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THE LEGITIMACY OF CRIMINAL LAW AND THE PERFORMANCE CRISES OF PENALITY

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ABSTRACT. The legitimacy of state punishment has long been debated to justify the extreme form of government-authorized coercion that is criminal law. Rather than focusing on the abstract legitimacy of criminal law, this article examines another dimension of the debate: the legitimacy (or lack thereof) arising from the dynamics of substantive criminalization. Specifically, it addresses the ‘‘performance crises’’ of penality—enforcement-related failures in the implementation of the criminal law. The article identifies and discusses three distinct typologies of crisis in the deployment and enforcement of penal statutes: crises of hyper-intensity, crises of hyper-selectivity, and crises arising from sentence opacity, each undermining the legitimacy of criminal law in different ways. By addressing this gap in the theoretical literature, the article highlights the critical role of enforcement in shaping normative and policy discussions on substantive criminalization and its impact on the legitimacy of criminal law as a whole. From this perspective, penal legitimacy should be informed by the notion of ‘‘penal adequacy’’, grounded—depending on the specific type of crisis—in moderation, non-discrimination, and transparency, and, across all cases, in sustainability. This concept highlights a balanced and fair exercise of the state's penal power—one that is measured, non-discriminatory, clearly communicated, and, overall, capable of achieving its objectives in a sustainable manner.

I INTRODUCTION

The legitimacy of the state's resort to punishment has traditionally been examined through discussions centered on principles and criteria aimed at justifying the use of criminal law, the most extreme form of public coercion authorized by the legal system. The theoretical debate on the justification of criminal law, comprehensive and nuanced in both Anglo-American and continental traditions, typically focuses on three main areas: the purposes and functions of

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criminal punishment;[1] the selection of interests worthy of protection by means of criminal law;[2] and the role of criminal law within the legal system[3] and society.[4] These analyses have revealed endemic issues within the penal realm, including a crisis in the traditional criteria for selecting behaviors worthy of being criminalized, often leading to uncontrolled forms of overcriminalization,[5] which include an increased use of criminal punishment to pursue spurious or misguided objectives.[6]

This article sets itself apart from these debates by analyzing a different problematic aspect of contemporary criminal law, which I

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[1] See, e.g., Michael Tonry, "Punishment" in Michael Tonry (ed), *The Oxford Handbook of Crime and Criminal Justice* (Oxford University Press 2011); Joshua Dressler, *Understanding Criminal Law* (4th edn, Lexis Nexis 2006) ch. 2; Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) ch. 3. For a discussion of recent debates, see Andrew Cornford, "The Aims and Functions of Criminal Law" (2024) 87(2) *Modern Law Review* 398.

[2] See, e.g., Andrew P. Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011); Dennis J. Baker, "Constitutionalizing the Harm Principle" (2008) 27(2) *Criminal Justice Ethics* 3; Nina Peršak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer 2007); Bernard E. Harcourt, "The Collapse of the Harm Principle" (1999) 90(1) *Journal of Criminal Law and Criminology* 109.

[3] See, e.g., Lindsay Farmer, "Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalization" in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014); Markus D. Dubber, "Regulatory and Legal Aspects of Penality" in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (eds), *Law as Punishment/Law as Regulation* (Stanford University Press 2011); Andrew Ashworth and Lucia Zedner, "Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions" (2008) 2(1) *Criminal Law and Philosophy* 21; Carol S. Steiker, "Punishment and Procedure: Punishment Theory and the Criminal–Civil Procedural Divide" (1997) 85(4) *Georgetown Law Journal* 775.

[4] See, e.g., Robert Weisberg, "Norms and Criminal Law, and the Norms of Criminal Law Scholarship" (2003) 93(2-3) *Journal of Criminal Law and Criminology* 467; David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press 1990); Andrew Hopkins, "On the Sociology of Criminal Law" (1975) 22(5) *Social Problems* 608.

[5] See Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008); Erik Luna, "The Overcriminalization Phenomenon" (2005) 54(3) *American University Law Review* 703.

[6] See, e.g., Alessandro Corda, "The Transformational Function of the Criminal Law: In Search of Operational Boundaries" (2020) 23(4) *New Criminal Law Review* 584, 589–92.

term "performance crises".[7] These crises relate to the dynamic and enforcement-related aspects of criminal law implementation, characterized by failures or inefficiencies in effectively enforcing the legal provisions set out in penal statutes. In what follows, I propose and discuss a taxonomy that focuses on pathologies undermining the legitimacy of criminal law arising from the substantive aspects of criminalization as a practice rather than the formal aspects of criminalization, which are more concerned with the legitimacy of abstract penal policy choices. As will be discussed, enforcement failures of criminal law can manifest in various ways. They may arise when penal laws either exceed or fall short of their intended targets during implementation, or when they are designed in a way that ultimately undermines stated goals which are generally considered desirable by the public. Performance crises often result not merely from unintended misalignments between design and enforcement but also from deliberate, although at times covert, policy choices.

In detail, the proposed taxonomy identifies three typologies of performance crises:

(i) *Hyper-intensity* crises—Defined as the excessive and aggressive use of the state's penal power, marked by disproportionate policing, prosecution, and punishment that far exceed what is necessary to maintain public order or justice. This approach results in heightened surveillance, criminalization of even minor

[7] The term "performance crisis" is chosen to avoid any ambiguity associated with the possible alternative term "performative crisis." In the context of law and legal theory, "performative" refers to language or actions that do not simply describe a legal status or obligation, but instead bring about a legal effect through the very act of being spoken or performed. This concept is closely associated with philosopher J.L. Austin's idea of *performative utterances* [J.L. Austin, *How to Do Things with Words* (Clarendon Press 1962)], indicating "utterances that do what they say *in* being said" [Marianne Constable, "Law as Claim to Justice: Legal History and Legal Speech Acts" (2011) 1(3) *UC Irvine Law Review* 631, 634], such as promises, bets, or wedding vows. The adjective has later been adopted by legal scholars to indicate legislation or pronouncements that merely serve a symbolic or ceremonial function without necessarily bringing about any substantive change or effect. In this context, "performative" implies that a certain act is more about signaling or expressing a certain intention or identity, rather than immediately accomplishing a tangible outcome. This function of the law, including criminal law, may still have positive effects, such as instilling new norms and values in society through communication and persuasion. See Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020) ch. 2; Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Harvard University Press 2017).

offenses, and a generalized overreliance on punitive measures, ultimately contributing to mass punishment. This leads to widespread fear among the population of being targeted, giving rise to a new form of vulnerable citizenship, where individuals view themselves as constantly at risk within an increasingly punitive system. This will be illustrated through a discussion of the rampant penal excess that has emerged in the U.S. since the late 1970s.

(ii) *Hyper-selectivity* crises—Defined as targeted application of penal sanctions, often focusing on specific groups or behaviors while ignoring other forms of formally criminalized conduct committed by different offender types. By prioritizing certain offenses or demographics for punitive attention, this selective application of criminal law not only erodes trust in the criminal justice system but also creates an inconsistent and fragmented implementation of legal rules, fundamentally at odds with the ideal of egalitarian and non-discriminatory justice. This will be explained through the example of the systematic prosecution of individuals from the lowest social classes and groups, contrasted with the underenforcement of criminal prohibitions against white-collar offenders.

(iii) Crises stemming from *sentence opacity*—Defined as the loss of legitimacy of the penal system when sentencing is perceived as lacking transparency, being excessively mild, or inconsistently enforced, thereby creating tension with its ostensibly stated goals. This issue arises when the formally prescribed severity of punishments is undermined in the public's view by mechanisms such as charge reductions and sentence modifications, or penalties that appear unduly lenient. These discrepancies send conflicting messages to the public, creating perceptions of a justice system that is either ineffective or inequitable and often fueling punitive attitudes. This will be illustrated through the examples of plea bargaining, as well as suspended and conditional sentences.

The first and second crises raise significant challenges to normative legitimacy, while the third primarily affects perceived legitimacy. My taxonomy underscores the need for quantifiable criteria to determine when a jurisdiction has reached a crisis point, aiming to reduce subjective ambiguity. While I do not define such criteria, this article lays the groundwork for future research in the direction of defining them. The article seeks to address a gap in the theoretical literature that, as highlighted by Nicola Lacey, often overlooks the critical role of enforcement and implementation in discussions of criminalization and the public legitimacy of penality.[8] This oversight, in turn, generates downstream misunderstandings concerning the appropriate functions of criminal law *as performed* in practice. My discussion highlights the critical role of enforcement in shaping normative and policy discussions on substantive criminalization and its impact on the legitimacy of criminal law as a whole.

The article proceeds as follows. Part II explores the notion of criminalization in a substantive sense and its central role in assessing the credibility and legitimacy of criminal law within a polity. Part III analytically examines each type of performance crisis outlined above. The article ultimately contends that scholars should pay greater attention to the pathologies associated with the actual implementation of criminal law. From this perspective, as argued in Part IV, the legitimacy of penal interventions should be guided by the concept of "penal adequacy", which prioritizes principles of moderation, egalitarianism, transparency, and, overall, sustainability in achieving agreed-upon goals. This framework underscores the importance of employing penal power in a balanced, fair, and proportionate manner, ensuring interventions are restrained, consistent, non-discriminatory, clearly communicated, and carefully calibrated to achieve their intended objectives, with the ultimate goal of fostering a criminal legal system that is both just and effective in addressing societal needs.

This article is dedicated to Michael Tonry, whose work—among many other key scholarly contributions—has profoundly shaped the understanding of how the (mal)functioning of penal systems can undermine their own legitimacy.

II THE LEGITIMACY OF CRIMINAL LAW FROM THE PERSPECTIVE OF SUBSTANTIVE CRIMINALIZATION

As Vincent Chiao observes, the criminal law "operates under the mantle of political legitimacy that…justifies imposing extremely serious sanctions on those who would disobey".[9] But this legitimacy

[8] Nicola Lacey, "Historicising Criminalisation: Conceptual and Empirical Issues" (2009) 72(6) *Modern Law Review* 936, 945.

[9] Vincent Chiao, "What Is the Criminal Law For?" (2016) 35(2) *Law and Philosophy* 137, 162.

is not a given. The legitimacy of criminal law is said to increase when actors and institutions of the criminal legal system act in ways that citizens perceive as consistent with principles and features that should inform, in particular, three dimensions of the penal system *in action*: procedural fairness characterized by the recognition of fundamental rights and respect for the dignity of criminal justice-involved individuals; a distributive, coherent and proportionate allocation of criminal law enforcement; and the ability of the criminal law and its institutions to protect the public.[10] The process of legitimization of the criminal legal system—i.e., the process leading to it gaining legitimacy—is therefore influenced to a decisive extent by the citizens' assessment regarding the mechanisms of implementation of criminal law rules and their perception about the responses of the penal system to those behaviors labelled as "criminal".

From this angle, the distinction between criminalization in a *formal* sense—as an outcome deriving from criminalization choices made at the legislative level—and criminalization in a *substantive* sense—as a practice resulting from the activities of the agencies to which the concrete implementation of criminal law is delegated—assumes crucial importance.[11] This second dimension, that of *substantive criminalization*, therefore encompasses and reflects the full scope of how the penal system enforces criminal prohibitions as defined by law, including apprehension, prosecution, sentencing, and the implementation of sentences.[12] Substantive criminalization, however, has been often overlooked by criminal law theorists, who tend to be more preoccupied with debates on issues such as the harm principle, legal moralism, and utilitarianism.[13]

The theme of substantive criminalization should not be seen as a minor theoretical exercise in comparison to inquiries pertaining to formal criminalization. Scholars who are sensitive to this issue insist that an adequate normative theory of criminalization must place

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[10] Jeffrey A. Fagan, "Legitimacy and Criminal Justice" (2008) 6(1) *Ohio State Journal of Criminal Law* 123, 124–6.

[11] Lacey, *supra* note 8, 942–7.

[12] Arrests without conviction are an application of criminal law through its enforcement mechanisms, as they involve the exercise of state authority based on legal provisions even if they do not result in formal penal outcomes. See Eisha Jain, "Arrests as Regulation" (2015) 67(4) *Stanford Law Review* 809, 817–25.

[13] Lacey, *supra* note 8, at 944.

substantive criminalization at the center of academic debates.[14] Once criminalization *in action* is recognized as a key aspect of penality from a theoretical perspective, scholars must broaden their research focus to include this essential praxeological dimension. This should not be limited to the legal interpretations carried out by courts but must also encompass the everyday practices of criminalization and the actions of the different actors responsible for implementing them. By doing so, inquiries can capture the full spectrum of criminal law as it is applied and experienced in real-world contexts, offering a more comprehensive understanding of its functions and impact.

From this perspective, moreover, the dividing line between formal and substantive criminalization turns out to be significantly more blurred than it may appear at first glance. Antony Duff correctly argues that paying attention to the processes through which criminalized conduct on paper becomes part of the actual 'range of action' of criminal law is essential for analyzing and understanding the principles and values that should guide and inform the choices made in the process of formal criminalization.[15] As Lacey notes, "the idea of criminalization captures the dynamic nature of the field as a set of interlocking practices in which the moments of 'defining' and 'responding to' crime can rarely be completely distinguished".[16] It is therefore essential to understand and think of criminalization as a system where inputs should be critically influenced by outputs.

These reflections underscore how the legitimacy of criminal law in the eyes of citizens largely hinges on its performance "on the ground", which, as will be discussed, occurs both before and after the phases of ascertaining responsibility and determining sentences. In other words, the community's recognition of the criminal law's credibility depends not only on the perceived 'potential' of the formal rules established at the legislative level but also, to a significant extent, on how those rules are applied and operate in practice; and just as the "performance crises" of penality—the focus of this article—negatively impact the legitimization of criminal law in the eyes

[14] R.A. Duff, *The Realm of Criminal Law* (Oxford University Press 2018); Nicola Lacey, "Theorising Criminalisation through the Modalities Approach: A Critical Appreciation" (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 122; Lacey *supra* note 8.

[15] Duff, *supra* note 14, 39 ff.

[16] Nicola Lacey, "Legal Constructions of Crime" in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (4th edn, Oxford University Press 2007) 197.

of the public, the loss of legitimacy of criminal law among members of a given polity likewise generates harmful consequences for the performance of penality.[17] In such a mutually reinforcing circuit, the socio-juridical lens becomes—or, more accurately, *should* become—an essential component of the tools used to address the theoretical reflection on the foundations of criminal law. By integrating this perspective, scholars can better understand the complex relationship between law and society, recognizing how social dynamics, perceptions, and practices shape and are shaped by the criminal legal system. This approach enriches the theoretical discourse and enhances the ability to critically evaluate the legitimacy and functioning of criminal law both in normative and empirical terms.[18]

As observed by Lacey, "the field of criminal law cannot be fully understood independent of the dynamics of criminalisation conceived as a broad social practice".[19] Within these coordinates, the field of inquiry of this article is not confined to the decision-making space where certain penal policies are adopted at the legislative level, but embraces a notion of "penality" that, besides the static statutory element, also encompasses actors, structures, processes, organizational arrangements, and enforcement mechanisms of the penal system, as well as the social context and social dynamics in which such components operate.[20] Having thus established the adopted perspective, in the following Part I identify, define, and discuss three pathological forms

[17] Fagan, *supra* note 10, 134 ("The law needs to have legitimacy to provide an alternative motivation for compliance"). See also Anthony Bottoms and Justice Tankebe, "Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice" (2012) 102(1) *Journal of Criminal Law and Criminology* 119; Tom R. Tyler (ed), *Legitimacy and Criminal Justice: An International Perspective* (Russell Sage Foundation 2007).

[18] See Sonja Snacken, "Punishment Between Normative and Empirical Legitimacy" in Adam Crawford and Anthea Hucklesby (eds), *Legitimacy and Compliance in Criminal Justice* (Routledge 2013). Furthermore, understanding the importance of analyzing the issue of criminalization in substantive terms, rather than purely formal ones, can provide extremely valuable insights. Once the gap between the ideal—represented in normative theories—and reality is recognized, we must ask ourselves whether this demonstrates how utopian the theory is or highlights how imperfect the practice is.

[19] Lacey, *supra* note 14, 122.

[20] David Garland, "Penality and the Penal State" (2013) 51(3) *Criminology* 475, 476. See also Ashley Rubin and Michelle S. Phelps, "Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change" (2017) 21(4) *Theoretical Criminology* 422, 424–6.

affecting penality in its *performance* which are ultimately capable of undermining the legitimacy of the criminal law as a whole.

III THE "PERFORMANCE CRISES" OF PENALITY: A PROPOSED TAXONOMY

After outlining both the field of inquiry and the terminology adopted in this article, this central Part provides a detailed analysis of the three different types of "performance crises" of penality identified. Each type of pathology will be discussed through examples and case studies drawn from the experiences of various legal systems. Specifically, each type of performance crisis illustrates a different aspect of how the implementation of penal measures can fall short, leading to various negative consequences for the criminal law and its legitimacy.

As previously noted, three forms of performance crises of penality can be identified.

TABLE 1
Manifestations and impact of the three types of performance crises of penality on the legitimacy of criminal law

Type of performance crisis of penality	Manifestations	Impact on the legitimacy of criminal law
Hyper-intensity	■ Excessive and aggressive enforcement, disproportionate punishment, and expansion of the penal reach ■ Fear of being targeted	■ Emergence of a new form of vulnerable citizenship ■ Distrust in criminal law, seen as a threat rather than a protective and security-enhancing tool
Hyper-selectivity	■ Uneven and discriminatory enforcement targeting certain groups ■ Deepening of pre-existing inequalities through the implementation of criminal law	■ Backlash against selective enforcement, contributing to an exasperation in debates about the allocation of penality ■ Erosion of public trust in the fairness of the penal system
Sentence opacity	■ Conflicting messages regarding punishment practices ■ Perceived inconsistency in the application of criminal law	■ Increased cynicism and dissatisfaction with how the criminal law is written and then enforced ■ Loss of public trust in the administration of justice

(i) Crises arising from *hyper-intensity*;
(ii) Crises arising from *hyper-selectivity*;
(iii) Crises arising from *sentence opacity* (see Table 1).

In what follows, each type of performance crisis is analyzed individually.

3.1 *Hyper-intensity Crises*

The first typology of performance crisis refers to an excessive application of penal measures beyond what is necessary or proportionate. It involves the overzealous enforcement of criminal law rules, characterized by an aggressive response to behavior classified as deviant. This manifests in practices such as excessive policing and prosecution, including the substantive overcriminalization of minor infractions, and harsh sentencing, resulting in the overextension of the penal system,[21] ultimately undermining its legitimacy within the polity. The performance crisis stemming from hyper-intensity, while conceptually different from the phenomenon of formal overcriminalization,[22] is linked to it insofar as the expansionist tendency of the letter of the criminal law represents one of the conditions that makes it possible to ratchet up the impact of penality *in action* downstream. An overzealous and overperforming criminal law, prioritizing enforcement at all costs, evokes dystopian models of implementation where punitive mechanisms established by the state fail to strike an adequate balance with safeguards.[23] Ideas of "hyper-intensity" or "hyper-performance" may also suggest that the actions taken by law enforcement agencies and judicial actors go beyond what the law's

[21] David Garland, "America's Extraordinary Penal State: A Structural Explanation" (2025) *Punishment & Society* (Online First) 3, 12 https://doi.org/10.1177/14624745241302061; Alia Nahra and Hernandez Stroud, "No One Answer to Over policing and Mass Incarceration But Many" in Lauren-Brooke Eisen (ed), *Excessive Punishment: How the Justice System Creates Mass Incarceration* (Columbia University Press 2024) 329–46; Michael Tonry, "Making American Sentencing Just, Humane, and Effective" (2017) 46 *Crime and Justice* 441. Here, again, we refer to (over)criminaliza tion as defined in the previous Part. See *supra* note 12 and accompanying text.

[22] E.g., Jesus Maria Silva Sánchez, *La Expansión del Derecho Penal: Aspectos de la Política Criminal en las Sociedades Postindustriales* (3rd edn, Marcial Pons 2011); Victor Tadros, "The Architecture of Criminalization" (2009) 28(1) *Criminal Justice Ethics* 74.

[23] See Packer, *supra* note 1, 158–9, discussing the main features of the Crime Control Model.

formal provisions might expect, becoming disproportionately harsh and pervasive.

However, one must first determine what constitutes a 'normal' level of performance for a penal system in its operational dimension, as opposed to a performance that can be defined as pathological. In the absence of universally applicable metrics, the historical-comparative analysis of penal systems offers valuable insights. One example, that of the United States, illustrates very powerfully what is meant by hyper-intensity crisis and how it can profoundly undermine the legitimacy of criminal law within a liberal democracy.[24] This example helps clarify how excessive penal enforcement can lead to a loss of public trust, further exacerbating the crisis of criminal law.[25]

Using the incarceration rate per 100,000 inhabitants as the primary and most obvious measure of a system's punitiveness,[26] it is important to note that, until the early 1970s, the U.S. had an incarceration rate that, while higher, was still substantially comparable to those of Western European countries and Canada.[27] In 1970, the U.S. had 161 prisoners per 100,000 inhabitants, compared to 40 in Italy, 57 in France, 80 in England, and 104 in Canada.[28] The idea of rehabilitation regarding the function of punishment represented a

[24] See Markus D. Dubber, *The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective* (Oxford University Press 2018) ch. 5. Criminal law is obviously more pervasive and invasive in non-democratic regimes, where it is often used as a tool of control to suppress opposition and maintain political power. In such regimes, laws are frequently applied arbitrarily, and enforcement mechanisms may target specific groups, stifling dissent and limiting civil liberties. On these aspects, see Hung-En Sung, *Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process* (2006) 605(1) *Annals of the American Academy of Political and Social Science* 311.

[25] See William J. Stuntz, "The Pathological Politics of Criminal Law" (2001) 100(3) *Michigan Law Review* 505; Andrew Ashworth, "Is the Criminal Law a Lost Cause?" (2000) 116(2) *Law Quarterly Review* 225.

[26] But see Michael Tonry, "Punishments, Politics, and Prisons in Western Countries" (2022) 51 *Crime and Justice* 7, 11 ("The punitiveness of national criminal justice systems is usually measured by the number of people locked up per 100,000 population. That rate provides some information but obscures important differences"), and the discussion below.

[27] Joshua Kleinfeld, "Two Cultures of Punishment" (2016) 68(5) *Stanford Law Review* 933, 937.

[28] World Prison Brief, *World Prison Brief Data*, https://www.prisonstudies.org/world-prison-brief-data [accessed 15 February 2025].

shared ethos on both sides of the Atlantic, consistently reaffirmed at both the policymaking and academic levels.[29]

Over the following decades, however, the United States has managed to earn the sinister record of the country with the highest incarceration rate in the world. The U.S. penitentiary boom presents impressive numbers. "In 1972, 161 U.S. residents were incarcerated in prisons and jails per 100,000 population; by 2007, that rate had more than quintupled to a peak of 767 per 100,000".[30] Considering all its correctional facilities at the federal, state and local levels, the U.S. criminal justice system in 2020 incarcerated about 2.1 million people, corresponding to about 630 inmates per 100,000 inhabitants. To provide some context, in the same year, Italy recorded an incarceration rate of 89 prisoners per 100,000 inhabitants, France 119, Germany 72, England 133, and Canada 104.[31]

Over the past forty years, criminal legislation and practices in the United States have become a stark anomaly at the comparative level. The American criminal justice system not only punishes far more than other jurisdictions, but also does so in a manner that is notably distinct from other Western democracies.[32] American penal exceptionalism, therefore, encompasses not only quantitative dimensions but also the qualitative features that define its mode of operation in terms of intensity and affliction.[33]

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[29] Alessandro Corda and Rhys Hester, "Leaving the Shining City on a Hill: A Plea for Rediscovering Comparative Criminal Justice Policy in the United States" (2021) 31(2) *International Criminal Justice Review* 203, 204–7.

[30] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (National Academies Press 2014) 33. On mass incarceration, see Frank E. Zimring, *The Insidious Momentum of American Mass Incarceration* (Oxford University Press 2020); John Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* (Basic Books 2017).

[31] World Prison Brief, *supra* note 28.

[32] See Michael Tonry, "Explanations of American Punishment Policies: A National History" (2009) 11 Punishment & Society 377.

[33] David Garland, "Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism" (2020) 22(3) *Punishment & Society* 321, 324–6. See also Bernard E. Harcourt, *The Counterrevolution: How Our Government Went to War Against Its Own Citizens* (Basic Books 2018) (criticizing the militarized policing style in the U.S. and arguing that it exacerbates the disconnect between law enforcement and communities); Floyd Feeney, *German and American Prosecutions: An Approach to Statistical Comparison* (U.S. Department of Justice 1998) 10 ("The number of persons arrested or referred for prosecution per 100,000 population is much higher in the United States than in Germany"); Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* (Harvard University Press 2019) ch. 2 (discussing the draconian sentencing laws passed in the U.S. since the 1980s and their implementation).

The hyper-punitiveness of the U.S. penal apparatus extends well beyond the penitentiary dimension, permeating society with various forms of sanctioning responses made possible by the criminal legal system, and even reaching beyond that. The numbers are staggering: including parole and probation, the U.S. correctional population currently totals around six million individuals.[34] Overall, it is estimated that one in thirty-one adults is currently subject to some form of control originating from the penal system.[35] In addition, more than 40,000 laws and regulations across the country create a massive web of collateral consequences—'civil' penalties that follow a criminal conviction beyond the direct sentence imposed by the court. These include restrictions on employment, housing, voting rights, and access to public benefits, often lasting long after the formal punishment ends. While not considered punitive by the law, these consequences frequently frustrate, often permanently, the chances of effective social reintegration for individuals involved in the criminal justice system.[36]

The process of penal intensification in the United States since the late 1970s has not been limited to minority populations. While racial and ethnic minorities, particularly Black and Brown Americans, have disproportionately borne the brunt of over-policing, over-prosecu-

[34] Michelle S. Phelps, "Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision" (2020) 3 *Annual Review of Criminology* 261, 262.

[35] Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Harvard University Press 2016) 6.

[36] Alessandro Corda, "Collateral Consequences and Criminal Justice Reform: Successes and Challenges" (2023) 52 *Crime and Justice* 447, 453–60; Nora V. Demleitner, "Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences" (1999) 11(1) *Stanford Law & Policy Review* 153. Having a criminal record also leads to informal/nonlegal collateral consequences where private actors—such as employers, landlords, or community members—discriminate against individuals based on their criminal history. Unlike legal mandates, these forms of discrimination arise from personal biases or organizational policies, leading to barriers in employment, housing, and social acceptance. See Alessandro Corda and Sarah E. Lageson, "Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism" (2020) 60(2) *British Journal of Criminology* 245.

tion, and mass punishment,[37] the impact of these punitive practices extends beyond these groups. Notably, an estimated 70 million Americans—one in every three adults—have a criminal record on file, including arrests and final convictions.[38] This underscores the broad reach of the penal system and the unprecedented escalation of penal interventions in the lives of U.S. residents. The increased enforcement of petty offenses, such as minor drug possession, loitering, or traffic violations, reflects a systemic shift toward criminalizing behaviors across different ethnicities and segments of the population.[39]

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[37] See, in part., Elizabeth Hinton and DeAnza Cook, "The Mass Criminalization of Black Americans: A Historical Overview" (2021) 4 *Annual Review of Criminology* 261; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2010); Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (Oxford University Press 1995). Racial selectivity in enforcement seems to be more closely tied to a *misdirected* performance of law enforcement than to hyper-intensive enforcement. This distinction highlights that racial selectivity involves a targeted, disproportionate application of the law against specific groups, rather than a generalized over-application of criminal law across the board. However, as noted, in the context of the United States, racial selectivity is embedded within a broader trend of exponential intensification in the implementation of penal measures, affecting American society as a whole. This larger trend of mass punishment and penal escalation exacerbates the disproportionate targeting of marginalized communities, particularly Black and Latino populations. While racial selectivity may reflect a form of misdirected enforcement, it is not divorced from the broader hyper-intensification of the U.S. penal system, often leading to disproportionately harsh enforcement outcomes within an already overburdened and excessively punitive criminal justice system. On the performance crisis of hyper-selectivity, see *infra* par. 3.2 "Hyper-Selectivity Crises".

[38] Matthew Friedman, "Just Facts: As Many Americans Have Criminal Records as College Diplomas" (17 November 2015) *Brennan Center for Justice* https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [accessed 15 February 2025]. See also James B. Jacobs, *The Eternal Criminal Record* (Harvard University Press 2015).

[39] Garland, *supra* note 21, 15; Christopher Lewis and Adaner Usmani, "The Injustice of Under-policing in America" (2022) 2 *American Journal of Law and Equality* 85, 85: "It has become common knowledge that the police do not solve serious crime, they focus far too much on petty offenses, and they are far too heavy-handed and brutal in their treatment of Americans […]". Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton University Press 2018) analyzes how the systematic enforcement of misdemeanor-level offenses contributed to overpolicing and entanglement in the criminal justice system. See also Alexandra Natapoff, "Misdemeanor Decriminalization" (2015) 68(4) *Vanderbilt Law Review* 1055, 1057, noting that the "misdemeanor machinery is a major source of overcriminalization".

The expansive application of penal measures, as exemplified by the U.S. case, highlights the pervasive and far-reaching consequences of the hyper-intensification of criminal punishment. Many have interpreted this excessive penal intensification as the triumph of neoliberal logics. Under these logics, the state withdraws from its leading role in social policy and economic governance, instead prioritizing social control through punishment and related institutions.[40] More broadly, the risks associated with the performance crisis of penality arising from hyper-intensity are both evident and multifaceted, producing severe and wide-ranging social disutility.[41] Such an overshooting in the deployment of penality "on the ground" significantly diminishes the incentives for citizens to trust the criminal law. What was originally conceived as a policy instrument of last resort,[42] serving a protective function for the accused, instead transforms into a pervasive and high-probability social risk of entanglement in the criminal justice machinery.[43]

The transformation of criminal law enforcement into a bulimic instrument of governance substantially weakens the position of the individual, exposing them to an increasingly powerful and penetrating state punitive apparatus. In times of hyper-intensive criminal law enforcement, the focus extends beyond citizens defined by their vulnerability to criminal victimization.[44] Hyper-intensive criminalization in action generates another troubling form of vulnerable citizenship, in which individuals exist under the constant fear of becoming targets of the state's penal power.[45] Consequently, a climate of perpetual

[40] Hinton, *supra* note 35; see also Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009).

[41] See Richard A. Bierschbach and Alex Stein, "Overenforcement" (2005) 93(6) *Georgetown Law Journal* 1743, 1744, defining "overenforcement" as the phenomenon that "occurs when the violator of a legal rule suffers excessive harm…from the actual implementation of that rule".

[42] Douglas Husak, "Should the Criminal Law Be a Last Resort?" in Alessandro Corda (ed), *Research Handbook on Penal Policy* (forthcoming, Edward Elgar Publishing 2025).

[43] For this metaphor, see Stephanos Bibas, *The Machinery of Criminal Justice* (Oxford University Press 2015).

[44] Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2007) ch. 3.

[45] Peter Ramsay, "Overcriminalization as Vulnerable Citizenship" (2010) 13(2) *New Criminal Law Review* 262. On vulnerability to pervasive substantive criminalization, see also Alice Goffman, *On the Run: Fugitive Life in an American City* (University of Chicago Press 2014).

insecurity emerges, blurring the line between law-abiding citizens and potential offenders and fundamentally reshaping the relationship between the individual and the state. Therefore, rather than enhancing citizens' trust in criminal law as a security-enhancing tool,[46] the paradigm of the hyper-intensity crisis critically delegitimizes the penal system. Criminal law enforcement is increasingly viewed as a threat rather than a protective force, undermining the social contract and fostering deep-seated distrust in authorities. This, in turn, cultivates a pervasive sense of precarity, wherein individuals find themselves permanently in fear of being subject to a punitive government response due to the expansive operation and reach of the state's penal apparatus.[47]

3.2 *Hyper-Selectivity Crises*

Just as performance crises arising from hyper-intensity, crises stemming from hyper-selectivity in the enforcement of criminal law also raise a fundamental preliminary question. A criminal law that performs too poorly generates harmful effects on its legitimacy within the social body, just as an over-performing criminal law does, as noted above. That said, a 'healthy' criminal law system neither aspires nor attempts to detect, arrest, prosecute, and punish every offender; a significant degree of non-enforcement or selective enforcement is inherently assumed. Therefore, it is accurate to assert that the sphere of criminal relevance "on paper" exceeds the scope of actual prosecution. Discretionary and diversionary mechanisms at the enforcement level—both de jure and de facto—intervene within the constraints of limited resources, particularly for police and prosecutors.[48] Moreover, refraining from punishing conduct that entails no or minimal harm can, in fact, serve to reinforce the authority of criminal law as a legal branch dedicated to sanctioning genuinely

[46] R.A. Duff, "A Criminal Law for Citizens" (2010) 14(3) *Theoretical Criminology* 293, 296.

[47] With marginalized communities, even more disproportionately subjected to criminal law enforcement, facing heightened anxiety and even greater harm as a result. Cf. *supra* note 37.

[48] See Heinz Zipf, *Kriminalpolitik: Ein Lehrbuch* (C.F. Müller Juristischer Verlag 1980).

reprehensible and punishment-worthy conduct, beyond formal definitions.[49]

Having made this necessary premise, criminologists have long pointed out that, in the processes of substantive criminalization, there are pathologies capable of subtly altering and distorting the application of the "official code" of penal rules.[50] This dysfunction results, on one hand, in a systematic disapplication of punishment with respect to certain criminal behaviors, akin to the approach taken at the legislative level through decriminalization measures. On the other hand, it leads to excessive and often overtly discriminatory enforcement of certain provisions, particularly against specific categories of individuals. As a consequence of the latter phenomenon, many individuals, especially those at the margins of Western societies,[51] such as immigrants, drug addicts, and members of ethnic minority groups, find themselves trapped in the revolving doors of the criminal justice system.[52]

[49] Alexandra Natapoff, "Underenforcement" (2006) 75(3) *Fordham Law Review* 1715, 1730; Duff, *supra* note 14, 68–70. Naturally, there are cases where the underenforcement of certain criminal law provisions is not the result of physiologically selective enforcement practices but rather the outcome of poor or ill-advised performances.

[50] P. Macnaughton-Smith, "The Second Code: Toward (or Away from) an Empiric Theory of Crime and Delinquency" (1968) 5(2) *Journal of Research in Crime and Delinquency* 189.

[51] Zygmunt Bauman, *Wasted Lives: Modernity and Its Outcasts* (Polity 2003). On the use of the punitive apparatus as a tool to control the ever-growing number of 'undesirable' individuals in contemporary societies, which often portray themselves as "fortresses under siege", see Alessandro De Giorgi, "Immigration Control, Post-Fordism, and Less Eligibility: A Materialist Critique of the Criminalization of Immigration Across Europe" (2010) 12(2) *Punishment & Society* 147.

[52] Loïc Wacquant, "'Suitable Enemies': Foreigners and Immigrants in the Prisons of Europe" (1999) 1(2) *Punishment & Society* 215. See also Ellen G. Cohn, Mario Coccia and Suman Kakar, "Disparate Incarceration Rates of Foreign Citizens in Europe Compared to Anglo-Saxon Countries" (2024) 18(1) *Sociology Compass* e13167, https://doi.org/10.1111/soc4.13167, finding that in most European countries the rate of foreign citizens held in prison is significantly higher compared to that of non-immigrants; European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), Prison and drugs in Europe: Current and future challenge (Publications Office of the European Union, 2022) 21, observing that "[a]t the European level, studies have shown that between 30% and 75% of people with problematic drug use have been in prison at some time in their life"). See also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2010), who argues that the U.S. criminal justice system functions as a racial caste system, disproportionately targeting Black individuals.

Sociologists and criminologists have convincingly argued that the selective application of criminal law, particularly targeting the lowest social classes and marginalized groups, serves an ideological project aimed at preserving the status quo, reinforcing existing social hierarchies and upholding established norms and structures.[53] While the penal system hyper-punishes and hyper-stigmatizes individuals labeled as "deviants", it simultaneously conceals a significant number of illegal behaviors committed by members of the elites, who remain largely immune from the processes of criminalization in a substantial sense.[54] The hyper-selectivity in the performance of penality makes the equal dignity of every person before the law become a luxury as "it renders full, fair, and balanced law enforcement an experience limited to those who can bend the government to their will".[55] This ultimately, just as it happens with the crisis of hyper-intensity, "casts a long shadow over the viability and legitimacy of [the] criminal system".[56] The performance crisis of hyper-selectivity emerges as a particularly acute manifestation of *non-egalitarian* and *discriminatory* enforcement. Criminal law is systematically applied to certain groups and types of conduct, while being deliberately under-enforced against others.[57]

Careful commentators have highlighted the harms caused by declining public trust regarding the commitment of criminal justice agencies to protecting all members of society in an egalitarian man-

[53] See, for a general discussion, Alessandro De Giorgi, *Re-Thinking the Political Economy of Punishment: Perspectives on Post-Fordism and Penal Politics* (Routledge 2006); Tonry, *supra* note 1, 96–7.

[54] Edwin H. Sutherland, *White Collar Crime: The Uncut Version* (Yale University Press 1983) 3–10; Henry N. Pontell, William K. Black and Gilbert Geis, "Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions after the 2008 Financial Meltdown" (2014) 6(1) *Crime, Law, and Social Change* 1. This aspect could be seen as a crisis of "hypo-intensity" of penality.

[55] Natapoff, *supra* note 49, 1775.

[56] Ibid.

[57] Ibid. See also Deborah Tuerkheimer, "Underenforcement as Unequal Protection" (2016) 57(4) *Boston College Law Review* 1287. It must be noted that the underenforcement of criminal law can also have detrimental effects on minority communities alongside the harm caused by the described hyper-selective discriminatory enforcement. See Darryl K. Brown, "Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute" (2018) 103(2) *Minnesota Law Review* 843, 844 ("Insufficient law enforcement attention to crimes in minority neighborhoods…has been criticized as depriving African American victims and communities of their fair share of government protection from criminal harm").

ner.[58] A hyper-selective criminalization in practice—thus hyper-effective only against a few offender 'types'—in fact becomes a vector of substantive injustice, imposing the burden of criminal penalties primarily on socially disadvantaged individuals and outright outsiders. The issue of fairness and justice in the operational dimension of penality therefore assumes a central role in terms of legitimation, particularly in relation to the relationship established between the members of a polity and criminal law. As Paul Robinson observes, "[a] criminal law that distributes criminal liability and punishment in ways that the community perceives as just gains moral credibility with the community, which translates into greater deference to, support for, and co-operation with the criminal justice".[59] On the contrary, "a criminal law that is seen as regularly doing injustice or failing to do justice loses moral credibility with the community and thereby reduces its influence".[60] In such a scenario, citizens are therefore significantly "less likely to defer to it, to support it, to co-operate with it, or to acquiesce in its commands".[61]

A non-egalitarian or discriminatory enforcement of criminal law not only deepens pre-existing inequalities but may also lead to an exasperation in debates about the allocation of penality amidst undue harbors of impunity. This discourse, as we shall see, does not promote penal de-escalation or moderation; rather, it fuels demands for more substantive criminalization—more egalitarian and less discriminatory—and, ultimately, leads to further penal intensification, albeit more equally distributed. Widespread discontent, particularly among certain segments of the population, manifests in calls for harsher punishment, primarily targeting those seen as immune from the effects of criminal law and its consequences. These reactive punitive demands are driven by perceptions of the ineffectiveness of criminal law in addressing certain behaviors and categories of offenders.

[58] See, e.g., William J. Stuntz, "Race, Class, and Drugs" (1998) 98(7) *Columbia Law Review* 1795, 1798; Randall Kennedy, *Race, Crime, and the Law* (Random House 1997); Gerald L. Neuman, "Anomalous Zones" (1996) 48(5) *Stanford Law Review* 1197, 1201.

[59] Paul H. Robinson, "The Proper Role of Community in Determining Criminal Liability and Punishment" in Jesper Ryberg and Julian V. Roberts (eds), *Popular Punishment* (Oxford University Press 2014) 54.

[60] Ibid.

[61] Ibid.

A clear and illustrative example of this can be found in Italy. The concept of so-called "justicialism" ("*giustizialismo*") is often criticized in political debates as a manifestation of penal populism. "Justicialism" is defined as a political and cultural attitude marked by an overreliance on criminal law to address societal and political problems, coupled with a tendency to view judicial intervention as the primary solution to issues such as corruption—sometimes at the expense of democratic or political processes;[62] "justicialism" is usually dialectically contrasted with "guaranteeism" ("*garantismo*"), that is "the struggle to ensure that state-pursued crime control projects do not trample on fundamental rights".[63] However, upon closer examination, supporters of the former actually express a harsh criticism of criminal justice enforcement mechanisms "pretending to protect the accused's rights but really aiming to create a system whereby it will be possible, if needed, to get certain accused people [particularly white-collar offenders] off the hook at all costs".[64]

In this regard, and generally speaking, punitive demands aimed at white-collar criminals seem more authentically rooted "from below", reflecting widespread dissatisfaction with the perceived unequal application of penal measures that often spare members of the elites. In contrast, demands for increased penal interventions in areas such as immigration and urban marginality seem to be phenomena artfully constructed "from above", frequently manufactured or amplified by political elites, media outlets, and influential interest groups to serve specific agendas.[65] For instance, the 2011 Occupy Wall Street grass-roots movement ("Occupy") in the U.S. did not only express anger at the fact that elites were gaining at the expenses of middle and lower classes. It also expressed powerful resentment again the impunity granted to top corporate officials responsible for the devastating financial crisis of 2008.[66] Occupy represented "the largest popular

[62] David Nelken, "Understanding and Learning from Other Systems of Juvenile Justice in Europe: Describing, Explaining and Interpreting" in Barry Goldson (ed), *Juvenile Justice in Europe: Past, Present and Future* (Routledge 2018) 198.

[63] Ibid.

[64] David Nelken, "Making Sense of Punitiveness: The 2008 Wiarda Inaugural Lecture" in David Nelken (ed), *Comparative Criminal Justice and Globalization* (Routledge 2011) 22.

[65] See, e.g., Anita Heber, "Stranger Danger: The Political Debate on Crimmigrants" (2023) 31(3) *Critical Criminology* 859; César Cuauhtémoc García Hernández, "Deconstructing Crimmigration" (2018) 52(1) *UC Davis Law Review* 197.

[66] On the underenforcement of economic criminal law in the U.S., see John C. Coffee, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler 2020).

expression of outrage at corporate conduct and demand for reform…channeling a long-standing and pervasive public sentiment that corporations need to suffer in a big way for their crimes".[67] Such demands for reform, as well as retributive punishment, eventually went unheard and fueled powerful narratives of distrust aimed at the government,[68] including the criminal law and the operation of the criminal legal system. In contrast, in Iceland, criminal behaviors responsible for the banking crisis of 2008, which were directly connected to the U.S. mortgage crisis of the same year, were addressed in a markedly different manner. The criminal prosecution of responsible government and corporate officials was key in signaling the absence of "safe harbors" and played an important role, in the eyes of the citizenry, in the gradual process of rebuilding public trust in institutions—including the criminal justice system—in the Nordic country, which had plunged after the collapse of the country's financial sector.[69]

Performance crises of hyper-selectivity trigger the diffusion of punitive fury across certain social strata, which may or may not be subsequently picked up at the political and legislative level. This leads to a rather paradoxical situation in the field of penal policy: community members who harshly criticize the hyper-selectivity of criminal law in action end up proposing, as an antidote to such unequal and discriminatory allocation of punishment, a sort of 'compensatory' reorientation of the criminal justice machinery toward conduct and categories of individuals perceived as largely immune from punishment instead of stimulating a constructive conversation aimed at an overall de-escalation and a more equitable distribution of penality. "Carceral progressivism" and "progressive punitivism" can

[67] Mihailis E. Diamantis, "Clockwork Corporations: A Character Theory of Corporate Punishment" (2018) 103(2) *Iowa Law Review* 507, 517.

[68] See Rachel Meade, "Populist Narratives from Below: Occupy Wall Street and the Tea Party" (2019) 14 *IdeAs* 1.

[69] See Susan Will, "The Icelandic Approach to the 2008 Banking Crisis" in Judith van Erp, Wim Huisman and Gudrun Vande Walle (eds), *The Routledge Handbook of White-collar and Corporate Crime in Europe* (Routledge 2015) 276–91.

be seen as expressions of this trend, rejecting penal moderation and advocating for more punishment, particularly targeting those who are typically exempt from the hyper-selective application of criminal law.[70]

Under the scenario of hyper-selectivity performance crises of penality, the uneven and discriminatory allocation of punishment disproportionately targets certain groups, while others—particularly members of the elites—are perceived as being spared. This deepens existing inequalities, as marginalized communities face harsher punishments, further entrenching systemic disparities. Such hyper-selectivity fuels a backlash, with public frustration directed at perceived favoritism and undue leniency toward certain offenders, undermining trust in the justice system. These dynamics erode confidence in the penal system's impartiality and effectiveness, as the selective application of the law fosters perceptions of bias and unfairness, ultimately weakening its legitimacy.

3.3 *Crises Arising from Sentence Opacity*

The third typology of performance crises of penality stems from what can be referred to as *sentence opacity*. These crises arise from sentencing practices where the intended outcomes outlined in legal provisions or policy statements diverge from the reality of how sentencing laws are actually applied. The focus is, therefore, on how opaque these sentences are, in that they are not legible to the public and/or set false expectations. This enforcement-related pathology undermines the legitimacy of the penal system when sentences are perceived as opaquely imposed, inconsistently enforced, or too lenient despite the rigor declared on paper. Performance crises in sentencing practices reflect a fundamental disconnect between the penal system's stated objectives and their actual implementation, exposing what are often interpreted by the public as flaws in the way criminal justice is administered on a day-to-day basis. Two phenomena exemplify this situation from different angles.

[70] See Benjamin Levin, "Carceral Progressivism and Animal Victims" in Lori Gruen and Justin Marceau (eds), *Carceral Logics: Human Incarceration and Animal Captivity* (Cambridge University Press 2022); Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (University of California Press 2021); Hadar Aviram, "Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends" (2020) 68(1) *Buffalo Law Review* 199.

A first example of the manifestation of this performance crisis is the widespread reliance on plea bargaining across penal systems around the globe, which has fundamentally altered the relationship between crime and punishment.[71] On paper, criminal law is designed to impose a punishment that corresponds directly to the crime committed, ensuring justice through proportionality and fairness. However, the reality of plea bargaining distorts this ideal by allowing individuals to be sentenced not based on what they actually did, but on what they (or their counsel) agree to admit under a negotiated plea. This practice, while intended to expedite case resolution, fractures the clear link between the offense and the corresponding sentence. As a result, the legal system's commitment to justice becomes clouded, as defendants often plead to lesser charges or, in some jurisdictions, even to crimes they did not commit,[72] or are let off with lighter sentences for serious offenses simply due to the strategic nature of the negotiation process.

For instance, a defendant may plead guilty to a lesser charge of robbery rather than face trial for a more serious charge of armed robbery, even if they were not involved in the crime at all.[73] This undermines a fundamental principle of criminal law—that punishment should fit the crime—and replaces it with a process of negotiation that appears more focused on avoiding procedural burdens than on ensuring justice. This situation introduces a fundamental

[71] See Maximo Langer, "Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions" (2021) 4 *Annual Review of Criminology* 377. With regard to the U.S., where approximately 98 percent of federal convictions and 95 percent of state convictions result from guilty pleas, see William Ortman, "When Plea Bargaining Became Normal" (2020) 100(4) *Boston University Law Review* 1435.

[72] For the U.S. context, see Ronald Wright and Marc Miller, "Honesty and Opacity in Charge Bargains" (2003) 55(4) *Stanford Law Review* 1409. In England and Wales, plea bargaining understood as seeking a specific sentence in exchange for dropping certain charges is not permitted.

[73] Defendants, therefore, often enter a plea agreement not because they are guilty but because they view it as the best option under the circumstances, including the fear of harsher sentencing if convicted at trial.

performance crisis, where a core tenet of criminal law—accountability and punishment based on the facts of a case—fails to manifest in practice, leading to a sense of injustice and disillusionment among the public, victims, and offenders alike,[74] ultimately undermining the perceived legitimacy of the criminal legal system.[75]

A second dimension of this performance crisis lies in the use of misleading language in sentencing, which distorts the public's understanding of the actual punishment an offender will face.[76] Terms such as "five years' imprisonment" or "suspended sentences" are often misrepresentative, failing to align with the realities of how sentences are executed. In many countries, most offenders do not serve their full sentence announced in court due to parole, remission, or other forms of early release mechanisms. For instance, in jurisdictions where "truth in sentencing" laws are rare, prisoners may become eligible for parole after serving only a fraction of their sentence—often one-half or two-thirds of the term,[77] with some jurisdictions allowing eligibility after as little as one-third of the sentence is served (e.g., Canada).[78] While parole plays a crucial role in criminal justice systems—serving as a mechanism to encourage rehabilitation and reintegration into society—the discrepancy between the sentence

[74] Thea Johnson, "Public Perceptions of Plea Bargaining" (2019) 46(1) *American Journal of Criminal Law* 133, 152, discussing the results of a survey where "[a]lmost no respondents answered that plea bargaining was meant to achieve justice".

[75] See Gregory M. Gilchrist, "Plea Bargains, Convictions and Legitimacy" (2011) 48(1) *American Criminal Law Review* 143, 163–70. Studies have shown that public confidence in the criminal justice system is influenced by perceptions of procedural fairness. As Tom R. Tyler, *Why People Obey the Law* (Princeton University Press 2006) argues, when legal processes appear arbitrary or biased, or when the public perceives that outcomes are shaped by negotiation rather than a fair assessment, their trust in the system is eroded. Plea bargaining, by introducing a layer of negotiation that is often opaque to the public, may contribute to such perceptions of arbitrariness.

[76] See, in part., Rory Kelly, *The Language of Sentencing* (paper presented at Queen's University Belfast School of Law, ICCJ seminar series, 18 January 2023).

[77] Dirk van Zyl Smit and Alessandro Corda, "American Exceptionalism in Parole Release and Supervision: A European Perspective" in Kevin R. Reitz (ed), *American Exceptionalism in Crime and Punishment* (Oxford University Press, 2018) 431–3.

[78] Government of Canada, "Types of Conditional Release" https://www.canada.ca/en/parole-board/services/parole/types-of-conditional-release.html [accessed 15 February 2025]. See also Corrections and Conditional Release Act s 120(1), under which an offender serving a fixed-length sentence is eligible for full parole after serving one-third of the sentence or 7 years, whichever is less. Eligibility does not guarantee automatic release but must be granted by the Parole Board.

announced in court and the actual time served creates significant challenges. This gap often remains uncommunicated or is poorly explained to the public, leading to confusion and a perception that justice has not been served.

A "suspended sentence" is another term that can be misleading. Legally, it refers to a situation where a court imposes a prison sentence but delays or suspends its execution, typically on the condition that the offender meets certain requirements, such as good behavior, attending rehabilitation programs, or other specific actions. If the offender adheres to these conditions over a set period of time, they may avoid serving the prison sentence altogether. However, if they violate the terms of the suspension (such as committing another crime or failing to comply with the conditions), the sentence may be activated, and they could be required to serve the prison time.[79] Yet, the label fails to convey these nuances, leading to misinterpretations about the actual consequences of such sentences. This lack of clarity not only skews public perceptions but also risks fostering cynicism, as it may appear to downplay the punitive aspects of the measure and the seriousness of the crime for which the individual was convicted. The result is often a sense of frustration, particularly (but not exclusively) among victims, who may feel that the punishment does not adequately correspond to the harm caused by the crime.[80]

Together, these phenomena reveal a performance crisis within criminal law at the sentence implementation stage. When there is extensive reliance on plea bargaining, legitimate sentencing practices are replaced by a system that often appears to prioritize unprincipled pragmatism over clear, transparent justice. Similarly, discrepancies between the language of sentencing and its actual outcomes contribute to widespread dissatisfaction among stakeholders. Victims, the general public, and even legal professionals grapple with a penal system that, in operation, appears opaque, inconsistent, and at times openly contradictory. These misalignments fuel perceptions of

[79] See Keir Irwin-Rogers and Julian V. Roberts, "Swimming Against the Tide: The Suspended Sentence Order in England and Wales, 2000-2017" (2019) 82(1) *Law and Contemporary Problems* 137, 137, observing that "Suspended sentences of various forms have been an element of western sentencing for decades, and almost all common law jurisdictions operate some form of suspended sanction. Yet of all the alternatives to institutional imprisonment, suspended sentences have proved the most problematic".

[80] See Julian V. Roberts and Loretta J. Stalans, *Public Opinion, Crime, and Criminal Justice* (Routledge 1998) ch. 7, highlighting how the public usually does not fully understand the complexities of sentencing patterns.

unfairness, erode the legitimacy of criminal justice practices, and exacerbate the performance crises arising from sentence opacity. The gap between the stated objectives—fairness, proportionality, and accountability—and their practical application, which often involves negotiation, language ambiguity, and even a certain degree of expediency, breeds a sense of distrust. As a result, criminal law as a tool for justice is increasingly delegitimized, as the widening gap between sentencing theory and its application fosters public dissatisfaction, confusion, and, ultimately, disillusionment.

This type of performance crisis highlights the complex ways in which theory and practice within criminal law can diverge, resulting in a system increasingly disconnected from the ideals it purports to uphold. The gap between the rhetoric of sentencing and its implementation fosters skepticism and fuels calls for "reactionary" reforms. When public confidence in the administration of justice erodes and people perceive offenders as "getting off lightly", the response often manifests in demands for harsher penalties rather than addressing the underlying issue of transparency. Sentence opacity underscores the need for clearer communication with the public—not to justify populist punitive sentiments, but to enhance understanding of how sanctions are imposed and function, thereby helping to defuse public anger and reduce misinterpretations.[81]

IV CONCLUSION: TOWARD PENAL ADEQUACY

The three forms of performance crises of penality presented and discussed in the preceding Part highlight the need to anchor the enforcement of criminal law to a principled modus operandi capable of enhancing its legitimacy from the perspective of substantive

[81] Sentencing guidelines can serve as a means to achieve this objective. See, e.g., Douglas A. Berman, "Sentencing Guidelines" in Erik Luna (ed), *Reforming Criminal Justice* (vol 4, Punishment, Incarceration, and Release, Arizona State University 2017) 109 ("[A] well-designed guideline structure provides the best means for the express articulation of sound standards to inform and shape individual sentencing outcomes and to promote transparency and the rule of law throughout a sentencing system"). See also Paul H. Robinson and Hugh Rennie, "Truth and Deception in Criminal Sentencing" (2025) University of Pennsylvania Law School, Public Law Research Paper No. 25-03, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5118333 (arguing that greater transparency in sentencing enables the public and politicians to understand what is actually happening in the criminal justice system, fostering fact-based discussions, and thereby avoiding the societal costs of deception while promoting more rational policymaking).

criminalization and, ultimately, as a whole. The hyper-intensity of the penal system cannot be curbed solely by resource constraints, where a bulimic punitive apparatus becomes unsustainable due to recession-driven budget cuts.[82] At the same time, overall penal moderation should not simply result from a punitive machinery that is either unselectively expansive—rendering it inefficient—or excessively selective—making it discriminatory in its operations. Furthermore, sentencing practices must directly address the gap between formally threatened sentences and their actual enforcement, thereby fostering confidence in the system's ability to deliver justice consistently and effectively. This requires clear communication of the complexities of the criminal legal system, including the variability of outcomes based on individual circumstances.

A legitimate criminal law can only be the result of a democratic-participatory process[83] that aspires to clearly define the "punitive resources" available to a given penal system, and anchors their allocation to shared principles and criteria. The implementation and evaluation of key parameters—such as the proportionality of punitive responses, the egalitarian and non-discriminatory distribution of punishment, and the alignment between stated goals and the means used to achieve them—are essential for building a penal system grounded in robust legitimacy. This architecture should be guided by the notion of "penal adequacy", which is rooted in moderation, egalitarianism, transparency, and effectiveness. Penal adequacy emphasizes the importance of a balanced and fair use of penal power—one that is measured, non-discriminatory, unambiguously communicated, and ultimately capable of achieving its intended objectives in a sustainable manner.

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[82] Ian Loader, "For Penal Moderation: Notes Towards a Public Philosophy of Punishment" (2010) 14(3) *Theoretical Criminology* 349, 357, speaks of punishment "during times of economic plenty" as a "binge" and "a frenetic feasting". See also Hadar Aviram, *Cheap on Crime: Recession-Era Politics and the Transformation of American. Punishment* (University of California Press 2015) 11, who employs the term "*humonetarianism*" to define a value-free approach to the use of punitive measures "that focuses on cost-saving and financial prudence as its raison d'être". Following the financial crisis of 2008, this approach led to a slowdown in mass incarceration and mass supervision in the U.S. due to a scarcity of resources. A more accurate term might be "*humofiscalism*", as "fiscalism" emphasizes the prioritization of financial or budgetary concerns, while "monetarianism" focuses on the role of policymakers in controlling the amount of money in circulation.

[83] Loader, *supra* note 82, 363.

Penal adequacy serves as a framework for enhancing the application of penal measures within a given legal and social context. It encompasses three main attributes in the exercise of the state's penal authority, each corresponding to one of the three performance crises that have been identified and discussed:

(1) *Moderation*: At the enforcement level, moderation serves as a critical antidote to the hyper-intensive use of criminal law, preventing excessive and overly punitive responses. It ensures sanctions are applied carefully, addressing only what is necessary and in a proportionate way, while avoiding overpolicing and overpunishment across the board. By limiting disproportionate penalties and curbing the overreach of the state's penal power, moderation helps prevent criminal law from becoming a blunt instrument of control and repression. This measured approach not only minimizes collateral harm but also upholds public trust, thereby reinforcing the system's legitimacy in practice.
(2) *Non-discrimination*: An egalitarian enforcement of criminal law promotes the uniform and impartial application of penal sanctions, rejecting the inequities of hyper-selective enforcement that erode the legitimacy and perceived fairness of the criminal justice system. A non-discriminatory approach to enforcement ensures that criminal law is applied consistently and universally, free from bias or disproportionate targeting of specific groups, while also fostering equality before the law. This approach reinforces the system's credibility, legitimacy, and broader societal trust, ensuring that the law operates as a fair and just mechanism for all members of society, irrespective of their background.
(3) *Transparency*: Transparent communication of both sentencing processes and outcomes is essential to ensure that the threat and application of sanctions convey credible messages. Unambiguous communication of how sentencing practices operate helps prevent public misperceptions of sentence opacity. Addressing these disconnects requires consistent messaging and clear articulation of the relationship between punitive measures and their intended aims and effects to reinforce the public's trust as well as the system's legitimacy and coherence.

Furthermore, and overall, it is essential to ensure that the enforcement of criminal law effectively achieves its core, agreed-upon objectives in ways that balance intended outcomes with broader societal and institutional costs. We could speak, in this regard, of *sustainability*. From this angle, sustainability means carefully weighing the resource demands of enforcement against the societal benefits it aims to deliver, while being mindful of the long-term impact on communities, institutions, and public trust in the justice system. Striking this balance allows the criminal law to maintain its legitimacy, minimize unintended consequences, and preserve public confidence in its operation.[84] Under this framework, the concept of penal adequacy encapsulates a balanced and transparent approach to the enforcement of criminal law—one that is neither overly lenient nor excessively harsh, aiming to maintain public trust while addressing societal harms in a measured, justified, socially constructive, and effective manner.

This article has emphasized the need to focus not solely on criminal law as adopted on paper, but also on how it is applied and enforced. Understanding criminalization in substantive terms, rather than purely formal ones, reveals the deeper complexities at play. A normative theory of criminalization must therefore incorporate a normative account of substantive criminalization. In this context, the article has introduced a tripartite taxonomy of what I have termed "performance crises" of penality (arising from, respectively, hyper-intensity, hyper-selectivity, and sentence opacity), providing illustrative examples from various jurisdictions to highlight the pressing need for a more comprehensive and systematic discussion on this topic. To deepen our understanding of criminal law and its broader social function and impact, it is crucial to examine both its theoretical foundations and practical application. This involves identifying and addressing systemic pathologies that undermine the legitimacy of penal systems, with greater attention to their operation "on the ground". The concept of "penal adequacy" and its attributes—a principled framework for guiding the determination and allocation of punitive resources in the deployment of criminal law—can be useful in advancing this endeavor. Ultimately, a coherent and sound approach to substantive criminalization is just as critical as a rational and principled approach to formal criminalization in upholding the legitimacy of criminal law. Moreover, it carries significant normative implications for the development of a comprehensive theory of criminalization and for shaping grounded and effective penal policy decisions.

[84] See Yvon Dandurand, "Criminal Justice Reform and the System's Efficiency" (2014) 25(3-4) *Criminal Law Forum* 383, 385, noting that "[p]oor performance makes many aspects of the criminal justice process questionable and also *unsustainable*" (emphasis added).

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No datasets were generated or analysed during the current study.

DECLARATIONS

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