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"Safety, in a Republican Sense": *Trump v. United States*, Democracy, and an Antisubordination Theory of the Criminal Law

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ABSTRACT. Democratic governance requires holding the powerful to account. This principle was as familiar to the ancient Athenians as it was to the Framers of the Constitution. Contemporary liberal democracies, however, must balance the need for popular control with the procedural principles of criminal due process. First and foremost among these is the formal equality of all petitioners before the law.

The Supreme Court's decision in *Trump v. United States* only confirms what scholars and activists have long observed—that the balance between these two considerations, democratic control and formal equality, has fallen out of alignment, and that the practical and conceptual complement to the mass incarceration of the disadvantaged is an increasing unwillingness or inability of the criminal justice system to prosecute and punish elite deviance.

This Essay proposes a broad antisubordination theory of the criminal law as an alternative to both what remains of the classical liberal doctrine of formal equality and the current alternative of prison, penal, and police abolitionism. Unlike formal equality and penal abolitionism, the broad antisubordination theory proposed here grapples directly with disparities in status and power, especially where the illicit exercise of power leads to the violation of democratic values like free elections and equal voice. Under a broad antisubordination theory, protection of democracy is coequal with the protection of individual goods like freedom and security.

The first two Parts of this Essay introduce the long-running constitutional debate over the criminal prosecution of elite actors and examine evidence that the liberal solution of formal equality has failed to deliver democratically acceptable results. In its second two Parts, the Essay gives a preliminary account of a broad antisubordination theory of the criminal law, and shows why this theory is ultimately preferable to contemporary alternatives like prison and penal abolitionism, especially from the perspective of democratic theory.

INTRODUCTION

The Supreme Court's decision in *Trump v. United States*, handed down on July 1, 2024—some four months before the presidential election in which the petitioner was the leading candidate—would have been a major constitutional event under any circumstances. But the radical nature of the Court's interpretation of presidential immunity for all "official" acts, even after the term of office had ended, and the extremely broad reading of what "official acts" might be, shocked many observers, including the dissenting Justices.[1] Significant elements of the most open and serious threat to American self-governance in generations—the attempt to prevent the transfer of power in a free and fair election on and before January 6—were effectively placed outside the purview of criminal sanctions by the country's highest judicial authority.[2] At the heart of the Court's decision lies a very simple premise: the criminal law must not hold accountable the nation's ultimate executive authority because the distraction of the law might deplete the "energy" with which the Executive governs.[3] The threat of criminal sanctions, in other words, might stop the President from acting quickly and decisively. Aside from the obvious invitation to crime and corruption offered by this line of reasoning,[4] the majority's self-assured certainty that the criminal law has no role to play in the accountability of those who govern is of a piece with a broader crisis in the democratic legitimacy of the criminal law. Simply put, the criminal law is increasingly powerless against the powerful. This trend towards the effective—or even de jure—immunity of elected officials and other high-status lawbreakers threatens the legitimacy not just of the criminal law, but of the entire political structure of American democracy.

The idea that the criminal law faces a crisis of democratic legitimacy is not a new one.[5] Many discussions of democracy and criminal law focus on the punitive

1. Justice Sotomayor writes: "Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them." Trump v. United States, 144 S. Ct. 2312, 2360 (2024) (Sotomayor, J., dissenting). Justice Jackson, for her part, notes that the proposed test for official acts is so expansive so as to be "illusory." *Id.* at 2379 (Jackson, J., dissenting).

2. *Id.* at 2324, 2334-36 (majority opinion) (granting immunity for the President's attempts to use both the Attorney General and Vice President to advance his attempts to overturn the election).

3. *Id.* at 2331.

4. Frank Bowman, *The Assassination Hypothetical Isn't Even the Scariest Part of the Supreme Court Immunity Ruling*, SLATE (July 2, 2024, 4:38 PM), https://slate.com/news-and-politics/2024/07/trump-2024-supreme-court-immunity-ruling-be-afraid.html [https://perma.cc/8PTA-XMYK].

5. For examples of prior work on the issue, see WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 6-7 (2011), arguing that structural relationships between legislators, prosecutors, and judges—but especially between legislators and prosecutors—lead to unintended

overreach that has led to the mass incarceration of millions of Americans.[6] The criminal justice system, these arguments contend, "has become one of the significant obstacles to democratic solidarity in American life today,"[7] thanks largely to racial bias and patterns of disparate treatment that have worsened considerably over the course of the twentieth century.[8] But alongside the violation of equal rights through discriminatory patterns of policing, prosecution, and punishment, there persists a second, often overlooked, democratic crisis of the criminal law: its failure to protect the institutions and forms of collective self-government from the predation of those who wield political or social power.[9]

It is this second democratic crisis of the criminal law—its failure to surveil and control the powerful adequately—that is suggested by the timorous attitude with which the Supreme Court approached the presidential conduct behind *Trump v. United States*. It is this crisis in punishing the powerful that is the chief subject of this Essay. To live up to its democratic potential, the criminal law must operate according to the democratic principle of antisubordination. This principle demands that the law work to enhance substantive social and political equality even, or especially, under conditions of real social and political inequality.[10] The harms that criminal law ought to address, from this perspective, are harms of illicit hierarchy, whether of a perpetrator over a victim, or, in the case of the very powerful, of a perpetrator over all his fellow citizens.[11] The antisubordination approach thus stands in opposition to the paradigm of formal equality: it

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and deleterious increases in the harshness of the penal system; and Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. L. REV. 1367, 1397 (2017), arguing that the proper response to penal populism is doubling down on democratization rather than reaching for bureaucratization.

6. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 15-16 (2019); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 11 NW. L. REV. 1597, 1600-01 (2017). For foundational accounts of mass incarceration and abolitionism, see generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); and MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

7. Kleinfeld, *supra* note 5, at 1371.

8. STUNTZ, *supra* note 5, at 4-5.

9. *See* JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME 136 (2020) (noting the absence of mandatory minimum sentences for those federal crimes most often committed by white-collar offenders); MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP 15 (2014) (arguing that corporate executives often evade prosecution through a sweeping use of attorney-client privilege); RENA STEINZOR, WHY NOT JAIL?: INDUSTRIAL CATASTROPHES, CORPORATE MALFEASANCE, AND GOVERNMENT INACTION 9 (2014) (describing the dramatic difference in incarceration rates between wealthy and poor people in the United States).

10. *See* Catherine MacKinnon, *Equality*, 149 DAEDALUS 213, 213-15 (2020).

11. *See* Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1161 (2018).

rejects the notion that the identical treatment of differently situated individuals in accordance with the law is sufficient to ensure their equal protection by it. Rather, the antisubordination approach recognizes that powerful people are exceptional and insists that for this very reason they are exceptionally deserving of legal scrutiny.

By focusing on real rather than formal equality, an antisubordination theory turns out to offer a framework for addressing *both* crises of the criminal law. An antisubordination theory of the criminal law can ground the conditions under which it is appropriate to use the criminal law to defend the democratic process, as well as support efforts to lessen the frequency and harshness with which average citizens are punished. If the far-reaching executive immunity established by *Trump v. United States* is ever revoked, it will be because citizens, legislators, and courts have come to recognize that the threat of accountability under criminal law — especially a criminal law designed to protect political equality and equal voice — is an essential resource in democracy's arsenal of self-defense.

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Of the many argumentative strategies proffered in *Trump v. United States*,[12] one seems to have met particular success. This is the idea that the prospect of criminal prosecution would be disruptive to the core functions of the Executive.[13] The petitioner produced some more or less tendentious evidence to support this proposition — the well-known position of the Department of Justice's Office of Legal Counsel that *sitting* presidents enjoy immunity from prosecution[14] and the finding of broad immunity from *civil* liability in *Nixon v. Fitzgerald*.[15] But the petitioner's arguments gesture at a more abstract claim about the privileges of high office under the common law,[16] or perhaps even at an extralegal aura of presidential power.[17] The Department of Justice, speaking on behalf of the people of the United States, offered one central response to this line of attack in its brief: "[N]o person is above the law."[18]

The petitioner's case depended on a sort of constitutional truism — the unique position of the President atop the executive branch, and the unparalleled

12. 144 S. Ct. 2312 (2024).

13. *Id*. at 2347.

14. Brief of Petitioner at 19, *Trump*, 144 S. Ct. 2312 (No. 23-939) (citing A Sitting President's Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. 222, 260 (2000)).

15. *Id.* at 14-15 (citing Nixon v. Fitzgerald, 457 U.S. 731, 748-49, 756 (1982)).

16. *See id.* at 24-25.

17. *See id.* at 12-13.

18. Brief for the United States at 8, *Trump*, 144 S. Ct. 2312 (No. 23-939).

powers and status that accompany that position. Criminal law is suspended for the length of the President's term, Trump's team argued, so might not the logic of exemption extend even further?[19] The government, on the other hand, was silent about or even blind to any contrary relationship between the criminal law and the President's status. It was dedicated to "applying the criminal laws equally to all persons."[20] The rhetorical and logical center of this argument is an understanding of the criminal law grounded in formal equality:[21] "It would be a striking paradox if the President, who alone is vested with the constitutional duty to 'take Care that the Laws be faithfully executed,' were the sole officer capable of defying those laws with impunity."[22] The government argued that there is a "public interest in an ongoing criminal prosecution" of a President.[23] But this interest is grounded in the "commitment to the rule of law,"[24] a general principle to which presidential prosecution should not be an exception.[25] The government's unwillingness to make the status or power of the President an explicit issue, to recommend that great power must be met with great vigilance, left intact the petitioner's theory of presidential exception—a theory that the Court's final ruling adopted, and even surpassed.

The jurisprudential logic at stake in *Trump v. United States* is even clearer in the Court of Appeals ruling that precipitated the Supreme Court's intervention. The D.C. Circuit, quoting *Nixon v. Fitzgerald*, stated that its task was "balanc[ing] the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."[26] But the court was slightly more daring than the government allowed itself to be. In addition to the aspiration to "equality before the law" that forms the backbone of the government's case before the Supreme Court, the D.C. Circuit identified another interest in the balance: "The public has a strong interest in the foundational principle of our government that the will of the people . . . determines

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19. Brief of Petitioner, *supra* note 14, at 28 (arguing that "[t]he same conclusion [that the threat of prosecution hampers a sitting president's job performance] holds if that criminal investigation is waiting in the wings until he leaves office").

20. Brief for the United States, *supra* note 18, at 12.

21. MacKinnon, *supra* note 10, at 213 ("[T]he formal equality notion used in most U.S. law . . . means treating likes alike, unlikes unalike.").

22. *Id.* at 20 (citing United States v. Texas, 599 U.S. 670, 678-679 (2023)).

23. Brief for the United States, *supra* note 18, at 19 (quoting United States v. Nixon, 418 U.S. 683 (1974)).

24. *Id.* (quoting Cheney v. U.S. Dist. Ct., 542 U.S. 367, 384 (2004)).

25. Trump v. United States, 144 S. Ct. 2312, 2342 (2024) (describing the government's argument that "the President enjoys no immunity from criminal prosecution for any action").

26. United States v. Trump, 91 F.4th 1173, 1195 (D.C. Cir. 2024) (per curiam) (quoting Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982)), *vacated and remanded*, 144 S. Ct 2312 (2024).

who will serve as President."[27] According to the D.C. Circuit's reasoning, it is the specific nature of the former President's alleged crimes—their relationship to elections *qua* democratic-accountability procedures—that makes the idea of immunity so dangerous. What is at stake in *Trump v. United States* is nothing less than the response to "crimes that would neutralize the most fundamental check on executive power—the recognition and implementation of election results."[28] The former President's brief urged the Court to resist the lower court's so-called "gerrymandered approach to immunity" tailored specifically to fit the facts of the Trump indictment.[29] In fact, the relationship between crimes, elections, and accountability was not pursued in the government's response, perhaps because the government feared that stressing this connection would violate the principle of formal equality at the heart of its own argument.

The German jurist Carl Schmitt pointed out a supposed inequality between these two arguments—that a theory of executive exception that takes into account the rule of law, and decides when it must be transcended, is superior to a supposedly weaker, formalistic insistence that no one, not even the Executive, is above the law.[30] It is impossible to say whether Schmitt's preference for the exception over the rule, and his identification of the exception with a constitutionally privileged Executive, laid the groundwork for the Court's broad embrace of the logic of presidential immunity.[31] It seems hard to imagine that this Court might have ruled any way other than as it did; as Justice Sotomayor noted in dissent, previously "[s]ettled understandings of the Constitution" were cast aside.[32] But in the hope of opening up a path for future thinking, this Essay will pursue the thought expressed in the ruling of the court of appeals and dismissed by the Supreme Court's majority—namely, that the connection between the power of the criminal law and the question of democratic accountability of rulers

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27. *Id.* at 1199.

28. *Id.* at 1200.

29. Brief for the Petitioner, *supra* note 14, at 47.

30. *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5–15 (George Schwab trans., Univ. Chi. Press 2005) (1922).

31. Other observers have noted the Schmittian overtones in the Court's decision, including Jennifer Szalai, *The Nazi Jurist Who Haunts Our Broken Politics*, N.Y. TIMES (July 13, 2024), https://www.nytimes.com/2024/07/13/books/review/carl-schmitt-jd-vance.html [https://perma.cc/K3ZH-H38R]; and Elizabeth (Liz) Anderson, *Supreme Court Rules Hitler Immune from Prosecution for Burning Down Reichstag, Seizing Absolute Power*, CROOKED TIMBER (July 2, 2024), https://crookedtimber.org/2024/07/02/supreme-court-rules-hitler-immune-from-prosecution-for-burning-down-reichstag-seizing-absolute-power [https://perma.cc/X2CK-WKWP].

32. Trump v. United States, 144 S. Ct. 2312, 2360 (2024) (Sotomayor, J., dissenting).

to the ruled is close and important.[33] The best response to the Schmittian argument that every system of laws implies necessary exceptions is a reaffirmation that no office in the American Constitution, and no "energetic" executive decision, is beyond the reach of prosecution before a jury of the officeholder's peers. This is not only because of a formal or universally applicable rule, but also because no value should be higher in a democracy than the accountability of rulers to those that they rule.

This democratic rejection of the Schmittian logic found in *Trump v. United States* has strong support from the American constitutional tradition. The lower court, citing Justice Scalia's dissent in *Morrison v. Olson*, writes that "the Founders . . . established a single Chief Executive accountable to the people" so that "the blame [could] be assigned to someone who can be punished."[34] Punishment refers, in this case, to the loss of an election, but the word may also refer to criminal prosecution. The Founders themselves were inheritors of a long tradition of democratic theorizing about the role of criminal sanctions in reinforcing the rule of the people over the powerful. They were deeply concerned with what Hamilton called the "safety, in a republican sense" of the people as sovereign, even (or especially) from the most powerful of their representatives, and the modes of accountability they considered and endorsed included the criminal law.[35] In this Essay, I will propose a theory of criminal law that would emphasize the importance of the criminal law to both the democratic dignity of equal citizens and the accountability of powerful citizens to the people as a whole. I will defend this antisubordination theory of the criminal law against both the reigning approach of formal equality (reflected in the *Trump* prosecution's unwillingness to discuss the special status of the President) and the increasingly popular theory of penal abolitionism.[36]

This antisubordination approach takes its bearings from a historical tradition of thinking about criminal law dating back to democratic Athens. According to this tradition, while the laws concerning the punishment of citizens in their private roles as civic equals should be "soft and measured," the supervision of the

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33. This line of thought was, however, picked up by Justice Sotomayor in her dissent: "The public interest in this criminal prosecution implicates both '[t]he Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution' as well as 'the voters' interest in democratically selecting their President.'" *Id.* at 2367 (quoting United States v. Trump, 91 F.4th 1173, 1195 (D.C. Cir. 2024) (per curiam)).

34. *Trump*, 91 F.4th at 1199 (quoting Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting)).

35. THE FEDERALIST No. 77, at 390 (Alexander Hamilton) (Ian Shapiro ed., 2009).

36. I borrow the term "antisubordination" from Deborah Tuerkheimer, who defines an antisubordination theory of criminal law as "demand[ing] that the state attend to harms to citizens whose injuries have traditionally been over-looked—whether those citizens are crime perpetrators or crime victims." Tuerkheimer, *supra* note 11, at 1161.

powerful should be "peremptory and hard . . . in order that those active in politics (*hoi politeumenoi*) do the least harm" to the many (*hoi polloi*).[37] A democratic theory of the criminal law must address the current crisis in democratic legitimacy made manifest by *Trump v. United States* while not forgetting that the United States is still tainted by the blight of mass incarceration. An antisubordination theory of the criminal law can help us to understand both problems and even to theorize their relationship to each other.

This Essay proceeds in four Parts. The first Part examines the ambivalence, exhibited in *Trump v. United States*, toward using the criminal law to call a powerful officeholder to account. A key question raised both in the briefs and in oral argument is whether the criminal law's possible role in accountability is obviated by other measures—most notably, elections and impeachment. This Part will give a brief history of the relationship between criminal and noncriminal forms of accountability in democratic theory, from Athens through the framing of the Constitution. The second Part examines the failure of the criminal law to perform its democratic function of restraining powerful actors and interests, and it relates this failure to the well-known penal failures of mass incarceration. The third Part lays out the foundations of a new democratic theory of the criminal law, the broad antisubordination approach, and explains its contribution to addressing the crisis of the democratic legitimacy of the criminal law discussed in the previous Part. The fourth Part addresses objections to the antisubordination theory of the criminal law, with special attention to the arguments of prison and penal abolitionists who reject the use of harsh punishment against any citizen, even powerful ones.

I. A BRIEF HISTORY OF DEMOCRATIC ACCOUNTABILITY AND THE RISE OF FORMAL EQUALITY

The case for a democratic theory of the criminal law depends on the idea that accountability is an appropriate aim of the criminal law in the first place. This very proposition is one of the central elements at stake in *Trump v. United States*. On the one hand, the former President's case rests on a hard distinction between political and criminal forms of accountability; on the other, it rests on the assertion that everything that the President does is political.[38] Part of this argument

37. Demosthenes, Against Timocrates, *in* AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 373, 496 (1935). The translation is mine.

38. Brief of Petitioner, *supra* note 14, at 33 (arguing that "offenses committed through the President's official acts 'are of a nature which may with peculiar propriety be denominated POLITICAL'") (quoting THE FEDERALIST No. 65 (Alexander Hamilton)); *id.* at 34 (arguing that "prosecution of a President is 'necessarily political in a way that criminal proceedings against

depends on a selective misreading of the historical record (discussed below), but it is also a claim about the nature of different forms of accountability. If everything the President does is political, and the only constitutionally legitimate form of political investigation is impeachment, then the only form of presidential accountability must be impeachment (or criminal prosecution warranted by a successful impeachment). According to this line of argument, "the President 'is accountable only to his country,'" through the electoral process or impeachment by elected representatives, "and to his own conscience."[39]

The government's case picked up this very point, distinguishing early on between political and criminal accountability: "Impeachment is an inherently political process, not intended to provide accountability under the ordinary course of the law. Criminal prosecution, in contrast, is based on facts and law, and is rigorously adjudicated in court."[40] The government, however, did not agree that the President is a wholly political being. Using an argument akin to the medieval political theory of the mortal king who inhabits an immortal office, the government noted that "far from being above the laws, [the President] is amenable to them in his private character as a citizen, and in his public character by impeachment."[41]

Both parties in *Trump v. United States* agreed that there are three types of accountability for officeholders: political, criminal, and civil. Neither party disputed the legitimacy of impeachment. *Nixon v. Fitzgerald* foreclosed civil accountability for the presidency.[42] This leaves the question of criminal accountability. The petitioner argued that if a weak form of accountability (civil liability) is too disruptive to be permitted against the Chief Executive, *a fortiori*, "[t]he requirement for criminal immunity for Presidents is even more urgent than that for civil immunity."[43] The government's response highlighted the public nature

other civil officers would not be,' and 'unavoidably political'") (quoting A Sitting President's Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. 222, 230 (2000)).

39. *Id.* at 30 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563 (1833)).

40. Brief for the United States, *supra* note 18, at 6-7.

41. *Id.* at 14 (quoting Trump v. Vance, 591 U.S. 786, 816-17 (2020) (Thomas, J., dissenting) (italics omitted)). For a discussion of the historical theory of the mortal king who inhabits an immortal office, see ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY 4-5 (1957).

42. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that "petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts").

43. Brief of Petitioner, *supra* note 14, at 30.

of a democratic criminal justice system, as opposed to the private nature of civil cases. There is a "compelling public interest in enforcing the criminal law."[44]

The relationship between punitive and nonpunitive modes of accountability for public servants is a question as old as self-government itself. The historical evidence brought to bear in *Trump v. United States* mostly relates to discussions during the Founding Era and shortly thereafter.[45] The Founders themselves, however, drew on a tradition of debates about holding the powerful to account that stretches all the way back to ancient Athens. Hamilton, whose statements on the relationship between impeachment and prosecution feature prominently in *Trump v. United States*, called impeachment "a perpetual ostracism,"[46] linking the Constitution's mode of political accountability to the most famous institution of Athenian political accountability. Importantly, as Hamilton probably knew,[47] ostracism was not a criminal procedure. Athens made use of both criminal and noncriminal procedures for accountability. As Hamilton notes in *Federalist No. 65*, the two forms have distinct ends. Ostracism, like impeachment, was strictly political, aiming at the "fame" of the impeached figure, while a criminal trial threatens a person's "life and his fortune."[48] Hamilton's point is that while both aims are legitimate in addressing public malfeasance, they should be tried by different procedures, each consonant with the particular ends of the process.

Hamilton's argument condenses two thousand years of argument over the correct form of democratic accountability. In Athens, as Hamilton's analogy suggests, there were indeed several forms of political accountability that did not imply criminal culpability.[49] There were also other forms of political prosecution

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44. Brief for the United States, *supra* note 18, at 19.

45. Brief of Petitioner, *supra* note 14, at 16-22; Brief for the United States, *supra* note 18, at 13-15. For an in-depth examination of *Trump v. United States* through the lens of Founding Era history, see Brief of Scholars of Constitutional Law as Amici Curiae in Support of Respondent at 4-10, 17-20, *Trump v. United States*, 144 S. Ct. 2312 (2024) (No. 23-939); and Brief of Amici Curiae Scholars of the Founding Era in Support of Respondent at 2-34, *Trump v. United States*, 144 S. Ct. 2312 (2024) (No. 23-939).

46. THE FEDERALIST No. 65, *supra* note 35, at 332 (Alexander Hamilton).

47. Hamilton's political philosophy drew heavily on the ancient world, suggesting an intimate familiarity with such concepts. *See* MICHAEL P. FEDERICI, THE POLITICAL PHILOSOPHY OF ALEXANDER HAMILTON 22 (2012) ("Hamilton's imagination was shaped by the history of Greece and Rome; invoking ancient political leaders, he consistently used the heroes of republican government to support his arguments and likened his political rivals to the enemies of ancient republics.").

48. THE FEDERALIST No. 65, *supra* note 35, at 332 (Alexander Hamilton).

49. Among these were ostracism, auditing (*euthuna*), and removal from office (*apocheirotonia*). *See* JENNIFER TOLBERT ROBERTS, ACCOUNTABILITY IN ATHENIAN GOVERNMENT 15-19 (1982); Jon Elster, *Accountability in Athenian Politics*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 260, 267-68 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999).

that were tried by criminal juries.[50] And some nonpunitive measures, like removal from office or a public audit ("national inquest," to use another of Hamilton's descriptions of impeachment), could later lead to criminal trials by a different body than that which initiated the review.[51]

Another historical example in the minds of Hamilton and his peers was the Roman Republic and its downfall,[52] particularly the way in which Roman history had been refracted through later political theorists like Machiavelli.[53] Machiavelli took a position on the question of political accountability almost diametrically opposed to that proffered by former President Trump. Machiavelli was an enthusiastic advocate for criminal punishment of those from the powerful class (the *grandi*, in his terms) who committed acts against the public interest, and he made no sharp distinction between the political and the criminal.[54] In a "well-ordered" state, "if an accuser is not lacking, a judge is not lacking to hold powerful men in check."[55] Machiavelli's radical encouragement of criminal proceedings as a means of accountability met understandable resistance from later political theorists.

Montesquieu, whose *Spirit of the Laws* was the most widely cited book of the American Revolutionary period,[56] responded directly to Machiavelli's assertion that the supposed health of the republic could justify almost any sort of criminal proceeding: "I would gladly adopt this great man's [Machiavelli's] maxim; but . . . political interest forces civil interest, so to speak . . . . [T]he laws must provide, as much as they can, for the security of individuals in order to remedy

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50. Most notable among these were the *eisangelia* (charge of subversion) and the *graphe paranomon* (charge of having made an unconstitutional decree). *See* MOGENS HERMAN HANSEN, EISANGELIA: THE SOVEREIGNTY OF THE PEOPLE'S COURT IN ATHENS IN THE FOURTH CENTURY B.C. AND THE IMPEACHMENT OF GENERALS AND POLITICIANS 28 (1975); ROBERTS, *supra* note 49, at 15-17; Elster, *supra* note 49, at 268.

51. *See* THE FEDERALIST No. 65, *supra* note 35, at 331 (Alexander Hamilton).

52. *See* Brief of Amici Curiae Scholars of the Founding Era in Support of Respondent, *supra* note 45, at 11.

53. *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975) (providing an overview of the "Machiavellian moment" in democratic theory).

54. Regarding the acceptance of false criminal trials as an acceptable political cost, Machiavelli remarked that "if a citizen is crushed ordinarily [that is, in a criminal trial], there follows little or no disorder in the republic, even though he has been done a wrong." NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 24 (Harvey C. Mansfield & Nathan Tarcov eds., 1996).

55. *Id.* at 101.

56. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193 (1984).

this drawback."[57] Politically charged trials risk violating what would now be called the civil rights of the defendant, and Montesquieu thought these rights should be valued above anything else: "The knowledge . . . concerning the surest rules one can observe in criminal judgments, is of more concern to mankind than anything else in the world."[58]

In his own sketch of an ideal constitution, Montesquieu allowed for the criminal trial of powerful figures (though tried by peers of their own class and status, not by the people or its representatives), as well as a distinct procedure for political trials in cases where "a citizen, in matters of public business, might violate the rights of the people and commit crimes that the established magistrates could not or would not want to punish."[59] This division between criminal procedure governed by strict rules of due process, on the one hand, and an impeachment procedure where "that part of the legislature drawn from the people must make its accusation before the part of the legislature drawn from the nobles, which has neither the same interests nor the same passions,"[60] on the other, looks very much like the systems the Framers of the Constitution would eventually adopt.

The Framers themselves were part of one final historical shift in thinking about the procedure for accountability under self-rule. Like Cesare Beccaria, himself deeply influential for the founding generation,[61] the Framers adopted Montesquieu's ideas about due process, but mediated by a new principle of formal equality. In Beccaria's words, law must "bind equally the most elevated and the humblest of men . . . . The sovereign, as the representative of society, may only frame laws in general terms which are binding on all members."[62] Similarly, "the punishments ought to be the same for the highest as they are for the lowest of citizens."[63] This approach to the formal penal law was the final stroke in severing political and penal forms of accountability. Political accountability in the form of impeachment proceedings cannot also be a form of criminal punishment because it exists outside the procedures that every citizen has the right to expect. The powerful do not get special treatment with regard to political crimes, as

57. CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 77-78 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds., 1989).

58. *Id.* at 188.

59. *Id.* at 163.

60. *Id.*

61. *See* JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 90 (2014) ("In the English-speaking world, Beccaria's name was, by the late eighteenth century, almost as famous as any and rolled off the tips of reformers' tongues."); Lutz, *supra* note 56, at 193.

62. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 12 (Richard Bellamy ed., Richard Davies trans., 1995).

63. *Id.* at 51.

aristocratic liberals like Montesquieu wanted, but they can no longer be punished using "ordinary" criminal trials for political crimes, as Machiavelli recommended.[64]

The American Framers were largely in agreement with Beccaria. Their eager affirmation of the protections of due process for all was codified in the Bill of Rights, and the old democratic and republican idea of criminal accountability of the rulers to the people who chose them faded to the background. But traces of the older idea of criminal political accountability remained. One of this theory's clearest vestiges in the American context appears in *Federalist No. 77*, which ironically is cited in the petitioner's brief in *Trump v. United States*.[65] Having satisfied himself as to the immense power and "energy" of the Executive, Hamilton asks whether the presidency contains the "requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?"[66] He goes on to enumerate the forms of accountability that comprise the people's oversight of the President. First, and most important, is reelection—a constitutional feature of the presidency that Hamilton himself had famously opposed.[67] Next is impeachment *and* criminal punishment: the President is "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law."[68] Hamilton's phrase "common course of law" calls to mind both Machiavelli's "ordinary" but exemplary punishments and Beccaria's theory of formal equality, and it does not give us an immediate reason to decide between them. Hamilton thus shows how the democratic approach to a mixed use of procedural and criminal punishments reached an ambivalent conclusion in American constitutionalism. On the one hand, the idea of "safety, in a republican sense" assured by "forfeiture of life and estate" is still present.[69] On the other, however, the traditional democratic suspicion of both officeholders and the elite social

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64. *See* MACHIAVELLI, *supra* note 54, at 24.

65. Brief of Petitioner, *supra* note 14, at 18.

66. THE FEDERALIST No. 77, *supra* note 35, at 390 (Alexander Hamilton).

67. JAMES MADISON, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 51 (Edward J. Larson & Michael P. Winship eds., 2005) (quoting Alexander Hamilton as having said that "an executive is less dangerous to the liberties of the people when in office during life than for seven years").

68. THE FEDERALIST NO. 77, *supra* note 35, at 390 (Alexander Hamilton). Hamilton's reasoning is, of course, directly at odds with the Supreme Court's decision in *Trump v. United States*, and Hamilton's clear intention that criminal prosecution should serve as an additional bulwark is confirmed in the expert briefs of historians and constitutional scholars. *See* Brief of Scholars of Constitutional Law, *supra* note 45, at 10.

69. *Id.*

classes that often supply them is absent from the notion of formal equality enshrined in the Constitution's attention to the rights of criminal due process.[70]

This historical account, while necessarily condensed, returns us to the flaws of *Trump v. United States* from the perspective of democratic legitimacy. While the petitioner's case was directed at elaborating and confirming the special privileges of the presidency under law,[71] the government's case — insofar as it understood itself, and the Constitution, as committed to strict formal equality before the criminal law — could only elliptically address citizens' interest in bringing criminal politicians to heel, through reference to the "public interest" in equality before the law.[72] Any evidence of a democratic or republican theory of criminal accountability for those who threaten the rule of the people was therefore present only in its absence, and attempts to discuss the threat of criminal immunity for holders of high office posed to free and fair elections or to the value of democratic accountability were summarily dismissed by the Court.[73] But the deficiencies of a formal-equality understanding of the criminal law have effects far beyond the case of executive power and possible protection of a former President. In the next Part, I will examine the democratic deficit of the formal-equality understanding of the criminal law across two major domains: (1) the tendency of status-blind law to punish the poor and other disadvantaged citizen subgroups, and (2) the inability of the criminal law to address some of the most socially destabilizing forms of deviance in modern society — financial crime and illegal political behavior, or, simply put, the abuse of money and power by those who have them.

II. THE DEMOCRATIC-LEGITIMACY CRISES OF THE CONTEMPORARY CRIMINAL LAW

The idea that the criminal law faces a crisis of democratic legitimacy has circulated in various forms among scholars and activists for decades.[74] This long-

70. Madison's distrust of majoritarian oversight is expressed plainly in THE FEDERALIST No. 10, at 51-53 (James Madison) (Ian Shapiro ed., 2009). For the question of elite oversight among the founders, see, generally, LUKE MAYVILLE, JOHN ADAMS AND THE FEAR OF AMERICAN OLIGARCHY (2016).

71. Brief of Petitioner, *supra* note 14, at 10-16.

72. Brief for the United States, *supra* note 18, at 19.

73. *See* Trump v. United States, 144 S. Ct. 2312, 2347 (2024) ("[W]e cannot afford to fixate exclusively, or even primarily, on present exigencies"). *But see id.* at 2367 (Sotomayor, J., dissenting) ("The public interest in this criminal prosecution implicates both '[t]he Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution' as well as 'the voters' interest in democratically selecting their President.'").

74. See, for example, landmarks such as DAVIS, *supra* note 6; and Pablo De Greiff, *Deliberative Democracy and Punishment*, 5 BUFF. CRIM. L. REV. 373 (2002).

developing conversation about the democratic grounding of punishment has not been concerned with the question of political accountability and the democratic idea of people's prerogative to punish their leaders. Rather, it has focused on the tectonic shifts in penal theory and practice over the last quarter of the twentieth century, especially in the United States. The stark reality of a system of law and punishment that was responsible, at its peak, for the confinement of approximately one in every hundred adults,[75] and that still exerts some form of control over almost six million Americans,[76] was given a new name: "mass incarceration."[77] Observers understandably wondered whether a legal system that punished so relentlessly along predictable and unequal racial and socioeconomic lines could be said to be functioning democratically.[78] These concerns drew support from evidence that changes in criminal law and the increasing harshness of American punishment were measurably exacerbating political and economic inequality between the wealthy and the poor and between white and Black Americans. Unequal punishment reinforced unequal voice.[79]

The democratic harms of mass incarceration are made more difficult and perplexing by the fact that they occur under a regime of formal equality. Many scholars have contributed to the analysis of differential punishment under formal equality. Michelle Alexander made the now-canonical argument that even after the achievements of the civil rights movement, the war on drugs provided an alternative legal framework from within which to police Black citizens more than white ones.[80] Marxian scholars drew on a long history of linking punishment and political economy to show how changes to the welfare state contributed to the differential punishment of the poor even without any formal discrimination

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75. NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 13 (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014).

76. For current custodial statistics, see Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/DKY2-UL7C].

77. *See* David Garland, *Introduction: The Meaning of Mass Imprisonment*, 3 PUNISHMENT & SOC'Y 5, 5-7 (2001); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 12 (2006).

78. *See, e.g.*, DEMOCRATIC THEORY AND MASS INCARCERATION 8-9 (Albert W. Dzur, Ian Loader & Richard Sparks eds., 2016).

79. *See* WESTERN, *supra* note 77, at 4-6; AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 7-9 (2014).

80. ALEXANDER, *supra* note 6, at 12-16; *see also* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2017) (recounting the rise of mass incarceration). *But see* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 9-11 (2017) (demonstrating that racial disparities in policing arose often through the participation and encouragement of Black communities).

between poor and rich in the language of criminal statutes.[81] More generally, legal scholars and political scientists have shown that even the ostensibly objective or neutral constitutional relationships between legislators, prosecutors, and judges can end up producing the population-level discrimination in punishing that characterizes mass incarceration.[82] When this gap between the formal equality of the legal codes and the real inequality of punishment in practice has been brought to the attention of the U.S. Supreme Court, however, the Court has repeatedly rejected any attempts to use the statistical fact of discrimination to challenge the formally equal law.[83] Despite its inability to address the root causes of mass incarceration, formal equality remains the law of the land.

The discussion of formal equality in *Trump v. United States* above suggests another area in which the formal-equality approach to the criminal law fails to advance the aims of democratic government: punishing the powerful. Although this issue has received considerably less attention than the social phenomena related to mass incarceration, the United States is arguably in the midst of a parallel crisis of elite underenforcement.[84] As the Court debates the nature and scope of presidential immunity, many powerful Americans already enjoy functional immunity from prosecution and conviction for their crimes.[85] Tellingly, the very same aspects of the criminal justice system that tend towards the differential punishment of the poor and socially disadvantaged also militate against the punishment of the wealthy and the powerful. If some defendants are criminalized for "living while Black," there is evidence that high social status (a status shared by most judges and prosecutors) is protective of elite criminals.[86] If prosecutorial discretion is a major cause of the epidemic scale of incarceration in America, it

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81. *See generally* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (drawing on a tradition dating to GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1968) and MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977)); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (same).

82. *See* Vanessa Barker, *Politics of Punishing: Building a State Governance Theory of American Imprisonment Variation*, 8 PUNISHMENT & SOC'Y 5, 6-7 (2006); STUNTZ, *supra* note 5, at 6. *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017) (arguing that the primary drivers of mass incarceration are prosecutorial toughness and public officials who benefit politically from prison growth).

83. Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 Nw. U. L. Rev. 1625, 1646 (2017) (discussing McCleskey v. Kemp, 481 U.S. 279 (1987)).

84. JEFFREY REIMAN & PAUL LEIGHTON, THE RICH GET RICHER AND THE POOR GET PRISON 131-32 (10th ed., 2012).

85. TAUB, *supra* note 9, at 15.

86. REIMAN & LEIGHTON, *supra* note 84, at 129-30; TAUB, *supra* note 9, at 83.

may also explain record-low levels of punishment for financial crimes.[87] And if the increasing scope of criminalized behavior is often linked to the evils of mass incarceration,[88] conversely, only one Wall Street executive responsible for the 2008 financial meltdown faced criminal sanctions for his role in the crisis—not only because of prosecutorial timidity, but also because some of the most egregious behavior was not explicitly proscribed by applicable law.[89] Perhaps the most prominent example of the undercriminalization of elite deviance was the management of the Lehmann Brothers investment bank, whose collapse triggered a massive international liquidity crisis that some have termed "global contagion."[90] No one at the bank was ever officially investigated, even in light of obvious fraudulent conduct among Lehman executives and their creditors before, during, and after its attempted bankruptcy sale.[91] This is equally true of other instances of corporate and financial crime, some of which are underenforced, some of which are not technically illegal, and some of which are not even defined or measured at all.[92] The criminal law does not recognize a formal difference between rich and poor citizens, and yet, in practice, it is the wealthy and the powerful who slip from its grasp, irrespective of the harms they cause to the community.[93]

Just as mass incarceration hinted at a crisis in political equality and democratic voice, the failure to investigate and prosecute the crimes of the powerful threatens to undermine the structure of democratic society, particularly the equal ability of citizens to have a say in the laws and policies that structure their shared lives. Here, the prosecution of figures like Sam Bankman-Fried is the exception that proves a rule. Bankman-Fried donated more than one hundred million

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87. JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 8-12 (2017); JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 35 (2020).

88. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3-4 (2008).

89. *See* William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368 [https://perma.cc/9F4E-LBT7].

90. Rosalind Z. Wiggins & Andrew Metrick, *The Lehman Brothers Bankruptcy H: The Global Contagion*, 1 J. FIN. CRISES 172, 172 (2019).

91. For a detailed account of the massive failure of enforcement in the case of Lehmann and its creditors, see TAIBBI, *supra* note 9, at 141-99.

92. Henry N. Pontell, *Theoretical, Empirical, and Policy Implications of Alternative Definitions of "White-Collar Crime": "Trivializing the Lunatic Crime Rate," in* OXFORD HANDBOOK OF WHITE-COLLAR CRIME 39, 39-40 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen eds., 2016) ("The most consequential forms of white-collar crime and corporate crime are rarely considered or accounted for because of definitional trivialization, leading to inadequate social policies designed to prevent them.").

93. REIMAN & LEIGHTON, *supra* note 84, at 128-32.

dollars from stolen funds to candidates in both parties before his arrest for financial fraud in 2022.[94] In Bankman-Fried's case, the line between ill-gotten gains and political influence is clear, but there are many less obvious areas where underenforcement of elite crime has serious democratic consequences. These include public corruption (a charge the Supreme Court has made increasingly difficult to prove),[95] risky financial behavior causing economic instability (which, in turn, contributes to political instability),[96] and, most broadly, the sort of elite financial behavior — including tax avoidance, corporate fraud, and profiteering — that drives economic inequality in the long run.[97] Given the tremendous influence that the ultrawealthy wield in the American political process and how often policy outcomes track their preferences, any legal structure that contributes to the accrual of extreme wealth in the hands of the comparative few can be said to contribute to a worsening crisis of democratic legitimacy.[98]

Some scholars have gone so far as to suggest a causal link between these two tendencies in the criminal law. It may be that social and economic inequality, and the institutional and ideological structures that enable it, are causally linked to the overpunishment (and overly harsh punishment) of poor citizens.[99] The methodological bar for proving this connection is high, but a preponderance of

94. Dominic Rushe, *Sam Bankman-Fried Charged with Using Stolen Funds for Political Donations*, GUARDIAN (Aug. 14, 2023, 04:36 PM EDT), https://www.theguardian.com/business/2023/aug/14/sam-bankman-fried-latest-charges-campaign-donation-ftx [https://perma.cc/Q6ZQ-TABK].

95. TAUB, *supra* note 9, at 172-73 (discussing United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999); McDonnell v. United States, 579 U.S. 550 (2016); and Kelly v. United States, 590 U.S. 391 (2020)).

96. John Cassidy, *The Real Cost of the 2008 Financial Crisis*, NEW YORKER (Sept. 10, 2018), https://www.newyorker.com/magazine/2018/09/17/the-real-cost-of-the-2008-financial-crisis [https://perma.cc/PUG3-BLUC].

97. JACOB HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 5 (2020).

98. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POLS. 564, 565 (2014) ("[E]conomic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."). *See generally* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008) (modeling the effects of political pressure on American policy outcomes).

99. NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES 42-54 (2008); Nicola Lacey & David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 PUNISHMENT & SOC'Y 454, 474 (2015); Nicola Lacey & David Soskice, *Tracing the Links Between Crime, Punishment, and Inequality: A Challenge for the Social Sciences*, *in* TRACING THE RELATIONSHIP BETWEEN INEQUALITY, CRIME AND PUNISHMENT: SPACE, TIME AND POLITICS 1, 1-2 (Nicola Lacey, David Soskice, Leonidas Cheliotis & Sappho Xenakis eds., 2021).

evidence suggests that the formally equal criminal law envisioned by the Framers and their Enlightenment forebears (e.g., Beccaria) has radically unequal real effects depending on race, class, and status.[100] This is the fatal flaw of the formal-equality model: given the conditions of real social inequality, even the formal political equality promised by law begins to break down. Poor and low-status offenders become marginalized and disenfranchised,[101] while the system is unable to police properly the forms of elite deviance that destabilize democratic societies and distort the circulation of political voice and influence.[102] Seen from this perspective, the failure of the formal-equality arguments used by the government and the lower court in *Trump v. United States* reflects a broader paradox within the contemporary legal philosophy of the criminal law: the formally equal criminal law violates the democratic principle of political equality between citizens. This is true when the crimes of the poor are punished while the crimes of the rich go unprosecuted, and it is even more inescapable when the powerful are granted de facto or de jure immunity, whether in the boardroom or in the White House.

Criminal justice is not, of course, the only area in which the rise of formal equality has been shown to hide the canker of real discrimination. In response to a similar failure of formal legal equality between the sexes and the races to produce equal treatment in society, feminist jurisprudence and critical race theory developed distinct theories of antisubordination jurisprudence.[103] Justice is not,

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100. Lucia Zedner, *Afterword: Unequal Punishment*, *in* TRACING THE RELATIONSHIP BETWEEN INEQUALITY, CRIME AND PUNISHMENT: SPACE, TIME AND POLITICS 332, 332-33 (Nicola Lacey, David Soskice, Leonidas Cheliotis & Sappho Xenakis eds., 2021).

101. WESTERN, *supra* note 77, at 4-6; LERMAN & WEAVER, *supra* note 79, at 7-9.

102. For a discussion of inequality and destabilization, see HACKER & PIERSON, *supra* note 97, at 5. For a discussion of distortions of political voice and influence, see Gilens & Page, *supra* note 98, at 565.

103. Gerald Torres summarizes: "Both critical race theory and feminist legal theory focus on the question of equality, especially the social basis of inequality and the law's role in perpetuating or reducing that inequality. Their focus highlights the disjunction between continuing social inequality and the triumph of formal legal equality, which took issues of continuing material inequality off the table." Gerald Torres, *The Ecology of Justice: The Relationship Between Feminism and Critical Race Theory*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 67, 68 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003). For examples of canonical feminist and critical race theory works advocating an antisubordination approach to issues of gender and racial justice, see CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 115 (1979), which advances an "inequality" definition of Title VII sexual harassment on the grounds that the "arbitrariness" of differential treatment emphasized by a formal-equality approach "does not provide a theory of justice that promotes affirmative social diversity" and "is not primarily a theory of how real differences are to be justly treated"; and Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341, 1345 (1988), which notes "a tension that runs throughout antidiscrimination law—the tension between equality

these theorists argued, only a matter of treating men and women, or white people and Black people, the same; it is a question of acknowledging the specific wrongs suffered by the disadvantaged class and creating the legal architecture necessary to correct them.[104] Deborah Tuerkheimer has made the bold and underappreciated suggestion that the same line of reasoning should be applied to the criminal law more generally.[105] The aim of the criminal law, Tuerkheimer argues, should be to protect citizens *both* from the sorts of overpunishment and harsh punishment that characterize mass incarceration *and* from the sorts of threats to body and wellbeing that result from underenforcement.[106] Tuerkheimer's proposal is directed at the harms that historically disadvantaged communities suffer under mass incarceration when the same citizens are both the potential victims of state repression through law enforcement and the potential victims of violent crime because their safety is not a political or administrative priority.[107] Her framework can and should be extended to an additional case of underenforcement: the failure to adequately punish the powerful.

III. BUILDING A BROAD ANTISUBORDINATION THEORY OF THE CRIMINAL LAW

Tuerkheimer introduced her antisubordination theory of the criminal law in response to an important body of scholarship suggesting that even, or especially, in an age of mass incarceration, theories of crime and punishment must address the harms suffered by the disadvantaged as victims of criminal activity, and not only as victims of harsh state enforcement.[108] But as this Essay has shown, disadvantaged citizens are not only victims of crimes in their community — they are victims of elite criminality, albeit more indirectly. The crimes of the wealthy and the powerful contribute directly and indirectly to economic precarity, and

as a process and equality as a result" and arguing that the "belief in color-blindness and equal process" that characterizes a formal-equality conception of civil rights "make[s] no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present." For an overview of the tension between anticlassification and antisubordination in the civil rights context, see generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

104. *Id.*

105. *See* Tuerkheimer, *supra* note 11, at 1161.

106. *See id.*; *see also* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1752-55 (2006) (offering a framework to identify potentially harmful forms of underenforcement, as described by Tuerkheimer).

107. Tuerkheimer, *supra* note 11, at 1150.

108. Indeed, the article in which Tuerkheimer introduces the idea of an antisubordination theory of criminal law is a review of FORMAN, *supra* note 80. *See* Tuerkheimer, *supra* note 11, at 1145.

financial and political crime committed by powerful individuals and corporate entities denies other citizens their claims to equal voice and influence.

The history of democratic accountability for elite criminals canvassed in Part I suggests that the antisubordination theory of the criminal law might be expanded even further to cover the protection of democratic citizens, *as a class*, from the predation of politicians or other cliques and combinations of the wealthy and powerful. Here, the criminal law of antisubordination harmonizes with an important and influential theory of political freedom: the republican theory of liberty as nondomination by arbitrary power.[109] The failure of the rule of law to govern the actions of a particular subset of citizens or rulers is a classic example of arbitrary power in republican thought.[110] This is the problem that Hamilton, well-versed in republicanism, had in mind when he wondered whether impeachment could provide sufficient "safety, in a republican sense" over the executive branch.[111] Insofar as elite criminals have immunity (de jure, as per *Trump v. United States*, or de facto, through the underenforcement of elite financial crime), this threatens the ability of citizens to exert their right to self-determination as a body of equals, and subordinates the many to the whims of the few. This new antisubordination theory of the criminal law is an attempt to integrate the possible role of punishment in the preservation of democracy as collective self-rule with the more widely accepted role of punishment in preserving the autonomy of individuals. In this sense, it can also be thought of as a democratic theory of the criminal law, and its moral first principles are grounded in a normative theory of democracy.[112]

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109. *See, e.g.*, QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 82 (1998) ("The neo-roman writers accept that the extent of your freedom as a citizen should be measured by the extent to which you are or are not constrained from acting at will in pursuit of your chosen ends."); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT, at vi (1997) (advancing a theory of "freedom as nondomination: as a condition under which a person is more or less immune . . . to interference on an arbitrary basis"); Frank Lovett, *Non-Domination*, *in* THE OXFORD HANDBOOK OF FREEDOM 106 (David Schmidtz & Carmen Pavel eds., 2016) (conceptualizing freedom as nondomination).

110. *See* Frank Lovett, *Republicanism*, STAN. ENCYCLOPEDIA PHIL. (June 29, 2022), https://plato.stanford.edu/entries/republicanism [https://perma.cc/W237-XKN3] (describing that, within republican thought, "[p]olitical freedom is most fully realized . . . in a well-ordered self-governing republic of equal citizens under the rule of law, where no one citizen is the master of any other").

111. THE FEDERALIST NO. 77, *supra* note 35, at 390 (Alexander Hamilton).

112. For an example of a normative theory of democracy, see generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996).

The antisubordination theory of the criminal law seeks to answer the question of what punishment should try to achieve.[113] Two models for this theory are (1) earlier "neo-Republican" attempts to reground the criminal law in the promotion of liberty-as-dominion, and (2) Tuerkheimer's approach to balancing the rights of citizens to antisubordination with respect to the state with the rights of citizens as potential victims of subordination through crime. I distinguish my theory from hers by calling it a "broad" theory of the criminal law as antisubordination.

Like both earlier theories, the aim of broad antisubordination requires parsimony in punishment.[114] In other words, the theory requires the state to minimize intervention through punishment as much as possible while still fulfilling the aim of protecting individuals from arbitrary interference and protecting the collective body of citizen-equals from manipulation by the one or the few. It is therefore best described as a forward-looking, consequentialist theory, because what matters are future states—the greatest level of freedom and security for individuals compatible with similar freedom for all, combined with the maintenance of a system of equal voice and self-rule for all individuals, considered as members of a collective body of citizens. Changing the aims of the criminal law to fit an antisubordination theory in this broad sense would mean decriminalizing the sorts of behaviors whose prosecution compounds an unequal distribution of social goods, while affirming the criminality of those behaviors that threaten the functions of democratic government.

Fully elaborating the differences between this broad antisubordination approach and other well-known justificatory theories of punishment like liberalism, retributivism, and utilitarianism is beyond the scope of this Essay, but some of these differences merit a brief discussion. Unlike liberal theories of punishment, including the theory of formal equality, this Essay traced to Beccaria,[115] an antisubordination approach to criminal law will necessarily consider the actual social situation of potential perpetrators and potential victims. This may mean, for instance, using financial penalties like day-fines or structured fines. These sorts of fines peg penalties to income levels (fines are levied in increments measured by "days" of income), enabling equal deterrence regardless of wealth or

113. *See* Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427, 427 (2002) (remarking that the modern democratic criminal justice system currently has "no determinate ideal as to what it should be trying to achieve").

114. *See* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 79-80, 87 (1990) (introducing the presumption in favor of parsimony).

115. *See supra* notes 61-63 and accompanying text.

status.[116] Similarly, an antisubordination approach will not criminalize behaviors that only affect low-status or impoverished citizens, even if they technically apply to all citizens—for example, penalties for sleeping outside as enforced against homeless people, which the Supreme Court found constitutional this term.[117]

An antisubordination theory is even further removed from the retributivist principles that have motivated many developments in legal philosophy, criminal legislation, and jurisprudence over the last fifty years.[118] Retributivism explains that punishment evinces equal respect for the moral agency of the criminalized person (and sometimes the rights of the victim to recognition). An antisubordination theory grounds punishment in the equal rights of citizens to social goods like freedom, security, and political voice. While the language of morality and recognition is backward-looking and absolute, the language of real social goods is contingent and subject to balancing. An antisubordination theory, while consequentialist, is not utilitarian, taking its bearings not from the greatest happiness of the greatest number or some other definition of utility, but from the greatest ability of all to control how things go for themselves as individuals and to rule themselves collectively.

This brings us to the most immediate and practical effect of an antisubordination theory of the criminal law: the types of harm that this theory would permit punishing, and those it would remove from the field of criminal sanction. The most distinctive aspect of this broader application of an antisubordination theory—and its greatest difference from Tuerkheimer's original formulation—is the explicit rationale it gives for recognizing certain crimes as harms against collective self-rule. The focus here, as opposed to the original context of equal-protection jurisprudence, is on the possible violation of the democratic rights of all citizens. To return to the example of *Trump v. United States*, a broad antisubordination theory urges us to recognize that it is precisely the possibility that the President might undermine the conditions of presidential elections that makes the threat of criminal sanctions so important. This is to pick out the presidency (or governorships, or judgeships) as places requiring the special attention of the law. What might be permitted to others should not be permitted to them—the

116. *See* Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. 333, 335 ("[T]his form of fine allows imposing an equal *relative* burden of punishment on all offenders regardless of their wealth.").

117. City of Grants Pass v. Johnson, No. 23-175, slip op. at 34-35 (U.S. June 28, 2024) (majority opinion) (deeming constitutional civil and criminal penalties for sleeping outside as enforced against homeless people).

118. JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 194 (2005).

democratic law, understood as a tool of collective antisubordination, has an interest in protecting itself from those who execute it.

Another domain where a broad antisubordination theory would expand the reach of the criminal law is the realm of financial crime. Given the consequentialist elements of this antisubordination approach, it is well-positioned to acknowledge that certain forms of elite behavior, including financial transactions now subject to regulatory scrutiny, threaten shared political goods. In extreme cases, these crimes even threaten the democratic autonomy of the collective of citizens considered as equals. In other cases, the question is not one of criminalization but rather one of prosecutorial motive and priority, and of recalibrating sentencing so that severity of punishment more closely tracks the severity of harm inflicted by various crimes upon the capacity of the citizenry for equal participation in democratic governance. One example of an area of law that would expand under this regime is tax avoidance. Neo-Republican theorists have classified these sorts of crimes as "derivative crimes" which "are not threats to dominion as such but which endanger the system whereby dominion is protected."[119] A broad antisubordination theory views these crimes not as "derivative" but as one of the central concerns of the criminal law. For a broad antisubordination theory, protection of democracy is coequal with the protection of individual goods like freedom and security.

It is important to stress once again that the protection of these goods will require substantially *less* criminalization and enforcement than is now common in the United States and some other developed countries, particularly for nonviolent crimes, and even the low-level fraud that makes up the vast majority of "white collar" criminal cases. Like its two parent theories, neo-Republicanism and Tuerkheimer's original antisubordination theory, the broad antisubordination theory holds that "the state should incarcerate only when and to the extent necessary to vindicate identifiable antisubordination norms"[120] and that we should argue for "criminalization only so far as criminalization is not likely to do more harm than good to the cause of non-domination."[121] In addition to the quantity of punishment, a broad antisubordination theory of the criminal law is likely to differ radically in its approach to the quality of punishment. As a consequentialist theory, the focus of punishment will naturally be on the lowest amount of punishment necessary to achieve the aims of deterrence.[122] The retributive fury that has accompanied the penal expansions of the last half century

119. BRAITHWAITE & PETTIT, *supra* note 114, at 94.

120. Tuerkheimer, *supra* note 11, at 1162.

121. Philip Pettit, *Republican Theory and Criminal Punishment*, 9 UTILITAS 59, 67 (1997).

122. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1970) (1781).

in the United States does not play any identifiable antisubordination function (in fact, quite the opposite) and would have to be abandoned. Given the catastrophic effects that current theories of the criminal law have had on the subordination and domination of identifiable subsets of the democratic citizen body,[123] it is fair to say that many proposals for the radical diminution of the scope of the criminal law will fit within the broad antisubordination approach.[124]

There is one type of critical approach to the criminal law, however, which exists in essential contradiction with the antisubordination theory as we have described it. Various forms of prison and police abolitionism have lately become popular among and even synonymous with progressive theories of criminal justice.[125] A broad antisubordination account of the aims of the criminal law views criminal prosecution and punishment as necessary tools in the maintenance of social and political equilibria in democratic systems. While the sorts of changes in penal practice that a broad antisubordination account of the criminal law would require are wide-ranging and radical, as long as there are powerful members of society, there will be a need to police and to punish them. This may make the theory an example of what some critics of the carceral state have attacked as "carceral progressivism"[126] and "progressive punitivism."[127] The final Part of the Essay will respond to some of the central antipunitive critiques of punishing the powerful.

IV. ABOLITION, ANTISUBORDINATION, AND DEMOCRACY

As scholars, activists, and politicians—for example, Senator Elizabeth Warren—have continued to draw attention to the crisis of elite-criminal underenforcement and its destructive social and political effects,[128] several legal scholars

123. *See supra* Part II.

124. *See, e.g.*, Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 838 (2021) (arguing for an analysis of how proposed changes to the criminal justice system would shift the balance of power between different stakeholders).

125. *See, e.g.*, Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. 1531, 1534 (2024) (interrogating the continued "selective reliance on the carceral system" of progressives); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 201 (2020) (interrogating "the emergence of an academic and popular discourse that advocates turning the cannons of the punitive machine against the powerful").

126. Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1438 (2021).

127. Aviram, *supra* note 125, at 202.

128. For information on scholars and activists, see *supra* Part II. Senator Warren drew attention to the issue with the introduction of the Corporate Executive Accountability Act in 2019. S. 1010, 116th Cong. (2020).

have criticized the use of penal tactics for progressive ends, including for the punishment of socially and politically powerful actors.[129] This Part will classify these criticism as representing three major types: practical, legal, and moral. Treating each type in turn will help distinguish the practical and philosophical foundations of the broad antisubordination account from what might be the most widely discussed contemporary critical philosophy of the criminal law: penal abolitionism.

The first and simplest charge that abolitionists levy against the idea of punishing the powerful is that it does not work, or that it might not work.[130] This is a fundamentally empirical question, and critics are right to note that the burden of proof is on proponents to show that punishment performs the social function it is asked to accomplish.[131] However, the evidence for an increased need to deter elite crime is strong. Criminal penalties are part of the "mixed" sanctioning strategy that has the strongest empirical support for deterring corporate crime,[132] and sanctions strategies without the threat of jailtime seem to be insufficient.[133] Low recidivism among white-collar criminals suggests that higher-status defendants are in fact more successfully deterred by punishment,[134] and even a proponent of abolitionism admits that when it comes to white-collar crime, "the abolitionist arsenal for deterrence is limited."[135]

The more serious practical criticism of punishing elite crime concerns its derivative or unintended effects. In the words of two critics of "carceral progressivism": "[D]oes empowering the carceral state in one area . . . lead to a

129. Levin, *supra* note 126, at 1438; Aviram, *supra* note 125, at 202; Pedro Gerson, *Less Is More?: Accountability for White-Collar Offenses Through an Abolitionist Framework*, 2 STETSON BUS. L. REV. 144, 144 (2022); Levin & Levine, *supra* note 125, at 1573.

130. Gerson, *supra* note 129, at 161 (arguing that "incarceration need not be used in order to achieve deterrence"); Levin & Levine, *supra* note 125, at 1546 ("Would a new criminal statute or a decision to prosecute redound to the benefit of and shift power to marginalized communities?").

131. Elsewhere, following M.M. McCabe, I have called this condition the avoidance of "institution begging." JACOB ABOLAFIA, THE PRISON BEFORE THE PANOPTICON 42 (2024) (citing MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 222 (1981)).

132. Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie & Mariel Alper, *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL'Y 387, 406-07 (2016); Melissa Rorie & Natalie Schell-Busey, *Corporate Crime Deterrence*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 219 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

133. *See* COFFEE, *supra* note 87, at 35 ("[O]ptimal enforcement policy should involve some mixture of carrots and sticks, but the key claim of this book is that today the terms of this trade unduly favor the defendants and leave the government with much too little.").

134. Gerson, *supra* note 129, at 177-78. Curiously, these statistics are advanced as arguments *against* punishing white-collar criminals, rather than for what they show *prima facie*: that such punishment is more effective than against low-status offenders. *Id.*

135. *Id.* at 166.

strengthened carceral state in other areas where progressives are less enthusiastic (drug crime, misdemeanor prosecutions, etc.)? Do punitive politics directed at powerful defendants 'trickle down' to harm less powerful defendants?"[136] There are good historical reasons to think that increased penality in the name of protecting the disadvantaged has in fact contributed to harsh and excessive punishment across American society, harming precisely those communities that crime legislation was intended to protect.[137] But there are also good reasons to say that, over the long term, the American criminal law has been particularly and exceptionally geared towards low-status offenders, and that the presence of and historical memory of high-status criminal punishment contributes to more egalitarian and humane practices of punishment in other developed democracies.[138] As with all counterfactual claims, more experimentation and evidence are necessary to decide between the two possibilities.

Behind this practical skepticism about the utility of punishing the powerful lies a more fundamental disagreement between antisubordination approaches and their opponents. Abolitionists criticize the project of punishing elite criminals on the basis of the same principle that, since Beccaria, has formed the basis of liberal criminal law—formal equality: "Arguing that punishment and justice are synonymous in one context implies that they are in other contexts."[139] This is not an empirical argument about ill effects. Rather, it is a legal and conceptual argument about the permissibility of punishment: if prison and harsh measures are wrong in the context of the mass incarceration of the poor and disadvantaged, they must be wrong in other legal contexts too. To some extent, this is begging the question. As we have shown, democratic theorists since Demosthenes distinguish between the punishment of political and social elites and the punishment of ordinary citizens on conceptual grounds.[140] Critics of punishment in the name of democratic equality need to argue for the equivalence of punishing elite and nonelite offenders—they cannot merely assert it. At least one abolitionist critic does explicitly argue in favor of the liberal principle of formal equality: "Progressive punitivism is as identity-driven as conservative

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136. Levin & Levine, *supra* note 125, at 1581.

137. *See* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 143-47 (2014) (tracing the relationship between civil rights and mass incarceration); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 11 (2006) (connecting victims' rights more broadly to mass incarceration); FORMAN, *supra* note 80, at 217 (recounting the role of Black communities in mass incarceration).

138. *See* WHITMAN, *supra* note 118, at 9-10; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782-83 (2006).

139. Levin & Levine, *supra* note 125, at 1582; Levin, *supra* note 126, at 1437.

140. Demosthenes, *supra* note 37; *see supra* Part I.

punitivism. The pursuit of criminal or social accountability is focused on the holders of social or institutional advantage . . . as targets."[141]

This view recognizes the claims of the democratic critique of formal equality immortalized in Anatole France's *bon mot* that the law "allows rich and poor alike to sleep under bridges."[142] Legal formal equality treats unlike things alike, and "is dishonest and generates false consciousness about the supposedly fair operation of the legal system."[143] Ultimately, however, abolitionist critics prefer this formal equality to the alternative because, as Hadar Aviram puts it, "laws employing a universal language at least open the possibility of enforcement reform and reinforce, albeit superficially, the shared value of equality before the law. By contrast, laws that openly target particular populations cement partisan animosity toward these populations, which then legitimizes overt denial of their civil rights."[144] Aviram is identifying a fundamental disagreement between what we might call liberal abolitionism, which seeks to preserve formal equality, and the radical democratic foundation of an antisubordination approach, which views the inculcation of animosity toward threats to collective self-rule as a form of civic-republican education.[145] To the question, "[i]f the problem is inequality, is the solution alleviating law's hold on the poor, or strengthening its grasp on the rich?,"[146] the broad antisubordination approach can comfortably respond, "why not both?"

A second, even more foundational disagreement between the democratic theory of antisubordination and the liberal-abolitionist defense of formal equality concerns the very idea of punishment as such. At the level of first principles, many abolitionists believe that it is not only the historically and geographically constrained phenomenon of American mass incarceration that is objectionable, but that all incarceration—or even state punishment of any form—is unjust.[147]

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141. Aviram, *supra* note 125, at 204.

142. *Id.* at 200.

143. *Id.* at 228.

144. *Id.* at 220; *see also* Levin & Levine, *supra* note 125, at 1589 (discussing the theory that the criminal law defines and punishes an outgroup).

145. Penal abolitionists are themselves apparently split over the importance of formal equality. As described below, self-described "abolition democrats" may be opposed to punishing the powerful on principle, but they are also opposed to maintaining the regime of legal formal equality supported by liberal abolitionists. *See, e.g.*, DAVIS, *supra* note 6, at 103; Fred Moten & Stefano Harney, *The University and the Undercommons: Seven Theses*, 22 SOC. TEXT 101, 114-15 (2004); Allegra McCleod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1619 (2019). Abolition democracy broadly understands itself to be incompatible with liberalism. *See generally* Jacob Abolafia, *Prison Abolitionism and the Liberal Imagination*, POL. SCI. Q., Mar. 2024, at 1 (exploring the tension between liberal society and prison abolitionism).

146. Aviram, *supra* note 125, at 201.

147. *See, e.g.*, Gerson, *supra* note 129, at 153; Levin & Levine, *supra* note 125, at 1586.

If, for the democratic theorist, punishment is a means to a broader theory of democratic justice, for the abolitionist, ending incarceration is the theory of justice itself.[148] "[T]o the extent that a project of abolition or decarceration isn't consequentialist and instead is grounded to a first-principle objection to incarceration or certain forms of criminal punishment, then redistributive/progressive criminal law should be just as indefensible as regressive criminal law."[149] Even if this argument manages to skirt a form of question begging (why *should* abolitionism be a philosophical first principle rather than a strategic or consequentialist response to political facts, power dynamics, and movement demands?), it suggests the far-reaching nature of the liberal-abolitionist position and its departure from other normative theories of the criminal law.[150] This position makes prison abolition into something like a "universal" value,[151] against which historical and political details can have no purchase.[152]

The strongest moral and philosophical disagreement between the broad antisubordination approach to the criminal law and liberal-abolitionist critics of punishing the powerful concerns the value of democracy. The broad antisubordination approach is a democratic theory of the criminal law—it takes as a given that one of the first virtues democratic institutions must be that they tend toward the preservation of democracy, conceived as popular sovereignty in concert with fundamental rights like political equality and bodily autonomy. The very "universal" language with which liberal abolitionists condemn punishing the powerful assumes that the value of penal abolition is prior to (and therefore more important than) the democratic process of will-formation and legislation. In fact, the word "democracy" is substantively absent from the liberal-abolitionist

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148. *See* Levin & Levine, *supra* note 125, at 1545-46 ("[M]any left and progressive commentators don't actually see criminal legal institutions as fundamentally objectionable. Rather, they understand those institutions as objectionable when they are deployed in service of particular regressive ends."); *id*. at 1586 ("If prisons should be abolished because it is wrong for the state to put members of the polity in cages, then the case for abolition doesn't depend on finding that the state disproportionately cages members of marginalized or disfavored groups.").

149. *Id.* at 1589.

150. Once again, it seems necessary to distinguish liberal abolitionism from the democratic-socialist or communist abolition position, such as that argued for by Davis, Moten, and McCleod, which is clearly committed to different higher-order first principles of which abolition is just one political expression. *See* DAVIS, *supra* note 6, at 108-11; Moten & Harney, *supra* note 145, at 114-15; McCleod, *supra* note 145, at 1619-20.

151. Gerson, *supra* note 129, at 152-53 ("Viewing punitive prisons as fundamentally destructive institutions that are ill-suited to respond to social harms is a universal claim."). Frustratingly, in a footnote, Gerson carves out Nordic prisons as an "exception"—making it unclear how "universal" this claim really is. *Id.* at 152 n.45.

152. Levin & Levine, *supra* note 125, at 1538 ("[T]he oppressive and inhumane aspects of the carceral state still would be oppressive and inhumane even if the identity of the defendants or the politics associated with the institutions shifted.").

articles discussed in this Part. This tendency among some abolitionists to neglect the moral significance of democratic self-government may be an additional expression of the widening gap between the liberal idea of formal equality and the idea of democratic law as it developed over the course of the twentieth century and into our own.[153]

But part of the reticence to discuss democracy among abolitionist critics may also have to do with the persistent political unpopularity of the abolitionist position. Despite the tremendous groundswell of support for abolitionist organizations like the Movement for Black Lives in the wake of the 2020 George Floyd protests, the actual political projects of prison and police abolition remind wildly unpopular, including within disadvantaged and minority communities.[154] This is for reasons that the antisubordination account of criminal law is well-positioned to understand, including the fear of threats to personal and communal security and autonomy under conditions of underenforcement. Abolitionist scholars have made various proposals about how to deal with public safety without prisons or police,[155] but regardless of the feasibility of these proposals, the democratic deficit faced by abolitionism places it in the awkward position of being largely unsupported by most citizens, including the populations whom the theory purports to be most concerned with protecting.[156]

One of the central aims and chief virtues of the broad antisubordination theory of the criminal law is to provide a moral framework for understanding the role of the criminal law in a democracy. As I have said, this role is a double one. The first role, as identified by republican theorists and in Tuerkheimer's narrow antisubordination proposal, is to find the minimum level of punishment consonant with equal enjoyment for all citizens of the fundamental political virtues like freedom of movement, expression, and bodily autonomy. While the precise mixture of penal expertise and democratic participation necessary to achieve this

153. For an analysis of this tension, see C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 11 (1977).

154. *See* Paige E. Vaughn, Kyle Peyton & Gregory A. Huber, *Mass Support for Proposals to Reshape Policing Depends on the Implications for Crime and Safety*, 21 CRIMINOLOGY & PUB. POL'Y 125, 127 (2022).

155. *See, e.g.*, DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 246 (2019) (making a powerful case for community-based techniques of nonpenal criminal rehabilitation); Danielle Sered & Amanda Alexander, *Making Communities Safe, Without the Police*, BOS. REV. (Nov. 1, 2021), https://www.bostonreview.net/articles/making-communities-safe-without-the-police [https://perma.cc/H76X-KB2L] (arguing for public-health and economic-equity-focused alternatives to policing).

156. Aviram compares the use of the criminal law against high-status defendants to Maoism. Aviram, *supra* note 125, at 225-27. Her accusation cuts both ways, as abolitionism currently functions as a vanguardist ideology—removed from the very populations it purports to represent.

level is a matter for further discussion,[157] a broad antisubordination theory is democratic all the way down—that is, it is legitimate because the goods it protects are valued by the democratic community, and that community participates in and affirms the methods it uses to protect them.

Where the broad antisubordination theory of the criminal law departs from its models, and where it differs most radically from current abolitionist debates, is in the second role of the criminal law in a democracy. This role requires that we recognize that for democracies, the crimes that endanger the system of democratic government itself warrant particular and careful scrutiny. These include political crimes, defined as those that undermine popular sovereignty and the regular exercise of the franchise by all who are eligible to exercise it; but they may also include other sorts of crimes, such as the defrauding of the public coffers at a large scale, or the destabilization of the economy, also at such a scale. Just as the narrow antisubordination approach cannot be indifferent to the status of disadvantaged groups threatened by over- or underenforcement of laws, the broad antisubordination approach extends this attention to status to the sorts of crimes (and, in turn, the sorts of offenders) that threaten the political autonomy of the citizen body as a whole. This approach to the criminal law understands the exceptional nature of elite crime and responds to it accordingly.

CONCLUSION

In *Trump v. United States*, both the petitioner and the Court picked out the presidency as a site of legal exception. In its decision, the majority appealed to the Executive's special need for swift and difficult decisions. Decisiveness, the Court implied, requires thinking without too much concern for the confines of the criminal law. The government's formal-egalitarian response—that in a constitutional system, no one is supposed to be above the law—missed the force of this exceptionalist claim. In fact, the President has long been agreed to be "above the law," at least in some ways or for a certain duration. The law recognizes the high status of the President and even defers to it in limited ways and at limited times. By ignoring the exceptionality of executive office and its status, and by hewing to a formalistic theory of equality before the law—a theory that intentionally blinds itself to the way status and power function—the government

157. Pettit, *supra* note 113, at 441-42, argues for a professionalized bureaucracy of penal administration, while others argue for a more democratically integrated approach. *See* Albert W. Dzur, Ian Loader & Richard Sparks, *Punishment and Democratic Theory: Resources for a Better Penal Politics*, *in* DEMOCRATIC THEORY AND MASS INCARCERATION 1, 9-10 (Albert W. Dzur, Ian Loader & Richard Sparks eds., 2016); Jocelyn Simonson, *The Place of the People in Criminal Procedure*, 119 COLUM. L. REV. 249, 249 (2019). Either is compatible in principle with a broad antisubordination theory.

doomed its case to irrelevance. The theory of legal exception, stated most forcefully by Carl Schmitt and taken up by the Court in *Trump v. United States*, had already considered a formally equal system of laws and placed the Executive above it. To fight the logic of exception embodied by the Court's decision, partisans of a constitutional system where the President is not excused from accountability for illegal actions should adopt a theory of the criminal law that aims to protect real, substantive political equality rather than formal legal equality. In this Essay, I have tried to show that a broad antisubordination theory of the criminal law is one such theory, and that it addresses the double crises of democratic legitimacy faced by the criminal law in the United States in a fuller way than the formalistic or abolitionist alternatives.

In their dissents in *Trump v. United States*, both Justice Sotomayor and Justice Jackson reaffirm the importance of the connection between the criminal law and democracy, emphasizing the same relationship that lies at the heart of the broad antisubordination approach. Justice Sotomayor writes: "The public interest in criminal prosecution is particularly strong with regard to officials who are granted some degree of civil immunity because of their duties. It is in those cases where the public can see that officials exercising power under public trust remain on equal footing with their fellow citizens under the criminal law."[158] To restate this in the language of this Essay, only the vigorous prosecution of those who would seem to be exceptional can protect the principle of democratic equality and override the dangerous logic of the executive exception. Justice Sotomayor affirms this democratic role of the criminal law by invoking the civic-republican tradition cited above—Alexander Hamilton's worry as to whether the Executive would "combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility."[159] Justice Jackson, for her part, painstakingly shows that both dependence on the people and the public "responsibility" of officeholders have been radically undermined by the Court's curtailment of the traditional model of accountability embodied in the criminal law.[160]

These dissents suggest what has been lost by the Court's recent ruling. In proposing the adoption of a broad antisubordination theory of the criminal law, this Essay has tried to suggest what can be gained by a new approach. A broad antisubordination approach would be a radical departure not only from the ruling in *Trump v. United States*, but from others made by the Court. It would require modifying, in some major respects, the very model of formal equality before the law that formed the basis of the government's case against Donald Trump. But in return for this concession—acknowledging that the law does not

158. Trump v. United States, 144 S. Ct. 2312, 2366 (2024) (Sotomayor, J., dissenting).

159. *Id.* at 2371-72 (quoting THE FEDERALIST NO. 77 (Alexander Hamilton)).

160. *See id.* at 2381-82 (Jackson, J., dissenting).

reach all people in the same way—we would gain the juridical tools to protect the communities whose rights and needs the criminal law has tended to ignore. And we would harness the power to call to account the sorts of elite criminals who exist largely in a "law-free zone" or "above the law."[161]

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161. *Id.* at 2371 (Sotomayor, J., dissenting).