 8–13 (1999). A similar observation could be made about career federal prosecutors. If electoral politics were the only evil to be avoided or were the clear driver of aggressive prosecutions, misconduct, and disparities in charging and plea bargaining decisions, the federal system should be dramatically less objectionable than state systems.

221. See Ruha Benjamin, *Introduction: Discriminatory Design, Liberating Imagination*, in CAPTIVATING TECHNOLOGY: RACE, CARCERAL TECHNOSCIENCE, AND LIBERATORY IMAGINATION IN EVERYDAY LIFE 1, 3 (Ruha Benjamin ed., 2019).

222. See generally Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218 (2019) (criticizing algorithmic risk assessment for recidivism analyses).

223. See Kohler-Hausmann, *supra* note 60, at 267 (calling for further study of "the particular commitments, constraints, and conceptualizations of current legal actors working with the rules we hope to change"); see also Meazell, *supra* note 119, at 746 ("I do not mean to suggest there is anything inherently wrong with such policy choices. To the contrary, they cannot be avoided, and good scientific practice involves documenting those choices, providing transparency and accountability.").

224. See *supra* note 7 and accompanying text.

225. Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1955 (2019).

226. *Id.*

When it comes to the construction of the 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.<sup>227</sup> It is not at all clear that highly educated actors and elite spaces have been immune to these cultural pathologies. From the Federal Sentencing Guidelines,<sup>228</sup> to problem-solving courts,<sup>229</sup> to algorithmic risk assessment tools,<sup>230</sup> many of the expert- or data-driven criminal justice reforms have failed to undermine the logics of the carceral state.<sup>231</sup> Some of the most maligned theories and practices of criminal law's administration over the last half century haven't been the product of tough-on-crime voters or politicians; instead, they have been crafted by the sorts of experts frequently presented as potential technocratic saviors.<sup>232</sup> These experts have provided new vocabularies, new tools, and new frameworks through which to consider the problems of the criminal system, but they have not necessarily addressed a host of those problems, such as expanding carceral populations, disparities across axes of race and class, and the significant numbers of people under state surveillance or control.<sup>233</sup>

In their influential 1992 article, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, Professors Malcolm Feeley and Jonathan Simon argued that the increasingly dominant paradigm for criminal law and punishment was not necessarily grounded in a purely moralist retributive frame.<sup>234</sup> The governing ideology that Feeley and Simon identified as “the new penology” was not visceral, emotional, or rooted in populist impulses; it was decidedly technical, framed in the language and logic of expertise.<sup>235</sup> In their account, the new penology

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227. See *supra* note 175 and accompanying text.

228. See *supra* note 134 and accompanying text.

229. See McLeod, *supra* note 100, at 1591. See generally Collins, *supra* note 95; Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595 (2016); Miller, *supra* note 100.

230. See Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1723 (2019). See generally VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018); BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2006).

231. See generally Collins, *supra* note 149.

232. See, e.g., James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29 (articulating the theory of broken windows policing).

233. See, e.g., Jessica M. Eaglin, *The Perils of “Old” and “New” in Sentencing Reform*, 76 N.Y.U. ANN. SURV. AM. L. 355, 373–74 (2021) (describing issues with sentencing guidelines and actuarial risk assessment); Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 543 (2019) (“By placing faith in technology to save us from ourselves, are we turning a blind eye to the structural problems that drive reliance on incarceration and the criminal apparatus more generally?”).

234. Feeley & Simon, *supra* note 186, at 451.

235. See *id.* at 452 (“A central feature of the new discourse is the replacement of a moral or clinical description of the individual with an actuarial language.”).

is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness. The task is managerial, not transformative. It seeks to *regulate* levels of deviance, not intervene or respond to individual deviants or social malformations.

. . . . It seeks to sort and classify, to separate the less from the more dangerous, and to deploy control strategies rationally. The tools for this enterprise are “indicators,” prediction tables, population projections, and the like. In these methods, individualized diagnosis and response is displaced by aggregate classification systems for purposes of surveillance, confinement, and control.<sup>236</sup>

In other words, even as punitive populism defined much of mass cultural discourse and helped shape electoral battles, the expert-driven universe of criminal justice policy reflected an “emphasis on . . . formal rationality.”<sup>237</sup> The new penology, then, represents an attempt to perfect social control: “It is about identifying and managing unruly groups. It is concerned with the rationality not of individual behavior or even community organization, but of managerial processes.”<sup>238</sup>

The recognition that carceral logics are about control as much as, if not more than, punishment has been reflected in the growing focus on misdemeanors, low-level urban courts, and the process of “managerial justice.”<sup>239</sup> This insight resonates with Judge Lynch’s frame of the criminal system and the rationale that has in turn led to an embrace of administrative models for reform.<sup>240</sup> But it also reflects a very different outlook: the problem isn’t that our administrative system of criminal law is poorly run or managed by the wrong experts; the problem is that the administrative model is one based on a logic of social control and the mass processing of marginalized people.<sup>241</sup> And, the experts (both the vocational ones and the educational ones) are guided by that same logic and approach.<sup>242</sup> Improving outcomes and dismantling these unjust institutions would require much more than greater expert involvement; it would require a deep reckoning with the fundamental logics that have allowed these institutions to proliferate in the first place.

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236. *Id.* (citations omitted).

237. *Id.* at 454.

238. *Id.* at 455.

239. See generally ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018).

240. See generally Lynch, *supra* note 97.

241. See Levin, *supra* note 12, at 82 (“If one believes that the system isn’t broken and actually is working as it’s supposed to (i.e., as a vehicle of social control targeted at marginalized populations), then the problem with the status quo is hardly its irrationality.”).

242. See generally ALEC KARAKATSANIS, *USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM* (2019); Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748 (2018).

## IV. LIVED EXPERIENCE AS EXPERTISE

The deconstruction of traditional expertise and the turn to a new, third model flows not only from the critiques traced in the previous part, but from another glaring question that advocates of technocratic governance often leave unanswered: who is an expert? At first blush, perhaps the answer seems clear: to the proponent of vocational expertise, an expert is the experienced institutional actor, and to the proponent of educational expertise, an expert is the well-educated person.

But who chooses those experts or assesses their qualifications? In the courtroom setting, of course, tests and inquiries allow judges to distinguish the “layperson” from the “expert.” In the scholarship and advocacy about the role of experts in policymaking, though, who stand as the gatekeepers, and how do they go about policing the boundaries of expertise? That answer is rarely explicit, but the implicit suggestion appears to be other elite actors—judges, elected officials, perhaps commissions, and maybe even academics.

For commentators focused on shifting power to marginalized groups, for those convinced by the critiques articulated in the previous part, and particularly for those who see those same elite actors as bearing responsibility for the current state of affairs, such an approach is hardly satisfactory. In this part, I outline what I take to be the critical response to the traditional conceptions of expertise—a move to reimagine experts and expertise as grounded in the theory and praxis of commentators committed to expanding public participation in criminal law. True to the overall theme and purpose of this Article, though, I also examine what I understand to be the unanswered questions raised by this third model of expertise. Given that this model or vision appears to have attracted less attention than the previous two, these critical questions are perhaps more speculative—there is not a dominant move or position in need of challenging and unpacking. Instead, my hope here is to highlight areas for further study and analysis.

*A. Deconstructing Expertise*

Recent years have seen a shift in legal scholarship about the criminal system. More and more academics have moved away from court-centric treatments of constitutional criminal procedure and doctrinal accounts of substantive criminal law’s development to focus on the politics and institutions of the carceral state.<sup>243</sup> One component of this move has been an expansion of sources and forms of knowledge about the criminal system that are treated as legitimate objects of study. From sociological accounts that focus on marginalized communities’ interactions with courts and police,<sup>244</sup> to treatments of activist literature as important sources from which to glean

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243. See generally NATAPOFF, *supra* note 239 (focusing on criminal law as a process of low-level social control); Levin, *supra* note 11 (describing these developments); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179 (2014) (describing often-neglected, nonjudicial forms of regulating police conduct).

244. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2097 (2017). See generally Bell, *supra* note 16.

policy proposals and different visions of institutional change,<sup>245</sup> new thinking about the criminal system reflects a capacious understanding of where academics should look to learn how the criminal system works (and doesn't).

The debates about acceptable and legitimate forms of knowledge as applied to criminal law are neither new nor unprecedented. Criminologist Mariana Valverde has critiqued the “questionable binary” that has persisted in the study of crime between “science (university-based science)” and “social reform.”<sup>246</sup> In calling for a new understanding of the place of crime in society, Valverde has proposed a deeper engagement with “miserology,” a collection of “non-institutionalized writings on pauperism, misery, political economy, and social reform that flourished in the 1830s and 1840s.”<sup>247</sup> These accounts—the work of novelists, social activists, and philanthropists—focused on crime in context and as a part of the struggles of a “new urban proletariat.”<sup>248</sup> Valverde decries the ways in which this nonformalized and nonacademic approach was rejected “in order to establish . . . respectable university-based endeavors.”<sup>249</sup>

In some sense, we might understand the third conception of expertise as rooted in a similar impulse that drives Valverde's project: a search for the new “miserologists,” for “ethically committed” insights into the injustices of the contemporary criminal system.<sup>250</sup> Rather than seeking the sorts of institutional and official qualifications that define the two traditional models of expertise, this third conception reflects Valverde's focus on the lived hardships of the individuals and communities that regularly are forced to grapple with the realities of violence, crime, policing, and the institutions of social control.<sup>251</sup>

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245. See generally Akbar, *supra* note 109; Akbar, *supra* note 14. See also Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 373 (2015); Rahman & Simonson, *supra* note 48, at 698; Simonson, *Police Reform*, *supra* note 16.

246. Valverde, *supra* note 16, at 332.

247. *Id.*

248. *Id.* at 330 (citation omitted).

249. *Id.* at 332.

250. See *id.*; see also Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 979–80 (2018) (arguing that treatments of misdemeanors too often exclude the practical realities of enforcement).

251. While reflecting a very different approach and set of political or ideological priors, this understanding of expertise might find some purchase with Hayek's characterization of “local knowledge”:

[T]here is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of general rules: the knowledge of the particular circumstances of time and place. It is with respect to this that practically every individual has some advantage over all others in that he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active coöperation. We need to remember . . . how valuable an asset in all walks of life is knowledge of people, of local conditions, and special circumstances.

Hayek, *supra* note 57, at 521–22. That said, “local knowledge” also may overlap significantly with certain types of vocational expertise.

Turns to a new model of expertise take different forms, and many are not necessarily framed or phrased as “expertise.”<sup>252</sup> But, they generally reflect an interest in centering voices that are seen as excluded—much like those of Valverde’s miserologists—from the dominant discourse of criminal law.<sup>253</sup>

Central to such a move is a reexamination of the structures and sources of knowledge that underpin much of law, the criminal system, and the expert institutions described in Part II.<sup>254</sup> This project requires recognizing the shortcomings of traditional sources of knowledge or expertise:

The legal scholar’s impulse is to say . . . [w]e know the problem. How are we going to fix it? But “we” do not have a rich understanding of “the problem.” Most legal and policy approaches that proceed under the banners of racial justice and economic justice reveal a breathtaking cluelessness—or, perhaps, willful flattening—of the nuanced realities that ghettoized African Americans face on a daily basis.<sup>255</sup>

That is, a more radical frame for addressing mass criminalization necessitates stepping outside of the confines of discussions about the “criminal justice system” and small-bore approaches to “criminal justice reform.”<sup>256</sup>

For example, Professor Amna Akbar has called for lawyers, legal academics, and elite actors in the legal system to “imagine with social movements.”<sup>257</sup> Akbar’s claim is rooted in a view that traditional legal thought and practice (including categories associated with progressive or left causes) are unduly constrained both in their conception of the problems to be solved and in their ambition for change.<sup>258</sup> And, despite popular characterizations of academics as out-of-touch producers of far-fetched and impractical proposals, Akbar contends that it is actually the activists and actors from marginalized and subordinated communities who have expanded the imagination or broadened the horizon of what society could look like and how the criminal system could be transformed.<sup>259</sup> Or, as attorney and abolitionist activist Derecka Purnell puts it, “People on the streets, people who are organizing, are gonna put certain things on the table that will rarely

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252. Indeed, as discussed in the next section, it is worth considering the costs and benefits of “expertise” as a frame or vehicle to advance the ends that might be associated with this model of expertise. And, there might be a fundamental tension at play in the characterization of the knowledge and experience described here as expertise. *See infra* Part IV.B.3. Or, as abolitionist activist Derecka Purnell puts it: “*the idea of being an abolitionist expert feels counter to the communal politics of abolition.*” Derecka Purnell (@dereckapurnell), TWITTER (June 17, 2020, 4:01 PM) (emphasis added), <https://twitter.com/dereckapurnell/status/1273375358298009601> [<https://perma.cc/94YU-AKA9>].

253. *See* Bell, *supra* note 43, at 211. *See generally* Matthew Clair, *Criminalized Subjectivity: Du Boisian Sociology and Visions for Legal Change*, 18 DU BOIS REV. 289 (2021).

254. *Cf.* BIBAS, *supra* note 14, at 34 (noting that some “outsiders” in criminal policymaking “are more knowledgeable and personally concerned . . . than the general public”).

255. Bell, *supra* note 16, at 710.

256. *See generally* Levin, *supra* note 164; Levin, *supra* note 11.

257. Akbar, *supra* note 14, at 479.

258. *See generally id.*

259. *See generally id.*

leave a lawyer's mouth. Like police abolition. Abolishing the carceral state. Ending prisons."<sup>260</sup>

Indeed, this turn to lived experience as expertise has been a staple of recent abolitionist theory and praxis.<sup>261</sup> In this space, there's often a focus on experience as granting authority to make a claim. For example, a significant amount of contemporary abolitionist organizing focuses on the experiences of people who have suffered interpersonal or state violence.<sup>262</sup> Part of the significance of the turn to lived experience as expertise in this context is how it complicates traditional framings of "victims' rights." Many activists pushing for abolition or radical approaches to criminal law frame their advocacy in terms of their own experiences of harm and violence.<sup>263</sup> But, in a departure from conventional framings of victim-centric advocacy, they deploy narratives of their experiences to critique the criminal system.<sup>264</sup> That is, by showing that people who have experienced harm do not necessarily favor punitive policies, this conception of expertise invites a broader reckoning with what it would really mean to prioritize victims. Perhaps those interventions would be punitive, but perhaps not.<sup>265</sup>

In a sense, this move resonates with intellectual and political traditions that emphasize resituating and reshaping narratives. From the movement for

260. *Introduction*, 132 HARV. L. REV. 1568, 1568 (2019) (quoting Derecka Purnell).

261. While reflecting a different politics and movement, abolitionist organizing in Scandinavia also has reflected a dynamic where currently and formerly incarcerated people were incorporated into policy discussions about how to address issues with incarceration. *See* MATHIESEN, *supra* note 175, at 5; *see also* McLeod, *supra* note 36, at 690.

262. *See generally* LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); McLeod, *supra* note 14.

263. *See, e.g.*, Camonghne Felix, *Aching for Abolition: As a Survivor of Sexual Violence, I Know Prison Isn't the Answer*, THE CUT (Oct. 1, 2020), <https://www.thecut.com/2020/10/aching-for-abolition.html> [<https://perma.cc/K3SV-VTHE>] ("I am a survivor, and have been for most of my life. I am also a prison abolitionist, and have been for most of my life . . ."); Victoria Law, *How Can We Reconcile Prison Abolition with #MeToo?*, FILTER (Sept. 25, 2018), <https://filtermag.org/how-can-we-reconcile-prison-abolition-with-metoo/> [<https://perma.cc/66VM-JMG3>].

264. *But see* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 772 (2007) (describing the concept of "the victim" as constructed to operate as a "tool of tough-on-crime penological goals").

265. *See, e.g.*, Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not "Transformative Justice." Here's Why*, THE APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/> [<https://perma.cc/239Z-PGWX>]; Mariame Kaba & Andrea J. Ritchie, *Opinion, We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, ESSENCE (Dec. 6, 2020), <https://www.essence.com/feature/breonna-taylor-justice-abolition/> [<https://perma.cc/L9S8-GUNR>].

participatory defense,<sup>266</sup> to postcolonial theory,<sup>267</sup> and critical race theory,<sup>268</sup> this turn is hardly unprecedented.<sup>269</sup> It represents an effort to rethink the structures of “subjugated knowledge” or “hierarchies of knowledge.”<sup>270</sup> And, such a move resonates with longstanding questions about how marginalized and subordinated communities can exercise agency.<sup>271</sup> This conception of expertise therefore appears to closely resemble versions of “standpoint epistemology,”<sup>272</sup> “which asserts that . . . systematically oppressed group[s] have superior knowledge of the character of their oppression than other individuals. This knowledge allows them to see social inequality and to challenge it where others cannot.”<sup>273</sup> Taking Professor Mari Matsuda’s formulation:

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266. See Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1289 (2015) (“[Participatory defense empowers] those whom the lawyers represent to be change agents in their own right. Participatory defense can trigger exponentially greater change—indeed, a cataclysmic shake-up of the criminal justice system—by adding a huge number of strong new voices . . .”); Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 635 (2020).

267. See, e.g., Robin D.G. Kelly, *A Poetics of Anticolonialism*, in AIMÉ CÉSAIRE: DISCOURSE ON COLONIALISM 7, 28 (Joan Pinkham trans., Monthly Rev. Press 2000) (1955); GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 309 (1999). See generally Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossber eds., 1988) [hereinafter Spivak, *Can the Subaltern Speak?*].

268. See, e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1760 (2003); Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements That Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1407 (2000) (“The task of critical opposition is to disinter such knowledge in order to ‘establish a historical knowledge of struggles and to make use of this knowledge tactically today.’”).

269. Indeed, Akbar has argued that a turn to a movement-centric approach to criminal legal transformation reflects a set of longstanding radical legal traditions focused on *shifting expertise*. Akbar, *supra* note 14, at 424 (“The movement accepts and centers much of what critical race theory and feminist law scholarship have argued for: the voices, the experience, and the expertise of Black and other people of color, immigrants, women, LGBTQ, trans, and gender-nonconforming people.”).

270. See Michel Foucault, *Two Lectures*, in POWER/KNOWLEDGE, *supra* note 24, at 78, 82 (“[B]y subjugated knowledges one should understand something else . . . namely, a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity.”).

271. See generally FREIRE, *supra* note 24; Spivak, *Can the Subaltern Speak?*, *supra* note 267.

272. Olúfẹ̀mí O. Táíwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, PHILOSOPHER (2020), <https://www.thephilosopher1923.org/essay-taiwo> [<https://perma.cc/4MN6-3VKM>] (“The deferential approach to standpoint epistemology often comes packaged with concern and attention to the importance of lived experience.”).

273. Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 7–8 (2005). See generally WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 41–42 (1995); SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN’S LIVES 117–19 (1991); NANCY C.M. HARTSOCK, THE FEMINIST STANDPOINT REVISITED AND OTHER ESSAYS (1998); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 872–76 (1990) (describing and critiquing standpoint epistemology); Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 210 (1991); Dorothy E. Smith, *Women’s*



[T]hose who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.<sup>274</sup>

But, it is worth considering some of these recent academic arguments and this third turn to expertise as something new and—at least in part—distinct because of the language of expertise and the adoption of expertise as a frame or vocabulary for advancing antisubordination interests.<sup>275</sup> That is, scholars and activists appear to be moving beyond seeing lived experience as producing objects of study or even producing alternative frames for acquiring knowledge<sup>276</sup> to suggesting that lived experience should be seen as producing *authority*.<sup>277</sup> In this account, “[p]rivileging everyday knowledge is an attempt to locate authority or expertise with those who experience a circumstance rather than generating it from scholars, policymakers, or other outsiders who lack access to authentic understanding of events, relationships, behaviors, values, or historical antecedents to current phenomena.”<sup>278</sup>

For example, Professor James Binnall, a previously incarcerated criminology professor, has called for greater attention to the “experiential carceral knowledge” possessed by people with criminal records.<sup>279</sup> Professor Jocelyn Simonson has urged “scholars and reformers to imagine what it would mean to temporarily set aside a desire for traditional ‘experts’ and ‘evidence-based’ practices” in debates about policing.<sup>280</sup> Instead, she calls

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*Perspective as a Radical Critique of Sociology*, reprinted in *THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL AND POLITICAL CONTROVERSIES* 21 (Sandra Harding ed., 2004).

274. Matsuda, *supra* note 24, at 324. *But see* Devon W. Carbado, *Critical What What?*, 43 *CONN. L. REV.* 1593, 1637 (2011) (expressing skepticism about the role or necessity of certain aspects of narrative and standpoint theory in critical race theory).

275. *See* Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 *MERCER L. REV.* 715, 715 (2018) (“[E]mpowering defendants’ families to assist or even challenge defense attorneys . . . is truly radical. It shifts notions of expertise and questions deeply-embedded power structures between attorneys and clients.”); Simonson, *Police Reform*, *supra* note 16, at 838–43.

276. *See* Joanne Conaghan, *Schlag in Wonderland*, 57 *U. MIAMI L. REV.* 543, 561–62 (2003) (“[T]o invoke the notion of standpoint is not necessarily to invoke the idea of an epistemically privileged position.”); Susan H. Williams, *Utopianism, Epistemology, and Feminist Theory*, 5 *YALE J.L. & FEMINISM* 289, 308 (1993) (“[T]hose excluded from the dominant culture can and do develop alternative perspectives critical of that culture. . . . [But] such alternative perspectives [do not] have any prima facie epistemic advantage over the dominant culture.”).

277. I mean “authority” here in the sense not only of providing legitimate knowledge but also in the sense of contributing to, or perhaps even enacting, policy or contributing to governance.

278. BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 130 (2012).

279. James M. Binnall, *Carceral Wisdom*, *INQUEST* (Oct. 15, 2021), <https://inquest.org/carceral-wisdom/> [<https://perma.cc/HL5Z-CMN7>].

280. Simonson, *Police Reform*, *supra* note 16, at 788 (footnotes omitted).

for “shifting power to policed populations” and focusing on “movement” arguments.<sup>281</sup> This approach, she argues,

brings a different view of expertise, and promotes a different kind of expert. . . . [S]ocial movement visions of power shifting are not just about taking power away from elite actors. They also come with very specific, even if sometimes contradictory, ideas about to whom power should be given: “directly impacted” people; people who live in particular neighborhoods; people with criminal records; Black, Latinx, and Indigenous People. These are populations who live in “race-class subjugated communities” who not only tend not to have much political power, but who are also consistently excluded from most forms of public participation in the criminal legal system. Under the power lens, these people do not just become important subjects of policing governance; they become *experts themselves*.<sup>282</sup>

As Simonson describes it, activists’ demands for greater involvement in the lawmaking process are “centered on a key idea: that directly impacted people are themselves the policy experts on ‘public safety’ to whom we should be listening for specific, grounded proposals for change.”<sup>283</sup>

Similarly, Akbar argues that focusing on social movements and subordinated or marginalized communities is not just a vehicle to achieve better outcomes or to advance a given political agenda.<sup>284</sup> Rather, the project “is about a vision to imagine expertise very differently than law scholarship.”<sup>285</sup> And, Professor Monica Bell has argued that,

as subordinates of the criminal justice system, members of marginalized communities are especially knowledgeable about systemic injustice and thus especially capable of and responsible for rectifying it. System participants, then, should cede power to those directly affected not only because it may make the system more just, but also because it will enable directly affected individuals and communities to better meet their own societal obligations.<sup>286</sup>

Nevertheless, adopting perhaps a more pluralist conception, Bell also asks: “How do we hold space for both the (bounded) expertise of academics and technocrats and the (bounded) expertise of the people who could benefit most from the achievement of racial and economic justice, those who will suffer most if it continues to elude us?”<sup>287</sup>

Ultimately, Bell’s question invites deeper engagement with how bounded expertise is and whether, or to what extent, this third conception of expertise

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281. *Id.* at 787.

282. *Id.* at 850–51 (footnotes omitted); *cf.* Gayatri Chakravorty Spivak, *Scattered Speculations on the Subaltern and the Popular*, 8 *POSTCOLONIAL STUD.* 475, 482 (2005) (arguing that Western academics should “learn from below, *from* the subaltern, rather than only study him(her)”).

283. Simonson, *Police Reform*, *supra* note 16, at 829.

284. *See* Akbar, *supra* note 14, at 425.

285. *Id.*

286. Bell, *supra* note 43, at 208 (citation omitted).

287. Bell, *supra* note 16, at 712.

is pluralist or represents an alternative model of exclusive governance to the ones proposed by some supporters of more traditional technocracy.<sup>288</sup> But, whatever approach to policymaking this expert turn takes, it demonstrates that “the relations between politics and culture on the one hand and knowledge on the other are neither fixed nor definitively knowable.”<sup>289</sup> That is, there is nothing natural about a social ordering that constructs expertise in one way or that allows experts a certain role in the political or policymaking process.<sup>290</sup>

### B. *Reconstructing Expertise*

In many ways, the deconstructive move that leads to the third conception of expertise is powerful and necessary. It takes advocates of technocracy seriously on their own terms but challenges the underlying assumptions of that approach. In doing so, advocates of lived experience as expertise highlight the weak points in the technocratic turn. They illustrate the ways in which defining expertise and deferring to experts is fundamentally a political project that cannot be insulated from politics and value judgments. And, they help to underscore the limitations of thinking about expertise and democracy as conceptually distinct and in tension when it comes to setting criminal policy.<sup>291</sup>

Additionally, the third model of expertise helps to drive home the ways in which the criminal system, as a vehicle of social control and for managing populations, so often excludes the voices of those most directly affected by both crime and law enforcement.<sup>292</sup> It suggests that the criminal system cannot simply be an object of study and that many claims about the epistemic advantage of elite actors and traditional experts reflects a skepticism about the abilities of historically marginalized communities to engage in meaningful self-governance.

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288. See *infra* Part IV.B.3.

289. Schlag, *supra* note 18, at 71.

290. See *infra* Part IV.B.3; see also Levin, *supra* note 11, at 637 (“[R]egardless of discipline, training, or method, we might be tempted to reenact the ‘questionable binary’ that would elevate one form of critique or study over another. Maybe that binary has its place. But . . . ‘criminal justice thinking’ can take many forms. We neglect those forms and those voices at our peril.”); Ocen, *supra* note 16, at 228 (“I argue for the explicit inclusion of external actors, such as community activists, who are often unaccounted for in empirical projects despite their important role in driving institutional action.”).

291. Cf. Dubber, *supra* note 140, at 99 (arguing that a new “penal code” should grapple with “principles that connect the penal law to the power of a democratic state over its constituents”).

292. See Rahman & Simonson, *supra* note 48, at 698 (“[W]hen people directly affected by the criminal legal system attempt to intervene in policy debates over criminal law and procedure, they find their calls muted because they are members of a population that has been systematically disenfranchised by the very systems of criminal law that they aim to reform.”); Jain, *supra* note 250, at 954 (describing “a profound disconnect between the lived experience of misdemeanants and the legal doctrines that govern the criminal law”); Moore et al., *supra* note 266, at 1286 (describing strategies to empower “the people who are most directly affected by criminal justice systems”); Levin, *supra* note 11, at 622 n.20 (collecting sources).

Those insights make the intervention a powerful one. Nevertheless, in this section, I ask several questions raised by this third concept of expertise. Might the turn to a new group of experts—not simply as a way to undercut the old models of expertise, but as an earnest embrace of new figures of power—risk re-entrenching some of the same problems that accompanied the traditional models of expertise? In this section, I articulate the ways that even a more radical and democratized conception of expertise might raise similar questions as the traditional models. To be clear, that this (or any other) conception raises questions or might be susceptible to critique doesn't mean it may not also be worth advancing or embracing; rather, I see raising and striving to address any such questions as an important piece of the theoretical and political project of reimagining the criminal system.<sup>293</sup> Or, as Professor Ruth Wilson Gilmore put it in describing the interplay between scholarship and activism, “[I]n scholarly research, answers are only as good as the further questions they provoke . . . .”<sup>294</sup>

### 1. Democratization or Decarceration?

Perhaps the most obvious question raised by lived expertise as a model sounds very much like a common critique of democratization more generally: this approach may shift power to the people,<sup>295</sup> but will it serve decarceral ends? As argued above, the educational expert might actually retain the sort of punitive instincts associated with populism and democratic criminal politics. But, recognizing the punitivism of elite actors shouldn't lead us to dismiss out-of-hand critiques of punitive populism. In other words, punitivism and the addiction to carceral solutions that pervade U.S. politics might cross a range of axes of identity and social status.

Several recent critical accounts of the turn to “democratic” or community-focused approaches to criminal justice transformation have stressed the tension between the goals of democratization and decarceration. That is, giving more power to “the people” needn't yield less punitive approaches to criminal law.<sup>296</sup> Or, as Professor Trevor Gardner contends, “It would be a categorical mistake to equate the pursuit of an equitable process of crime policymaking—even as it relates to race-class subordinated communities—with the pursuit of equitable crime policy.”<sup>297</sup> Prioritizing

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293. See *supra* notes 29–30 and accompanying text; cf. Pierre Schlag, *A Reply—The Missing Portion*, 57 U. MIAMI L. REV. 1029, 1037 (2003) (“Among those critical theorists who seek to contest . . . expertise, one can distinguish two approaches. One approach is to try to reveal the emptiness of the claims to expertise among the legal intelligentsia and to reveal how these claims nonetheless gain power. Another approach is to try to relocate the authority to say what the law is among those who have been excluded. I do not see these approaches as antithetical, but rather as complementary.”).

294. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 27 (2007).

295. See generally Simonson, *Police Reform*, *supra* note 16 (articulating this power-shifting frame for considering questions of criminal policy).

296. See generally Gardner, *supra* note 50; Rappaport, *supra* note 12.

297. Gardner, *supra* note 50, at 805. Gardner explains the distinction further: “[T]he pursuit of equitable crime policymaking pertains to the specific means by which crime policy

democratic values and “equitable process” might be an important goal, and so too might prioritizing decarceration and “equitable crime policy.” But it’s not inevitable that these goals always will be congruent. Whether, where, and to what extent the goals might conflict or overlap remain empirical questions.

Studies reflect a range of answers. Perhaps people from marginalized communities who have borne the brunt of mass incarceration and who are disproportionately subject to policing actually don’t want to see the institutions of the carceral state expanded, but instead want different vehicles for achieving accountability or public safety.<sup>298</sup> Or, perhaps people who have experienced interpersonal violence or who have lived in marginalized communities actually do want more involvement from law enforcement.<sup>299</sup> Or, perhaps most likely, it’s a mix that reflects the diversity of views and voices within any community.<sup>300</sup> And, whatever individuals’ or communities’ preferences might be, how are those preferences shaped and restricted by sociocultural understandings of punishment, by politics, and by a constrained menu of policy options?<sup>301</sup>

There are no right or wrong answers to the question of policy or process as the touchstone. But, I think that question, or the tension, should be an important part of how to think about this concept (or any concept)<sup>302</sup> of expertise. Indeed, the concept of experiential expertise might reinforce the sort of punitive, victim-centric politics and policies of the conventional victims’ rights movement.<sup>303</sup> And, even if this victim-centric focus looks different than the tough-on-crime victims’ rights movement, it still may shift even more power away from criminal defendants.<sup>304</sup>

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is promulgated, while the pursuit of equitable crime policy pertains to the substance of crime policy itself.” *Id.*

298. *See generally* Cullors, *supra* note 262 (arguing for noncriminal forms of accountability); Gruber, *supra* note 264 (same); Kaba & Ritchie, *supra* note 265 (same).

299. *See generally* MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015) (arguing that many Black voters supported punitive policies); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (arguing that failure to protect Black victims from crime is a civil rights and equality issue); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (arguing that underenforcement of crime harms marginalized communities that are disproportionately victimized).

300. *See* Gardner, *supra* note 50, at 9–11 (discussing the challenge in identifying the views and will of an entire community); *see also infra* Part IV.B.2.

301. *See generally* FORMAN, *supra* note 7; MILLER, *supra* note 9; Reginald Dwayne Betts, *Kamala Harris, Mass Incarceration and Me*, N.Y. TIMES (Nov. 8, 2020), <https://www.nytimes.com/2020/10/20/magazine/kamala-harris-crime-prison.html> [<https://perma.cc/2RQW-JJTF>].

302. *See supra* Part III.B.2.

303. *See* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1436 (1993) (“The victims’ rights movements . . . celebrated subjectivity, embraced contextual judgments, and emphasized that the most credible truth claims would be those from the most oppressed people. They criticized the criteria for truth that neglected perceptions of oppressed people.” (footnote omitted)).

304. *See* Gruber, *supra* note 264, at 772 (“[T]he victim must occupy a specific, predefined legal space, such that granting her ‘rights’ will necessarily lead to more incarceration for the

## 2. Whose Experiences?

One of the draws of understanding lived experience as expertise is the possibility of breaking down the expert/nonexpert distinction. This deconstructive potential further promises to highlight the politicized and contingent nature of the expert's certification or qualification in the first place.<sup>305</sup> Yet, if the expert frame is still retained and is still meant to do work,<sup>306</sup> the same threshold questions remain: Who is an expert? And, maybe more importantly, who gets to decide who is an expert? If expertise, in this third conception, still rests on qualification or certification, the prospect of qualifying or certifying the experiential expert strikes me as potentially worrisome. To the extent that the arbiter of expertise remains some relatively elite or powerful actor (e.g., a politician, an agency, an academic, or an advocate in a leadership position), then how democratic is it, really?<sup>307</sup> In other words, rather than shifting authority or power to the experiential expert, there's a risk that power (at least some amount of it) will continue to rest with the arbiter of expertise.<sup>308</sup>

Perhaps for some commentators that is a worthwhile risk to take, as this model of expertise still would shift power to previously marginalized voices.<sup>309</sup> As Simonson argues, "Our job right now might be to put aside our measurement devices and listen to the calls from movement actors as they ask us to recalibrate our understandings of justice, safety, and power."<sup>310</sup> That is, perhaps if the arbiter also were someone outside of the dominant

defendant."); Minow, *supra* note 303, at 1436–37 (tying the victims' rights movement to standpoint theory).

305. See Carrie Menkel-Meadow & Shari Seidman Diamond, *The Content, Method, and Epistemology of Gender in Sociolegal Studies*, 25 *LAW & SOC'Y REV.* 221, 232 (1991) (noting "the social situatedness of all of our work").

306. As discussed throughout, maybe the language of expertise is meant to be evacuated of significance by scholars and activists who adopt this third vision of expertise. That is, maybe appealing to the language of expertise is simply a means of entering into and participating in a broader dialogue, policymaking framework, and political economy; it is not meant to imply or accept the sort of epistemic hierarchy invoked by traditional expertise. Or, framed differently, perhaps expertise simply operates as a shorthand for standing or legitimate authority to express an opinion.

307. Bell raises the question of how (white) elites consume and interact with the sorts of "expertise" or subordinated knowledge that define this third conception:

Ghetto abolition should entail reconsidering how we consume the testimonies of people living at America's margins. How do we hear these testimonies? . . . Does depicting the suffering . . . merely satisfy the liberal elite demand for poverty porn? Trauma porn? Do seeing and feeling . . . testimonies illuminate the structural reasons for their suffering—as I hope it does—or do their individual stories obscure social structure and simply induce white pity and shame?

Bell, *supra* note 16, at 711.

308. See Spivak, *Can the Subaltern Speak?*, *supra* note 267, at 287 (discussing the problem of "the historian, transforming 'insurgency' into 'text for knowledge'"); *id.* at 292 (describing the "dangerous[ness]" of "the first-world intellectual masquerading as the absent nonrepresenter who lets the oppressed speak for themselves").

309. See generally Simonson, *Police Reform*, *supra* note 16 (arguing that "power shifting" is the appropriate lens through which to view criminal legal reforms).

310. Simonson, *Power over Policing*, *supra* note 16.

social/political/cultural class, there would be even less concern: power would rest exclusively *outside* of the traditional spaces of dominance. But, I'm not sure, in part because one's insider/outsider identity is not necessarily clear and uncontested—movement, community, and experience are fraught, heterodox, uncertain, and perhaps conflicting.<sup>311</sup>

By way of example, consider the recent public debate between police abolition and reform activists. In the midst of widespread protests during the summer of 2020, Campaign Zero, an organization founded by activists and organizers in the wake of the 2015 Ferguson uprising, launched a campaign branded #8CantWait.<sup>312</sup> The campaign proposed eight “data-backed policies” that were designed to reduce police violence (particularly violence against Black people).<sup>313</sup> In response, abolitionist activists launched an alternate website and campaign: #8toAbolition.<sup>314</sup> The creators of #8toAbolition explicitly framed their campaign and set of proposals as a radical alternative to #8CantWait.<sup>315</sup> Where #8CantWait proposed “reformist reforms” that would improve policing, #8toAbolition set out to dismantle police as an institution.<sup>316</sup>

To the extent that some version of the turn to lived experience as expertise involves a call to defer to “The Movement,” which of these campaigns represents The Movement? Perhaps the answer is the more radical “8 to Abolition”—its authors and organizers grounded their claims in the work of other activists and organizers, whereas “8 Can't Wait” adopted a model familiar to the realm of educational expertise and rooted in statistical arguments about efficient, technocratic oversight.<sup>317</sup> But, answering this question, I contend, requires some political or value judgment, particularly for those outside The Movement.<sup>318</sup> If “[e]xpertise is special knowledge

311. Some advocates of this turn to a third concept of expertise respond to this concern by advocating for greater academic involvement in political and social movements, which may allow for a greater understanding or awareness of where such fault lines lie—of who is truly in the movement or who speaks for the movement. Nevertheless, questions about how officials or relative insiders define the boundaries of subordinated or marginalized identities remain tricky. Cf. Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. (forthcoming 2022) (manuscript on file with author) (raising concerns about schools' function in policing the boundaries of student gender identity and classification).

312. See Daniel Kreps, *Campaign Zero's '8 Can't Wait' Project Aims to Curtail Police Violence*, ROLLING STONE (June 4, 2020, 1:02 PM), <https://www.rollingstone.com/culture/culture-news/campaign-zero-8-cant-wait-police-violence-1010013/> [<https://perma.cc/2P7W-F3YA>]; #8CANTWAIT, <https://8cantwait.org/> [<https://perma.cc/C7SA-9NUZ>] (last visited Apr. 2, 2022).

313. See #8CANTWAIT, *supra* note 312.

314. See #8TOABOLITION, <https://www.8toabolition.com/> [<https://perma.cc/WV6P-E5FT>] (last visited Apr. 2, 2022); see also Edward Ongweso, Jr., “Defund the Police” Actually Means Defunding the Police, VICE (June 9, 2020), <https://www.vice.com/en/article/ep4xy7/what-does-defund-and-abolish-the-police-mean> [<https://perma.cc/NE52-SZ63>].

315. See *supra* note 314.

316. See *supra* note 314.

317. Compare Authors, #8TOABOLITION, <https://www.8toabolition.com/authors> [<https://perma.cc/WJ6H-VMZN>] (last visited Apr. 2, 2022), with 8 CAN'T WAIT, RESEARCH BASIS (2022), <https://docs.google.com/document/d/1YW132-LCtECh0zFHxMGZV-Hnv8NLHhZjfihdDapWXow/edit> [<https://perma.cc/Z88U-VKZZ>].

318. But see *supra* note 311.

made real as authority in struggle,” then that struggle (or those struggles) must be taken seriously.<sup>319</sup> To the extent that any Movement contains movements and might always stand on the verge of fracture or at least fragmentation, what approach should be used in assessing which voices, experiences, or movements to privilege? And, what about other movements—movements with very different worldviews or politics?<sup>320</sup>

To be clear, these are questions for any conception of expertise—expertise and claims to expertise rest on (and often paper over) political struggle, and the places where debates about expertise are the most important are also the places where there might be competing expert claims. But, just as that question should shape our understanding of educational or vocational expertise, it also should be a part of any turn to experiential expertise. (Indeed, Professors Akbar, Simonson, and Sameer Ashar’s call for a new method of scholarship that is embedded in a movement consciousness or ethos may reflect such focus or a desire to better understand the contours of any movement or subordinated identity as a component of such an expert turn.)<sup>321</sup>

Further, and perhaps relatedly, one challenge remains: the lack of a monolithic community or movement.<sup>322</sup> Put differently, lived experience remains omnipresent—we have all experienced what we have experienced, and we might be said to be experts in aspects of our experience filtered through our cultural context, community, or background. But, the animating impulse for this contemporary turn to lived experience as expertise remains a focus on centering the voices and experiences of those who previously had been marginalized or left out of the policymaking process. While I think that’s an important priority and should be an important component of any movement for criminal justice reform or transformation, understanding this move in terms of expertise and deference to experts may be easier said than done.<sup>323</sup>

As philosopher Professor Olúfẹmi O. Táíwò observes, “the norms of putting standpoint epistemology into practice call for practices of deference,” but “[t]he rooms of power and influence are at the end of causal chains that

319. KENNEDY, *supra* note 38, at 120.

320. For example, many contemporary abolitionist accounts center the organizing work and narratives of survivors of interpersonal and/or state violence, who have rejected punitive, criminal responses. *See supra* note 298. But, viewing expertise in this light, what should we make of the conventional victims’ rights movement? To the extent that activists associated with that movement are less deserving of deference (and maybe they are not), is that because of a judgment about their political commitments, or their (experiential) expert qualifications?

321. *See generally* Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821 (2021).

322. *See* Gardner, *supra* note 50; Bernard E. Harcourt, *Matrioshka Dolls*, in TRACEY L. MEARES & DAN KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 81 (Joshua Cohen & Joel Rogers eds., 1999).

323. In raising this concern, I seek to draw from and build on the important work of Monica Bell, Katherine Beckett, and Forrest Stuart, who argue that “just governance requires careful attention to (though not uncritical deference to) knowledge from ‘below,’ or expertise that emanates from lived experience.” Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1326 (2021).



have selection effects.”<sup>324</sup> Therefore, the “very strength of standpoint epistemology—its recognition of the importance of perspective—becomes its weakness when combined with deferential practical norms. . . . For those who are deferred to, [deference politics] can supercharge group-undermining norms.”<sup>325</sup> Put differently, an expert frame that requires or invites deference based on a presumed experiential representativeness might in and of itself undercut the potential for representativeness.

Recurring in decades of commentary on “community control” of police has been an overarching question of who is “the community” and how to go about defining “community will.”<sup>326</sup> Writing during the height of an earlier iteration of debates about community control, Harcourt observed that “empower[ing] the majority within a minority community” as a solution to the lack of community control over crime policy resembles

a Russian *matrioshka* doll. When you open that doll, you find another: at each level of the majority/minority issue, we are faced with the same problem—the risk that the majority (now of the minority community) won’t bear the burdens of its laws but instead will infringe upon the liberty of a powerless or despised minority within it.<sup>327</sup>

Some form of subordination and marginalization remains a risk inherent in any governance project, particularly any such project that appears to create or entrench some set of dominant actors. And, given the dynamics at play in a system of expertise, it seems fair to ask whether and to what extent these nested hierarchies might be re-entrenched, and—if they are—how to go about undercutting those hierarchies.<sup>328</sup>

### 3. Self-Governance or Community Control?

Finally, this third model of expertise invites the same questions as any other expert turn: Does recognizing this class or category of experts imply that they possess an epistemic advantage such that they exclusively should govern and make policy? Or, does recognizing this category of expertise simply suggest that society should recognize a new or additional set of voices in the policymaking process?<sup>329</sup>

As Gardner argues, one question posed by this move or reconceptualization is what the new model of governance or policymaking will look like:

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324. Táiwò, *supra* note 272.

325. *Id.*

326. *See generally* MEARES & KAHAN, *supra* note 322 (collecting essays expressing various positions on this question).

327. Harcourt, *supra* note 322, at 81, 87.

328. *See* Táiwò, *supra* note 272. For example, Táiwò argues that the answer might come in the form of shifting from a deference-based model to a “constructive” one, where identity and experience do not provide a “special right to speak” but instead bring perspective and build community. *Id.*

329. *See* Okidegbe, *supra* note 16, at 37 (describing a “spectrum” of “decision-making power”).

Power reallocation . . . will in some instances require the inclusion of individuals and groups at the social margins, giving them the proverbial seat at the table. Alternatively, it may mean something along the lines of minority exclusivity in crime policymaking. In which case, racial minorities, race-class minorities, and those bearing the mark of a criminal record are given not merely a seat at the table, but a table in which every seat is occupied by a member of a subordinate class.<sup>330</sup>

To be clear, these are dramatically different outcomes. And, either is theoretically and normatively defensible. But, choosing between the two requires a significant unpacking of the ends to be served. The former suggests a commitment to pluralism or to opening up the process of criminal policymaking: individuals and communities who previously were systematically excluded should instead be seen as valued (and necessary) contributors to the process of setting criminal policy. In contrast, the latter suggests the maintenance of an exclusionary process but reimagines that process as altering the set of privileged voices. That is, “the project of including the socially marginalized in the crime-policymaking process may culminate in a policymaking process exclusive to the marginal.”<sup>331</sup> And, indeed, such a decision about the role of such experts in any decision-making process need not reflect “an on-off switch, but . . . rather [could suggest] a continuum ranging from a body whose recommendations are merely advisory, at one extreme, to a body with complete, non-reviewable control over policies and decisions that govern local services, at the other.”<sup>332</sup>

Expertise as a frame and vocabulary implies exclusivity: calling someone an expert both presumes and also establishes that others are nonexperts.<sup>333</sup> Indeed, the power of the expertise claim generally rests on its exclusivity. Expertise presupposes that expert knowledge is of worth because other nonexperts do not possess it.<sup>334</sup>

Depending on one’s vision of social change, perhaps that exclusivity is a good thing. Perhaps, if the right experts were identified, it would advance Simonson’s vision of “power shifting,” empowering movement actors and individuals from marginalized communities.<sup>335</sup> Yet, this logic of expertise cannot help but stand in tension against norms or values of broader participation.<sup>336</sup> Even if expertise and technocracy become somehow

330. Gardner, *supra* note 50, at 802 (footnotes omitted).

331. *Id.* at 805.

332. Rahman & Simonson, *supra* note 48, at 720; *see also* Okidegbe, *supra* note 16, at 37 (describing a “spectrum” or approaches to incorporating community “expertise” into the design of pretrial risk assessment instruments).

333. *See* JACQUES DERRIDA, *OF GRAMMATOLOGY* 141–64 (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (describing this sort of “diacritical” relationship).

334. *See* Marion Fourcade-Gourinchas, *Politics, Institutional Structures, and the Rise of Economics: A Comparative Study*, 30 *THEORY & SOC’Y* 397, 397 (2001) (tracing the power of economics to its status as “the most well-bounded and organized scholarly enterprise in the social scientific field”).

335. *See generally* Simonson, *Police Reform*, *supra* note 16.

336. *See* Mary Grisez Kweit & Robert W. Kweit, *The Politics of Policy Analysis: The Role of Citizen Participation in Analytic Decision Making*, in *CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING* 19, 29 (Jack DeSario & Stuart Langton eds., 1987) (“Technocratic

disentangled, there is still a risk that appeals to expertise suggest that only some subset of the polity is qualified to decide or opine. If the logic of this move is one of reparations or anti-subordination—shifting power to a previously disempowered group—the exclusionary aspect of the project might be justified, or even desirable.<sup>337</sup> That is, if the goal of this third model of expertise isn't democratic, but rather is rooted in ensuring that previously marginalized or disenfranchised groups are able to wield power, then perhaps that concern is irrelevant. (Indeed, perhaps this objection represents a feature of the model, not a bug.) But, it is important to recognize the risk that the expert turn here—as elsewhere—limits the possible universe of policy solutions or the legal imaginaries. Or, “by withdrawing political questions from the public sphere and giving them over to expert decisionmaking, technocratic rationality actually diminishes the possibility of democratic debate over ends, in the name of an improved analysis of means.”<sup>338</sup>

Further, as discussed in the previous section, this vision continues to raise questions about relative marginality, the homogeneity of “the community,” and who should be authorized to speak on behalf of a larger group as expert. Those may be answerable questions, but they are difficult questions. And approaching them requires a serious conversation, both about who makes those decisions of representativeness and whether and to what extent it is acceptable that some voices might continue to be further marginalized in any such expert-based governance process.

Additionally, returning to the discussion of whether this model of expertise is necessarily decarceral, I think it's fair to ask whether retaining an expert frame facilitates *self-governance* or whether it shifts control over existing mechanisms and institutions of governance.<sup>339</sup> Maybe that distinction isn't terribly meaningful—what is self-governance if not control of the reins of power? But, if the institutions of the criminal system are identified as fundamentally unjust, illegitimate, or designed to weed out and punish the most marginal in any community or space, how sanguine should commentators be about a power shift that does not require dismantling the underlying structures of state violence?<sup>340</sup>

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methods are tools that seem to limit the role of public participation . . . [and] justify and reify the wishes of a few.”).

337. See generally Simonson, *Police Reform*, *supra* note 16.

338. Boyle, *supra* note 145, at 751.

339. See M. Adams & Max Rameau, *Black Community Control over Police*, 2016 WIS. L. REV. 515, 519 (calling for “[d]emocratic community control over the organs of the state granted the consent of the governed to carry arms, deny people their freedom, and even kill through the exercise of the state monopoly on violence”); see also Olúfẹ̀mi O. Táíwò, *Power over the Police*, DISSENT (June 12, 2020), [https://www.dissentmagazine.org/online\\_articles/power-over-the-police](https://www.dissentmagazine.org/online_articles/power-over-the-police) [<https://perma.cc/UAA5-2Y28>].

340. To be clear, some of the academics and activists who have adopted this rhetoric have done so in the context of arguments in favor of abolition. But, as Simonson notes, “power shifting is not inherently abolitionist, or even left-leaning; community control, for instance, could be an institution that people who want more policing take up.” Simonson, *Police Reform*, *supra* note 16, at 809.

And, there's still a question about whether "expertise" is the best way of describing the phenomenon. By way of example, consider the justifications for the right to vote in a representative democracy. Arguments for suffrage are not commonly grounded in a logic of expertise. For example, I have the right to vote for the City Council in Boulder, Colorado, not because I have some particular knowledge or expertise when it comes to Boulder. Indeed, I know more about other cities in which I cannot vote, and I'm sure that other people who cannot vote in Boulder (because of criminal record, age, residency, citizenship, etc.) know more about the city than I. Instead, I can vote in Boulder because I live here, and government officials therefore recognize me as a part of a polity entitled to some degree of self-governance. If, instead, suffrage were premised on expertise, then we might enter a world favored by commentators concerned about so-called "political ignorance," where self-governance is a privilege reserved for individuals who know "enough" about governance or their jurisdiction.<sup>341</sup>

Expertise might become a shorthand for legitimacy and standing, but I wonder whether that rhetorical or framing move has costs in that it implies an acceptance of the logic of qualified participation in governance.<sup>342</sup>

To the extent that community control is unsatisfactory or to the extent that end is not desired by commenters who embrace this third vision of expertise, we are left with democratized expertise as a pluralistic or denaturalizing tool. In other words, if expertise has become the vehicle for legitimating participation, then certifying a new class of experts suggests that expertise either should be devalued (e.g., if everyone is an expert, what good does the classification do?)<sup>343</sup> or should mean something different—perhaps a vocabulary for describing relative sources of knowledge that might be useful rather than dispositive. To me, this possibility of expert fluidity is part of what makes expanding conceptions of expertise so exciting. But, it is possible that some proponents of this model of expertise are less interested in such a defanged conception and are interested instead in an alternative technocratic framework that *does* treat expertise as authoritative and exclusive. If the goal is governance by expert, it is all the more important to answer the first two questions raised in this section—whether democratization or decarceration is the overarching goal, and who qualifies as an experiential expert. Put differently, if expertise were simply an

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341. See, e.g., Jonah Goldberg, Opinion, *Too Uninformed to Vote?*, L.A. TIMES (July 31, 2007), <https://www.latimes.com/opinion/opinion-la/la-oe-goldberg31jul31-column.html> [<https://perma.cc/L2L6-6Q3L>] ("Instead of making it easier to vote, maybe we should be making it harder. Why not test people about the basic functions of government? Immigrants have to pass a test to vote; why not all citizens?").

342. See Schlag, *supra* note 293, at 1037 ("[B]oth approaches [i.e., deconstructing expert authority and shifting expert authority] will in fact reinscribe, will performatively reinforce, precisely the sort of rhetorics and hierarchies they contest. No way around that.").

343. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1279 (1993) ("Since all standpoints are equally validated (or invalidated), there is no longer any compelling reason to privilege any viewpoint. . . . [M]y personal narrative is as relevant as your personal narrative, and since both of them are equally relevant, they are equally irrelevant.").

instrumental concept designed to democratize and reimagine the hierarchies of policymaking, perhaps the exact contours of expertise would hold less importance. If, however, experts are framed as possessing significant epistemic advantage or greater institutional legitimacy, these questions take on greater weight because the classification of expertise “transforms what may be cultural or political issues—sites of contestation and creativity—into questions of expert knowledge.”<sup>344</sup>

#### CONCLUSION

Ultimately, expertise retains significant allure in no small part because it offers a commonly accepted language of legitimacy.<sup>345</sup> In some sense, my goal in this Article has been less to critique the language of expertise than to raise questions about the claims of legitimacy and authority that tend to accompany the expert turn.<sup>346</sup> There might be good reasons to embrace, or at least accept “expertise” and the promise of the bounded, specialized knowledge that it offers. And, indeed, I think there are. But acknowledging that some actors know more about certain facts; have a greater appreciation of certain issues; or have more time, skills, or resources to address certain problems needn’t (and shouldn’t) mean accepting a claim that there is a natural, clear, and unassailable hierarchy of knowledge that can be used to assess truth and craft “best” policies in the criminal system.<sup>347</sup>

My hope in this Article has been to suggest that recognizing different, competing, and complementary claims to expertise should help us appreciate the deep political questions that underlie how criminal law is made and enforced. That is, I don’t mean to dismiss the potential value of each epistemic frame or the knowledge/truth claim that different “experts” might bring to the table. Rather, I mean to critique the sort of exclusivity or inflexibility that “expertise” as a frame might invite.

One of the deep pathologies of the U.S. criminal system is its naturalization—the way in which the “is” and “ought” are elided in discussions of criminal policy.<sup>348</sup> That criminalization and prosecution

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344. Schlag, *supra* note 18, at 71 (footnote omitted).

345. See BRINT, *supra* note 105, at 8 (“[E]xpert knowledge has enjoyed a virtually unquestioned legitimacy in American culture.”).

346. See Samuel Moyn, *Knowledge and Politics in International Law*, 129 HARV. L. REV. 2164, 2165 (2016) (reviewing DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016)) (“[S]tudying experts was . . . the great device of delegitimation, with unclear consequences.”).

347. I see this observation as consistent with Lvovsky’s characterization of expertise as functioning as a “professional technology,” rather than a “virtue.” See Lvovsky, *supra* note 6, at 540–45. As Lvovsky describes the distinction, “it is . . . possible to imagine expertise differently: not as a virtue of any sort, but, simply enough, as a professional technology—one that increases the proficiency of expert actors without any inherent bearing on the legality or legitimacy of their conduct.” *Id.* at 545.

348. See generally Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777 (2013); Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 564 (2018); Alice Ristroph, *The Definitive Article*, 68 U. TORONTO L.J. 140, 150 (2018) [hereinafter Ristroph, *The Definitive*

operate as the dominant vehicles for signaling that society takes a problem seriously needn't mean that they should be. That arrest, conviction, and incarceration have become synonymous with accountability does not mean that they should be. And, that police have become the agents of the state tasked with responding to social problems does not mean that they need to be. Put simply, the institutions of the criminal system are not inevitable or natural. They are the product of struggle, of political decisions, of compromise, and of inertia.

Addressing the violence and massive societal imprint of the carceral state requires denaturalizing these institutions, recognizing their noninevitability, and examining the roads not taken or alternatives not chosen.<sup>349</sup> A range of actors with different experiences and knowledge bases—different *expertises*—have been and will be a part of that effort. To address these problems and move out of the shadow of past efforts, though, requires not only new experts but also a new understanding of expertise—one that recognizes that expertise, like the other institutions of the criminal system, is in need of denaturalizing so that we (whoever we may be) can confront and contest the values, politics, and decisions that undergird it.

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*Article*] (reviewing LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CIVIL ORDER AND CRIMINALIZATION (2016)).

349. See Ristroph, *The Definitive Article*, *supra* note 348, at 165.